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OFFICIAL REPORTS

OF

THE SUPREME COURT

BEGINNING OF TERM

OCTOBER 7, 1985, THROUGH JANUARY 13, 1986

TOGETHER WITH ORDERS OF INDIVIDUAL JUSTICES IN CHAMBERS

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REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

RETIRED

POTTER STEWART, ASSOCIATE JUSTICE.[1]

OFFICERS OF THE COURT

EDWIN MEESE III, ATTORNEY GENERAL.
CHARLES FRIED, SOLICITOR GENERAL.[2]
JOSEPH F. SPANIOL, JR., CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
STEPHEN G. MARGETON, LIBRARIAN.

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[1] Justice Stewart, who retired effective July 3, 1981 (453 U. S. VII), died on December 7, 1985. See *post*, p. XXIII.

[2] The Honorable Charles Fried, of Massachusetts, was nominated by President Reagan on September 26, 1985, to be Solicitor General; the nomination was confirmed by the Senate on October 22, 1985; he was commissioned on the same date and took the oath of office on October 23, 1985. He was presented to the Court on November 4, 1985 (see *post*, p. XXI).

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

PROCEEDINGS IN COMMEMORATION OF THE 50TH ANNIVERSARY OF THE OPENING OF THE SUPREME COURT BUILDING

MONDAY, OCTOBER 7, 1985

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR.

THE CHIEF JUSTICE said:

We are in special session today to take note of the fiftieth anniversary of the opening of this building; and, as is not entirely uncommon, the Court is ahead of some of the lawyers who will be attending the proceedings.

We have the privilege of having three distinguished American lawyers here to take note of these events. We begin with Mr. Erwin Griswold, former Solicitor General of the United States and former Dean of Harvard Law School. Mr. Griswold.

Mr. Griswold: MR. CHIEF JUSTICE and may it please the Court:

This Court and its bar live in what I believe is called a symbiotic relationship. Each benefits from the presence of the other. At any rate, the bar hopes that is an accurate statement.

The bar has its role, but it is not very cohesive. There is no published list of the membership of this Court's bar and no organization of it. Indeed, no one knows how many members there are. The Clerk's office tells me that no applications were required until 1925.

Since then there have been applications, and these have been numbered serially. At the present time the number of such applications is somewhat over 165,000. But there is no record of those who have died or retired from active practice. As a guess, I would say that there are about 75,000 lawyers in this country who are members of this Court's bar.

It is a privilege to speak on their behalf and to express the appreciation of the bar for the important role which this Court plays in our constitutional and legal structure.

We do know one thing: The first member of the bar of this Court was Elias Boudinot of New Jersey, who was admitted in February 1790. Of course, there was no one to move his admission, but this Court was flexible. It had not yet established procedures for the filing of credentials.

For the first few admissions, the Court apparently relied on judicial notice. The judges knew who were the qualified lawyers and they were admitted. After about a year, the Court turned to the Attorney General, Edmund Randolph. Though he was never admitted to practice before the Court, he was treated as an officer of the Court.

And before long, the practice was established of admission to the bar on motion of persons already admitted. Under the first admissions rule, adopted on February 5, 1790, the Court made the provision, which continues to this day, that applicants for admission shall have been admitted for "three years past in the Supreme Court of the state to which they respectively belong."

The formula also provided then, as it did throughout the nineteenth century, that the private and professional character of the applicants "shall appear to be fair." As our language evolved, the word "fair" acquired a double meaning, and the use of the phrase sometimes produced a laugh in the courtroom. So the wording was changed, and for many years in the twentieth century the sponsor was required to say that he vouched for the applicant. Under the rule as it now stands, he affirms that the applicant is of good moral and professional character.

All motions for admission were made in open court until about 15 years ago. Now, in accordance with modern times, the whole procedure can be done by mail.

Under the first rule for admission, the applicant was required to elect whether he would practice as an attorney or as a counselor, and he could not practice as both. If this rule had continued, the British distinction between solicitors and barristers would have been established here, and we might have a narrower group today which could be recognized as the bar of the Supreme Court.

Indeed, the Circuit Court for the First Circuit provided for four degrees: attorneys, counselors, barristers, and sergeants. Charles Warren in his "History of the American Bar" refers to an order by Justice Story made in that court in 1812 admitting on his own motion Jeremiah Smith and Jeremiah Mason to the degree of sergeant at law, and as far as I know they are the only lawyers who have been sergeants at law in this country.

Many great lawyers have appeared before the Court. John Marshall appeared in one case in the late 1790's, unsuccessfully. Others who may be mentioned are Luther Martin, Caesar Rodney, and Roger B. Taney. These were the days of oratory, and by the 1830's Daniel Webster achieved his long continued eminence before the Court.

His appearances were often great social events, with large crowds both of men and women attending the Court sessions, for often several days were devoted to a single case. In those days Webster argued several hundred cases, more than have been presented before the Court by any other person in its history.

Interestingly enough, the member of the bar with the second largest total of arguments has left little trace. He was Walter Jones, admitted to practice in 1796, and the United States Attorney in the District of Columbia from 1802 to 1821.

In later years, he often acted in association with Daniel Webster. Among others, he argued the case of Martin

against Hunter's Lessee and McCulloch against Maryland. He also appeared in the first hearing of the Charles River Bridge case, where he was opposed by Daniel Webster.

We ought to have more information about Walter Jones, and perhaps the Supreme Court Historical Society can find a way to make him better known.

The history of the Court and its bar is of course intertwined with the history of the country. The details are being developed in the great history of the Court which is being prepared under the Oliver Wendell Holmes bequest. I will refer to only two events, both reflecting the Court's interrelationship with the slow but steady progress which the country made during the nineteenth century with two fundamental problems.

The first black lawyer to be admitted to the bar of the Supreme Court was Dr. John S. Rock, who was born of free parents in New Jersey in 1825. He was admitted on February 1st, 1865, just short of his fortieth birthday. Before then he had been a teacher, a dentist, and a doctor. He had moved to Boston in 1853 and he was one of the founders of the Republican Party in Massachusetts.

In 1858 he wanted to go to France for medical treatment, but he was refused a passport on the ground that he was not a citizen. The Massachusetts legislature then passed a law providing for state passports—I'm not sure this Court would accept that today—and this was accepted in France.

A year or so later, Dr. Rock returned to Boston and began to read law. He was admitted to practice in Massachusetts in September 1861 and he was admitted to practice in this Court on February 1, 1865. Note that date—shortly after the appointment of Salmon P. Chase as Chief Justice.

This came before the final termination of the Civil War and before the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments and with the Dred Scott case still on the books. As the New York Tribune reported: "By Jupiter, the sight was good." It must have been one of the dramatic moments in this Court's history, at least in retrospect.

Rock's admission was moved by Senator Charles Sumner. The newspaper reporter observed that "The assenting nod of

the Chief Justice dug the grave to bury the Dred Scott decision."

I am glad to record, too, that one of the persons who encouraged Dr. Rock was George L. Ruffin, whom we believe to be the first black graduate of the Harvard Law School.

The next event to which I will refer was the admission of the first woman to the Supreme Court bar. In 1872, this Court had refused to interfere with the action of the Supreme Court of Illinois, which denied admission to Myra Bradwell, who was the wife of a judge in Chicago. She relied in this Court on the equal protection clause of the recently adopted Fourteenth Amendment, but was unsuccessful. It may be mentioned that Chief Justice Chase was the sole dissenter from this conclusion.

It was less than seven years later, though, that Belva A. Lockwood became the first woman admitted to practice before the Court. This was on March 3rd, 1879. So quick was the change of view that this evoked no opinion from any member of the Court. Indeed, Mrs. Bradwell, who was denied admission in 1872, was finally admitted when she applied again in March 1892 on motion of Attorney General W. H. H. Miller.

Alice O'Donnell has pointed out in her paper in the 1977 Yearbook of the Supreme Court Historical Society that it took 41 years or until 1929 before the first 100 women became members of the bar of the Court. Some of the early admittees had great careers in the law. I will mention only Florence Allen, who became the first woman judge of a constitutional federal court: Mabel Walker Willebrand, who was Assistant Attorney General under President Hoover; and Helen Carloss, who had a long and distinguished career in the Tax Division of the Department of Justice and was an extraordinarily persuasive lawyer in the federal courts, including this Court.

A great increase in the number of women lawyers has occurred in the past 15 years. In another 15 years, if present trends continue, perhaps 30 percent of the members of the bar of this Court will be women. This will surely have an

important impact, though it is not as yet clear just what that impact will be.

Is there a bar of this Court? It is hard to say. There have been periods when there was a relatively small group of lawyers who were widely recognized as leaders of the bar of this Court. They were the orators of the nineteenth century, starting with Daniel Webster and continuing through John G. Johnson of Pennsylvania.

There was a bar in the 1920's and 1930's, when such lawyers as Charles Evans Hughes, Owen D. Roberts, John W. Davis, George Wharton Pepper, and William D. Mitchell made frequent appearances before the Court. By this time, oratory was passé. The presentations were less flowery, but they were mellifluous.

As a young lawyer, I was fascinated by John W. Davis and his skill at crossing thin ice with great artistry, reaching the other side safely before it was fully recognized that the ice was so thin.

There is one case which I recall which brought together three of these giants. This was United States against George Otis Smith in 1932. It involved the question whether the Senate could reconsider the confirmation of a presidential nomination after the President had acted on it.

The Senate retained John W. Davis as its counsel. Attorney General William D. Mitchell appeared for the United States, essentially representing the President. And George Wharton Pepper represented Mr. Smith. That was surely one of the high points of advocacy in this century.

With the great increase in ease and speed of travel since World War Two, there is much less concentration on work before the Court, although it has never been highly concentrated since the days of Daniel Webster and Walter Jones. This is inevitable in a country as large and diverse as this country is.

It might have been different if the original division between attorneys and counselors had prevailed. It is hard to

think, though, that such an arrangement, while having some advantages, would have been a good one overall. In any event, it is really impossible to have such distinctions in this country.

There is one group which has long provided the backbone of the Supreme Court bar. That is the Solicitor General and his staff and his associates in the Department of Justice. This office has long maintained a high standard and a great tradition. It appears in one way or another in nearly half of the cases which are heard on the merits by the Court and in a high percentage of all applications for review.

I should also refer to the considerable number of cases which have been presented here by what we now know as special interest groups. I think, for example, of the work done in the early days of the NAACP, which was represented here by one of the country's great lawyers, Charles Hamilton Houston, work which was carried on later with great ability by Thurgood Marshall. And I may mention the work done by lawyers representing groups interested in the rights of women, of whom Ruth Bader Ginsburg was an outstanding example.

The bar of this Court has a somewhat difficult role. As I have indicated, it is scattered and diverse. It can never be assembled, nor is it possible to take a consensus of the bar. Nevertheless it is clear, at least to me, that the Court could not get along without it.

Yet, the demands on the Court are such that the bar finds difficulty in making its full contribution. Fifty years ago when the Court first met in this building, it heard arguments five days a week for a total of about 75 days a year. Now it hears arguments for about 45 days during the year.

Fifty years ago, the time made available for oral arguments was an hour on each side and there were frequent substantial allowances of additional time. Now the time allotted is 30 minutes on a side and additional time is, shall I say, a very scarce commodity.

This inevitably presents problems for the oral advocate and requires a wholly different type of argument from that which was customary even 50 years ago. The lawyer today can rarely deal with his case as a case. He has to pick out certain salient points and hope that, with the welcome questioning, he will have time to deal with the matters he regards as vital.

I think that the briefs today are on average much better than they were 50 years ago, probably more improved than is commonly recognized. But oral argument often remains a difficult and somewhat tantalizing field.

This Court moved into this great building 50 years ago today. According to the newspaper articles, the first words spoken by Chief Justice Hughes in this courtroom were: "Are there any admissions?" Thus was the bar recognized, and thus has it been recognized at every session since.

The Court heard no arguments on the opening day. There were, however, many admissions, including Harold B. Willey, Chief Deputy Clerk of the Court, and Mary Agnes Quinn, the Docket Clerk in the Solicitor General's Office.

The first business before the Court was a motion made, appropriately enough, by Solicitor General Stanley F. Reed. The first case was argued before the Court a week later on October 14th. That was the case of Douglas against Wilcutts. It was a tax case, and it was, too, the first case whose decision was announced in this room. It is reported in 296 U. S., page 1.

Just as we are hearing these days in cases before the Court about non-bank banks, verbally a rather odd concept, I think I may well close these remarks by referring to the non-bar bar. For the brief for Douglas in that case was written by a young lawyer who had graduated from the Harvard Law School in 1932 and had not yet completed the three years required for admission here. Thus his name, though on the brief, does not appear in the United States Reports, since he was a member of the non-bar bar.

He was, though, well worthy of the assignment. His name later became well known here. He was Harry A. Blackmun.

CHIEF JUSTICE BURGER: Thank you, Mr. Griswold. Mr. Attorney General.

Attorney General Meese: MR. CHIEF JUSTICE and may it please the Court:

It is a privilege for me to be here today representing the Department of Justice and the Executive Branch of the Government in these proceedings.

Fifty years ago on the date that we are commemorating here, this nation was in the midst of a great Depression. To borrow Tom Paine's language of an earlier critical period in our history, it was a crisis that truly did try men's souls.

The problems of that era were deeper than economic despair and Depression. The deepest problem, the greatest threat of that time, was that our very system of government had been called into question. It was a time where our fundamental precepts of democracy were being challenged from without as well as from within.

Our great national economic tragedy came at a time when new and foreign ideologies were attacking the very soul and spirit of free and democratic institutions around the world. The communist and fascist movements abroad were gaining strength and sought to promote themselves as the dominant force in the world, at the expense of liberty and peace.

In the midst of an increasingly confused and confusing world, the structure we honor today arose here in our nation's capital. As though to serve as a moral beacon to all the world, the new building of the Supreme Court stood

forth, dedicated to that most basic principle of civilization, the rule of law.

Equal justice under law, that is what we as a people stood for then, as we had since the founding of our Republic; and that is what we as a people stand for today.

Now as then, this Court in many ways represents our national vision of a just and civilized world. As an impartial and independent institution under our Constitution, the Supreme Court, symbolic of our entire Judiciary, gives practical effect to the idea of the rule of law.

In The Federalist Papers, as in other writings during our founding period, this Court was deemed to be an essential part of that new science of government which had led to the framing of the Constitution. Alexander Hamilton confessed that under the previous Articles of Confederation the lack of a judiciary was a crowning defect. After all, he said, "laws are a dead letter without courts to expound and define their true meaning and operation."

Indeed, Hamilton went on to say that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." He concluded that "[a] constitution is, in fact, and must be regarded by the judges, as a fundamental law." Without this understanding and without an independent judiciary to guard the lines and the limits of the original Constitution, all the "particular rights or privileges" of that Constitution "would amount to nothing."

The magnificent structure in which we are now gathered symbolizes both the necessary independence and the constitutional integrity of the Supreme Court. It stands apart from, yet is near to, the homes of the other two branches.

It is a serious and a solemn place. In terms of those who wrote in The Federalist Papers, there is no wielding of the sword nor control of the purse strings here. There is, as the founders prescribed, only judgment.

I congratulate this Court as it celebrates its first 50 years in this magnificent marble building, a temple of reason, a temple of justice, and a temple of law.

Thank you.

CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

The Court recognizes Mr. William Falsgraf, the President of the American Bar Association, to speak for the legal profession as a whole. Mr. Falsgraf.

Mr. Falsgraf: MR. CHIEF JUSTICE and may it please the Court:

I am truly delighted to bring the congratulations and best wishes of the American Bar Association and in fact all of the lawyers of America as the Supreme Court celebrates 50 years in this magnificent hall. As spokesman for the American legal profession, I want to express on behalf of my colleagues across the country our profound respect for the Court, both before and after it obtained this permanent home.

We know that for some 144 years the Court performed its constitutional duties with dedication and often with brilliance despite the lack of an adequate and dignified quarters. Nevertheless, there is indeed symbolic importance in its having an impressive and dignified home.

Our Association has recognized and acknowledged that fact since the first foundation stone of this building was laid some 53 years ago. For we recognize that appropriate physical surroundings are essential in order for the Court to serve as our nation's primary symbol of the rule of law.

Generations of Americans and guests from around the world have visited this building and been overwhelmed by its grace and by its dignity. This is indeed a hallowed place, an appropriate acknowledgment by the people of the United

States of the critical role which the third coequal branch of government plays in our constitutional form of government.

The special feeling that we in the ABA have for this building was first given expression by leaders of the Association who were intimately involved in the construction and dedication of this edifice. The energy and the leadership with respect to the construction of this building of course came from Chief Justice William Howard Taft, who was a former President of the American Bar Association as well as a former President of the United States of America. And incidentally, Chief Justice Taft was a fellow Ohioan, of which I am personally quite proud.

Unfortunately, Chief Justice Taft died in 1930, before his dream of a permanent home for this Court could take shape. But his widow was present at the cornerstone laying of this building in 1932. This was indeed an appropriate recognition of the leading role which Chief Justice Taft played in the planning for and the ultimate approval for the design and construction of this temple of the law.

All three speakers at the laying of the cornerstone had served or were serving as President of the American Bar Association. Guy Thompson of St. Louis, who represented the legal profession, was of course then Acting President of the American Bar Association. The Honorable John W. Davis, who spoke for the bar of the Supreme Court, had served as President of the American Bar Association in 1922–23. And Chief Justice Hughes himself, speaking for the Court, had been ABA President in 1924–25.

The text of these speeches were among the articles that were placed within the cornerstone of this building. In his remarks, President Thompson predicted that this building would be "a monument to justice," and how prophetic those comments have become.

John W. Davis called this place "the abode of the peacemaker" and "the house of refuge for all such as are oppressed."

In response, Chief Justice Hughes said: "This building is the symbol of the distinctive character of the Republic, the symbol of its faith. It suggests permanence, not the permanence of stone and steel but of an idea, a testimonial to an imperishable idea of liberty under law."

Well, tremendous changes have swept over this land in the past 50 years, and yet the dedicatory sentiments of my predecessors, like the beauty and the grace of this building, are as relevant and apt today as they were 50 years ago.

As we look to the Court's next 50 years and beyond, it is entirely appropriate for us to pause and to do as we are today, acknowledging that which is past. When this Court was established, constitutional government was indeed a revolutionary idea, and perhaps still is in other parts of the world. The form of nearly every other government which was then in existence almost 200 years ago has changed so drastically as to be virtually unrecognizable to their subjects of two centuries ago.

Many of the fundamental tenets of scientific knowledge which were the presumption of that age have been found to be flawed when examined under the light of newly discovered truths involving matter, energy, space, and time. The industrial revolution has come and gone, the atomic age has arrived. And yet, our nation and the Constitution under which it operates have not only endured, they have thrived.

How fitting it is, then, that we celebrate today the tangible symbol of that durability which is this building. The American people owe a debt beyond counting to the Supreme Court of the United States as the definitive interpreter of the Constitution, our highest law.

This Court is not only the refuge for all such as are oppressed, it is the bulwark of freedom for every citizen, regardless of his or her station in life. For just as the cornerstone serves as the support for the walls and the roof of this building, so the Constitution serves as the support for our Republic and the fundamental freedoms that have allowed our citizens to make it great.

Let us give thanks, then, first to the architects of this building and all of those who labored to make that design a reality. But let us give greater thanks to the architects of our Constitution and those who labor within these laws to make the blessings of freedom secured by that Constitution a continuing reality.

CHIEF JUSTICE BURGER: Thank you, Mr. Falsgraf.

As Mr. Griswold has noted in his excellent statement, when the Court gathered here precisely 50 years ago today at 12:00 noon it did not undertake to hear oral arguments, but formally opened the Term and then retired to the Conference Room and undertook to deal with the accumulation of petitions for certiorari, jurisdictional statements, and motions that had accumulated during the summer.

In recent years, the pressure of the docket has led the Court to hold the conferences on the summer accumulation in the last week of September so that we could begin, as we did this morning, at 10:00 o'clock to hear oral arguments.

The tortoise, which Cass Gilbert employed in much of his design in this Building, is of course, a more ancient symbol of justice than the blindfolded lady for both justice and the law are like the tortoise, rather than the swift hare of the fable.

Yet some changes have occurred, as some of the speakers have commented. In 1935, as Mr. Griswold said, the Court allowed one hour for each side and sometimes more, and was able to hear two cases each day or ten cases a week with a conference on Saturday. This was changed about 15 years ago when we limited the oral argument to 30 minutes on each side. Now we hear 12 cases a week, leaving Thursday free for the Justices to prepare for the Friday Conference. On Saturday and on Sunday, the Justices are still engaged in the work of the Court. The time allowed for oral argument is now very different from an earlier day.

In the Dartmouth College case, for example, after some days of oral argument, we can well imagine that Chief Justice

Marshall may have said to Daniel Webster: "Mr. Webster, you have now had three and a half days; do you think you will finish this week?" Contrast that, if you will, with the legend—and it has not been verified—that when the red light came on in Chief Justice Hughes' time, he would stop a lawyer in the middle of the word "if."

Of course, we are much more liberal now. We allow a lawyer to finish the sentence that is unfolding when the red light goes on, provided, of course, the sentence is not too long.

Sometimes, as close observers of the Court observed, we Justices do not always fully agree about everything, and that was true when the Chief Justice began his efforts to have this Building erected. Some of the Justices felt it was not a good idea for the Court to lose regular contact with the leaders of Congress whose support was needed for whatever it was that the Court needed.

There may have been some merit to that view, but Chief Justice Taft was concerned more, as the speakers have indicated, with matters other than the comfort and the needs of the Justices. He was profoundly concerned with the need for a visible symbol of the independence of the third branch of government as a separate and a coequal branch.

The differing views of the Justices at that time was illustrated in a story, perhaps a legend, of 1935 that one Justice is reported to have said that he expected each member of the Court would be provided with an elephant to ride into the Building mounted on that elephant much like a rajah. Just how those elephants were going to negotiate those steep stairs out in front of the Building has never been made clear.

Habits of judges and Justices, as with lawyers, change slowly. Having worked in their homes with their clerks and secretaries at hand, there was no great rush on the part of the Justices to occupy this splendid building, with luxurious three-room suites provided for each Justice.

Chief Justice Hughes himself continued to work out of his home for the most part and came to Court, as he put it,

chiefly to hang his hat and also to take care of the rapidly increasing administrative duties of that office.

When Hugo Black was confirmed as a member of the Court he had the choice of any one of eight suites in the Building, and he wisely selected a very choice corner suite and occupied that space throughout his entire tenure on the Court.

With all his foresight, Chief Justice Taft and the architect were not able to fully anticipate the future needs of the Court, and so about 15 years ago, Justices' chambers were enlarged by converting each of three suites into two and then creating three sets of new chambers.

This required that the Clerk of the Court move from this floor to the ground floor. Previously, Chief Justice Warren had moved the Administrative Office of the United States Courts out of this Building in order to meet the growing needs of the Court itself.

Electric typewriters supplanted the manual power machines, and, in turn, they were recently replaced by word processing machines, which then in turn supplanted the hot lead typesetting process used for preparing the opinions of the Court.

The classical grandeur of this Building has been enhanced by the advent of the Office of the Curator of the Court. Miss Kathy Hetos, the first Curator, served from 1974 to 1976 and was succeeded by Miss Gail Galloway, the present Curator. Working with that man-of-all-skills, Mr. Edward Douglas, a long-time member of the Supreme Court staff, the Lower Great Hall has become a museum of the history of the Court and the history of the Building itself. The work of these people can be observed by those of you who take the time to see the special exhibit that has just been completed on Chief Justice Taft in the Lower Great Hall.

In these efforts to make this great symbol of justice come alive, the cooperation of Mr. George White, the Architect of the Capitol, has been very important. Mr. White turned to architecture only after graduating from the Harvard Law School, and naturally has a sensitive appreciation of both the work of the Architect, Cass Gilbert, and of the law.

The Attorney General and the President of the American Bar Association have alluded to world events occurring soon after the Court sat here, some of them before the Court sat here. Few statesmen of Europe and probably fewer in this country fully understood the meaning of the rise of men like Mussolini and Hitler and the expansion of communism and the other dictatorships of the world of the 1930's.

Whether Chief Justice Taft saw the trends in Europe as undermining justice and were to destroy established systems of freedom, we do not know. What is important was that at a great cataclysmic epoch in history, when dictators first destroyed independent courts and thus left no barriers to protect free speech and free press and other freedoms, this Building became a symbol, as the Attorney General and Mr. Falsgraf have said, not only to Americans but to the whole world, a symbol of the role and the function of a truly independent judiciary.

So, as we pause for an hour to take note of this fiftieth year of a great monument to justice and to freedom under law, we do well to remember both the events of interest in that half century and the meaning in a larger sense, of this edifice as a symbol of a system that has endured for two centuries. With all of the shortcomings of human institutions, our system remains a beacon and a guide to people everywhere who seek freedom.

In laying the cornerstone of the Building, Chief Justice Hughes said: "This Republic endures and this Building is the symbol of its faith."

Mr. Griswold, Mr. Attorney General, Mr. Falsgraf, on behalf of the Court I thank you for your part in this proceeding, the record of which will become part of the permanent records of this Court.

PRESENTATION OF THE SOLICITOR GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, NOVEMBER 4, 1985

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR.

Mr. Deputy Solicitor General Lawrence G. Wallace presented the Honorable Charles Fried, Solicitor General of the United States.

THE CHIEF JUSTICE said:

Mr. Solicitor General, the Court welcomes you to the performance of the important office that you have assumed, to represent the government before this Court. Your commission will be duly recorded by the Clerk.

DEATH OF JUSTICE STEWART

SUPREME COURT OF THE UNITED STATES

MONDAY, DECEMBER 9, 1985

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR.

THE CHIEF JUSTICE said:

It is my sad duty to announce that our distinguished colleague and friend, Justice Potter Stewart, died Saturday, December 7, 1985, in Hanover, New Hampshire.

Justice Stewart served as a Judge of the United States Court of Appeals for the Sixth Circuit from 1954 to 1958 when he was appointed to this Court to succeed Justice Harold Burton. He took office on October 14, 1958, and served as an Associate Justice for 23 years until his retirement in 1981 at the close of the 1980 Term of Court. He had served his country for four years in the United States Navy in World War II.

His appointment to the Court of Appeals in 1954 came at the age of 39, making him the youngest Federal Judge in the country at that time. His opinions on a wide range of subjects appear in nearly 100 volumes of the United States Reports covering a period of great social, political and economic development reflecting the turmoil, upheavals and changes taking place throughout the world.

Those changes had a marked impact on the kinds of issues coming into all courts including this Court. In meeting these issues in the setting of the dramatic changes in the world at large, Justice Stewart exhibited a steadiness of purpose, comprehension and grasp of contemporary law and its antecedents in the Common Law.

His work as a Justice rejected the popular labels and categorizations of judges. Adhering to precedent he sought to resolve cases on narrow grounds leaving related but unresolved issues to the future. He was particularly concerned that the rights of privacy of person and home, protected by the Fourth Amendment, be observed by all levels of government. Few legal issues concerned him more than the protection of the rights envisaged by those who drafted the Constitution and the Bill of Rights.

We mourn Justice Stewart's passing but we will not forget the comradeship and friendship that overshadowed the inescapable differences arising in the processes of resolving the difficult issues that find their way to this Court.

I speak for all members of the Court in expressing our profound sympathy to Mrs. Stewart and her family.

In due course, the traditional memorial service of the Bar of this Court and the Court will be conducted in this Chamber to pay our respects more fully to Justice Stewart.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1985

KENTUCKY *v.* INDIANA ET AL.

ON BILL OF COMPLAINT

No. 81, Orig. Decree entered November 4, 1985

The Report of the Special Master is received and ordered filed. The parties having waived the right to file Exceptions, the Report is adopted.

DECREE

IT IS ORDERED, ADJUDGED, AND DECREED THAT:

1. The boundary line between the State of Indiana and the Commonwealth of Kentucky is fixed as geodetically described in Joint Exhibit 50 to the Special Master's Report filed with this Court on November 4, 1985. Joint Exhibit 50 is incorporated by reference herein.

2. Copies of this Decree and the Special Master's Report (including Joint Exhibits 1–50, inclusive) shall be filed with the Clerk of this Court, the Archives Division of the Indiana Commission on Public Records of Indiana, and the Secretary of State of the Commonwealth of Kentucky.

3. Copies of this Decree and the Special Master's Report (including Joint Exhibit 50 and paper prints of Joint Exhibits 1–49, inclusive, once they become available) shall be filed with the Office of the County Recorder in each of the follow-

ing Indiana counties: the counties of Posey, Vanderburgh, Warrick, Spencer, Perry, Crawford, Harrison, Floyd, Clark, Jefferson, Switzerland, Ohio, and Dearborn; and with the County Clerk's Office in the Commonwealth of Kentucky in each of the following Kentucky counties: the counties of Union, Henderson, Daviess, Hancock, Breckinridge, Meade, Hardin, Jefferson, Oldham, Trimble, Carroll, Gallatin, and Boone.

4. The State of Indiana and the Commonwealth of Kentucky each have concurrent jurisdiction over the Ohio River.

5. The costs of this proceeding shall be divided between the parties as recommended by the Special Master.

CUYAHOGA VALLEY RAILWAY CO. v. UNITED TRANSPORTATION UNION ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-1634. Decided November 4, 1985*

Pursuant to the Occupational Safety and Health Act (Act), the Secretary of Labor issued a citation to Cuyahoga Valley Railway Co. for a violation of the Act; the company contested the citation; the Secretary filed a complaint with the Occupational Safety and Health Review Commission (Commission), and the company filed an answer; and the United Transportation Union, which represents the company's employees, intervened. At the hearing, the Administrative Law Judge (ALJ), over the Union's objection, granted the Secretary's motion to vacate the citation on the ground that the Secretary did not have jurisdiction over the relevant safety conditions. Despite the Secretary's objection, the Commission directed review of the ALJ's order and ultimately remanded the case to the ALJ for consideration of the Union's objections. The Court of Appeals affirmed, holding that, because the adversarial process was well advanced at the time the Secretary attempted to withdraw the citation, the Commission, as the adjudicative body, had the authority to review the Secretary's withdrawal of the citation.

Held: The Secretary has unreviewable discretion to withdraw a citation charging an employer with violating the Act. The Court of Appeals' decision is inconsistent with the detailed statutory scheme, which contemplates that the rights created by the Act are to be protected by the Secretary, and that enforcement of the Act is the Secretary's sole responsibility. The Commission's function is to act as a neutral arbiter and to determine whether the Secretary's citations should be enforced. Its authority does not extend to overturning the Secretary's decision not to issue or to withdraw a citation.

Certiorari granted; 748 F. 2d 340, reversed.

PER CURIAM.

The Secretary of Labor is authorized to inspect work sites to uncover noncompliance with the Occupational Safety and

*Together with No. 85-170, *Brock, Secretary of Labor* v. *United Transportation Union et al.*, also on petition for certiorari to the same court.

Health Act. 29 U. S. C. § 657(a). If, as a result of such an inspection, the Secretary discovers a violation of the Act, he is authorized to issue a citation to the employer fixing a reasonable time for the abatement of the violation, § 658(a), and assessing a penalty for the violation. § 666. The employer then has 15 days in which to contest the citation. § 659(a). Similarly, employees have 15 days in which to challenge as unreasonable "the period of time fixed in the citation for the abatement of the violation." § 659(c). See generally *Whirlpool Corp.* v. *Marshall*, 445 U. S. 1, 9, n. 11 (1980). The statute and rules of the Occupational Safety and Health Review Commission also permit affected employees to participate as parties in any hearing in which the employer contests the citation. 29 U. S. C. § 659(c); 29 CFR § 2200.20(a) (1985).

If an employer contests the citation, and the Secretary intends to seek its enforcement, the Secretary must file a complaint with the Commission within 20 days, and the employer must file an answer within 15 days. 29 CFR § 2200.33 (1985). Once these pleadings are filed, a hearing to determine the validity of the citation will be held before an administrative law judge, with discretionary review by the Commission. 29 U. S. C. §§ 659(c), 661(j).

In the present cases, the Secretary cited Cuyahoga Valley Railway Company for a violation of the Act. Cuyahoga contested the citation, the Secretary filed a complaint with the Commission, and Cuyahoga filed an answer. Respondent United Transportation Union, which represents Cuyahoga employees, properly moved to intervene in the proceedings. At the hearing, however, the Secretary moved to vacate the citation on the ground that the Federal Railway Administration, not the Secretary, had jurisdiction over the relevant safety conditions. Despite the Union's objection, the ALJ granted the Secretary's motion and vacated the citation. Thereafter, the Commission directed review of the ALJ's order. The Secretary promptly objected to this action, as-

serting that part of the citation involved matters beyond the reach of the Act and that additional portions of the citation did not warrant litigation because of the state of the evidence. He also stated that the record before the Commission was inadequate to resolve the issue posed.[1] Some six years later, the Commission rejected this submission and remanded the case to the ALJ for consideration of the Union's objections.

The Court of Appeals for the Sixth Circuit affirmed the Commission's holding that it could review the Secretary's decision to withdraw a citation. *Donovan* v. *United Transportation Union*, 748 F. 2d 340 (1984). The court recognized that the Secretary "has the sole authority to determine whether to prosecute" a violation of the Act. *Id.*, at 343. Here, however, the court found that the Secretary "had already made the decision to prosecute by filing a complaint and that complaint had been answered at the time the Secretary attempted to withdraw the citation." *Ibid.* Because the "adversarial process was well-advanced at the time the Secretary attempted to withdraw the citation," the court reasoned that the Commission, "as the adjudicative body, had control of the case and the authority to review the Secretary's withdrawal of the citation." *Ibid.*[2]

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[1] Vacating the citation thus did not rest solely on jurisdictional grounds. Nor did the Court of Appeals' decision sustaining the Commission's order focus on jurisdiction. Its holding would permit review by the Commission of the Secretary's withdrawal of any citation, whatever the reason, provided the adversarial process was sufficiently advanced to vest control in the Commission. For these reasons and because the issue relates to the statutory division of authority between the Secretary and the Commission, rather than the question of judicial review of administrative action, the cases do not pose the question whether an agency's decision, resting on jurisdictional concerns, not to take enforcement action is presumptively immune from judicial review under the Administrative Procedure Act, 5 U. S. C. § 701(a)(2). See *Heckler* v. *Chaney*, 470 U. S. 821, 833, n. 4 (1985).

[2] The Court of Appeals also relied to some extent on the position of the Commission as to the scope of its powers. The Commission, however, has

Contrary to the Sixth Circuit's decision, eight other Courts of Appeals have held that the Secretary has unreviewable discretion to withdraw a citation charging an employer with violating the Occupational Health and Safety Act. *Donovan* v. *Allied Industrial Workers (Midland)*, 760 F. 2d 783, 785 (CA7 1985); *Donovan* v. *Local 962, International Chemical Workers Union (Englehard)*, 748 F. 2d 1470, 1473 (CA11, 1984); *Donovan* v. *International Union, Allied Industrial Workers (Whirlpool)*, 722 F. 2d 1415, 1422 (CA8 1983); *Donovan* v. *United Steelworkers of America (Monsanto)*, 722 F. 2d 1158, 1160 (CA4 1983); *Donovan* v. *Oil, Chemical and Atomic Workers International (American Petrofina)*, 718 F. 2d 1341, 1352–1353 (CA5 1983), cert. denied, 466 U. S. 971 (1984); *Donovan* v. *Occupational Safety and Health Review Comm'n (Mobil Oil)*, 713 F. 2d 918, 926–927 (CA2 1983); *Oil, Chemical and Atomic Workers International* v. *Occupational Safety and Health Comm'n (American Cynamid)*, 217 U. S. App. D. C. 137, 144–145, 671 F. 2d 643, 650–651, cert. denied, 459 U. S. 905 (1982); *Marshall* v. *Sun Petroleum Products Co.*, 622 F. 2d 1176, 1187 (CA3), cert. denied, 449 U. S. 1061 (1980). We agree with the decisions of these courts.

It is apparent that the Court of Appeals' decision is inconsistent with the detailed statutory scheme which contemplates that the rights created by the Act are to be protected by the Secretary. See *Atlas Roofing Co.* v. *Occupational Safety and Health Comm'n*, 430 U. S. 442, 444–447 (1977); *Mobil Oil, supra*, at 927; *Sun Petroleum Products, supra*, at 1187. It is also clear that enforcement of the Act is the sole responsibility of the Secretary. *Oil, Chemical and Atomic Workers International* v. *Occupational Safety and Health Comm'n, supra*, at 143, 671 F. 2d, at 649. It is the Secre-

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since revised its view and now declines to review the Secretary's dismissal of a citation. *Pan American World Airways, Inc.*, 1984 OSHD ¶ 26,920; *American Bakeries Co.*, 1984 OSHD ¶ 26,951; *Copperweld Steel Co.*, 1984 OSHD ¶ 26,956.

tary, not the Commission, who sets the substantive standards for the workplace, and only the Secretary has the authority to determine if a citation should be issued to an employer for unsafe working conditions, 29 U. S. C. § 658. A necessary adjunct of that power is the authority to withdraw a citation and enter into settlement discussions with the employer. *Whirlpool, supra,* at 1420; *Mobil Oil, supra,* at 927. The Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections. Its authority plainly does not extend to overturning the Secretary's decision not to issue or to withdraw a citation.

The Sixth Circuit's conclusion that the Commission can review the Secretary's decision to withdraw a citation would discourage the Secretary from seeking voluntary settlements with employers in violation of the Act, thus unduly hampering the enforcement of the Act. *Whirlpool, supra,* at 1420; *Mobil Oil, supra,* at 927. Such a procedure would also allow the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute, a commingling of roles that Congress did not intend. *Whirlpool, supra,* at 1419; *Mobil Oil, supra,* at 930–931; *Sun Petroleum Products, supra,* at 1187. Indeed, the Commission itself was created to avoid giving the Secretary both prosecutorial and adjudicatory powers. See generally Senate Committee on Labor and Public Welfare, Subcommittee on Labor, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (S. 2193, Pub. L. 91–596) (Comm. Print 1971). Accord, *Whirlpool, supra,* at 1419; *Mobil Oil, supra,* at 930–931, and n. 21. The other Courts of Appeals to address this problem have recognized the distinct roles of the Secretary and the Commission and accordingly have acknowledged that the Secretary's decision to withdraw a citation against an employer under the Act is

not reviewable by the Commission. Based on these considerations, the petitions for certiorari are granted, and the judgment of the Court of Appeals is

Reversed.

JUSTICE BRENNAN and JUSTICE BLACKMUN dissent from summary disposition. They would grant certiorari and set the cases for oral argument.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

CALIFORNIA STATE BOARD OF EQUALIZATION ET AL. *v.* CHEMEHUEVI INDIAN TRIBE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–130. Decided November 4, 1985

Since 1959, California has imposed an excise tax on the distribution of cigarettes, and respondent Chemehuevi Indian Tribe originally remitted the tax to petitioner State Board of Equalization (Board) insofar as the tax was imposed on the distribution of cigarettes to non-Indians who purchased the cigarettes from the Tribe on its reservation in California. However, in 1977 the Tribe enacted its own cigarette tax and ceased collecting and remitting the state tax. When California sought to obtain the unremitted tax, the Tribe filed suit in Federal District Court for injunctive relief and a declaratory judgment that the Board could not lawfully apply the state tax to cigarettes sold by the Tribe to non-Indian purchasers. The court held that the Board's counterclaim for damages in the amount of back taxes allegedly owed by the Tribe was barred by sovereign immunity, but that California could lawfully require the Tribe to collect state taxes imposed on cigarettes that it sold to non-Indians. The Court of Appeals affirmed the first determination, but reversed the second.

Held: The Court of Appeals erred insofar as it held that the Tribe could not be required to collect the tax imposed by California on non-Indian purchasers at tribal smoke shops. It is not necessary that a state cigarette tax statute contain an express statement that the tax is to be passed on to the ultimate purchaser in order for the State to require a tribe to collect the tax from non-Indian purchasers and remit the amounts of such tax to the State. If the legal incidence of the tax falls on non-Indian purchasers, the State may impose on the tribe the burden of collecting the tax. The proper test for determining the legal incidence of the tax is nothing more than a fair interpretation of the taxing statute as written and applied. The fairest reading of California's cigarette scheme as a whole is that the legal incidence of the tax falls on consuming purchasers if the vendors are untaxable, and thus the Board has the right to require the Tribe to collect the tax on the Board's behalf with regard to purchases of cigarettes by non-Indian consumers.

Certiorari granted; 757 F. 2d 1047, reversed in part.

PER CURIAM.

Since 1959 California has imposed an excise tax on the distribution of cigarettes. Respondent Chemehuevi Indian Tribe sells cigarettes on its reservation in southeastern California. The Tribe originally remitted the state tax to petitioner State Board of Equalization (petitioner) insofar as that tax was imposed on the distribution of cigarettes to non-Indian purchasers. But in 1977 the Tribe enacted a cigarette tax of its own that was the equivalent of the California tax, and then ceased collecting and remitting the state tax. When California sought to obtain the unremitted tax from the Tribe, the Tribe brought an action in the United States District Court for the Northern District of California requesting a declaratory judgment that petitioner could not lawfully apply the state tax to cigarettes sold by the Tribe to non-Indian purchasers. Respondent Tribe also sought an injunction preventing petitioner from enforcing the state cigarette tax against it. Petitioner counterclaimed for damages in the amount of back taxes claimed to be owed by respondent Tribe.

The District Court held that petitioner's counterclaim was barred by sovereign immunity, 492 F. Supp. 55 (1979), but also held that California could lawfully require the Tribe to collect cigarette excise taxes imposed on cigarettes that it sold to non-Indians. On appeal, the Court of Appeals affirmed the first determination, but reversed the second. 757 F. 2d 1047 (CA9 1985).

The Court of Appeals observed that, unlike the Washington statute that we considered in *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980), California's cigarette tax statute "does not contain any . . . *explicit* 'pass-through' language," 757 F. 2d, at 1056 (emphasis added), and that therefore the question of the legal incidence of the California cigarette tax was not controlled by our decision in that case. *Id.*, at 1055–1056. It went on to observe that a "legislative intent to impose even a collection

burden should be *explicitly* stated." *Id.*, at 1056, n. 11 (emphasis added). The Court of Appeals concluded that the California excise tax, properly construed, did not impose liability on the ultimate purchaser of cigarettes when the vendor was not a taxable entity. *Id.*, at 1057, and n. 13.

We think that the Court of Appeals applied a mistaken standard in determining whether or not the California tax on cigarettes was sufficiently like the Washington tax involved in *Colville* so that the result in the latter case should be controlling here. None of our cases has suggested that an express statement that the tax is to be passed on to the ultimate purchaser is necessary before a State may require a tribe to collect cigarette taxes from non-Indian purchasers and remit the amounts of such tax to the State. Nor do our cases suggest that the only test for whether the legal incidence of such a tax falls on purchasers is whether the taxing statute contains an express "pass on and collect" provision. Indeed, the Washington statute in *Colville* did not contain an express pass-through provision; the conclusion of the District Court in that case, which we accepted, was that the statutory scheme required consumers to pay the tax whenever the vendor was untaxable, and thus the legal incidence of the tax fell on purchasers in such cases. 447 U. S., at 142, and n. 9. The test to be derived from cases such as *Colville* and *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463, 481–483 (1976), is nothing more than a fair interpretation of the taxing statute as written and applied, without any requirement that pass-through provisions or collection requirements be "explicitly stated." Cf. *United States* v. *Mississippi Tax Comm'n*, 421 U. S. 599, 607–608 (1975).

We think the fairest reading of California's cigarette scheme as a whole is that the legal incidence of the tax falls on consuming purchasers if the vendors are untaxable. California Rev. & Tax Code Ann. § 30107 (West 1979) clearly seems to place on consumers the obligation to pay the tax for all previously untaxed cigarettes. The Board's implement-

ing regulation does not restrict this obligation to the hypotheticals contained in the regulation; it merely indicates that the consumer has a duty to pay any tax directly to the Board when the vendor is the type of entity on which the State cannot impose a collection requirement. See Cal. Admin. Register 72, No. 16, Tit. 18, Art. 16, § 4091. The regulation does not address itself to the question of legal incidence. And since both *Colville* and *Moe* hold that if the legal incidence of a state excise tax falls on non-Indian purchasers, the State may impose on the tribe the burden of collecting that tax from the purchasers, 447 U. S., at 159; 425 U. S., at 482–483, this particular regulation is inapplicable to purchasers from Indian tribes if the ultimate liability for the tax falls on the purchaser when the vendor is not taxable. We think that in the context of the entire California statutory scheme, interpreted without any of the restrictive requirements which the Court of Appeals employed, Cal. Rev. & Tax Code Ann. § 30108(a) (West 1979) evidences an intent to impose on the Tribe such a "pass on and collect" requirement. We hold that the legal incidence of California's cigarette tax falls on the non-Indian consumers of cigarettes purchased from respondent's smoke shop, and that petitioner has the right to require respondent to collect the tax on petitioner's behalf.

The petition for certiorari is granted on the first three questions it presents. Insofar as the Court of Appeals held that respondent might not be required to collect the cigarette tax imposed by California on non-Indian purchasers at tribal smoke shops, its judgment is

Reversed.

JUSTICE BRENNAN would deny certiorari.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MAR-

SHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

JUSTICE BLACKMUN would grant certiorari and give the case plenary consideration.

JUSTICE STEVENS, dissenting.

The courts of appeals are better qualified to decide questions of state law than is this Court. Most circuit judges formerly practiced in States within their respective circuits. As judges, they must confront state-law issues on a regular basis. For these reasons, it has long been the settled practice in this Court to show the greatest deference to opinions of the courts of appeals on questions of state law. "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949). See also *Haring* v. *Prosise*, 462 U. S. 306, 314, n. 8 (1983) ("a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review"); *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 181, n. 11 (1979) ("it is not our practice to re-examine state-law determinations of this kind"); *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976), and cases cited therein.

The outcome of this case depends entirely on an interpretation of the California Revenue and Taxation Code. I am not prepared to say that the Court of Appeals' construction of the California Code is correct or incorrect.[1] I am prepared,

[1] The Court of Appeals summarized its construction of the California statute as follows:

"Upon careful examination, it is apparent that section 30108(a) is merely a procedural section that denotes the manner in which a vendor shall collect a tax from a purchaser if and when the purchaser is obligated to pay the tax. In the case of a sale with respect to which 'the [usual cigarette] tax imposed by Section 30101 is inapplicable,' the vendor is required to collect the tax from the purchaser either (a) at the time of sale, if the purchaser is

however, to disagree with the Court's conclusion that we should undertake to decide the state-law question in a case of this kind. Even if the Court is correct in its view that the Court of Appeals applied a mistaken standard in construing the California tax,[2] that premise does not justify the action of the Court today in undertaking to decide the state-law issue on its own—particularly when that issue has not been fully briefed and argued. At most, the Court should remand the case to the Court of Appeals for a reconsideration under the proper standard. Such a remand would at least demonstrate that this Court has not forgotten that "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we" to interpret state law. *Butner* v. *United States*, 440 U. S. 48, 58 (1979). Because the Court's summary disposition conveys a different message, I respectfully dissent.

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then obligated to pay the tax, or (b) if the purchaser is not then obligated to pay the tax, at the time the purchaser becomes so obligated. Cal. Rev. & Tax. Code § 30108(a) (West 1979). Collection by the vendor is mandatory, but only if and when the purchaser has a tax obligation. The section does not contain any substantive provisions that themselves impose any tax or that indicate when section 30101 is inapplicable. Nor does it specify under which situations a purchaser is obligated to pay the tax at the time of sale or, if the purchaser is not then obligated, when the purchaser becomes so obligated. We find no language in section 30108—the only section on which the Board relies for its argument that the incidence of the tax falls upon the purchaser—that remotely suggests a legislative intent to have the purchaser pay the tax whenever the vendor is a non-taxable entity." 757 F. 2d 1047, 1056–1057 (CA9 1985) (footnotes omitted).

[2] The portion of the Court of Appeals opinion which I have quoted in n. 1, *supra*, suggests that the Court of Appeals would have reached the same conclusion even if it had not used the unfortunate word "explicit" earlier in its opinion.

DELAWARE v. FENSTERER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

No. 85-214. Decided November 4, 1985

During respondent's murder trial in a Delaware court, the State sought to prove that a cat leash was the weapon used in strangling the victim, and that a hair found on the leash was similar to the victim's hair and had been forcibly removed. The State's expert witness testified that in his opinion the hair had been forcibly removed but stated, on both direct examination and cross-examination, that he could not recall which of three methods he had employed in determining that the hair had been forcibly removed. The trial court overruled respondent's objection that the admission of the expert's testimony precluded adequate cross-examination unless he could testify as to which of the methods he relied upon. The defense offered its own expert, who testified that he had talked earlier with the State's expert and had been informed as to the method employed by the State's expert in reaching his "forcible removal" conclusion. The defense's expert then proceeded to challenge the premise of that method. The respondent was convicted, but the Delaware Supreme Court reversed, holding that because the State's expert was unable to recall the method he used in arriving at his opinion, the admission of the opinion violated respondent's rights under the Confrontation Clause of the Sixth Amendment.

Held:

1. The admission of the State's expert's opinion did not offend the Confrontation Clause despite his inability to recall the basis for that opinion. This case does not fall within the category of Confrontation Clause cases involving the admission of out-of-court statements as substantive hearsay evidence against the defendant and his literal right to "confront" the witness at the time of trial. The State made no attempt to introduce an out-of-court statement by its expert for any purpose, let alone as hearsay. Nor does this case fall within the category of Confrontation Clause cases involving restrictions imposed by law or by the trial court on the scope of cross-examination of prosecution witnesses. The trial court here did not limit the scope or nature of defense counsel's cross-examination of the State's expert. Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination (as in this case), not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

2. The prosecution's foreknowledge that its expert would be unable to give the precise basis for his opinion did not impose an obligation on it, as a matter of due process, to refrain from introducing the expert's testimony unless the basis for that testimony could definitely be ascertained. Whether or not, under state law, the State's expert's opinion should have been admitted, the Federal Constitution does not forbid the trial court's conclusion that the expert's inability to recall the basis for his opinion went to the weight of the evidence, not its admissibility. The testimony of the defense's expert, suggesting the actual basis for the State's expert's opinion and disputing its validity, dispels any possibility of a claim that the introduction of the State's expert's opinion was so lacking in reliability and so prejudicial as to deny respondent a fair trial.

Certiorari granted; 493 A. 2d 959, reversed and remanded.

PER CURIAM.

In this case, the Delaware Supreme Court reversed respondent William Fensterer's conviction on the grounds that the admission of the opinion testimony of the prosecution's expert witness, who was unable to recall the basis for his opinion, denied respondent his Sixth Amendment right to confront the witnesses against him. 493 A. 2d 959 (1985). We conclude that the Delaware Supreme Court misconstrued the Confrontation Clause as interpreted by the decisions of this Court.

I

Respondent was convicted of murdering his fiancée, Stephanie Ann Swift. The State's case was based on circumstantial evidence, and proceeded on the theory that respondent had strangled Swift with a cat leash. To establish that the cat leash was the murder weapon, the State sought to prove that two hairs found on the leash were similar to Swift's hair, and that one of those hairs had been forcibly removed. To prove these theories, the State relied on the testimony of Special Agent Allen Robillard of the Federal Bureau of Investigation.

At trial, Robillard testified that one of the hairs had been forcibly removed. He explained that, in his opinion, there are three methods of determining that a hair has forcibly

been removed: (1) if the follicular tag is present on the hair, (2) if the root is elongated and misshaped, or (3) if a sheath of skin surrounds the root. However, Robillard went on to say that "'I have reviewed my notes, and I have no specific knowledge as to the particular way that I determined the hair was forcibly removed other than the fact that one of those hairs was forcibly removed.'" *Id.*, at 963. On cross-examination, Agent Robillard was again unable to recall which method he had employed to determine that the hair had forcibly been removed. He also explained that what he meant by "forcibly removed" was no more than that the hair could have been removed by as little force as is entailed in "'brushing your hand through your head or brushing your hair.'" Pet. for Cert. 7. The trial court overruled respondent's objection that the admission of Robillard's testimony precluded adequate cross-examination unless he could testify as to which of the three theories he relied upon, explaining that in its view this objection went to the weight of the evidence rather than its admissibility.

The defense offered its own expert in hair analysis, Dr. Peter DeForest, who agreed with Agent Robillard that the hairs were similar to Swift's. Doctor DeForest testified that he had observed that one of the hairs had a follicular tag. He also testified that he had spoken by telephone with Robillard, who advised him that his conclusion of forcible removal was based on the presence of the follicular tag. App. to Pet. for Cert. D–2. Doctor DeForest then proceeded to challenge the premise of Robillard's theory—that the presence of a follicular tag indicates forcible removal. According to Dr. DeForest, no adequate scientific study supported that premise, and a follicular tag could be attached to hairs that naturally fall out.

On appeal, the Delaware Supreme Court reversed respondent's conviction on the authority of the Confrontation Clause. Noting that "[t]he primary interest secured by the Clause is the right of cross-examination," 493 A. 2d, at 963,

the court reasoned that "[e]ffective cross-examination and discrediting of Agent Robillard's opinion at a minimum required that he commit himself to the basis of his opinion." *Id.*, at 964 (footnote omitted). Absent such an acknowledgment of the basis of his opinion, the court believed that "defense counsel's cross-examination of the Agent was nothing more than an exercise in futility." *Ibid.* Since the court could not rule out the possibility that Robillard could have been "completely discredited" had he committed himself as to the theory on which his conclusion was based, it held that respondent "was denied his right to effectively cross-examine a key state witness." *Ibid.* Accordingly, the court reversed without reaching respondent's additional claim that Robillard's testimony was inadmissible under the pertinent Delaware Rules of Evidence. We now reverse the Delaware Supreme Court's holding that Agent Robillard's inability to recall the method whereby he arrived at his opinion rendered the admission of that opinion violative of respondent's rights under the Confrontation Clause.

II

This Court's Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination. The first category reflects the Court's longstanding recognition that the "literal right to 'confront' the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause." *California* v. *Green*, 399 U. S. 149, 157 (1970). Cases such as *Ohio* v. *Roberts*, 448 U. S. 56 (1980), and *Dutton* v. *Evans*, 400 U. S. 74 (1970), gave rise to Confrontation Clause issues "because hearsay evidence was admitted as substantive evidence against the defendants." *Tennessee* v. *Street*, 471 U. S. 409, 413 (1985). Cf. *Bruton* v. *United States*, 391 U. S. 123 (1968).

The second category of cases is exemplified by *Davis* v. *Alaska*, 415 U. S. 308, 318 (1974), in which, although some cross-examination of a prosecution witness was allowed, the trial court did not permit defense counsel to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." As the Court stated in *Davis*, *supra*, at 315, "[c]onfrontation means more than being allowed to confront the witness physically." Consequently, in *Davis*, as in other cases involving trial court restrictions on the scope of cross-examination, the Court has recognized that Confrontation Clause questions will arise because such restrictions may "effectively . . . emasculate the right of cross-examination itself." *Smith* v. *Illinois*, 390 U. S. 129, 131 (1968).

This case falls in neither category. It is outside the first category, because the State made no attempt to introduce an out-of-court statement by Agent Robillard for any purpose, let alone as hearsay. Therefore, the restrictions the Confrontation Clause places on "the range of admissible hearsay," *Roberts*, *supra*, at 65, are not called into play.

The second category is also inapplicable here, for the trial court did not limit the scope or nature of defense counsel's cross-examination in any way. The Court has recognized that "the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but [also] . . . allowed to impeach, *i. e.*, discredit, the witness." *Davis*, 415 U. S., at 316. But it does not follow that the right to cross-examine is denied by the State whenever the witness' lapse of memory impedes one method of discrediting him. Quite obviously, an expert witness who cannot recall the basis for his opinion invites the jury to find that his opinion is as unreliable as his memory. That the defense might prefer the expert to embrace a particular theory, which it is prepared to refute with special vigor, is irrelevant. "'The main and essential purpose of confrontation is *to secure*

for the opponent the opportunity of cross-examination.'" *Id.*, at 315–316 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940) (emphasis in original)). Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. See *Roberts*, 448 U. S., at 73, n. 12 (even where the only opportunity the defense has to cross-examine the declarant is at a preliminary hearing, except in "extraordinary cases" where defense counsel provided ineffective representation at the earlier proceeding, "no inquiry into 'effectiveness' is required"). This conclusion is confirmed by the fact that the assurances of reliability our cases have found in the right of cross-examination are fully satisfied in cases such as this one, notwithstanding the witness' inability to recall the basis for his opinion: the factfinder can observe the witness' demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused. See *id.*, at 63, n. 6.

We need not decide whether there are circumstances in which a witness' lapse of memory may so frustrate any opportunity for cross-examination that admission of the witness' direct testimony violates the Confrontation Clause. In this case, defense counsel's cross-examination of Agent Robillard demonstrated to the jury that Robillard could not even recall the theory on which his opinion was based. Moreover, through its own expert witness, the defense was able to suggest to the jury that Robillard had relied on a theory which the defense expert considered baseless. The Confrontation Clause certainly requires no more than this.

Although *Green*, *supra*, involved a witness who professed a lapse of memory on the stand, that case lends no support to respondent. In pertinent part, *Green* was a case in which a minor named Porter informed a police officer of a transaction in which he claimed Green supplied him with drugs. At trial, Porter professed to be unable to recall how he obtained

the drugs. The prosecution then introduced Porter's prior inconsistent statements as substantive evidence. *Green*, 399 U. S., at 152. This Court held that "the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories." *Id.*, at 164. However, the Court also concluded that, in the posture of that case, it would be premature to reach the question "[w]hether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause . . . ." *Id.*, at 168. In this connection, the Court noted that even some who argue that "prior statements should be admissible as substantive evidence" believe that this rule should not apply to "the case of a witness who disclaims all present knowledge of the ultimate event," because "in such a case the opportunities for testing the prior statement through cross-examination at trial may be significantly diminished." *Id.*, at 169, n. 18 (citations omitted).

We need not decide today the question raised but not resolved in *Green*. As *Green*'s framing of that question indicates, the issue arises only where a "prior statement," not itself subjected to cross-examination and the other safeguards of testimony at trial, is admitted as substantive evidence. Since there is no such out-of-court statement in this case, the adequacy of a later opportunity to cross-examine, as a substitute for cross-examination at the time the declaration was made, is not in question here.

Under the Court's cases, then, Agent Robillard's inability to recall on the stand the basis for his opinion presents none of the perils from which the Confrontation Clause protects defendants in criminal proceedings. The Confrontation Clause includes no guarantee that every witness called by the

prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony. Accordingly, we hold that the admission into evidence of Agent Robillard's opinion did not offend the Confrontation Clause despite his inability to recall the basis for that opinion.

The Delaware Supreme Court also appears to have believed that the prosecution breached its "serious obligation not to obstruct a criminal defendant's cross-examination of expert testimony," 493 A. 2d, at 963, seemingly because the prosecution knew in advance that Agent Robillard would be unable to recall the basis for his opinion when he testified at trial. While we would agree that Robillard's testimony at the *voir dire* examination must be taken to have alerted both the prosecution and the defense to his lapse of memory, see App. to Brief in Opposition A–1, we do not think the prosecution was obliged to refrain from calling Robillard unless it could somehow refresh his recollection. Whether or not, under state law, Robillard's opinion should have been admitted into evidence, nothing in the Federal Constitution forbids the conclusion reached by the trial court in this case: that the expert's inability to recall the basis for his opinion went to the weight of the evidence, not its admissibility. See *United States* v. *Bastanipour*, 697 F. 2d 170, 176–177 (CA7 1982), cert. denied, 460 U. S. 1091 (1983). That being so, the prosecution's foreknowledge that its expert would be unable to give the precise basis for his opinion did not impose an obligation on it, as a matter of due process, to refrain from introducing the expert's testimony unless the basis for that testimony could definitely be ascertained. We need not decide whether the introduction of an expert opinion with no basis could ever be so lacking in reliability, and so prejudicial, as to

deny a defendant a fair trial. The testimony of Dr. DeForest, suggesting the actual basis for Robillard's opinion and vigorously disputing its validity, utterly dispels any possibility of such a claim in this case.

The petition for certiorari is granted, the judgment of the Delaware Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

JUSTICE BLACKMUN would grant certiorari and give this case plenary consideration.

JUSTICE STEVENS, concurring in the judgment.

Summary reversal of a State Supreme Court's application of federal constitutional strictures to its own police and prosecutors in novel cases of this kind tends to stultify the orderly development of the law. Because I believe this Court should allow state courts some latitude in the administration of their criminal law,[1] I voted to deny certiorari. Cf. *California* v. *Carney*, 471 U. S. 386, 395 (1985) (STEVENS, J., dissenting).

On the merits, I find the issue much closer to the question reserved in *California* v. *Green*, 399 U. S. 149, 168–170

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[1] In *California* v. *Green*, 399 U. S. 149, 171 (1970), THE CHIEF JUSTICE wrote separately "to emphasize the importance of allowing the States to experiment and innovate, especially in the area of criminal justice." He correctly observed that "neither the Constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States." *Id.*, at 171–172.

(1970), than does the Court. The question reserved in *Green* concerned the admissibility of an earlier out-of-court statement by the witness Porter of which Porter disclaimed any present recollection at the time of trial.[2] The question decided by the Court today concerns the admissibility of an earlier out-of-court conclusion reached by a witness who disclaims any present recollection of the *basis* for that conclusion. The reasons for carefully reserving the question in *Green* persuade me that this case should not be decided without full argument. Nevertheless, because the Court has granted certiorari and decided to act summarily, because I am not persuaded that the Federal Constitution was violated, and because the State Supreme Court remains free to reinstate its judgment on the basis of its interpretation of state law, I reluctantly concur in the judgment.

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[2] "Whether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture" (footnote omitted). *Id.*, at 168–169. See also *id.*, at 169, n. 18.

LANIER v. SOUTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF SOUTH CAROLINA

No. 85-5260. Decided November 4, 1985

Petitioner, who was convicted of armed robbery, contended that the South Carolina trial court should have suppressed his confession as being the product of an illegal arrest. The South Carolina Court of Appeals affirmed the trial court, holding that, even assuming petitioner's arrest was illegal, the confession was admissible because voluntariness was the test of admissibility and petitioner did not claim that his confession was not voluntary.

Held: The South Carolina Court of Appeals' judgment is vacated, and the case is remanded, because the court's reasoning is inconsistent with well-established precedent holding that a finding of voluntariness of a confession for Fifth Amendment purposes is not by itself sufficient to purge the taint of an illegal arrest, but is merely a threshold requirement for Fourth Amendment analysis.

Certiorari granted; vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted.

Petitioner was convicted of armed robbery. He contends that his confession should have been suppressed because it was the product of an illegal arrest. The South Carolina Court of Appeals affirmed the trial court's rejection of his motion to suppress the confession:

> "Assuming, without deciding, that Lanier's arrest was illegal, we nevertheless hold his confession was admissible. A confession made while the accused is in custody before any warrant for his arrest has been issued is not per se inadmissible. *State* v. *Funchess*, 255 S. C. 385, 179 S. E. 2d 25, *cert. denied*, 404 U. S. 915, 92 S. Ct. 236, 30 L. Ed. 2d 189 (1971). Voluntariness remains as the test of admissibility. *Id.* Even if the arrest was

> illegal, the confession will be admissible if it is freely and voluntarily given. *State* v. *Plath*, 277 S. C. 126, 284 S. E. 2d 221 (1981). Since Lanier does not claim his confession was not voluntary, his argument that the confession was inadmissible is without merit." App. to Pet. for Cert. A-2.

The South Carolina Supreme Court declined further review.

Under well-established precedent, "the fact that [a] confession may be 'voluntary' for purposes of the Fifth Amendment, in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest. In this situation, a finding of 'voluntariness' for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis." *Taylor* v. *Alabama*, 457 U. S. 687, 690 (1982). See also *Dunaway* v. *New York*, 442 U. S. 200, 217–218 (1979); *Brown* v. *Illinois*, 422 U. S. 590, 602 (1975). The reasoning of the South Carolina Court of Appeals is inconsistent with those cases. We therefore vacate the judgment and remand the case to that court for further proceedings.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, concurring in the judgment.

I concur in the judgment of the Court vacating the judgment and remanding this case to the South Carolina Court of Appeals. For the reasons stated in my opinion in *Taylor* v. *Alabama*, 457 U. S. 687, 694 (1982) (O'CONNOR, J., dissenting), I believe the court on remand can consider the timing, frequency, and likely effect of whatever *Miranda* warnings were given to petitioner as factors relevant to the question whether, if petitioner was illegally arrested, his subsequent confession was tainted by the illegal arrest.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits.

See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

PENNSYLVANIA *v.* GOLDHAMMER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

No. 84-1852. Decided November 12, 1985

Respondent was convicted in a Pennsylvania trial court on multiple counts of theft and multiple counts of forgery. He was sentenced to two-to-five years of imprisonment on a single theft count and five years of probation on one of the forgery counts. Sentence was suspended on the remaining counts. On respondent's appeal, the Pennsylvania Superior Court held that the statute of limitations barred the prosecution of several of the theft counts, including the count on which respondent had received his sentence of imprisonment. On the Commonwealth's appeal, the Pennsylvania Supreme Court affirmed the Superior Court's ruling on the statute of limitations, and denied the Commonwealth's request that the case be remanded to the trial court for resentencing on the remaining theft counts. The court acknowledged that a defendant could be twice sentenced for the same count when there was an intervening retrial at the defendant's request, but it held that resentencing on the counts which were affirmed after an appeal by the Commonwealth was barred by the Double Jeopardy Clause when the sentence of imprisonment on another count was vacated.

Held: The Pennsylvania Supreme Court's rationale was inconsistent with the rationale of the holding in *United States* v. *DiFrancesco*, 449 U. S. 117, that the Double Jeopardy Clause was not violated by 18 U. S. C. § 3576, which allows the United States to appeal to a court of appeals the sentence given a "dangerous special offender" by a district court, and allows the court of appeals to affirm the sentence, impose a different sentence, or remand to the district court for further sentencing proceedings. Since the Pennsylvania Supreme Court in this case held that resentencing was barred by the Double Jeopardy Clause, it did not consider whether Pennsylvania laws in effect at the time allowed the State to obtain review of the sentences on the counts for which the sentence had been suspended. Accordingly, the judgment is reversed, and the case is remanded for a determination of that issue and for further consideration in light of *DiFrancesco*.

Certiorari granted; 507 Pa. 236, 489 A. 2d 1307, reversed and remanded.

PER CURIAM.

The Supreme Court of Pennsylvania held below that the Double Jeopardy Clause of the Fifth Amendment of the

United States Constitution barred the resentencing of the respondent. 507 Pa. 236, 489 A. 2d 1307 (1985). We grant certiorari, and, on the basis of our decision in *United States* v. *DiFrancesco*, 449 U. S. 117 (1980), we reverse and remand. The motion of the respondent for leave to proceed *in forma pauperis* is granted.

The respondent was convicted in the Philadelphia Court of Common Pleas on 56 counts of forgery and 56 counts of theft. He was sentenced by the trial court to two-to-five years of imprisonment on a single theft count and five years of probation on one of the forgery counts. Sentence was suspended on the remaining counts.

The respondent appealed all 112 convictions to the Superior Court of Pennsylvania. That court ruled that the statute of limitations barred the prosecution of 34 of the theft counts, including the count on which the respondent had received his sentence of imprisonment.

On appeal by the Commonwealth, the Supreme Court of Pennsylvania affirmed the Superior Court's ruling on the statute of limitations. In addition, the Supreme Court of Pennsylvania denied the petitioner's request that the case be remanded to the trial court for resentencing on the remaining 22 theft counts. The court acknowledged that a defendant could be twice sentenced for the same count when there was an intervening retrial at the request of the defendant, but it held that resentencing on the counts which were affirmed after an appeal by the Commonwealth is barred by the Double Jeopardy Clause when the sentence of imprisonment on another count is vacated. 507 Pa., at 248–251, 489 A. 2d, at 1314–1315, citing *North Carolina* v. *Pearce*, 395 U. S. 711 (1969).

The Pennsylvania Supreme Court's rationale is inconsistent with the rationale of the holding of this Court in *DiFrancesco, supra*. In *DiFrancesco* we upheld the constitutionality of 18 U. S. C. § 3576, which allows the United States to appeal to the court of appeals the sentence given a "dangerous special offender" by a district court, and allows the court

of appeals to affirm the sentence, impose a different sentence, or remand to the district court for further sentencing proceedings.

We noted that the decisions of this Court "clearly establish that a sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal." *DiFrancesco, supra*, at 134. In *North Carolina* v. *Pearce, supra*, we held that a court could sentence a defendant on retrial more severely than after the first trial. Any distinction between the situation in *Pearce* and that in *DiFrancesco* is "no more than a 'conceptual nicety.'" *DiFrancesco, supra*, at 136 (quoting *Pearce, supra*, at 722). Indeed, a resentencing after an appeal intrudes even less upon the values protected by the Double Jeopardy Clause than does a resentencing after retrial:

> "[T]he basic design of the double jeopardy provision [is to] bar . . . repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent. These considerations, however, have no significant application to the prosecution's statutorily granted right to review a sentence. This limited appeal does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence." *DiFrancesco, supra*, at 136.

In *DiFrancesco* a federal statute clearly allowed the appellate review of the sentences at issue. The Court noted that, in light of that statute, the defendant could not claim any expectation of finality in his original sentencing. 449 U. S., at 136, 139. Here, because the Pennsylvania Supreme Court held that resentencing was barred by the Double Jeopardy Clause, there was no need to consider below whether the Pennsylvania laws in effect at the time allowed the State to obtain review of the sentences on the counts for which the sentence had been suspended. We reverse and remand the

case to the Supreme Court of Pennsylvania for a determination of that issue, and for further consideration of this case in light of *DiFrancesco, supra.*

Reversed and remanded.

JUSTICE BRENNAN dissents from summary disposition and would vote to deny the petition.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

JUSTICE BLACKMUN would grant the petition and set the case for argument.

JUSTICE STEVENS, dissenting.

In *United States* v. *DiFrancesco*, 449 U. S. 117 (1980), this Court upheld the constitutionality of a federal statute that permitted Government appeals from certain sentences. Today, the Court summarily reverses because it finds that the "Pennsylvania Supreme Court's rationale is inconsistent with the rationale of the holding of this Court in *DiFrancesco*." *Ante*, at 29.

The Pennsylvania Supreme Court opinion does not mention *DiFrancesco*. The appellate briefs before the Pennsylvania court did consider that case, however.[1] Indeed, Mr. Goldhammer argued that *DiFrancesco* did not govern precisely because no Pennsylvania statute authorized government appeals of sentences at the time of his conviction and sentencing.[2] Mr. Goldhammer has raised the same argument

[1] See Brief for Appellant in No. CR 84–1852, p. 13, n. 3; Brief for Appellee in No. CR 84–1852, pp. 13–15.

[2] See *id.*, at 14 ("At the time the instant case arose in Pennsylvania, the Commonwealth did not have the right to appeal from a sentence. That right did not exist until the sentencing guidelines were approved in July, 1982. See 42 Pa. C. S. A. § 9781").

before this Court in his response to the Commonwealth's petition.[3] Moreover, it should be noted that, unlike the situation in *DiFrancesco*, the Pennsylvania prosecutor made no attempt to take an appeal from the sentences imposed by the trial court. The Commonwealth, in its petition and in its reply, has not adequately addressed these points.

The majority recognizes that the Pennsylvania court's judgment may ultimately be supported by state-law grounds. See *ante*, at 30–31. In view of that uncertainty, and in view of the Commonwealth's failure to address this important issue, I would simply deny certiorari.[4] I would presume that the Pennsylvania Supreme Court determined that *DiFrancesco* did not govern for the plausible state-law reason that had been argued to it.

Three factors support this presumption. First, Pennsylvania's current statutory framework for permitting government appeals from sentences was not in place at the time of Mr. Goldhammer's conviction and sentencing.[5] Second, Pennsylvania courts are now applying the new statutory framework,[6] with full knowledge of *DiFrancesco*.[7] Third,

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[3] See Brief in Opposition 9, n. 6 ("At the time of the trial and sentence here, there was no statutory provision in Pennsylvania for appeal of sentences").

[4] See this Court's Rule 21.5 ("The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition").

[5] See 42 Pa. Cons. Stat. § 9781 (1982); 204 Pa. Code § 303.1 *et seq.* (1982), reproduced following Pa. Stat. Ann., Tit. 42, § 9721 (Purdon 1982).

[6] See, *e. g.*, *Commonwealth* v. *Dixon*, 344 Pa. Super. 293, 496 A. 2d 802 (1985); *Commonwealth* v. *Hutchinson*, 343 Pa. Super. 596, 495 A. 2d 956 (1985); *Commonwealth* v. *Drumgoole*, 341 Pa. Super. 468, 491 A. 2d 1352 (1985).

[7] See *Commonwealth* v. *Drumgoole*, *supra*, at 477, n. 2, 491 A. 2d, at 1356, n. 2 ("Appellee also suggests that to grant the relief sought by the Commonwealth 'would appear to be a violation of the Fifth Amendment Constitutional guarantee against double jeopardy.' This argument has

and perhaps most importantly, we should assume that a State Supreme Court is familiar with this Court's precedents and with its own State's law. Because the majority's summary reversal reflects a contrary assumption, I respectfully dissent.

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been resolved contrary to appellee's claim. *United States* v. *DiFrancesco*, 449 U. S. 117 . . .").

PENNSYLVANIA BUREAU OF CORRECTION *v.* UNITED STATES MARSHALS SERVICE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-489. Argued October 15, 1985—Decided November 18, 1985

A Pennsylvania state prisoner temporarily confined in the Philadelphia County jail brought suit in Federal District Court under 42 U. S. C. § 1983 against various county officials, alleging that they had beaten and harassed him. The court assigned the action to a Magistrate, who issued writs of habeas corpus *ad testificandum* for the producing of state prisoners, including the plaintiff, as witnesses. The order directed the state Wardens to transport the prisoners to the county jail nearest the federal court, and then directed the United States Marshals Service (respondent) to transport the prisoners from the county jail to the federal court. Respondent's motion for reconsideration of the latter part of the order was denied. The Court of Appeals reversed in pertinent part, holding that the All Writs Act did not confer power on the District Court to compel noncustodians to bear the expense of producing the prisoner-witnesses.

Held: There is no statutory authority for the order in question. Pp. 37-43.

(a) Title 28 U. S. C. §§ 567 and 569(b) merely enumerate respondent's obligations to obey a federal court's mandate and to transport prisoners if the court so orders. The court's authority to issue such mandates must derive from some independent source. Pp. 37-38.

(b) The habeas corpus statutes—28 U. S. C. §§ 2241(c)(5) and 2243—do not authorize a federal court to direct a writ *ad testificandum* to parties who do not have custody of the prisoner. There is no evidence in the language of §§ 2241 and 2243, in their legislative history, or in the common-law writ *ad testificandum* that courts are empowered to cause third parties who are neither custodians nor parties to the litigation to bear the cost of producing the prisoner in federal court. Nor does *Carbo* v. *United States*, 364 U. S. 611, support an expansive reading of the power conferred upon federal district courts by the writ of habeas corpus *ad testificandum*. Pp. 38-39.

(c) The All Writs Act does not confer authority upon a federal court to issue an order such as the one at issue. An examination of the Act, its legislative history, and this Court's past interpretations of the Act all support this conclusion. Although the Act empowers federal courts to

fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate. Pp. 40–43.

737 F. 2d 1283, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 43.

Leroy S. Zimmerman, Attorney General of Pennsylvania, argued the cause for petitioner. With him on the briefs were *Maria Parisi Vickers*, *Andrew S. Gordon*, and *Allen C. Warshaw*, Senior Deputy Attorneys General.

Mark I. Levy argued the cause for respondents. With him on the brief were *Acting Solicitor General Fried*, *Acting Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, and *Barbara L. Herwig*.

JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether a United States district court may compel the United States Marshals Service to transport state prisoners to the federal courthouse to testify in an action brought under 42 U. S. C. § 1983 by a state prisoner against county officials.

I

In June 1980, Richard Garland brought suit under 42 U. S. C. § 1983 against various Philadelphia County officials in the United States District Court in the Eastern District of Pennsylvania, alleging that he had been beaten and harassed by the defendant deputy sheriffs and prison guards. At the time Garland filed this suit, he was incarcerated in the Philadelphia County jail, but was subsequently transferred to a state facility. The District Court assigned the action to a Magistrate for disposition on the merits.

In December 1982, the Magistrate issued writs of habeas corpus *ad testificandum* to produce five witnesses, including plaintiff Garland. At that time, Garland was in a state cor-

rectional facility in Huntingdon, approximately 220 miles from Philadelphia. The other four witnesses were all confined in state facilities over 100 miles from Philadelphia. The orders directed the Wardens of the state facilities to transport inmates from state prison to the county jail nearest the federal courthouse in Philadelphia. The orders then commanded the United States Marshals Service (Marshals)[1] to transport the inmates from that county facility to the federal court and to maintain custody of them during trial. The Marshals unsuccessfully moved for reconsideration of that portion of the order that directed them to transport the state prisoners from the county jail to the federal courthouse and to guard them during trial.

On the Marshals' appeal from this denial, the Court of Appeals for the Third Circuit reversed in part, holding that the All Writs Act did not confer power upon the District Court "to compel *non-custodians* to bear the expense of [the production of witnesses] simply because they have access to a deeper pocket." *Garland* v. *Sullivan*, 737 F. 2d 1283, 1287 (1984) (emphasis in original).[2] The Court of Appeals did find, however, that the District Court has the power to compel the Marshals to take custody of state prisoners while those prisoners are in the federal courthouse in connection

[1] The Marshals are within the Executive Branch of the Federal Government. The Marshal for each district is appointed by the President, 28 U. S. C. § 561(a), is subject to the supervision and direction of the Attorney General, see, *e. g.*, §§ 562, 567, 569(c), 571(a) and (d), and is funded through Department of Justice appropriations, *e. g.*, § 567.

[2] Judge Becker concurred in the judgment, believing the court to be bound by *McClung* v. *Silliman*, 6 Wheat. 598 (1821), and *McIntire* v. *Wood*, 7 Cranch 504 (1813). He hoped that this Court would "find that, because statutes can adapt to fit the needs of changing times, the All Writs Act now permits what, in the time of *McIntire* and *McClung* it did not." 737 F. 2d, at 1292 (footnote omitted). Judge Atkins, sitting by designation from the Southern District of Florida, concurred in part and dissented in part, believing that the Third Circuit could impose a duty on the Marshals to transport state prisoners. *Ibid.*

with federal judicial proceedings. *Ibid.* Finally, the court held that the District Court could order the Marshals to take custody of state prisoners if the trial court made a specific finding that special security risks required that state prisoner-witnesses be in the Marshals' custody away from the federal courthouse. *Id.*, at 1289.

The Commonwealth Bureau of Correction (Commonwealth) petitioned this Court for a writ of certiorari on the question whether a federal court can command the Marshals to share responsibility with state officials for transporting state inmates to the federal courthouse when neither the State nor any state official is a party.[3] Because this case presents a recurrent problem on which the Circuits differ, we granted the writ. 469 U. S. 1206 (1985). We find that there is no statutory authority for a United States district court to command the Marshals to take custody of state prisoners outside the federal courthouse during the normal course of producing state prisoner-witnesses for trial, and accordingly affirm.

II

The Commonwealth argues that the Marshals have a statutory obligation to obey the lawful orders and writs of the federal courts, 28 U. S. C. § 569(b), and are statutorily authorized to expend funds for the specific purpose of transporting prisoners, § 567. It also contends that these provisions recognize the authority of the district courts to seek assistance from the Marshals. Two Circuits have summarily agreed. *Ford* v. *Allen*, 728 F. 2d 1369, 1370 (CA11 1984) *(per curiam); Ballard* v. *Spradley*, 557 F. 2d 476, 481 (CA5 1977). Two other Circuits have relied in part on these provisions in

[3] The propriety of that part of the order commanding the Marshals to take custody of the state prisoners while they are in the federal courthouse is not specifically before us. The Marshals have conceded that they are responsible for the custody of state prisoners in the federal courthouse as witnesses or parties.

imposing the responsibility for transport upon the Marshals. *Wiggins* v. *County of Alameda*, 717 F. 2d 466 (CA9 1983), cert. denied *sub nom. California Dept. of Corrections* v. *United States*, 465 U. S. 1070 (1984); *Ford* v. *Carballo*, 577 F. 2d 404 (CA7 1978). The Court of Appeals for the Third Circuit is the only Circuit to deny a district court authority to compel the Marshals to assist in transporting state prisoner-witnesses to the federal courthouse.

Sections 569(b) and 567 merely enumerate obligations of the Marshals. The Marshals must obey the mandates of federal courts and transport prisoners if the court so orders. The courts' authority to issue such writs, however, must derive from some independent statutory source. We therefore must look to the habeas corpus statute or the All Writs Act to see if they authorize federal courts to order the transportation of state prisoners to the federal courthouse.

III

The Court of Appeals reasoned that the Magistrate's order amounted to a writ of habeas corpus *ad testificandum*[1] properly directed only to the custodian, and that there was no basis in the habeas corpus statute for the District Court's authority to direct a writ *ad testificandum* to a noncustodian. We agree.

Since 1867, the writ of habeas corpus has incorporated the common-law command that the writ "*shall* be directed to the person in whose custody the party is detained." Act of Feb. 5, 1867, ch. 28, 14 Stat. 386 (emphasis added). See *In re Thaw*, 166 F. 71, 74–75 (CA3 1908). It was the custodian who then was to "make return of said writ and bring the party before the judge who granted the writ." *Ibid.* Con-

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[1] The habeas corpus statute provides in pertinent part that the writ "shall be directed to the person having custody of the person detained," and that "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." 28 U. S. C. § 2243.

gress preserved this unambiguous directive throughout subsequent revisions, and the current habeas corpus statute states that the writ "shall be directed to the person having custody of the person detained." 28 U. S. C. § 2243. Section 2243 also specifically provides that "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."

The language of the statute thus expressly commands the custodian to bring his prisoner to the court, but extends this duty to no other. See also Fed. Rule Civ. Proc. 81(a)(2) ("The writ of habeas corpus . . . shall be directed to the person having custody of the person detained"). We find no evidence in the language of §§ 2241 and 2243, in their legislative history, or in the common-law writ *ad testificandum* to suggest that courts are also empowered to cause third parties who are neither custodians nor parties to the litigation to bear the cost of producing the prisoner in a federal court. We therefore conclude that there is no basis in the habeas corpus statute for a federal court to order the Marshals to transport state prisoners to the federal courthouse.[5]

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[5] *Carbo* v. *United States*, 364 U. S. 611 (1961), does not support an expansive reading of the power conferred upon federal district courts by the writ of habeas corpus *ad testificandum*. In *Carbo*, the Court found that although § 2241 contained an express territorial limitation of "[w]rits of habeas corpus," 28 U. S. C. § 2241(a), the limitation applied to habeas corpus *ad subjiciendum*, but not to habeas corpus *ad prosequendum*. The Commonwealth similarly argues that the provisions in § 2243 that direct the custodian to produce the prisoners in court do not apply to the writ *ad testificandum* but instead are limited to the Great Writ, habeas corpus *ad subjiciendum*.

Carbo's expansive reading of the statute was consistent with common-law procedure and requirements applied to the writ *ad prosequendum* and with the legislative history of § 2241(a). 364 U. S., at 615–618. But this case involves the writ *ad testificandum*, which has been confined in its application to the actual custodian of the prisoners from before its initial codification in 1789 to the present. We therefore do not believe that *Carbo* justifies a more expansive view of the writ of habeas corpus *ad testificandum* today.

IV

Finally, the Commonwealth argues that the All Writs Act, 28 U. S. C. § 1651,[6] confers authority upon a district court to order the Marshals to transport state prisoners to and from the federal courthouse in connection with federal litigation. It argues that the "deluge of . . . civil rights actions" calls for "creative" use of federal judicial power to alleviate the drain on the States' fiscs from the transport of inmates to and from federal courthouses.

It is true that this Court consistently has construed the All Writs Act to authorize a federal court "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *New York Telephone Co.*, 434 U. S. 159, 172 (1977). This Court also has held that the supplemental powers of the Act are not limited to situations where it is "necessary" to issue the writ or order "in the sense that the court could not otherwise physically discharge its appellate duties." *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 273 (1942). An examination of the language of the All Writs Act, its legislative history, and our decisions construing it convinces us, however, that the Act does not authorize a district court to order the Marshals to transport state prisoners from state prisons to the federal courthouse in the ordinary course of litigation in federal courts.

The All Writs Act originally was codified in § 14 of the Judiciary Act of 1789, 1 Stat. 81–82, which provided that

> "all the . . . courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specifically provided for by statute,

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[6] The All Writs Act provides in pertinent part:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

Our early view of the scope of the all writs provision confined it to filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction. *McClung* v. *Silliman*, 6 Wheat. 598 (1821); *McIntire* v. *Wood*, 7 Cranch 504 (1813). This limitation is especially significant in construing federal courts' power to issue writs of habeas corpus *ad testificandum:* The Judiciary Act of 1789 codified the *ad testificandum* writ in the same section as the all writs provision.

The original phrase "not specifically provided for by statute" remained in the all writs section until 1948. Although the legislative history is scant, it appears that Congress then merely consolidated various provisions into § 1651 and made "necessary changes in phraseology" without substantive amendment. See H. R. Rep. No. 308, 80th Cong., 1st Sess., A144 (1947); see also *id.*, at 5. The legislative history did, however, state that the new section was "expressive of the construction recently placed upon [the all writs provision] by the Supreme Court in *U. S. Alkali Export Assn.* [v. *United States*, 325 U. S. 196 (1945)]." *Id.*, at A145. In *United States Alkali*, the Court rejected use of the all writs provision to enable the Court to review a lower court's determination where jurisdiction did not lie under an express statutory provision. Chief Justice Stone wrote:

> "The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews." 325 U. S., at 203.

Although Congress dropped the phrase "not specifically provided for by statute" in its 1948 consolidation, we conclude that it apparently intended to leave the all writs provision substantially unchanged. That intention and the favorable reference to *United States Alkali* convince us that the 1948 changes in phraseology do not mark a congressional expansion of the powers of federal courts to authorize issuance of any "appropriate" writ.

Nevertheless, the Commonwealth, relying on *United States* v. *New York Telephone Co.*, *supra*, at 171, as well as *Harris* v. *Nelson*, 394 U. S. 286, 299 (1969), and *Price* v. *Johnston*, 334 U. S. 266, 282 (1948), insists that under the All Writs Act the District Court can order the Marshals to transport state prisoners upon a mere statement that such an order would be "necessary or appropriate." As summarized in the margin below, these cases are clearly distinguishable and lend little support to the Commonwealth's argument.[7]

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[7] In *United States* v. *New York Telephone Co.*, 434 U. S. 159 (1977), the Court held that a District Court could under the All Writs Act compel a third party, the New York Telephone Company, to assist the Federal Bureau of Investigation in installing devices under a warrant that would register the numbers dialed on certain telephones. In that case the All Writs Act filled a gap in federal statutes by granting the District Court jurisdiction over the only party capable of installing the devices. In the instant case, by contrast, the habeas corpus statute already expressly provides for the issuance of a writ "to the person having custody of the person detained."

In *Price* v. *Johnston*, 334 U. S. 266 (1948), the Court held that a Court of Appeals could order a prisoner to be brought before it to argue his own appeal, finding that the All Writs Act was a mechanism to achieve the "rational ends of law." *Id.*, at 282. In *Price*, however, there was no alternative way to bring the prisoner before the court. In the present case, the traditional writ *ad testificandum* is sufficient. Similarly, *Harris* v. *Nelson*, 394 U. S. 286 (1969), held that the District Court in that case had no alternative means of providing an effective habeas corpus proceeding except by use of an extraordinary writ. *New York Telephone*, *Price*, and *Harris* afforded resort to the All Writs Act to fill statutory interstices. We do not find their reasoning controlling here, where a writ *ad testifican-*

The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate. We need not categorically rule out reliance on the All Writs Act and the use of Marshals in procuring or safeguarding state prisoner-witnesses in the course of federal litigation. There may be exceptional circumstances in which a district court can show clearly the inadequacy of traditional habeas corpus writs, such as where there are serious security risks. In such circumstances, a district court may find it "necessary or appropriate" for Marshals to transport state prisoners. We therefore leave open the question of the availability of the All Writs Act to authorize such an order where exceptional circumstances require it.

V

We conclude, at least in the absence of an express finding of exceptional circumstances, that neither a magistrate nor a district court has authority to order the Marshals to transport state prisoners to the federal courthouse to testify in an action brought by a state prisoner under 42 U. S. C. § 1983 against county officials. Accordingly, we affirm the Court of Appeals for the Third Circuit.

It is so ordered.

JUSTICE STEVENS, dissenting

This is an exceptional case. It involves a dispute between the Marshals Service and a Federal District Court. Ordinarily, the marshals and the federal courts which they serve

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dum directed to the custodian indisputably provides a district court with a means of producing a prisoner-witness.

have a close and harmonious relationship. To be sure, the special responsibilities of the marshal—an office that serves both the Executive and Judicial Branches—can give rise to administrative problems.[1] Customarily such problems are resolved on a voluntary, cooperative basis, either in the individual court or circuit, or in high-level discussions between the Executive and Judicial Branches.[2] Open disputes between the marshals and the courts are rare, and appropriately so.

The question whether federal marshals should be required to transport state prisoners to testify in federal litigation is, however, a recurring problem that has not been resolved amicably, either between the federal courts and the marshals[3] or between the marshals and the States.[4] The majority notes that, in "exceptional circumstances," *ante*, at 43, the district court may order marshals to transport state prisoners. I entirely agree. The majority's holding, however, is that, absent such circumstances, the district court may not

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[1] See Report by the Comptroller General, U. S. Marshals' Dilemma: Serving Two Branches of Government (1982).

[2] See, *e. g.*, U. S. Marshals Service, Oversight Hearing before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 99th Cong., 1st Sess., 3 (1985) (citing agreement between the Attorney General and THE CHIEF JUSTICE regarding court security); *id.*, at 26 (citing agreement between the Attorney General and THE CHIEF JUSTICE regarding contract guard program); Hearings on H. R. 7039 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess., 175 (1982) (citing agreement between the Attorney General and THE CHIEF JUSTICE regarding court security and the allocation of marshals).

[3] See *Ford* v. *Allen*, 728 F. 2d 1369 (CA11 1984) *(per curiam)*; *Wiggins* v. *County of Alameda*, 717 F. 2d 466 (CA9 1983), cert. denied, 465, U. S. 1070 (1984); *Ford* v. *Carballo*, 577 F. 2d 404 (CA7 1978); *Ballard* v. *Spradley*, 557 F. 2d 476 (CA5 1977).

[4] See *Wiggins* v. *County of Alameda*, 717 F. 2d, at 469 ("We decry the inability of state and federal officials to resolve such matters fairly and equitably . . .").

order marshals to do so because no statute expressly authorizes that action. In my view, this conclusion ignores the importance of history and tradition in defining the relationship between the Marshals Service and the Federal Judiciary.

History and tradition suggest that the court's authority over the marshal is not so narrowly circumscribed as the Court suggests. In the Judiciary Act of 1789, Congress placed the marshal under the direction of the court. Because the office of the marshal was patterned after the office of the common-law sheriff,[5] there was no need for Congress to define the judge's authority to issue orders to the marshal with any particularity. Instead, § 27 of the Judiciary Act of 1789 provided that a marshal should be appointed in each

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[5] See U. S. Dept. of Justice, United States Marshals Service—Then . . . and Now 3 (1978) ("the Marshal carried on the tradition of the English common law sheriff, possessing complete authority within his bailiwick"). Indeed, one of the objections expressed to the Judiciary Act of 1789 was that it would lead to conflicts between the federal marshals and the local sheriffs. 1 Annals of Cong. 826 (1789) (statement of Rep. Stone) ("in different tribunals, not connected, mischiefs may happen. Will a sheriff be justifiable in delivering up his prisoner to the marshal, or will it be a proper return by the marshal that the prisoner is kept by the State sheriff"). In 1792, moreover, Congress expressly provided that "the marshals of the several districts and their deputies, shall have the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states," 1 Stat. 265—a provision that, in substance, exists today, 28 U. S. C. § 570. On the power of the sheriff at English common law, see G. Atkinson, Sheriff-Law 5 (1861) ("The sheriff is the immediate officer to *all* the Courts at Westminster to execute writs. . . . [W]hether a writ comes to him, by authority, or without authority, or is awarded against whom it does not lie, he cannot doubt, or dispute its validity").

The title for the marshals may have been derived from the example of the marshals to the British and colonial vice-admiralty courts. See L. Ball, The United States Marshals of New Mexico and Arizona Territories 3 (1978). See also C. Ubbelohde, The Vice-Admiralty Courts and the American Revolution 10 (1960) (In the colonial vice-admiralty courts, "[t]he marshals' duties were similar to those of a sheriff: serving processes, taking custody of goods or people, and executing the decrees of the court").

judicial district.[6] The primary duty of the marshal, as expressed in that Act, was "to attend the district and circuit courts when sitting therein, and also the Supreme Court in the district in which that court shall sit." In carrying out his duty to execute "all lawful precepts directed to him," each marshal was given the power to appoint "one or more deputies," but such deputies were removable at will by the appropriate federal judge. Read against the background of the relationship between the judge and the sheriff that had existed at common law, it is evident that the statute simply assumed that the judge had ample power to call upon the marshal for appropriate assistance in carrying out the duties of judicial office.

Although the marshal was subsequently given a variety of other duties, including some subject to direction from the

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[6] "SEC. 27. *And be it further enacted*, That a marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure, whose duty it shall be to attend the district and circuit courts when sitting therein, and also the Supreme Court in the district in which that court shall sit. And to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint as there shall be occasion, one or more deputies, who shall be removable from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either; and before he enters on the duties of his office, he shall become bound for the faithful performance of the same, by himself and by his deputies before the judge of the district court to the United States, jointly and severally, with two good and sufficient sureties, inhabitants and freeholders of such district, to be approved by the district judge, in the sum of twenty thousand dollars, and shall take before said judge, as shall also his deputies, before they enter on the duties of their appointment, the following oath of office: 'I, A. B., do solemnly swear or affirm, that I will faithfully execute all lawful precepts directed to the marshal of the district of under the authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal (or marshal's deputy, as the case may be) of the district of , during my continuance in said office, and take only my lawful fees. So help me God.'" 1 Stat. 87.

Executive Branch,[7] it was not until 1861 that Congress gave the Attorney General any authority over United States marshals.[8] Furthermore, it was not until 1969 that the Attorney General formalized his control over the marshals through the establishment of the Office of the Director of the Marshals Service.[9]

Under the current statutory framework, the United States marshals owe obligations both to the Executive Branch and to the Judiciary. Thus, although as the majority points out, the Marshals Service is under the control of the Attorney General, *ante*, at 36, n. 1, marshals also remain subject to the instructions of the court.[10] Indeed, Congress has considered, but not passed, legislation to lodge control of the marshals exclusively in the Executive Branch.[11] Thus, Congress has not yet divested the Judiciary of the control of marshals that it has had since 1789, and that it has shared with the Attorney General since 1861.

Throughout our history, the marshals have played an important role in the administration of justice. Although their most dramatic exploits may be called to mind by references to names like Bat Masterson, Wyatt Earp, and David Neagle, or to events like the enforcement of civil rights legislation in the 1960's, the primary assistance to the Federal Judiciary provided by the marshals has been in the area of

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[7] See U. S. Dept. of Justice, The Office of the United States Marshal 2–3 (1981).

[8] See Report by the Comptroller General, *supra* n. 1, at 8 ("On August 2, 1861, an act of Congress (ch. 37, 12 Stat. 285) placed U. S. attorneys and marshals under the general superintendence and direction of the Attorney General. The 1861 legislation neither explicitly repealed nor made reference to any prior statutes affecting marshals").

[9] *Id.*, at 10.

[10] See 28 U. S. C. § 569(a) ("The United States marshal of each district is the marshal of the district court and of the court of appeals when sitting in his district, . . . and may, in the discretion of the respective courts, be required to attend any session of court").

[11] See Hearings on H. R. 7039, *supra* n. 2, at 141.

protection of the trial process, including the courtroom itself, and the service of writs issued by the judges. The duty of the Marshals Service "to service the federal forum"[12] does, however, encompass more than these two specific activities.

Many aspects of the court's authority over the marshal are not set forth in detail in any Act of Congress. Thus, it is not the Congress that decided that formal proceedings in our courtroom shall be preceded by the Marshal's cry of "Oyez, Oyez." Nor is it Congress, or the United States Marshals Service, that has decided to use different language to call the court to order in other federal courthouses. Decisions of that kind concerning the administration of justice in federal courts are made by federal judges.

When a federal judge orders the marshal to open court at a particular time, or in a particular way, to provide appropriate security for a trial participant, or to escort a prisoner from the lockup in the federal building to the courtroom, the court is exercising judicial power in a manner that is certainly "agreeable to the usages and principles of law" as that phrase is used in the All Writs Act.[13] In my judgment, however, such an order is not a "writ." The court's authority to issue such directives to the marshal is therefore not derived from the All Writs Act, but rather is simply one of the powers of the federal judicial office that has long been an aspect of the relationship between the court and its officers.

These daily instances of judicial authority over the marshal reflect the conventional relationship between the court and the marshal. The closeness of the relationship is derived, not from an assertion of judicial power over an unwilling marshal, but from the cooperative nature of the shared mission to administer justice. This case represents one of those un-

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[12] "The *raison d'etre* of the Marshal Service is to service the federal forum in civil as well as criminal litigation." *Ballard* v. *Spradley*, 557 F. 2d, at 481.

[13] The statute, in both its original and present form are quoted by the Court, *ante*, at 40–41, and n. 6.

usual instances in which the ordinary mechanisms for addressing disagreements have apparently failed. The majority holds that the answer must be found in an explicit statutory delineation of each exercise of judicial authority. In my view, the nature of the shared mission of the federal courts and the federal marshals should provide the standard for resolving the dispute. Thus, the controlling question is whether the district court's order is reasonably related to the administration of justice and is a sound exercise of judicial discretion.[14]

As noted, the Court recognizes that there may be "exceptional circumstances" in which it would be appropriate for a trial court to order the marshal to transport a state prisoner to a federal courthouse. See *ante*, at 43. In my judgment, even with respect to an ordinary witness, special circumstances might make it appropriate to order the marshal to transport the witness to court, even though there may not be any common-law writ that would be available in a comparable situation. The question whether such an order to a marshal constitutes an appropriate exercise of the judge's inherent power to control the course of proceedings in a particular trial should not, in my opinion, be answered by reference to the All Writs Act, but rather by reference to the traditional relationship between the court and the marshal and to the particular facts that may support the order in a particular case.

In this case, four factors suggest that ordering the federal marshal to transport the state prisoners was a sound exercise of judicial discretion. First, federal marshals have consider-

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[14] Four of the five United States Courts of Appeals that have considered federal-court orders to transport state prisoners for their testimony in federal litigation have viewed the issue as a question of the District Court's discretion, and located the authority for that discretion in a specific statutory provision. See cases cited in n. 3, *supra*.

able expertise in transporting prisoners to federal courts;[15] moreover, the marshals acknowledge that they have ample authority to transport state, as well as federal, prisoners when appropriate.[16] Second, in this instance, the federal marshal will be responsible for the prisoners when they are in the federal courthouse.[17] Third, federal marshals frequently house federal prisoners at state and local jails, and, indeed, have developed special programs to serve that end.[18] Fourth, in this case, the District Court, through the Magistrate, specifically found that requiring the State to bear the entire responsibility of transporting the state prisoners for this federal litigation would impose an unfair financial hardship upon the Commonwealth of Pennsylvania.[19] This finding derives support, not only from the particular facts disclosed by this record,[20] but also from the strong federal policy

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[15] The marshals transported more than 130,000 prisoners in fiscal year 1984. Oversight Hearing, *supra* n. 2, at 10.

[16] See Tr. of Oral Arg. 38–40.

[17] See *ante*, at 37, n. 3.

[18] Oversight Hearing, *supra* n. 2, at 16.

[19] See Magistrate's opinion, App. to Pet. for Cert. 58a–59a. The Magistrate ordered the Marshals Service to transport the prisoners from the Philadelphia Detention Center to the federal courthouse in Philadelphia. The State, in contrast, remained responsible for transporting the prisoners from their prisons in other parts of the State to the Philadelphia Detention Center. *Id.*, at 58a.

[20] The Magistrate found that the financial costs imposed by his requirement that the State transport the prisoners to the Philadelphia Detention Center were "significant," *id.*, at 59a. Determining that it was "equitable and reasonable," *ibid.*, to refrain from imposing additional costs on the State, he emphasized that the Marshal already made frequent trips from the Philadelphia Detention Center to the federal courthouse because federal prisoners were often housed at the Detention Center during their federal trials. *Id.*, at 60a. According to the Magistrate's findings, the Detention Center is "relatively close" to the federal courthouse. *Id.*, at 59a–60a. At oral argument, the Federal Government reported that "the Marshal typically brings between six and twelve prisoners from the Philadelphia Detention Center to the Federal Courthouse on an average day." Tr. of Oral Arg. 28.

favoring cooperation with the States in the administration of civil rights litigation in the federal courts.[21] Thus, I believe that it was an appropriate exercise of the District Court's discretion to issue the order that it did in this case.

This is not the kind of confrontation that should arise between the marshals and the federal courts. There are a variety of mechanisms that should be used before the marshal and the court engage in judicial combat. The district judges and the individual marshals should be able to resolve most difficulties. If they are unable to, the Circuit Conference should be asked to intervene. If the problem is a recurring, national disagreement, as this issue seems to be, the Marshals Service and the Judicial Conference can seek to address it. If these mechanisms fail, however, and if the district court issues an order to the marshal, then the historic relationship between the marshal and the courts, reflected in the current statutory framework, convinces me that the court's order should be upheld if it is reasonably related to the administration of justice and is an appropriate exercise of the district court's discretion.

Because I believe that the District Court's order in this case was fully consistent with the historic relationship between the federal court and the federal marshal, I respectfully dissent.

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[21] Cf. Remarks of Warren E. Burger, Chief Justice of the United States, at the Dedication of the National Center for State Courts 8 (1978) ("I would hope that there will be close cooperation and coordination between our two systems—close, I repeat, but voluntary. Our experience with the State-Federal Councils has shown us the value of cooperation").

HILL *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1103. Argued October 7, 1985—Decided November 18, 1985

Pursuant to a plea-bargaining agreement, petitioner pleaded guilty in an Arkansas court to charges of first-degree murder and theft of property, and the court accepted the plea, sentencing him, in accordance with the State's recommendations, to concurrent sentences of 35 years for the murder and 10 years for the theft. Petitioner later filed a federal habeas corpus petition alleging, *inter alia*, that his guilty plea was involuntary by reason of ineffective assistance of counsel because his court-appointed attorney had misinformed him that if he pleaded guilty he would become eligible for parole after serving one-third of his prison sentence, whereas under Arkansas law petitioner, as a "second offender," was required to serve one-half of his sentence before becoming eligible for parole. The District Court denied habeas relief without a hearing, and the Court of Appeals affirmed.

Held: The District Court did not err in declining to hold a hearing on petitioner's claim. Pp. 56–60.

(a) Where a defendant enters a guilty plea upon counsel's advice, the voluntariness of the plea depends on whether the advice was within the range of competence demanded of attorneys in criminal cases. The two-part standard adopted in *Strickland* v. *Washington*, 466 U. S. 668, for evaluating claims of ineffective assistance of counsel—requiring that the defendant show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different—applies to guilty-plea challenges based on ineffective assistance of counsel. In order to satisfy the second, or "prejudice," requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Pp. 56–60.

(b) In the present case it is unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because petitioner's allegations were insufficient to satisfy the "prejudice" requirement. He did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date,

he would have pleaded not guilty and insisted on going to trial. Nor did he allege any special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether to plead guilty. P. 60.

764 F. 2d 1279, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which STEVENS, J., joined, *post*, p. 60.

Jack T. Lassiter, by appointment of the Court, 471 U. S. 1064, argued the cause and filed a brief for petitioner.

John Steven Clark, Attorney General of Arkansas, argued the cause for respondent. With him on the brief was *Alice Ann Burns*, Deputy Attorney General.

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner William Lloyd Hill pleaded guilty in the Arkansas trial court to charges of first-degree murder and theft of property. More than two years later he sought federal habeas relief on the ground that his court-appointed attorney had failed to advise him that, as a second offender, he was required to serve one-half of his sentence before becoming eligible for parole. The United States District Court for the Eastern District of Arkansas denied relief without a hearing, and the en banc Court of Appeals for the Eighth Circuit affirmed by an equally divided court. We granted certiorari because of the difference between the result reached in the present case and that reached by the Court of Appeals for the Fourth Circuit in *Strader* v. *Garrison*, 611 F. 2d 61 (1979). 470 U. S. 1049 (1985). We affirm the judgment of the Court of Appeals for the Eighth Circuit because we conclude that petitioner failed to allege the kind of prejudice from the allegedly incompetent advice of counsel that would have entitled him to a hearing.

Under Arkansas law, the murder charge to which petitioner pleaded guilty carried a potential sentence of 5 to 50

years or life in prison, along with a fine of up to $15,000. Ark. Stat. Ann. §§ 41-1502(3), 41-901(1)(a), 41-1101(1)(a) (1977). Petitioner's court-appointed attorney negotiated a plea agreement pursuant to which the State, in return for petitioner's plea of guilty to both the murder and theft charges, agreed to recommend that the trial judge impose concurrent prison sentences of 35 years for the murder and 10 years for the theft. Petitioner signed a written "plea statement" indicating that he understood the charges against him and the consequences of pleading guilty, that his plea had not been induced "by any force, threat, or promise" apart from the plea agreement itself, that he realized that the trial judge was not bound by the plea agreement and retained the sole "power of sentence," and that he had discussed the plea agreement with his attorney and was satisfied with his attorney's advice. The last two lines of the "plea statement," just above petitioner's signature, read: "I am aware of everything in this document. I fully understand what my rights are, and I voluntarily plead guilty because I am guilty as charged."

Petitioner appeared before the trial judge at the plea hearing, recounted the events that gave rise to the charges against him, affirmed that he had signed and understood the written "plea statement," reiterated that no "threats or promises" had been made to him other than the plea agreement itself, and entered a plea of guilty to both charges. The trial judge accepted the guilty plea and sentenced petitioner in accordance with the State's recommendations. The trial judge also granted petitioner credit for the time he had already served in prison, and told petitioner that "[y]ou will be required to serve at least one-third of your time before you are eligible for parole."

More than two years later petitioner filed a federal habeas corpus petition alleging, *inter alia*, that his guilty plea was involuntary by reason of ineffective assistance of counsel because his attorney had misinformed him as to his parole eligi-

bility date. According to petitioner, his attorney had told him that if he pleaded guilty he would become eligible for parole after serving one-third of his prison sentence. In fact, because petitioner previously had been convicted of a felony in Florida, he was classified under Arkansas law as a "second offender" and was required to serve one-half of his sentence before becoming eligible for parole. Ark. Stat. Ann. § 43-2829B(3) (1977). Petitioner asked the United States District Court for the Eastern District of Arkansas to reduce his sentence to a term of years that would result in his becoming eligible for parole in conformance with his original expectations.

The District Court denied habeas relief without a hearing. The court noted that neither Arkansas nor federal law required that petitioner be informed of his parole eligibility date prior to pleading guilty, and concluded that, even if petitioner was misled by his attorney's advice, parole eligibility "is not such a consequence of [petitioner's] guilty plea that such misinformation renders his plea involuntary." The court also held that "even if an attorney's advice concerning such eligibility is not wholly accurate, such advice does not render that attorney's performance constitutionally inadequate."

A divided panel of the Court of Appeals for the Eighth Circuit affirmed, holding that parole eligibility is a collateral rather than a direct consequence of a guilty plea, of which a defendant need not be informed, and that the District Court did not err in declining to hold a hearing on petitioner's claims. 731 F. 2d 568, 570-573 (1984). One judge dissented, arguing that a hearing should have been held to determine whether the attorney's alleged mistake in informing petitioner about "the applicable law" constituted ineffective assistance of counsel and warranted vacating the guilty plea. *Id.*, at 573-574 (Heaney, J., dissenting). On rehearing, the en banc Court of Appeals affirmed the judgment of the Dis-

trict Court by an equally divided court. 764 F. 2d 1279 (1985).

The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina* v. *Alford*, 400 U. S. 25, 31 (1970); see *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969); *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962). Here petitioner does not contend that his plea was "involuntary" or "unintelligent" simply because the State through its officials failed to supply him with information about his parole eligibility date. We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the federal courts. See Fed. Rule Crim. Proc. 11(c); Advisory Committee's Notes on 1974 Amendment to Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 22 (federal courts generally are not required to inform defendant about parole eligibility before accepting guilty plea). Instead, petitioner relies entirely on the claim that his plea was "involuntary" as a result of ineffective assistance of counsel because his attorney supplied him with information about parole eligibility that was erroneous. Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson*, 397 U. S. 759, 771 (1970). As we explained in *Tollett* v. *Henderson*, 411 U. S. 258 (1973), a defendant who pleads guilty upon the advice of counsel "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from coun-

sel was not within the standards set forth in *McMann*." *Id.*, at 267.

Our concern in *McMann* v. *Richardson* with the quality of counsel's performance in advising a defendant whether to plead guilty stemmed from the more general principle that all "defendants facing felony charges are entitled to the effective assistance of competent counsel." 397 U. S., at 771 and n. 14; see *Reece* v. *Georgia*, 350 U. S. 85, 90 (1955); *Powell* v. *Alabama*, 287 U. S. 45 (1932). Two Terms ago, in *Strickland* v. *Washington*, 466 U. S. 668 (1984), we adopted a two-part standard for evaluating claims of ineffective assistance of counsel. There, citing *McMann*, we reiterated that "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." 466 U. S., at 687–688. We also held, however, that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. This additional "prejudice" requirement was based on our conclusion that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.*, at 691.

Although our decision in *Strickland* v. *Washington* dealt with a claim of ineffective assistance of counsel in a capital sentencing proceeding, and was premised in part on the similarity between such a proceeding and the usual criminal trial, the same two-part standard seems to us applicable to ineffective assistance claims arising out of the plea process. Certainly our justifications for imposing the "prejudice" requirement in *Strickland* v. *Washington* are also relevant in the context of guilty pleas:

> "The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in

> an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense." *Id.*, at 693.

In addition, we believe that requiring a showing of "prejudice" from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas we identified in *United States* v. *Timmreck*, 441 U. S. 780 (1979):

> "'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.'" *Id.*, at 784 (quoting *United States* v. *Smith*, 440 F. 2d 521, 528–529 (CA7 1971) (Stevens, J., dissenting)).

We hold, therefore, that the two-part *Strickland* v. *Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the *Strickland* v. *Washington* test is nothing more than a restatement of the standard of attorney competence already set forth in *Tollett* v. *Henderson*, *supra*, and

McMann v. *Richardson*, *supra*. The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.*

In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. See, *e. g.*, *Evans* v. *Meyer*, 742 F. 2d 371, 375 (CA7 1984) ("It is inconceivable to us . . . that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received"). As we explained in *Strickland* v. *Washington*, *supra*, these predic-

*Several Courts of Appeals have adopted this general approach. See *Thomas* v. *Lockhart*, 738 F. 2d 304, 307 (CA8 1984); accord, *United States* v. *Gavilan*, 761 F. 2d 226, 228 (CA5 1985); *Beans* v. *Black*, 757 F. 2d 933, 936–937 (CA8 1985); *Mitchell* v. *Scully*, 746 F. 2d 951, 957 (CA2 1984); *Evans* v. *Meyer*, 742 F. 2d 371, 374–375 (CA7 1984).

tions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker." *Id.*, at 695.

In the present case the claimed error of counsel is erroneous advice as to eligibility for parole under the sentence agreed to in the plea bargain. App. 31. We find it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland* v. *Washington* requirement of "prejudice." Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty. Indeed, petitioner's mistaken belief that he would become eligible for parole after serving one-third of his sentence would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted.

Because petitioner in this case failed to allege the kind of "prejudice" necessary to satisfy the second half of the *Strickland* v. *Washington* test, the District Court did not err in declining to hold a hearing on petitioner's ineffective assistance of counsel claim. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE WHITE, with whom JUSTICE STEVENS joins, concurring in the judgment.

The only question properly before the Court is whether petitioner is entitled to an evidentiary hearing in a federal habeas proceeding where he has alleged that his guilty plea

entered in state court was involuntary and resulted from ineffective assistance of counsel. I write separately to state why, under the particular facts of this case, petitioner is not entitled to an evidentiary hearing on his habeas claim of ineffective assistance of counsel.

It is necessary, in my view, to focus on the "plea statement" signed by petitioner. The statement is a standardized form to be completed by defense counsel, in consultation with his client, and submitted to the court for consideration. The form calls for the insertion of specific information in the appropriate spaces. Among the items to be included are the crime with which the defendant is charged, whether that crime is a felony or a misdemeanor, and the maximum sentence and/or fine defendant could receive if found guilty of the offense. There is also a blank space in which to indicate the number of prior convictions which the defendant has suffered. App. 28.

As the majority indicates, petitioner signed such a written "plea statement" indicating that he understood the charges against him, the consequences of pleading guilty, and that he was "aware of everything in this document." *Ante*, at 54; App. 28. In the space provided for disclosing the number of prior convictions, petitioner's form reads "0." *Ibid.*

Although it is unclear whether petitioner or his counsel filled out the form and inserted this number, there is no allegation that petitioner told his attorney about his previous Florida felony conviction. Indeed, it is incredible that the attorney would have filled in the "0" had he known there was a prior conviction. Petitioner thus has no factual basis for suggesting that his attorney's advice was incompetent, or that he was affirmatively misled by counsel as to his earliest possible parole eligibility date. Without an allegation that the attorney knew of petitioner's prior conviction, but failed to inform him of the applicability of the Arkansas "second offender" statute, there is no reason to provide petitioner with an evidentiary hearing on his claim of ineffective assistance

of counsel. None of his allegations, if proved, would entitle petitioner to relief, as there is nothing in the record to indicate "that [defense] counsel's representation fell below an objective standard of reasonableness." *Strickland* v. *Washington*, 466 U. S. 668, 687–688 (1984); see also *McMann* v. *Richardson*, 397 U. S. 759, 771 (1970).

Were it not for the misinformation in the plea statement—had petitioner's attorney known of a prior conviction and still informed petitioner that he would be eligible for parole after serving one-third of his sentence—petitioner would be entitled to an evidentiary hearing and an opportunity to prove that counsel's failure to advise of him of the effect of Ark. Stat. Ann. § 43–2829B(3) (1977) amounted to ineffective assistance of counsel. The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis adopted by the majority, as such an omission cannot be said to fall within "the wide range of professionally competent assistance" demanded by the Sixth Amendment. *Strickland* v. *Washington*, *supra*, at 690.

Moreover, an examination of the record reveals that petitioner alleged sufficient facts to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Ante*, at 59. In the first two paragraphs of his habeas petition, petitioner alleged, in pertinent part, as follows:

> "I agreed to plead guilty with the understanding that I'd get 35 yrs. for 1st degree murder & 10 years concurrent for theft of property, and that I would only have 1/3 of my sentence to do, less good time. . . .
>
> "My lawyer told me that a plea negotiation was binding to both sides and that the Court would impose the sentence agreed to by me and the prosecutor. I did not know that the Court could deviate from the concessions agreed to without informing me, nor that it could say to do 1/3 minimum enstead *[sic]* of just 1/3, until parole." App. 8–9.

Later, petitioner made the following objections to the Magistrate's proposed order:

> "Petitioner's first two arguments should be restated to allege that his guilty plea was involuntary in that his counsel improperly advised him as to his earliest possible parole eligibility date and as a result of that incorrect advice the Petitioner did not fully understand the consequences of his plea." *Id.*, at 40.
>
> "The Petitioner contends that his counsel's erroneous advice concerning his potential parole eligibility date was a critical factor in his decision to enter a guilty plea. It was an important consequence of his plea which he did not understand." *Id.*, at 41–42.
>
> "It is Petitioner's contention that he would not have entered the negotiated plea had his attorney correctly advised him that he would be required to serve one-half of his sentence less good time under Arkansas law." *Id.*, at 46–47.

In sum, because petitioner failed to allege that his attorney knew about his prior conviction but failed to inform him of the applicability of Ark. Stat. Ann. § 43–2829B(3) (1977), I find that petitioner did not allege sufficient facts to entitle him to an evidentiary hearing on his ineffective-assistance-of-counsel claim. Had petitioner made such an allegation, however, he would be entitled to such a hearing, as he clearly alleged more than sufficient facts that, if proved, would show that he was prejudiced by his counsel's error, and thus entitled to habeas relief.

GREEN ET AL. *v.* MANSOUR, DIRECTOR, MICHIGAN DEPARTMENT OF SOCIAL SERVICES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-6270. Argued October 7, 1985—Decided December 3, 1985

Petitioner recipients of benefits under the federal Aid to Families With Dependent Children (AFDC) program brought class actions in Federal District Court against respondent Director of the Michigan Department of Social Services. They claimed that respondent's policies of prohibiting the deduction of child care costs and requiring the inclusion of stepparents' income for purposes of calculating earned income, thereby determining eligibility for and the amount of AFDC benefits, violated applicable federal law. Petitioners sought an injunction, a declaratory judgment, and "notice relief." While the actions were pending, Congress amended the relevant federal statute to expressly require States to deduct child care expenses and to include stepparents' income. Granting respondent's motions to dismiss in each case, the District Court held that the changes in federal law rendered moot the claims for prospective relief, that the remaining claims for declaratory and "notice relief" related solely to past violations of federal law, and that such retrospective relief was barred by the Eleventh Amendment. The Court of Appeals affirmed in a consolidated appeal.

Held:

1. Petitioners are not entitled to "notice relief." Since there is no continuing violation of federal law to enjoin, and therefore no valid injunction to which notice could attach, the notice cannot be justified as a mere case-management device that is ancillary to a judgment awarding valid prospective relief. *Quern* v. *Jordan*, 440 U. S. 332, distinguished. Absent these conditions, the Eleventh Amendment limitation on the Art. III power of federal courts prevents them from ordering "notice relief" against States because it is not the type of remedy designed to prevent ongoing violations of supreme federal law. Pp. 68-72.

2. Nor are petitioners entitled to a declaratory judgment that respondent violated federal law in the past. Where there is no claimed continuing violation of federal law or any threat of future violation, a declaratory judgment is inappropriate because its purpose could only be to provide a federal judgment on the issue of liability with the hope that it would be res judicata in state-court proceedings, leaving to the state courts only a form of accounting proceeding whereby damages or restitu-

tion would be computed. This would be an inappropriate exercise of federal judicial power because it would have much the same effect as an award of damages or restitution, which kinds of relief against States are prohibited by the Eleventh Amendment. Pp. 72–73.

742 F. 2d 277, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 74. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 79. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 81.

William Burnham argued the cause for petitioners. With him on the briefs was *Paul D. Reingold*.

Louis J. Caruso, Solicitor General of Michigan, argued the cause for respondent. With him on the brief were *Thomas L. Casey*, *Erica Weiss Marsden*, and *Robert N. Rosenberg*, Assistant Attorneys General.

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners brought two separate class actions in the United States District Court for the Eastern District of Michigan against respondent Director of the Michigan Department of Social Services, claiming that respondent's calculations of benefits under the federal Aid to Families With Dependent Children (AFDC) program violated certain provisions of that federal law. Before a final determination on the merits of either case could be made, Congress amended the relevant statutory provisions. It is undisputed that respondent's calculations thereafter have conformed to federal law. Notwithstanding this fact, petitioners claim that they were entitled to have the District Court award them both "notice relief" and a declaration that respondent's prior conduct violated federal law. The District Court denied petitioners both forms of relief, and the Court of Appeals for the Sixth Circuit affirmed. We now affirm the judgment of the Court of Appeals, holding that the Eleventh Amendment

to the United States Constitution and applicable principles governing the issuance of declaratory judgments forbid the award of either form of relief.

The two class actions involved in this case were brought on behalf of recipients of benefits disbursed under the AFDC program. See 42 U. S. C. §§ 601–615. The AFDC program uses a person's earned income in determining eligibility for, and the amount of, benefits. See § 602. The complaints alleged that certain of respondent's policies and regulations violated 42 U. S. C. § 1983 by inflating their respective class members' earned income and thereby causing a reduction or termination of AFDC benefits contrary to the applicable federal law.

One putative class challenged respondent's policy of prohibiting the deduction of child care costs in the calculation of earned income. While the case was pending in the District Court, Congress changed the relevant provisions of the AFDC program to expressly require participating States to deduct child care expenses up to a specified amount. Respondent thereafter brought state policy into compliance with this amendment and began deducting child care expenses in the calculation of earned income. There is no claim that respondent's current child care deduction policy violates federal law.

The other putative class challenged respondent's policy of automatically including stepparents' income in the calculation of earned income. The District Court issued a preliminary injunction preventing respondent from enforcing its automatic inclusion policy. But again, while the matter was pending on the merits, Congress amended the relevant section of the AFDC program to expressly require States to include stepparent income in the calculation of earned income. The parties thereafter stipulated that the District Court should terminate its preliminary injunction as of the effective date of the amendment. Here, too, there is no claim that respondent has not complied with federal law since that time.

The District Court granted respondent's motions to dismiss in each case. It held in each that the changes in federal law rendered moot the claims for prospective relief, and that the remaining claims for declaratory and notice relief related solely to past violations of federal law. Such retrospective relief, the court determined, is barred by the Eleventh Amendment.

The Court of Appeals affirmed in a consolidated appeal. *Banas* v. *Dempsey*, 742 F. 2d 277 (1984). It agreed that the changes in federal law rendered moot the claims for prospective relief. *Id.*, at 281–283. It also agreed that because the sought after notice and declaratory relief was retrospective in nature, the relief was barred by *Edelman* v. *Jordan*, 415 U. S. 651 (1974). 742 F. 2d, at 286–288. It reasoned that when there is no prospective relief to which notice can be ancillary, even notice of the sort approved in *Quern* v. *Jordan*, 440 U. S. 332 (1979), cannot escape the Eleventh Amendment bar. 742 F. 2d, at 287–288. Declaratory relief is similarly barred under such circumstances, it explained, because such relief could relate solely to past violations of federal law. *Id.*, at 288.

We granted certiorari to resolve a conflict in the Circuits over whether federal courts may order the giving of notice of the sort approved in *Quern* v. *Jordan*, *supra*, or issue a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law. The decision by the Court of Appeals in this case agrees with the result in *Colbeth* v. *Wilson*, 554 F. Supp. 539 (Vt. 1982), aff'd, 707 F. 2d 57 (CA2 1983) *(per curiam)*, but it conflicts with the decisions in *Appleyard* v. *Wallace*, 754 F. 2d 955, 959–963 (CA11 1985); *Randall* v. *Lukhard*, 729 F. 2d 966 (CA4) (en banc), cert. denied, 469 U. S. 872 (1984); *Beltran* v. *Myers*, 701 F. 2d 91, 94 (CA9) *(per curiam)*, cert. denied, 462 U. S. 1134 (1983); and *Silva* v. *Vowell*, 621 F. 2d 640, 650–654 (CA5 1980), which all allowed notice relief even though changes in state policy or federal law rendered moot

any claim for injunctive relief stopping ongoing violations of federal law. We now affirm the decision of the Court of Appeals.

The Eleventh Amendment confirms that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Pennhurst State School & Hospital* v. *Halderman*, 465 U. S. 89, 98 (1984). Because of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity. *Id.*, at 99. The landmark case of *Ex parte Young*, 209 U. S. 123 (1908), created an exception to this general principle by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State. *Id.*, at 159–160. The theory of *Young* was that an unconstitutional statute is void, *id.*, at 159, and therefore does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States." *Id.*, at 160. *Young* also held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law. *Id.*, at 155–156, 159. We have refused to extend the reasoning of *Young*, however, to claims for retrospective relief. See *Pennhurst*, *supra*, at 102–103; *Quern* v. *Jordan*, *supra*, at 337; *Edelman* v. *Jordan*, *supra*, at 668.

Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. See *Pennhurst*, *supra*, at 102. See also *Milliken* v. *Bradley*, 433 U. S. 267 (1977). But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment. Petitioners concede that any claim they might

have had for the specific type of injunctive relief approved in *Ex parte Young* was rendered moot by the amendments to the AFDC program. They nevertheless seek "notice relief" of the type approved in *Quern* v. *Jordan*, arguing that notice is an independent form of prospective relief protected against the Eleventh Amendment bar by *Ex parte Young*. In taking this position, we think petitioners misconceive our Eleventh Amendment jurisprudence and our decision in *Quern*.

Quern was the last chapter in the litigation that initially gave rise to *Edelman* v. *Jordan*, *supra*. The plaintiffs in that litigation challenged a State's administration of the federal-state program for Aid to the Aged, Blind, or Disabled (AABD). The District Court issued a declaratory judgment that current state regulations governing the administration of the program violated federal regulations then in effect.[1] It therefore permanently enjoined the state officials from continuing to violate federal law. Although the language of the declaratory judgment was no broader than necessary to complement the injunction against the current violation of federal law, it implied that the defendants had violated federal law in the past. The District Court therefore issued a second injunction ordering the defendants to release and remit all AABD benefits that they had wrongfully withheld on account of their past violations of federal law. The Court of Appeals affirmed, *Jordan* v. *Weaver*, 472 F. 2d 985 (CA7 1973), but we reversed, holding that the Eleventh Amendment barred the injunction ordering retroactive benefits because it was effectively an award of money damages for past

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[1] The declaratory judgment was embodied in paragraph 4 of the District Court's judgment, which stated:

"Illinois Categorical Assistance Manual, Section 4004, and subsections thereunder, as applied to applicants for AABD are invalid insofar as they *are* inconsistent with the requirements of [federal law as construed in] paragraphs 1 and 2." *Jordan* v. *Weaver*, No. 71 C 70, p. 3 (ND Ill., Mar. 15, 1972) (emphasis added).

violations of federal law. *Edelman* v. *Jordan*, 451 U. S., at 666–669.

On remand, the District Court ordered the defendants to send notice to the plaintiff class informing individual class members that they were wrongfully denied benefits in a particular amount, together with a returnable form for filing claims with the appropriate state agency. The Court of Appeals reversed, holding that the District Court's proposed notice violated the Eleventh Amendment because it would effectively result in a federal adjudication of state liability for past violations of federal law. *Jordan* v. *Trainor*, 563 F. 2d 873, 875 (CA7 1977) (en banc). At the same time, the Court of Appeals determined that the Eleventh Amendment would not bar an order requiring state officials to send "a mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits." *Ibid.*

We affirmed in *Quern* v. *Jordan*, 440 U. S. 332 (1979), holding that although *Edelman* v. *Jordan*, *supra*, retained continuing vitality after *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), see 440 U. S., at 338–345, the specific notice order approved by the Court of Appeals did not violate the Eleventh Amendment. *Id.*, at 346–349. We explained that the appellate court's particular notice order fell "on the *Ex parte Young* side of the Eleventh Amendment line rather than on the *Edelman* side." *Id.*, at 347. We reasoned that "unlike [the notice] ordered by the District Court, [this notice was] more properly viewed as ancillary to the prospective relief already ordered by the court," *id.*, at 349, and it did no more than "simply infor[m] class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue." *Ibid.* We also stressed that the state defendants had not objected to the expense of providing

such notice, state agencies rather than federal courts would be the final arbiters of whether retroactive payments would be ordered, and the notice would not automatically lead to any particular action. *Id.*, at 347–348.

Our review of the long, drawn-out *Jordan* litigation convinces us that neither the Court of Appeals nor this Court conceived of the requested notice allowed in that case to be an independent form of relief. We simply held that the specific order fell within the *Ex parte Young* exception to the Eleventh Amendment principle of sovereign immunity because it was ancillary to a valid injunction previously granted and was sufficiently narrow to retain its character as a mere case-management device. The notice in *Quern* v. *Jordan* did nothing other than inform a diverse and partially victorious class concerning the extent of the judgment in its favor, cf. Fed. Rule Civ. Proc. 23(d)(2), and that the federal courts could do no more for them. There was no suggestion that the notice itself would bind state officials in any way, or that such notice would be routinely available as a form of relief in other cases. Because "notice relief" is not the type of remedy designed to prevent ongoing violations of federal law, the Eleventh Amendment limitation on the Art. III power of federal courts prevents them from ordering it as an independent form of relief.

Measured by the standards of *Quern*, however, a request for a limited notice order will escape the Eleventh Amendment bar if the notice is ancillary to the grant of some other appropriate relief that can be "noticed." Because there is no continuing violation of federal law to enjoin in this case, an injunction is not available. Therefore, notice cannot be justified as a mere case-management device that is ancillary to a judgment awarding valid prospective relief. Petitioners argue, however, that they are entitled to a declaratory judgment that respondent violated federal law in the past. Only if petitioners are correct in this assertion can they properly

claim a right to "notice" of a judgment under the principles of *Quern*.

The Declaratory Judgment Act of 1934, 28 U. S. C. § 2201, permits a federal court to declare the rights of a party whether or not further relief is or could be sought, and we have held that under this Act declaratory relief may be available even though an injunction is not. *Steffel* v. *Thompson*, 415 U. S. 452, 462 (1974). But we have also held that the declaratory judgment statute "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237, 241 (1952). The propriety of issuing a declaratory judgment may depend upon equitable considerations, see *Samuels* v. *Mackell*, 401 U. S. 66, 73 (1971), and is also "informed by the teachings and experience concerning the functions and extent of federal judicial power." *Wycoff*, *supra*, at 243; cf. *Younger* v. *Harris*, 401 U. S. 37, 44–45 (1971).

In applying these principles, we have held that a declaratory judgment is not available in a number of instances. In *Great Lakes Co.* v. *Huffman*, 319 U. S. 293 (1943), we held that a declaratory judgment was not available to obtain a determination of the constitutionality of a state tax even though the relevant federal statute prohibited federal courts only from issuing injunctions against the collection of such taxes. *Id.*, at 299. We held in *Samuels* v. *Mackell*, *supra*, that a declaratory judgment declaring a state criminal statute unconstitutional was unavailable where it would have much the same effect as an injunction prohibiting enforcement of the statute, and the latter was barred by traditional principles of equity, comity, and federalism. *Id.*, at 69–73. In *Wycoff*, we held that it was inappropriate to issue a declaratory judgment deciding whether the plaintiff's business was interstate commerce and therefore potentially immune from state regulation. 344 U. S., at 244, 247–249. We reasoned that if the federal judgment were res judicata in subsequent

state proceedings, then the federal court will have lifted the case out of the state court before the state agency or court can hear it. *Id.*, at 247. On the other hand, if the federal judgment would not have such an effect, then it would "serv[e] no useful purpose as a final determination of rights." *Ibid.*

We think that these cases demonstrate the impropriety of the issuance of a declaratory judgment in this case. There is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction. Nor can there be any threat of state officials violating the repealed law in the future. Cf. *Steffel* v. *Thompson*, *supra*, at 454. There is a dispute about the lawfulness of respondent's past actions, but the Eleventh Amendment would prohibit the award of money damages or restitution if that dispute were resolved in favor of petitioners. We think that the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed. But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment. The teachings of *Huffman*, *Samuels*, and *Wycoff* are that a declaratory judgment is not available when the result would be a partial "end run" around our decision in *Edelman* v. *Jordan*, 415 U. S. 651 (1974).[2]

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[2] If, of course, petitioners would make no claim that the federal declaratory judgment was res judicata in later commenced state proceedings, the declaratory judgment would serve no purpose whatever in resolving the remaining dispute between the parties, and is unavailable for that reason. *Wycoff*, 344 U. S., at 247.

JUSTICE BRENNAN's dissent contends that because the injunction and declaratory judgment in *Quern* implied past violations of federal law, declaratory judgments expressly adjudicating the question of past violations are routinely available. We think he is mistaken. The District Court's injunction and declaratory judgment against continuing and future violations of federal law in *Quern* implied that similar violations had occurred in the past because neither state nor federal policy had varied through the time of judgment. Here, by contrast, there are no present violations under the amended statute, and even if there were, an injunction against them would not imply that past practice violated the repealed federal law. Thus, a declaratory judgment that respondent violated federal law in the past would have to stand on its own feet as an appropriate exercise of federal jurisdiction in this case. This it cannot do for the reasons we have previously stated.

We hold that the District Court was correct in concluding that neither the "notice" proposed by petitioners nor a declaratory judgment should have issued in a case of this type. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

Last Term, in my dissent in *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 257 (1985), I explained at length my view that the Court's Eleventh Amendment doctrine "lacks a textual anchor [in the Constitution], a firm historical foundation, or a clear rationale." Today's decision demonstrates that the absence of a stable analytical structure underlying the Court's Eleventh Amendment jurisprudence produces inconsistent decisions.

In *Quern* v. *Jordan*, 440 U. S. 332 (1979), the State of Illinois contended that the notice relief ordered by the Court of Appeals, which was identical in all significant respects to

that requested in the instant case,[1] offended the Eleventh Amendment because "giving the proposed notice [would] lead inexorably to the payment of state funds for retroactive benefits and therefore it, in effect, amounts to a monetary award." *Id.*, at 347. JUSTICE REHNQUIST, writing for the Court, rejected that argument:

> "[T]he chain of causation which petitioner seeks to establish is by no means unbroken; it contains numerous missing links, which can be supplied, if at all, only by the State and members of the plaintiff class and not by a federal court. The notice approved by the Court of Appeals simply apprises plaintiff class members of the existence of whatever administrative procedures may already be available under state law by which they may receive a determination of eligibility for past benefits. . . . The mere sending of that notice does not trigger the state administrative machinery. Whether a recipient of notice decides to take advantage of those available state procedures is left completely to the discretion of that particular class member; the federal court plays no role in that decision. And whether or not the class member will receive retroactive benefits rests entirely with the

[1] Green asked the District Court to order that notices be sent out to other AFDC recipients advising them of the outcome of the litigation, *i. e.*, of the declaratory judgment and telling them that state administrative proceedings might be available to them to obtain retroactive benefits. App. 132. Similarly, the notice approved in *Quern* v. *Jordan*, 440 U. S., at 349, "inform[ed] class members that their federal suit [was] at an end, that the federal court [could] provide them with no further relief, and that there [were] existing state administrative procedures which they may wish to pursue." The class members were "'given no more . . . than what they would have gathered by sitting in the courtroom.'" *Ibid.*, quoting *Jordan* v. *Trainor*, 563 F. 2d 873, 877–878 (CA7 1977). And, of course, what class members would have gathered by sitting in the courtroom was the substantive outcome of the litigation—a declaration that Illinois officials had violated federal law.

> State, its agencies, courts, and legislature, not with the federal court." *Id.*, at 347–348.

In the present case, the Court turns around and accepts the argument made by the State of Illinois in *Quern* with respect to Green's request for declaratory relief. JUSTICE REHNQUIST states that declaratory relief is barred by the Eleventh Amendment because

> "the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed. But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being . . . prohibited by the Eleventh Amendment." *Ante*, at 73.

What the Court ignores is that the declaration by the District Court in the *Quern* litigation that Illinois officials had violated federal law, combined with the notice relief we sanctioned, would have yielded the same result.[2] The Court fails to explain adequately why declaratory relief should be analyzed differently than notice relief was in *Quern*, since use of the declaratory judgment in the State's courts is also left completely to the discretion of individual notice recipients and the award of retroactive benefits "rests entirely with the State, its agencies, courts, and legislature, not with the federal court." *Quern*, *supra*, at 348.

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[2] It is not enough to distinguish the cases to observe that the notice relief in *Quern* was "ancillary" to a prospective injunction because the "prospective" injunction had been moot for three years before the Court of Appeals fashioned the notice relief and for five years before this Court approved it—Congress abolished the federal program at issue in *Quern* in 1974.

By way of explication, the Court retreats to the position that federal courts may grant relief prospectively, that is, against ongoing and future violations of federal law, but not retroactively, that is, against past violations of federal law. Basically what the Court is doing, as it admits in this case, is balancing the Eleventh Amendment and the Supremacy Clause. *Ante*, at 68. If relief is sought against continuing violations, the Court finds that the Supremacy Clause outweighs the Eleventh Amendment; but if relief is requested against past violations, the Court determines that the Eleventh Amendment outweighs the Supremacy Clause. The Court cites no constitutional authority for this balancing test and has not offered, and I suspect cannot offer, a satisfactory analytical foundation for it.

Furthermore, I strenuously disagree with the Court's suggestion that the balance it has struck sufficiently protects the supremacy of federal law. It may be true that the availability of prospective relief of the sort awarded in *Ex parte Young*, 209 U. S. 123 (1908), gives, as the Court puts it, some "life" to the Supremacy Clause. *Ante*, at 68. That this rule saves the Clause from being completely moribund does not, however, alter the reality that it is insufficient to ensure that federal law is paramount. From this day forward, at least with regard to welfare programs, States may refuse to follow federal law with impunity, secure in the knowledge that all they need do to immunize themselves from accountability in federal courts is to conform their policies to federal law on the eve of judgment in a suit brought to secure "prospective" injunctive relief. During the period of noncompliance, States save money by not paying benefits according to the criteria established by federal law,[3] while needy individuals desig-

[3] AFDC is a matching benefits program. States pay up to 50 percent of their benefit payments, the Federal Government pays the remainder. House Committee on Ways and Means, Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means, 98th Cong., 2d Sess., 292 (Comm. Print 1984).

nated by Congress as the beneficiaries of welfare programs are cheated of their federal rights. Once again, the Court's doctrine "require[s] the federal courts to protect States that violate federal law from the legal consequences of their conduct." *Atascadero*, 473 U. S., at 258. Surely the Supremacy Clause requires a different result.

The foregoing reveals the fundamental incoherence of the Court's Eleventh Amendment jurisprudence. Before the Court can develop a coherent Eleventh Amendment doctrine, I believe that it must reassess a long line of our precedents, beginning with *Hans* v. *Louisiana*, 134 U. S. 1 (1890), and culminating in today's decision, that have perpetuated an erroneous interpretation of the Eleventh Amendment. As I demonstrated in *Atascadero*, *supra*, the Court's constitutional doctrine of the sovereign immunity of States rests on a mistaken historical premise. Because I treated the subject exhaustively in that case, I will only restate my conclusions here. Recent scholarship indicates that the Framers never intended to constitutionalize the doctrine of state sovereign immunity; consequently the Eleventh Amendment was not an effort to reestablish, after *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), a limitation on federal judicial power contained in Article III. Nor, given the limited terms and context in which the Eleventh Amendment was drafted, could the Amendment's narrow and technical language be understood to have instituted a broad new limitation on the federal judicial power in cases "arising under" federal law whenever an individual attempts to sue a State. *Atascadero*, 473 U. S., at 258–259. Rather, as the historical records and the language of the Constitution reveal, the Amendment was intended simply to remove federal-court jurisdiction over suits against a State where the basis for jurisdiction was that the plaintiff was a citizen of another State or an alien—suits which result in the abrogation of the *state* law of sovereign immunity in *state-law* causes of action. *Id.*, at 259.

Because the disputes in the instant case are between citizens and their own State and because a federal question is the source of federal-court jurisdiction, the Eleventh Amendment, properly construed, is no bar to petitioners' suits.

I respectfully dissent.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

I concur in JUSTICE BRENNAN's and JUSTICE BLACKMUN's dissents. I contribute to this proliferation of opinions only to add a few words as to why, even under the view of the Eleventh Amendment accepted by the majority in *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985), the majority reaches an incorrect result in this case.

I

JUSTICE BRENNAN's opinion cogently explains how the decision of the majority today repudiates *Quern* v. *Jordan*, 440 U. S. 332 (1979). The Court in that case did not approve notice relief as a "mere case-management device," *ante*, at 71, nor does the majority suggest how informing class members of state administrative procedures serves a case-management function in federal-court litigation. Rather, the *Quern* Court, explicitly posing the question whether "the modified notice contemplated by the Seventh Circuit constitute[s] permissible prospective relief or a 'retroactive award which requires the payment of funds from the state treasury,'" concluded that "this relief falls on the *Ex parte Young* side of the Eleventh Amendment line rather than on the *Edelman* side." *Quern*, *supra*, at 346–347.

II

In abandoning the result it reached six years ago, the majority misapplies its own Eleventh Amendment jurisprudence. The majority states that there are two kinds of remedies that can be sought against a state officer: prospective relief "designed to end a continuing violation of federal law,"

and retrospective relief serving mere "compensatory or deterrence interests." *Ante*, at 68. Only in the former class of relief, it concludes, do the federal interests involved outweigh the Eleventh Amendment interests implicated by a suit against a state officer in his official capacity.* "Prospective" and "retrospective" labels, however, should be irrelevant to analysis of this case. The notice relief at issue here imposes no significant costs on the State, creates no direct liabilities against the State, and respects the institutions of state government. See *Quern*, *supra*, at 347–348. This Court has never held that the Eleventh Amendment poses any bar to such relief. Indeed, notice of the availability of possible relief through existing state administrative remedies, where the state agency and state courts would be the sole arbiters of what relief would be granted, assists in the vindication of state law by informing class members that they may have causes of action under that law. In the Eleventh Amendment balance set up by the majority opinion, it is thus hard to see what weight, if any, exists on the State's side of the scale, and why that weight should overcome the interest in vindicating federal law.

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*The distinction is hardly so neat as the majority implies. The majority cites *Milliken* v. *Bradley*, 433 U. S. 267 (1977), as exemplifying permissible injunctive relief. *Ante*, at 68. That case involved a continuing federal duty to remedy the effects of past *de jure* segregation; the Court upheld against Eleventh Amendment attack an order that state officials pay costs attributable to a program "designed . . . to restore the schoolchildren of Detroit to the position they would have enjoyed absent constitutional violations by state and local officials," 433 U. S., at 281, characterizing the relief both as "prospectiv[e]" and as "compensatory," *id.*, at 290. Yet petitioners here note that Congress has imposed on state agencies a continuing federal duty to "take all necessary steps to correct any . . . underpayment of aid under the State plan." 42 U. S. C. § 602(a)(22); see also 45 CFR § 205.10(a) (1984). The relief in this case too might therefore be described as related to a continuing federal duty, "part of a plan that operates *prospectively* to bring about the delayed benefits of a [constitutionally administered program]." *Milliken*, *supra*, at 290 (emphasis in original).

I would hold that whether the Eleventh Amendment was intended simply to provide that a State cannot be sued in federal court where the basis of jurisdiction is that the plaintiff is a citizen of another State or an alien (as I believe), or was intended to constitutionalize a much broader principle of state sovereign immunity (as the majority believes), there is simply nothing offensive to that Amendment in an order that the State notify class members of the possibility that they may be entitled to relief through the state administrative process. Because that order neither imposes significant costs on the State nor creates any direct liabilities against it, the *Quern* Court properly placed it "on the *Ex parte Young* side of the Eleventh Amendment line." 440 U. S., at 347.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

I joined JUSTICE BRENNAN's dissent in *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 247 (1985), and I join his dissent in this case. I fully agree that the Court's Eleventh Amendment approach, as demonstrated by the difference between the result in this case and that in *Quern* v. *Jordan*, 440 U. S. 332 (1979), is sterile, produces inconsistent decisions, and is in serious need of reconsideration. Cf. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 539, 546–547 (1985).

But I also would reverse the judgment of the Court of Appeals in this case for the additional reason expressed in my dissent (joined by JUSTICES BRENNAN, MARSHALL, and STEVENS) in *Atascadero*, 473 U. S., at 302, namely, the waiver by Michigan, "as a willing recipient of federal funds," *id.*, at 304, of any Eleventh Amendment barrier that otherwise might exist. The State too easily avoids its responsibilities, and the Court by its decision today allows the State to go its way unimpeded and unburdened with any remedy for those who have been wronged during the period of Michigan's noncompliance with federal law.

HEATH *v.* ALABAMA

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 84-5555. Argued October 9, 1985—Decided December 3, 1985

Petitioner hired two men to kill his wife. In accordance with petitioner's plan, the men kidnaped petitioner's wife from her home in Alabama. Her body was later found on the side of a road in Georgia. Petitioner pleaded guilty to "malice" murder in a Georgia trial court in exchange for a sentence of life imprisonment. Subsequently, he was tried and convicted of murder during a kidnaping and was sentenced to death in an Alabama trial court, which rejected his claim of double jeopardy. The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed the conviction.

Held:

1. This Court will not decide whether the Alabama trial court had jurisdiction, where petitioner did not claim lack of jurisdiction in his petition to the Alabama Supreme Court but raised the claim for the first time in his petition to this Court. P. 87.

2. Under the dual sovereignty doctrine, successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause of the Fifth Amendment, and, hence, Alabama was not barred from trying petitioner. Pp. 87-93.

(a) The dual sovereignty doctrine provides that when a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences" for double jeopardy purposes. In applying the doctrine, the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the prosecuting entities' powers to undertake criminal prosecutions derive from separate and independent sources. It has been uniformly held that the States are separate sovereigns with respect to the Federal Government because each State's power to prosecute derives from its inherent sovereignty, preserved to it by the Tenth Amendment, and not from the Federal Government. Given the distinct sources of their powers to try a defendant, the States are no less sovereign with respect to each other than they are with respect to the Federal Government. Pp. 87-91.

(b) The application of the dual sovereignty principle cannot be restricted to cases in which two prosecuting sovereigns can demonstrate that allowing only one sovereign to exercise jurisdiction over the defend-

ant will interfere with the second sovereign's unvindicated "interests." If the prosecuting entities are separate sovereigns, the circumstances of the case and the specific "interests" of each are irrelevant. Pp. 91–92.

(c) The suggestion that the dual sovereignty doctrine be overruled and replaced with a balancing of interests approach is rejected. The Court's rationale for the doctrine is not a fiction that can be disregarded in difficult cases; it finds weighty support in the historical understanding and political realities of the States' role in the federal system and in the Double Jeopardy Clause itself. Pp. 92–93.

455 So. 2d 905, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 94. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 95.

Ronald J. Allen argued the cause and filed briefs for petitioner.

William D. Little, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *Charles A. Graddick*, Attorney General.

JUSTICE O'CONNOR delivered the opinion of the Court.

The question before the Court is whether the Double Jeopardy Clause of the Fifth Amendment bars Alabama from trying petitioner for the capital offense of murder during a kidnaping after Georgia has convicted him of murder based on the same homicide. In particular, this case presents the issue of the applicability of the dual sovereignty doctrine to successive prosecutions by two States.

I

In August 1981, petitioner, Larry Gene Heath, hired Charles Owens and Gregory Lumpkin to kill his wife, Rebecca Heath, who was then nine months pregnant, for a sum of $2,000. On the morning of August 31, 1981, petitioner left the Heath residence in Russell County, Alabama, to meet with Owens and Lumpkin in Georgia, just over the Alabama

border from the Heath home. Petitioner led them back to the Heath residence, gave them the keys to the Heaths' car and house, and left the premises in his girlfriend's truck. Owens and Lumpkin then kidnaped Rebecca Heath from her home. The Heath car, with Rebecca Heath's body inside, was later found on the side of a road in Troup County, Georgia. The cause of death was a gunshot wound in the head. The estimated time of death and the distance from the Heath residence to the spot where Rebecca Heath's body was found are consistent with the theory that the murder took place in Georgia, and respondent does not contend otherwise.

Georgia and Alabama authorities pursued dual investigations in which they cooperated to some extent. On September 4, 1981, petitioner was arrested by Georgia authorities. Petitioner waived his *Miranda* rights and gave a full confession admitting that he had arranged his wife's kidnaping and murder. In November 1981, the grand jury of Troup County, Georgia, indicted petitioner for the offense of "malice" murder under Ga. Code Ann. § 16–5–1 (1984).[1] Georgia then served petitioner with notice of its intention to seek the death penalty, citing as the aggravating circumstance the fact that the murder was "caused and directed" by petitioner. Record 742. See Ga. Code Ann. § 17–10–30(b)(6) (1982). On February 10, 1982, petitioner pleaded guilty to the Georgia murder charge in exchange for a sentence of life imprisonment, which he understood could involve his serving as few as seven years in prison. See Record 495.

On May 5, 1982, the grand jury of Russell County, Alabama, returned an indictment against petitioner for the capi-

[1] The indictment read as follows:

"[The grand jurors] in the name and on behalf of the citizens of Georgia, charge and accuse LARRY GENE HEATH [et al.] with the offense of MURDER (26–1101); for that the said LARRY GENE HEATH [et al.] on the date of August 31, 1981, in the county aforesaid, did then and there unlawfully and with malice aforethought cause the death of Rebecca McGuire Heath, a human being, by shooting her with a gun, a deadly weapon." Record 740.

tal offense of murder during a kidnaping.[2] See Ala. Code § 13A-5-40(a)(1) (1982). Before trial on this indictment, petitioner entered pleas of *autrefois convict* and former jeopardy under the Alabama and United States Constitutions, arguing that his conviction and sentence in Georgia barred his prosecution in Alabama for the same conduct. Petitioner also entered a plea contesting the jurisdiction of the Alabama court on the ground that the crime had occurred in Georgia.

After a hearing, the trial court rejected petitioner's double jeopardy claims. It assumed, *arguendo*, that the two prosecutions could not have been brought in succession by one State but held that double jeopardy did not bar successive prosecutions by two different States for the same act. See Record 776. The court postponed a ruling on petitioner's plea to jurisdiction until the close of the State's case in chief. See *id.*, at 778.

At the close of the State's case, petitioner argued that Alabama did not have jurisdiction under state law because there had been no evidence of kidnaping and all the evidence showed that Rebecca Heath was killed in Georgia. The State responded that a kidnaping had been proved, and that under Ala. Code § 15-2-3 (1982), if a crime commences in Alabama it may be punished in Alabama regardless of where the crime is consummated. The court rejected both petitioner's jurisdictional plea and his renewed double jeopardy claims. See Record 590.

On January 12, 1983, the Alabama jury convicted petitioner of murder during a kidnaping in the first degree. After a sentencing hearing, the jury recommended the death

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[2] The indictment stated:

"Larry Gene Heath did intentionally cause the death of Rebecca Heath, by shooting her with a gun, and Larry Gene Heath caused said death during Larry Gene Heath's abduction of, or attempt to abduct, Rebecca Heath with intent to inflict physical injury upon her, in violation of § 13A-5-40(a)(1) of the Code of Alabama 1975, as amended, against the peace and dignity of the State of Alabama." *Id.*, at 728.

penalty. Pursuant to Alabama law, a second sentencing hearing was held before the trial judge. The judge accepted the jury's recommendation, finding that the sole aggravating factor, that the capital offense was "committed while the defendant was engaged in the commission of a kidnapping," outweighed the sole mitigating factor, that the "defendant was convicted of the murder of Rebecca Heath in the Superior Court of Troup County, Georgia, . . . and received a sentence of life imprisonment in that court." *Id.*, at 718–720. See Ala. Code §§ 13A–5–49(4), 13A–5–50 (1982).

On appeal, the Alabama Court of Criminal Appeals rejected petitioner's pleas of *autrefois convict* and former jeopardy under the Alabama and United States Constitutions and affirmed his conviction. 455 So. 2d 898 (1983). Petitioner then filed a writ of certiorari with the Alabama Supreme Court, stating the sole issue to be "whether or not the prosecution in the State of Alabama constituted double jeopardy in violation of the 5th Amendment of the United States Constitution." App. 92. The court granted his petition, and unanimously affirmed his conviction. *Ex parte Heath*, 455 So. 2d 905 (1984).

The Alabama Supreme Court noted that "[p]rosecutions under the laws of separate sovereigns do not improperly subject an accused twice to prosecutions for the same offense," citing this Court's cases applying the dual sovereignty doctrine. *Id.*, at 906. The court acknowledged that this Court has not considered the applicability of the dual sovereignty doctrine to successive prosecutions by different States. It reasoned, however, that "[i]f, for double jeopardy purposes, Alabama is considered to be a sovereign entity vis-à-vis the federal government then surely it is a sovereign entity vis-à-vis the State of Georgia." *Ibid.*

Petitioner sought a writ of certiorari from this Court, raising double jeopardy claims and claims based on Alabama's exercise of jurisdiction. No due process objections were asserted. We granted certiorari limited to the question of

whether petitioner's Alabama conviction was barred by this Court's decision in *Brown* v. *Ohio*, 432 U. S. 161 (1977), and requested the parties to address the question of the applicability of the dual sovereignty doctrine to successive prosecutions by two States. 470 U. S. 1026 (1985). For the reasons explained below, we affirm the judgment of the Alabama Supreme Court.

Despite the fact that this Court did not grant certiorari on the constitutional objection to Alabama's exercise of jurisdiction, petitioner has continued to argue in this Court his jurisdictional claim. See Tr. of Oral Arg. 11–22, 29–31; Brief for Petitioner 15. We decline to decide the issue because petitioner did not claim lack of jurisdiction in his petition to the Alabama Supreme Court and he raised the claim for the first time in his petition to this Court. Pet. for Cert. 4. Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court, as has sometimes been stated, see, *e. g.*, *State Farm Mutual Automobile Ins. Co.* v. *Duel*, 324 U. S. 154, 160 (1945); *Crowell* v. *Randell*, 10 Pet. 368, 392 (1836), the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review. See, *e. g.*, *Illinois* v. *Gates*, 462 U. S. 213, 218–222 (1983).

II

Successive prosecutions are barred by the Fifth Amendment only if the two offenses for which the defendant is prosecuted are the "same" for double jeopardy purposes. Respondent does not contravene petitioner's contention that the offenses of "murder during a kidnaping" and "malice murder," as construed by the courts of Alabama and Georgia respectively, may be considered greater and lesser offenses and, thus, the "same" offense under *Brown* v. *Ohio*, *supra*, absent operation of the dual sovereignty principle. See *id.*, at 169; *Illinois* v. *Vitale*, 447 U. S. 410 (1980). We, therefore, assume *arguendo* that, had these offenses arisen under

the laws of one State and had petitioner been separately prosecuted for both offenses in that State, the second conviction would have been barred by the Double Jeopardy Clause.

The sole remaining question upon which we granted certiorari is whether the dual sovereignty doctrine permits successive prosecutions under the laws of different States which otherwise would be held to "subject [the defendant] for the same offence to be twice put in jeopardy." U. S. Const., Amdt. 5. Although we have not previously so held, we believe the answer to this query is inescapable. The dual sovereignty doctrine, as originally articulated and consistently applied by this Court, compels the conclusion that successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause.

The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences." *United States* v. *Lanza*, 260 U. S. 377, 382 (1922). As the Court explained in *Moore* v. *Illinois*, 14 How. 13, 19 (1852), "[a]n offence, in its legal signification, means the transgression of a law." Consequently, when the same act transgresses the laws of two sovereigns, "it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable." *Id.*, at 20.

In applying the dual sovereignty doctrine, then, the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the two entities draw their authority to punish the offender from distinct sources of power. See, *e. g.*, *United States* v. *Wheeler*, 435 U. S. 313, 320 (1978); *Waller* v. *Florida*, 397 U. S. 387, 393 (1970); *Puerto Rico* v.

Shell Co., 302 U. S. 253, 264–265 (1937); *Lanza, supra*, at 382; *Grafton* v. *United States*, 206 U. S. 333, 354–355 (1907). Thus, the Court has uniformly held that the States are separate sovereigns with respect to the Federal Government because each State's power to prosecute is derived from its own "inherent sovereignty," not from the Federal Government. *Wheeler, supra*, at 320, n. 14. See *Abbate* v. *United States*, 359 U. S. 187, 193–194 (1959) (collecting cases); *Lanza, supra*. As stated in *Lanza, supra*, at 382:

> "Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."

See also *Bartkus* v. *Illinois*, 359 U. S. 121 (1959); *Westfall* v. *United States*, 274 U. S. 256, 258 (1927) (Holmes, J.) (the proposition that the State and Federal Governments may punish the same conduct "is too plain to need more than statement").

The States are no less sovereign with respect to each other than they are with respect to the Federal Government. Their powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment. See *Lanza, supra*, at 382. The States are equal to each other "in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle* v. *Oklahoma*, 221 U. S. 559, 567 (1911). See *Skiriotes* v. *Florida*, 313 U. S. 69, 77 (1941). Thus, "[e]ach has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the

other.'" *Wheeler, supra,* at 320 (quoting *Lanza, supra,* at 382).

The cases in which the Court has applied the dual sovereignty principle outside the realm of successive federal and state prosecutions illustrate the soundness of this analysis. *United States* v. *Wheeler, supra,* is particularly instructive because there the Court expressly refused to find that only the State and Federal Governments could be considered distinct sovereigns with respect to each other for double jeopardy purposes, stating that "so restrictive a view of [the dual sovereignty] concept . . . would require disregard of the very words of the Double Jeopardy Clause." *Id.,* at 330. Instead, the *Wheeler* Court reiterated the principle that the sovereignty of two prosecuting entities for these purposes is determined by "the ultimate source of the power under which the respective prosecutions were undertaken." *Id.,* at 320. On the basis of this reasoning, the Court held that the Navajo Tribe, whose power to prosecute its members for tribal offenses is derived from the Tribe's "primeval sovereignty" rather than a delegation of federal authority, is an independent sovereign from the Federal Government for purposes of the dual sovereignty doctrine. *Id.,* at 328.

In those instances where the Court has found the dual sovereignty doctrine inapplicable, it has done so because the two prosecuting entities did not derive their powers to prosecute from independent sources of authority. Thus, the Court has held that successive prosecutions by federal and territorial courts are barred because such courts are "creations emanating from the same sovereignty." *Puerto Rico, supra,* at 264, 264–266. See also *Grafton, supra* (the Philippine Islands). Similarly, municipalities that derive their power to try a defendant from the same organic law that empowers the State to prosecute are not separate sovereigns with respect to the State. See, *e. g., Waller, supra.* These cases confirm that it is the presence of independent sovereign authority to prosecute, not the relation between States and the Federal Gov-

ernment in our federalist system, that constitutes the basis for the dual sovereignty doctrine.

Petitioner argues that *Nielsen* v. *Oregon*, 212 U. S. 315 (1909), indicates, albeit in dicta, that where States have concurrent jurisdiction over a criminal offense, the first State to prosecute thereby bars prosecution by any other State. We find that *Nielsen* is limited to its unusual facts and has continuing relevance, if at all, only to questions of jurisdiction between two entities deriving their concurrent jurisdiction from a single source of authority. In *Nielsen*, the Court set aside a conviction obtained by the State of Oregon against a resident of the State of Washington for his operation of a purse net for fish in the Columbia River pursuant to a valid license to do so from the State of Washington. The Court noted:

> "By the legislation of Congress the Columbia River is made the common boundary between Oregon and Washington, and to each of those States is given concurrent jurisdiction on the waters of that river." *Id.*, at 319. "[T]he grant of concurrent jurisdiction may bring up from time to time . . . some curious and difficult questions, so we properly confine ourselves to the precise question presented. . . . It is enough to decide, as we do, that for an act done within the territorial limits of the State of Washington under authority and license from that State one cannot be prosecuted and punished by the State of Oregon." *Id.*, at 320–321.

It is obvious that the *Nielson* Court did not attempt to decide or even to consider the double jeopardy effect of successive state prosecutions for offenses proscribed by both States; the case, therefore, has no bearing on the issue of the applicability of the dual sovereignty doctrine presented in this case.

III

Petitioner invites us to restrict the applicability of the dual sovereignty principle to cases in which two governmental

entities, having concurrent jurisdiction and pursuing quite different interests, can demonstrate that allowing only one entity to exercise jurisdiction over the defendant will interfere with the unvindicated interests of the second entity and that multiple prosecutions therefore are necessary for the satisfaction of the legitimate interests of both entities. This balancing of interests approach, however, cannot be reconciled with the dual sovereignty principle. This Court has plainly and repeatedly stated that two identical offenses are *not* the "same offence" within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns. See, *e. g.*, *United States* v. *Lanza*, 260 U. S. 377 (1922) (same conduct, indistinguishable statutes, same "interests"). If the States are separate sovereigns, as they must be under the definition of sovereignty which the Court consistently has employed, the circumstances of the case are irrelevant.

Petitioner, then, is asking the Court to discard its sovereignty analysis and to substitute in its stead his difficult and uncertain balancing of interests approach. The Court has refused a similar request on at least one previous occasion, see *Abbate* v. *United States*, 359 U. S. 187 (1959); *id.*, at 196 (BRENNAN, J., separate opinion), and rightfully so. The Court's express rationale for the dual sovereignty doctrine is not simply a fiction that can be disregarded in difficult cases. It finds weighty support in the historical understanding and political realities of the States' role in the federal system and in the words of the Double Jeopardy Clause itself, "nor shall any person be subject for the same *offence* to be twice put in jeopardy of life or limb." U. S. Const., Amdt. 5 (emphasis added). See *Wheeler*, 435 U. S., at 330.

It is axiomatic that "[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

McCulloch v. *Maryland*, 4 Wheat. 316, 410 (1819). It is as well established that the States, "as political communities, [are] distinct and sovereign, and consequently foreign to each other." *Bank of United States* v. *Daniel*, 12 Pet. 32, 54 (1838). See also *Skiriotes* v. *Florida*, 313 U. S., at 77; *Coyle* v. *Oklahoma*, 221 U. S., at 567. The Constitution leaves in the possession of each State "certain exclusive and very important portions of sovereign power." The Federalist No. 9, p. 55 (J. Cooke ed. 1961). Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code. See, *e. g.*, *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U. S. 592, 601 (1982); *McCulloch*, *supra*, at 418. To deny a State its power to enforce its criminal laws because another State has won the race to the courthouse "would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines." *Bartkus*, 359 U. S., at 137.

Such a deprivation of a State's sovereign powers cannot be justified by the assertion that under "interest analysis" the State's legitimate penal interests will be satisfied through a prosecution conducted by another State. A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws. Just as the Federal Government has the right to decide that a state prosecution has not vindicated a violation of the "peace and dignity" of the Federal Government, a State must be entitled to decide that a prosecution by another State has not satisfied its legitimate sovereign interest. In recognition of this fact, the Court consistently has endorsed the principle that a single act constitutes an "offence" against each sovereign whose laws are violated by that act. The Court has always understood the words of the Double Jeopardy Clause to reflect this fundamental principle, and we see no reason why we should reconsider that understanding today.

The judgment of the Supreme Court of Alabama is affirmed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I concur wholeheartedly in JUSTICE MARSHALL's dissent. I write separately only to clarify my views on the role that "different interests" should play in determining whether two prosecutions are "for the same offence" within the meaning of the Double Jeopardy Clause.

In *Abbate* v. *United States*, 359 U. S. 187 (1959), in addition to arguing that the dual sovereignty doctrine permitted successive state and federal prosecutions, the Federal Government also urged that the federal prosecution was not barred because the two prosecutions were not "for the same offense." The Government's theory was that, because the federal and state statutes involved had divergent *specific purposes*—the federal law to protect communications and the state law to protect private property—and thus promoted different "interests," the prosecutions were really for different offenses.

I rejected this argument in a separate opinion. *Id.*, at 196–201. My concern was that "this reasoning would apply equally if each of two successive *federal* prosecutions based on the same acts was brought under a different *federal* statute, and each statute was designed to protect a different federal interest." *Id.*, at 197 (emphasis in original). That result I found clearly barred by the Fifth Amendment.*

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*I illustrated how radical and pernicious a revision in existing double jeopardy jurisprudence the Government's theory might work by referring to *In re Nielsen*, 131 U. S. 176 (1889). *Abbate* v. *United States*, 359 U. S., at 201. In *Nielsen*, the defendant, a Mormon with more than one wife, had been convicted of violating two separate congressional statutes that applied to the Territory of Utah in two successive prosecutions. In the first prosecution he was tried for and convicted of cohabiting with more

I adhere to the position I took in *Abbate*, that the different purposes or interests served by specific statutes cannot justify an exception to our established double jeopardy law. However, I read JUSTICE MARSHALL's dissent to use "interest" analysis in another context. He employs it to demonstrate the qualitative difference in the general nature of federal and state interests and the qualitative similarity in the nature of States' interest. JUSTICE MARSHALL's use of this interest analysis furthers, rather than undermines, the purposes of the Double Jeopardy Clause. Based on this understanding, I join JUSTICE MARSHALL's dissent.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Seizing upon the suggestion in past cases that every "independent" sovereign government may prosecute violations of its laws even when the defendant has already been tried for the same crime in another jurisdiction, the Court today gives short shrift to the policies underlying those precedents. The "dual sovereignty" doctrine, heretofore used to permit federal and state prosecutions for the same offense, was born of the need to accommodate complementary state and federal concerns within our system of concurrent territorial jurisdictions. It cannot justify successive prosecutions by different States. Moreover, even were the dual sovereignty doctrine to support successive state prosecutions as a general matter, it simply could not legitimate the collusion between Georgia and Alabama in this case to ensure that petitioner is executed for his crime.

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than one woman, in the second he was tried for and convicted of adultery. The Court correctly held that the second prosecution had unconstitutionally placed the defendant twice in jeopardy for the same offense. Under the rule the Government proposed in *Abbate*, however, the mere difference between the interests in prohibiting multiple sexual partners and in proscribing extramarital sexual relationships would have permitted successive prosecutions.

I

On August 31, 1981, the body of Rebecca Heath was discovered in an abandoned car in Troup County, Georgia. Because the deceased was a resident of Russell County, Alabama, members of the Russell County Sheriff's Department immediately joined Troup County authorities in investigating the causes and agents of her death. Tr. 359. This cooperative effort proved fruitful. On September 4, petitioner Larry Heath, the deceased's husband, was arrested and brought to the Georgia State Patrol barracks in Troup County, where he confessed to having hired other men to murder his wife. Shortly thereafter, petitioner was indicted by the grand jury of Troup County for malice murder. The prosecution's notice to petitioner that it was seeking the death penalty triggered the beginning of the Unified Appeals Procedure that Georgia requires in capital cases. But while these pretrial proceedings were still in progress, petitioner seized the prosecution's offer of a life sentence in exchange for a guilty plea. Upon entry of his plea in February 1982, petitioner was sentenced in Troup County Superior Court to life imprisonment. His stay in the custody of Georgia authorities proved short, however. Three months later, a Russell County, Alabama, grand jury indicted him for the capital offense of murdering Rebecca Heath during the course of a kidnaping in the first degree.

The murder of Rebecca Heath must have been quite noteworthy in Russell County, Alabama. By petitioner's count, of the 82 prospective jurors questioned before trial during *voir dire*, all but 7 stated that they were aware that petitioner had pleaded guilty to the same crime in Georgia. *Id.*, at 294. The *voir dire* responses of almost all of the remaining 75 veniremen can only be characterized as remarkable. When asked whether they could put aside their knowledge of the prior guilty plea in order to give petitioner a fair trial in Alabama, the vast majority answered in the affirmative. See, *e. g.*, *id.*, at 110, 112–113, 134, 254. These answers sat-

isfied the trial judge, who denied petitioner's challenges for cause except as to those jurors who explicitly admitted that the Georgia proceedings would probably affect their assessment of petitioner's guilt.

With such a well-informed jury, the outcome of the trial was surely a foregone conclusion. Defense counsel could do little but attempt to elicit information from prosecution witnesses tending to show that the crime was committed exclusively in Georgia. The court having rejected petitioner's constitutional and jurisdictional claims, the defense was left to spend most of its summation arguing that Rebecca Heath may not actually have been kidnaped from Alabama before she was murdered and that petitioner was already being punished for ordering that murder. Petitioner was convicted and, after sentencing hearings, was condemned to die. The conviction and sentence were upheld by the Alabama Court of Criminal Appeals, 455 So. 2d 898 (1983), and the Alabama Supreme Court. *Ex parte Heath*, 455 So. 2d 905 (1984).

II

Had the Georgia authorities suddenly become dissatisfied with the life sentence petitioner received in their courts and reindicted petitioner in order to seek the death penalty once again, that indictment would without question be barred by the Double Jeopardy Clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment, *Benton v. Maryland*, 395 U. S. 784 (1969). Whether the second indictment repeated the charge of malice murder or instead charged murder in the course of a kidnaping, it would surely, under any reasonable constitutional standard, offend the bar to successive prosecutions for the same offense. See *Brown v. Ohio*, 432 U. S. 161, 166 (1977); *id.*, at 170 (BRENNAN, J., concurring).

The only difference between this case and such a hypothetical volte-face by Georgia is that here Alabama, not Georgia, was offended by the notion that petitioner might

not forfeit his life in punishment for his crime. The only reason the Court gives for permitting Alabama to go forward is that Georgia and Alabama are separate sovereigns.

A

The dual sovereignty theory posits that where the same act offends the laws of two sovereigns, "it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable." *Moore* v. *Illinois*, 14 How. 13, 20 (1852). Therefore, "prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, 'subject [the defendant] for the same offence to be twice put in jeopardy.'" *United States* v. *Wheeler*, 435 U. S. 313, 317 (1978). Mindful of the admonitions of Justice Black, we should recognize this exegesis of the Clause as, at best, a useful fiction and, at worst, a dangerous one. See *Bartkus* v. *Illinois*, 359 U. S. 121, 158 (1959) (Black, J., dissenting). No evidence has ever been adduced to indicate that the Framers intended the word "offence" to have so restrictive a meaning.[1]

This strained reading of the Double Jeopardy Clause has survived and indeed flourished in this Court's cases not because of any inherent plausibility, but because it provides reassuring interpretivist support for a rule that accommodates the unique nature of our federal system. Before this rule is extended to cover a new class of cases, the reasons for its creation should therefore be made clear.

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[1] It is curious to note how reluctant the Court has always been to ascertain the intent of the Framers in this area. The furthest the Court has ever progressed on such an inquiry was to note: "It has not been deemed relevant to discussion of our problem to consider dubious English precedents concerning the effect of foreign criminal judgments on the ability of English courts to try charges arising out of the same conduct . . . ." *Bartkus* v. *Illinois*, 359 U. S., at 128, n. 9. But see *id.*, at 156 (Black, J., dissenting); M. Friedland, Double Jeopardy 360–364 (1969)

Under the constitutional scheme, the Federal Government has been given the exclusive power to vindicate certain of our Nation's sovereign interests, leaving the States to exercise complementary authority over matters of more local concern. The respective spheres of the Federal Government and the States may overlap at times, and even where they do not, different interests may be implicated by a single act. See, *e. g.*, *Abbate* v. *United States*, 359 U. S. 187 (1959) (conspiracy to dynamite telephone company facilities entails both destruction of property and disruption of federal communications network). Yet were a prosecution by a State, however zealously pursued, allowed to preclude further prosecution by the Federal Government for the same crime, an entire range of national interests could be frustrated. The importance of those federal interests has thus quite properly been permitted to trump a defendant's interest in avoiding successive prosecutions or multiple punishments for the same crime. See *Screws* v. *United States*, 325 U. S. 91, 108–110, and n. 10 (1945) (plurality opinion). Conversely, because "the States under our federal system have the principal responsibility for defining and prosecuting crimes," *Abbate* v. *United States*, *supra*, at 195, it would be inappropriate—in the absence of a specific congressional intent to pre-empt state action pursuant to the Supremacy Clause—to allow a federal prosecution to preclude state authorities from vindicating "the historic right and obligation of the States to maintain peace and order within their confines," *Bartkus* v. *Illinois*, *supra*, at 137.

The complementary nature of the sovereignty exercised by the Federal Government and the States places upon a defendant burdens commensurate with concomitant privileges. Past cases have recognized that the special ordeal suffered by a defendant prosecuted by both federal and state authorities is the price of living in a federal system, the cost of dual citizenship. Every citizen, the Court has noted, "owes allegiance to the two departments, so to speak, and within their

respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction." *United States* v. *Cruikshank*, 92 U. S. 542, 551 (1876). See *Moore* v. *Illinois*, *supra*, at 20 ("Every citizen . . . may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either").

B

Because all but one of the cases upholding the dual sovereignty doctrine have involved the unique relationship between the Federal Government and the States,[2] the question of whether a similar rule should exempt successive prosecutions by two different States from the command of the Double Jeopardy Clause is one for which this Court's precedents provide all too little illumination. Only once before has the Court explicitly considered competing state prosecutorial interests. In that case, it observed that where an act is prohibited by the laws of two States with concurrent jurisdiction over the locus of the offense

> "the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both States, so that one convicted or acquitted in the courts of the one State cannot be prosecuted for the same offense in the courts of the other." *Nielsen* v. *Oregon*, 212 U. S. 315, 320 (1909).

Where two States seek to prosecute the same defendant for the same crime in two separate proceedings, the justifica-

[2] *United States* v. *Wheeler*, 435 U. S. 313 (1978), where the Court upheld successive prosecutions by Federal Government and Navajo tribal authorities, merely recognizes an analogous relationship between two governments with complementary concerns. While the Court noted that "Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government," *id.*, at 319, Congress has in fact wisely refrained from interfering in this sensitive area. The relationship between federal and tribal authorities is thus in this respect analogous to that between the Federal Government and the States.

tions found in the federal-state context for an exemption from double jeopardy constraints simply do not hold. Although the two States may have opted for different policies within their assigned territorial jurisdictions, the sovereign concerns with whose vindication each State has been charged are identical. Thus, in contrast to the federal-state context, barring the second prosecution would still permit one government to act upon the broad range of sovereign concerns that have been reserved to the States by the Constitution. The compelling need in the federal-state context to subordinate double jeopardy concerns is thus considerably diminished in cases involving successive prosecutions by different States. Moreover, from the defendant's perspective, the burden of successive prosecutions cannot be justified as the *quid pro quo* of dual citizenship.

To be sure, a refusal to extend the dual sovereignty rule to state-state prosecutions would preclude the State that has lost the "race to the courthouse" from vindicating legitimate policies distinct from those underlying its sister State's prosecution. But as yet, I am not persuaded that a State's desire to further a particular policy should be permitted to deprive a defendant of his constitutionally protected right not to be brought to bar more than once to answer essentially the same charges.

III

Having expressed my doubts as to the Court's ill-considered resolution of the dual sovereignty question in this case, I must confess that my quarrel with the Court's disposition of this case is based less upon how this question was resolved than upon the fact that it was considered at all. Although, in granting Heath's petition for certiorari, this Court ordered the parties to focus upon the dual sovereignty issue, I believe the Court errs in refusing to consider the fundamental unfairness of the process by which petitioner stands condemned to die.

Even where the power of two sovereigns to pursue separate prosecutions for the same crime has been undisputed, this Court has barred both governments from combining to do together what each could not constitutionally do on its own. See *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964); *Elkins* v. *United States*, 364 U. S. 206 (1960).[3] And just as the Constitution bars one sovereign from facilitating another's prosecution by delivering testimony coerced under promise of immunity or evidence illegally seized, I believe that it prohibits two sovereigns from combining forces to ensure that a defendant receives only the trappings of criminal process as he is sped along to execution.

While no one can doubt the propriety of two States cooperating to bring a criminal to justice, the cooperation between Georgia and Alabama in this case went far beyond their initial joint investigation. Georgia's efforts to secure petitioner's execution did not end with its acceptance of his guilty plea. Its law enforcement officials went on to play leading roles as prosecution witnesses in the Alabama trial. Indeed, had the Alabama trial judge not restricted the State to one assisting officer at the prosecution's table during trial, a Georgia officer would have shared the honors with an Alabama officer. Tr. 298. Although the record does not reveal

[3] To be sure, *Murphy*, which bars a State from compelling a witness to give testimony that might be used against him in a federal prosecution, and *Elkins*, which bars the introduction in a federal prosecution of evidence illegally seized by state officers, do not necessarily undermine the basis of the rule allowing successive state and federal prosecutions. It is one thing to bar a sovereign from using certain evidence and quite another to bar it from prosecuting altogether. But these cases can be read to suggest that despite the independent sovereign status of the Federal and State Governments, courts should not be blind to the impact of combined federal-state law enforcement on an accused's constitutional rights. See Note, Double Prosecution by State and Federal Governments: Another Exercise in Federalism, 80 Harv. L. Rev. 1538, 1547 (1967). Justice Harlan's belief that *Murphy* "abolished the 'two sovereignties' rule," *Stevens* v. *Marks*, 383 U. S. 234, 250 (1966) (Harlan, J., concurring in part, dissenting in part), was thus well founded.

the precise nature of the assurances made by Georgia authorities that induced petitioner to plead guilty in the first proceeding against him, I cannot believe he would have done so had he been aware that the officials whose forbearance he bought in Georgia with his plea would merely continue their efforts to secure his death in another jurisdiction. Cf. *Santobello* v. *New York*, 404 U. S. 257, 262 (1971).

Even before the Fourteenth Amendment was held to incorporate the protections of the Double Jeopardy Clause, four Members of this Court registered their outrage at "an instance of the prosecution being allowed to harass the accused with repeated trials and convictions on the same evidence, until it achieve[d] its desired result of a capital verdict." *Ciucci* v. *Illinois*, 356 U. S. 571, 573 (1958). Such "relentless prosecutions," they asserted, constituted "an unseemly and oppressive use of a criminal trial that violates the concept of due process contained in the Fourteenth Amendment, whatever its ultimate scope is taken to be." *Id.*, at 575. The only differences between the facts in *Ciucci* and those in this case are that here the relentless effort was a cooperative one between two States and that petitioner sought to avoid trial by pleading guilty. Whether viewed as a violation of the Double Jeopardy Clause or simply as an affront to the due process guarantee of fundamental fairness, Alabama's prosecution of petitioner cannot survive constitutional scrutiny. I therefore must dissent.

MILLER *v.* FENTON, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-5786. Argued October 16, 1985—Decided December 3, 1985

Petitioner, after a 58-minute interrogation at the New Jersey State Police Barracks, confessed to a murder. The New Jersey trial court rejected his motion to suppress the confession, and the jury found him guilty of first-degree murder. The New Jersey Superior Court Appellate Division reversed, finding as a matter of law that the confession was the result of compulsion and thus was impermissible under the Fourteenth Amendment's due process guarantee. The New Jersey Supreme Court reversed, finding, after examining the "totality of all the surrounding circumstances," that the interrogation was proper and that the resulting confession, being voluntary, had been properly admitted into evidence. Petitioner then sought a writ of habeas corpus in Federal District Court, which dismissed the petition without an evidentiary hearing. The Court of Appeals affirmed, holding that the voluntariness of a confession is a "factual issue" within the meaning of 28 U. S. C. § 2254(d), which provides that state-court findings of fact, with certain exceptions, "shall be presumed to be correct" in a federal habeas corpus proceeding, and that accordingly federal review of the New Jersey Supreme Court's determination that petitioner's confession was voluntary was limited to whether that court applied the proper legal test and whether its factual conclusions were supported by the record. Under this standard, the Court of Appeals concluded that the District Court's denial of the habeas corpus petition was proper.

Held: The voluntariness of a confession is not an issue of fact entitled to the § 2254(d) presumption but is a legal question meriting independent consideration in a federal habeas corpus proceeding. Pp. 109–118.

(a) There is no support in this Court's decisions for the suggestion that the enactment of § 2254(d) in 1966 altered this Court's prior confession cases holding that the ultimate issue of "voluntariness" is a legal question requiring independent federal determination. More importantly, § 2254(d)'s history undermines any argument that Congress intended that the ultimate question of the admissibility of a confession be treated as a "factual issue" within the meaning of that provision. Pp. 109–112.

(b) In addition to considerations of *stare decisis* and congressional intent, the nature of the "voluntariness" inquiry itself lends support to the

holding in this case. Moreover, the practical considerations that have led this Court to find other issues within the scope of the § 2254(d) presumption are absent in the confession context. Unlike such issues as the impartiality of a juror or competency to stand trial, assessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue of voluntariness. And the critical events surrounding the taking of a confession almost invariably occur, not in open court, but in a secret and more coercive environment. Pp. 112–118.

741 F. 2d 1456, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 118.

Paul Martin Klein argued the cause for petitioner. With him on the briefs were *Thomas S. Smith* and *Claudia Van Wyk*.

Anne C. Paskow, Deputy Attorney General of New Jersey, argued the cause for respondents. With her on the brief were *Irwin I. Kimmelman*, Attorney General, and *Allan J. Nodes* and *Debra L. Stone*, Deputy Attorneys General.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Under 28 U. S. C. § 2254(d), state-court findings of fact "shall be presumed to be correct" in a federal habeas corpus proceeding unless one of eight enumerated exceptions applies.[1] The question presented is whether the voluntariness

**Charles S. Sims* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

[1] In pertinent part, 28 U. S. C. § 2254(d) provides:

"In any proceeding instituted in a Federal Court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct, unless . . .

. . . .

"(8) . . . the Federal court . . . concludes that such factual determination is not supported by the record as a whole."

of a confession is an issue of fact entitled to the § 2254(d) presumption.

I

On the morning of August 13, 1973, a stranger approached the rural New Jersey home of 17-year-old Deborah Margolin and told her that a heifer was loose at the foot of her driveway. She set out alone to investigate and never returned. Later that day, her mutilated body was found in a nearby stream.

The victim's brothers were able to provide a description of the stranger's car and clothing. Based on this information, officers of the New Jersey State Police tentatively identified petitioner and, later that evening, found him at his place of employment. Petitioner responded to the officers' preliminary inquiries and agreed to return to the police barracks for further questioning. Approximately two hours later, Detective Charles Boyce led petitioner to an interrogation room and informed him of his *Miranda* rights. Petitioner inquired about the scope of his privilege to remain silent and then executed a written waiver, the validity of which is not at issue.

A 58 minute long interrogation session ensued. During the course of the interview, Detective Boyce told petitioner that Ms. Margolin had just died. That statement, which Boyce knew to be untrue, supported another officer's earlier, and equally false, suggestion that the victim was still alive and could identify her attacker. App. 16–17; Record 109 and 305. Detective Boyce also told petitioner that he had been identified at the Margolin home earlier in the day. In fact, Ms. Margolin's brothers had only provided a general description of the stranger's car and clothing. Finally, Detective Boyce indicated that blood stains had been found on petitioner's front stoop. No such evidence was introduced at trial, and respondents do not now contend that it ever in fact existed.

Throughout the interview, Detective Boyce presented himself as sympathetic to petitioner's plight. On several

occasions, he stated that he did not consider petitioner to be a criminal because the perpetrator of the deed had a "mental problem" and needed medical help rather than punishment. App. 19.[2] Eventually, petitioner fully confessed to the crime. After doing so, he lapsed into what Detective Boyce described as a "state of shock." Record 84–85. Repeated

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[2] The following exchange is representative of the tone of the interrogation.

"Boyce: 'Frank, look, you want help, don't you, Frank?'

"Miller: 'Yes, uh huh, yes, but yet I'm, I'm not going to admit to something that, that I wasn't involved in.'

"Boyce: 'We don't want you to, all I want you to do is talk to me, that's all. I'm not talking about admitting to anything Frank. I want you to talk to me. I want you to tell me what you think. I want you to tell me how you think about this, what you think about this?'

"Miller: 'What I think about it?'

"Boyce: 'Yeah.'

"Miller: 'I think whoever did it really needs help.'

"Boyce: 'And that's what I think and that's what I know. They don't, they don't need punishment, right? Like you said, they need help.'

"Miller: 'Right.'

. . . . .

"Boyce: 'Now, don't you think it's better if someone knows that he or she has a mental problem to come forward with it and say, look, I've, I've, I've done these acts, I'm responsible for this, but I want to be helped, I couldn't help myself, I had no control of myself and if I'm examined properly you'll find out that's the case.'

. . . . .

"'Okay. [L]isten Frank, [i]f I promise to, you know, do all I can with the psychiatrist and everything, and we get the proper help for you . . . will you talk to me about it.'

"Miller: 'I can't talk to you about something I'm not . . .'

"Boyce: 'Alright, listen Frank, alright, honest. I know, I know what's going on inside you, Frank. I want to help you, you know, between us right now. . . . You've got to talk to me about it. This is the only way we'll be able to work it out. I mean, you know, listen, I want to help you, because you are in my mind, you are not responsible. You are not responsible, Frank. Frank, what's the matter?'

"Miller: 'I feel bad.'" App. 17–22.

efforts to rouse him from his stupor failed, and the police summoned an ambulance to transport him to the hospital.

The trial court rejected petitioner's motion to suppress the confession, and the jury found petitioner guilty of murder in the first degree. The Superior Court Appellate Division reversed, finding as a matter of law that the confession was the result of "intense and mind bending psychological compulsion" and therefore was impermissible under the Fourteenth Amendment's guarantee of due process. App. 53. Over three dissents, the Supreme Court of New Jersey reversed again. *State* v. *Miller*, 76 N. J. 392, 388 A. 2d 218 (1978). After examining the "totality of all the surrounding circumstances," including petitioner's educational level, age, and awareness of his *Miranda* rights, the court found that the interrogation "did not exceed proper bounds," and that the resulting confession, being voluntary, had been properly admitted into evidence. *Id.*, at 402–405, 388 A. 2d, at 223–224.

Petitioner then sought a writ of habeas corpus in the United States District Court for the District of New Jersey. That court dismissed the application without an evidentiary hearing. A divided panel of the Court of Appeals for the Third Circuit affirmed. 741 F. 2d 1456 (1984). Relying on Circuit precedent,[3] the court held that the voluntariness of a confession is a "factual issue" within the meaning of 28 U. S. C. § 2254(d). Accordingly, federal review of the New Jersey Supreme Court's determination that petitioner's confession was voluntary was "limited to whether the state court applied the proper legal test, and whether [its] factual conclusions . . . [were] supported on the record as a whole." 741 F. 2d, at 1462. Under this standard, the court concluded,

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[3] The Court of Appeals relied on an earlier decision of that court holding that the "voluntariness" of a waiver of *Miranda* rights was entitled to the § 2254(d) presumption. *Patterson* v. *Cuyler*, 729 F. 2d 925, 930 (1984). The present case presents no occasion for us to address the question whether federal habeas courts must accord the statutory presumption of correctness to state-court findings concerning the validity of a waiver.

the District Court's denial of the petition for habeas relief was proper.

Because the Courts of Appeals have reached differing conclusions on whether state-court voluntariness determinations are entitled to the § 2254(d) presumption of correctness, and because of the issue's importance to the administration of criminal justice, we granted certiorari. 471 U. S. 1003 (1985). Compare *Brantley* v. *McKaskle*, 722 F. 2d 187, 188 (CA5 1984) "([V]oluntariness of a confession is a mixed question of law and fact"), with *Alexander* v. *Smith*, 582 F. 2d 212, 217 (CA2) (state-court voluntariness determination entitled to § 2254(d) presumption), cert. denied, 439 U. S. 990 (1978). We now reverse and remand.

II

This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. *Brown* v. *Mississippi*, 297 U. S. 278 (1936), was the wellspring of this notion, now deeply embedded in our criminal law. Faced with statements extracted by beatings and other forms of physical and psychological torture, the Court held that confessions procured by means "revolting to the sense of justice" could not be used to secure a conviction. *Id.*, at 286. On numerous subsequent occasions the Court has set aside convictions secured through the admission of an improperly obtained confession. See, *e. g.*, *Mincey* v. *Arizona*, 437 U. S. 385 (1978); *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Chambers* v. *Florida*, 309 U. S. 227, 235–238 (1940). Although these decisions framed the legal inquiry in a variety of different ways, usually through the "convenient shorthand" of asking whether the confession was "involuntary," *Blackburn* v. *Alabama*, 361 U. S. 199, 207 (1960), the Court's analysis has

consistently been animated by the view that "ours is an accusatorial and not an inquisitorial system," *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961), and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness. Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations, *Miranda* v. *Arizona*, 384 U. S. 436, 478 (1966), and is binding on the States, *Malloy* v. *Hogan*, 378 U. S. 1, 6 (1964), the Court has continued to measure confessions against the requirements of due process. See, *e. g.*, *Mincey* v. *Arizona*, *supra*, at 402; *Beecher* v. *Alabama*, 389 U. S. 35, 38 (1967) *(per curiam)*.

Without exception, the Court's confession cases hold that the ultimate issue of "voluntariness" is a legal question requiring independent federal determination. See, *e. g.*, *Haynes* v. *Washington*, *supra*, at 515–516; *Ashcraft* v. *Tennessee*, *supra*, at 147–148. As recently as 1978, the Court reaffirmed that it was "not bound by" a state-court voluntariness finding and reiterated its historic "duty to make an independent evaluation of the record." *Mincey* v. *Arizona*, *supra*, at 398. That duty, as *Mincey* makes explicit, is not limited to instances in which the claim is that the police conduct was "inherently coercive." *Ashcraft* v. *Tennessee*, *supra*, at 154. It applies equally when the interrogation techniques were improper only because, in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will. See *Mincey* v. *Arizona*, *supra*, at 401. Because the ultimate issue in both categories of cases is the same—whether the State has obtained the confession in a manner that comports with due process—the decisions leave no doubt that our independent obligation to decide the constitutional question is identical.

Mincey, *Ashcraft*, and many of the early decisions applying the independent-determination rule in confession cases came

to the Court on direct appeal from state-court judgments. The rule, however, is no less firmly established in cases coming to the federal system on application for a writ of habeas corpus. *Davis* v. *North Carolina*, 384 U. S. 737 (1966), resolved the issue with unmistakable clarity. There, the State had admitted into evidence a confession elicited from an impoverished, mentally deficient suspect who had been held incommunicado for 16 days with barely adequate nourishment. Expressly relying on the direct-appeal cases, the Court stated unequivocally that state-court determinations concerning the ultimate question of the voluntariness of a confession are not binding in a federal habeas corpus proceeding. *Id.*, at 741–742.

Davis was decided four months before 28 U. S. C. § 2254(d) was signed into law. Act of Nov. 2, 1966, Pub. L. 89–711, 80 Stat. 1105. Respondent contends that, whatever may have been the case prior to 1966, the enactment of § 2254(d) in that year fundamentally altered the nature of federal habeas review of state voluntariness findings. That suggestion finds no support in this Court's decisions. See, *e. g.*, *Boulden* v. *Holman*, 394 U. S. 478, 480 (1969) (finding confession voluntary after making "an independent study of the entire record"); *Frazier* v. *Cupp*, 394 U. S. 731, 739 (1969) (examining "totality of the circumstances" to assess admissibility of confession). More importantly, the history of § 2254(d) undermines any argument that Congress intended that the ultimate question of the admissibility of a confession be treated a "factual issue" within the meaning of that provision. The 1966 amendment was an almost verbatim codification of the standards delineated in *Townsend* v. *Sain*, 372 U. S. 293 (1963), for determining when a district court must hold an evidentiary hearing before acting on a habeas petition. When a hearing is not obligatory, *Townsend* held, the federal court "ordinarily should . . . accept the facts as found" in the state proceeding. *Id.*, at 318. Congress elevated that exhortation into a mandatory presumption of

correctness. But there is absolutely no indication that it intended to alter *Townsend*'s understanding that the "ultimate constitutional question" of the admissibility of a confession was a "mixed questio[n] of fact and law" subject to plenary federal review. *Id.*, at 309, and n. 6.

In short, an unbroken line of cases, coming to this Court both on direct appeal and on review of applications to lower federal courts for a writ of habeas corpus, forecloses the Court of Appeals' conclusion that the "voluntariness" of a confession merits something less than independent federal consideration. To be sure, subsidiary factual questions, such as whether a drug has the properties of a truth serum, *id.*, at 306, or whether in fact the police engaged in the intimidation tactics alleged by the defendant, *LaVallee* v. *Delle Rose*, 410 U. S. 690, 693–695 (1973) *(per curiam)*, are entitled to the § 2254(d) presumption. And the federal habeas court, should, of course, give great weight to the considered conclusions of a coequal state judiciary. *Culombe* v. *Connecticut*, 367 U. S. 568, 605 (1961) (opinion of Frankfurter, J.). But, as we now reaffirm, the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination.

III

The Court of Appeals recognized that treating the voluntariness of a confession as an issue of fact was difficult to square with "fifty years of caselaw" in this Court. 741 F. 2d, at 1462. It believed, however, that this substantial body of contrary precedent was not controlling in light of our more recent decisions addressing the scope of the § 2254(d) presumption of correctness. See *Wainwright* v. *Witt*, 469 U. S. 412, 429 (1985) (trial court's determination that a prospective juror in a capital case was properly excluded for cause entitled to presumption); *Patton* v. *Yount*, 467 U. S. 1025 (1984)

(impartiality of an individual juror); *Rushen* v. *Spain*, 464 U. S. 114 (1983) *(per curiam)* (effect of *ex parte* communication on impartiality of individual juror); *Maggio* v. *Fulford*, 462 U. S. 111 (1983) *(per curiam)* (competency to stand trial); *Marshall* v. *Lonberger*, 459 U. S. 422, 431–437 (1983) (determination that defendant received and understood sufficient notice of charges against him to render guilty plea voluntary). We acknowledge that the Court has not charted an entirely clear course in this area. We reject, however, the Court of Appeals' conclusion that these case-specific holdings tacitly overturned the longstanding rule that the voluntariness of a confession is a matter for independent federal determination.

In the § 2254(d) context, as elsewhere, the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485 (1984); *Baumgartner* v. *United States*, 322 U. S. 665, 671 (1944). A few principles, however, are by now well established. For example, that an issue involves an inquiry into state of mind is not at all inconsistent with treating it as a question of fact. See, *e. g.*, *Maggio* v. *Fulford*, *supra*. Equally clearly, an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question. See *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526, 534 (1979) (finding of intent to discriminate subject to "clearly erroneous" standard of review). But beyond these elemental propositions, negative in form, the Court has yet to arrive at "a rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Pullman Standard* v. *Swint*, 456 U. S. 273, 288 (1982).

Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of

analysis. See Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 237 (1985). At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question. Where, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S., at 503. Similarly, on rare occasions in years past the Court has justified independent federal or appellate review as a means of compensating for "perceived shortcomings of the trier of fact by way of bias or some other factor. . . ." *Id.*, at 518 (REHNQUIST, J., dissenting). See, *e. g.*, *Haynes* v. *Washington*, 373 U. S., at 516; *Watts* v. *Indiana*, 338 U. S. 49, 52 (1949) (opinion of Frankfurter, J.). Cf. *Norris* v. *Alabama*, 294 U. S. 587 (1935).

In contrast, other considerations often suggest the appropriateness of resolving close questions concerning the status of an issue as one of "law" or "fact" in favor of extending deference to the trial court. When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight. *Patton* v. *Yount*, *supra*, and *Wainwright* v. *Witt*, *supra*, are illustrative. There the Court stressed that the state trial judge is in a position to assess juror bias that is far superior to that of federal judges reviewing an application for a writ of habeas corpus. Principally

for that reason, the decisions held, juror bias merits treatment as a "factual issue" within the meaning of § 2254(d) notwithstanding the intimate connection between such determinations and the constitutional guarantee of an impartial jury.

For several reasons we think that it would be inappropriate to abandon the Court's longstanding position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary federal review. We note at the outset that we do not write on a clean slate. "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions." *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, 403 (1970). Thus, even assuming that contemporary considerations supported respondent's construction of the statute, nearly a half century of unwavering precedent weighs heavily against any suggestion that we now discard the settled rule in this area. Moreover, as previously noted, Congress patterned § 2254(d) after *Townsend* v. *Sain*, 372 U. S. 293 (1963), a case that clearly assumed that the voluntariness of a confession was an issue for independent federal determination. Thus, not only are *stare decisis* concerns compelling, but, unlike in *Marshall* v. *Lonberger*, 459 U. S. 422 (1983), *Rushen* v. *Spain*, 464 U. S. 114 (1983), or any of our other recent § 2254(d) cases, in the confession context we have the benefit of some congressional guidance in resolving whether the disputed issue falls outside of the scope of the § 2254(d) presumption. Although the history of that provision is not without its ambiguities, it is certainly clear enough to tip the scales in favor of treating the voluntariness of a confession as beyond the reach of § 2254(d).

In addition to considerations of *stare decisis* and congressional intent, the nature of the inquiry itself lends support to the conclusion that "voluntariness" is a legal question meriting independent consideration in a federal habeas corpus proceeding. Although sometimes framed as an issue of

"psychological fact," *Culombe* v. *Connecticut*, 367 U. S., at 603, the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension. It is telling that in confession cases coming from the States, this Court has consistently looked to the Due Process Clause of the Fourteenth Amendment to test admissibility. See, *e. g.*, *Mincey* v. *Arizona*, 437 U. S., at 402. The locus of the right is significant because it reflects the Court's consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne. See, *e. g.*, *Gallegos* v. *Colorado*, 370 U. S. 49, 51 (1962) (suggesting that "a compound of two influences" requires that some confessions be condemned); *Culombe* v. *Connecticut*, *supra*, at 605 (describing voluntariness as an "amphibian"). This hybrid quality of the voluntariness inquiry,[4] subsuming, as it does, a "complex of values," *Blackburn* v. *Alabama*, 361 U. S., at 207, itself militates against treating the question as one of simple historical fact.

Putting to one side whether "voluntariness" is analytically more akin to a fact or a legal conclusion, the practical considerations that have led us to find other issues within the scope of the § 2254(d) presumption are absent in the confession context. First, unlike the impartiality of a given juror, *Patton* v. *Yount*, 467 U. S., at 1036, or competency to stand trial, *Maggio* v. *Fulford*, 462 U. S., at 117, assessments of credibil-

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[4] The voluntariness rubric has been variously condemned as "useless," Paulson, The Fourteenth Amendment and the Third Degree, 6 Stan. L. Rev. 411, 430 (1954); "perplexing," Grano, Voluntariness, Free Will, and the Law of Confessions, 65 Va. L. Rev. 859, 863 (1979); and "legal 'double-talk,'" A. Beisel, Control Over Illegal Enforcement of the Criminal Law: Role of the Supreme Court 48 (1955). See generally Y. Kamisar, Police Interrogation and Confessions 1–25 (1980).

ity and demeanor are not crucial to the proper resolution of the ultimate issue of "voluntariness." Of course, subsidiary questions, such as the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with the *Miranda* warnings, often require the resolution of conflicting testimony of police and defendant. The law is therefore clear that state-court findings on such matters are conclusive on the habeas court if fairly supported in the record and if the other circumstances enumerated in § 2254(d) are inapplicable. But once such underlying factual issues have been resolved, and the moment comes for determining whether, under the totality of the circumstances, the confession was obtained in a manner consistent with the Constitution, the state-court judge is not in an appreciably better position than the federal habeas court to make that determination.

Second, the allocution of a guilty plea, *Marshall* v. *Lonberger*, *supra*, the adjudication of competency to stand trial, *Maggio* v. *Fulford*, *supra*, and the determination of juror bias, *Wainwright* v. *Witt*, 469 U. S. 412 (1985), take place in open court on a full record. In marked contrast, the critical events surrounding the taking of a confession almost invariably occur in a secret and inherently more coercive environment. *Miranda* v. *Arizona*, 384 U. S., at 458. These circumstances, standing alone, cannot be dispositive of the question whether a particular issue falls within the reach of § 2254(d). However, together with the inevitable and understandable reluctance to exclude an otherwise reliable admission of guilt, *Jackson* v. *Denno*, 378 U. S. 368, 381 (1964), they elevate the risk that erroneous resolution of the voluntariness question might inadvertently frustrate the protection of the federal right. See *Haynes* v. *Washington*, 373 U. S., at 516; *Ward* v. *Texas*, 316 U. S. 547 (1942). We reiterate our confidence that state judges, no less than their federal counterparts, will properly discharge their duty to protect the constitutional rights of criminal defendants. We

note only that in the confession context, independent federal review has traditionally played an important parallel role in protecting the rights at stake when the prosecution secures a conviction through the defendant's own admissions.

IV

After defending at length its conclusion that the voluntariness of a confession was entitled to the § 2254(d) presumption, and after carefully analyzing the petitioner's confession under that standard, the Court of Appeals suggested in a brief footnote that it "would reach the same result" even were it to give the issue plenary consideration. 741 F. 2d, at 1467, n. 21. Inasmuch as it is not clear from this language that the court did in fact independently evaluate the admissibility of the confession, and because, in any event, we think that the case warrants fuller analysis under the appropriate standard, we reverse the decision below and remand for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, dissenting.

The Court decides that the voluntariness of a confession is not an issue of fact presumed to be correct under 28 U. S. C. § 2254(d). I think it is difficult to sensibly distinguish the determination that a particular confession was voluntary from the determinations which we have held to be entitled to a presumption of correctness under § 2254(d). See *Sumner* v. *Mata*, 449 U. S. 539 (1981); *Sumner* v. *Mata*, 455 U. S. 591 (1982) *(per curiam); Marshall* v. *Lonberger*, 459 U. S. 422, 431–437 (1983); *Maggio* v. *Fulford*, 462 U. S. 111 (1983) *(per curiam); Rushen* v. *Spain*, 464 U. S. 114 (1983) *(per curiam); Patton* v. *Yount*, 467 U. S. 1025, 1036–1038 (1984); and *Wainwright* v. *Witt*, 469 U. S. 412, 426–430 (1985). While the Court relies principally on *stare decisis* for the result it reaches today, almost all the cases upon which it relies entailed direct review by this Court of state-court decisions

rather than federal habeas review. But even if that difference were deemed immaterial, it seems to me that *stare decisis* is not a sufficient reason for excluding a finding as to the voluntariness of a confession from the presumption embodied in § 2254(d). All of the recent cases cited evince a more reasoned approach to this issue than the interesting but somewhat mystical exegesis in cases such as *Culombe* v. *Connecticut*, 367 U. S. 568, 603–605 (1961) (opinion of Frankfurter, J.).

I also disagree with the Court's decision to remand this case to the Court of Appeals for a second run at the voluntariness issue. I think the majority of that court made it clear that it had evaluated the admissibility of the confession under the correct standard as defined by this Court today. It is unfortunate that petitioner's challenge to his conviction for a murder which occurred 12 years ago should be the subject of additional and unnecessary litigation and delay.

I respectfully dissent.

LAKE COAL CO., INC. *v.* ROBERTS & SCHAEFER CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-1240. Argued October 15, 1985—Decided December 3, 1985

Held: The parties' motion requesting decision of the questions presented in the petition for certiorari despite settlement of the underlying causes of action is denied; the Court of Appeals' judgment is vacated; and the case is remanded for dismissal of the cause as moot.

751 F. 2d 386, vacated and remanded.

Ronald G. Polly argued the cause for petitioner. With him on the briefs was *Gene Smallwood, Jr.*

C. Kilmer Combs argued the cause and filed a brief for respondent.

PER CURIAM.

The motion of the parties requesting the Court to decide the questions presented in the petition for writ of certiorari despite complete settlement of the underlying causes of action is denied. See *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974).

The judgment of the United States Court of Appeals for the Sixth Circuit is vacated, and the case is remanded to the United States District Court for the Eastern District of Kentucky with instructions to dismiss the cause as moot.

UNITED STATES v. RIVERSIDE BAYVIEW HOMES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-701. Argued October 16, 1985—Decided December 4, 1985

The Clean Water Act prohibits any discharge of dredged or fill materials into "navigable waters"—defined as the "waters of the United States"—unless authorized by a permit issued by the Army Corps of Engineers (Corps). Construing the Act to cover all "freshwater wetlands" that are adjacent to other covered waters, the Corps issued a regulation defining such wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." After respondent Riverside Bayview Homes, Inc. (hereafter respondent), began placing fill materials on its property near the shores of Lake St. Clair, Michigan, the Corps filed suit in Federal District Court to enjoin respondent from filling its property without the Corps' permission. Finding that respondent's property was characterized by the presence of vegetation requiring saturated soil conditions for growth, that the source of such soil conditions was ground water, and that the wetland on the property was adjacent to a body of navigable water, the District Court held that the property was wetland subject to the Corps' permit authority. The Court of Appeals reversed, construing the Corps' regulation to exclude from the category of adjacent wetlands—and hence from that of "waters of the United States"—wetlands that are not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation. The court took the view that the Corps' authority under the Act and its implementing regulations must be narrowly construed to avoid a taking without just compensation in violation of the Fifth Amendment. Under this construction, it was held that respondent's property was not within the Corps' jurisdiction, because its semi-aquatic characteristics were not the result of frequent flooding by the nearby navigable waters, and that therefore respondent was free to fill the property without obtaining a permit.

Held:

1. The Court of Appeals erred in concluding that a narrow reading of the Corps' regulatory jurisdiction over wetlands was necessary to avoid a taking problem. Neither the imposition of the permit requirement

itself nor the denial of a permit necessarily constitutes a taking. And the Tucker Act is available to provide compensation for takings that may result from the Corps' exercise of jurisdiction over wetlands. Pp. 126–129.

2. The District Court's findings are not clearly erroneous and plainly bring respondent's property within the category of wetlands and thus of the "waters of the United States" as defined by the regulation in question. Pp. 129–131.

3. The language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of material into wetlands adjacent to other "waters of the United States." Pp. 131–139.

729 F. 2d 391, reversed.

WHITE, J., delivered the opinion for a unanimous Court.

Kathryn A. Oberly argued the cause for the United States. With her on the briefs were former *Solicitor General Lee*, *Acting Solicitor General Fried*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Claiborne*, and *Anne S. Almy*.

Edgar B. Washburn argued the cause for respondents. With him on the brief was *Richard K. Gienapp*.*

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*Briefs of *amici curiae* urging reversal were filed for the National Wildlife Federation et al. by *Jerry Jackson*, *Frank J. Kelley*, Attorney General of Michigan, and *Louis Caruso*, Solicitor General and for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *N. Gregory Taylor* and *Theodora Berger*, Assistant Attorneys General, and *Steven H. Kaufmann* and *David W. Hamilton*, Deputy Attorneys General, *Joseph I. Lieberman*, Attorney General of Connecticut, *Michael A. Lilly*, Attorney General of Hawaii, *Neil F. Hartigan*, Attorney General of Illinois, and *Jill Wine-Banks*, Solicitor General, *William J. Guste, Jr.*, Attorney General of Louisiana, *Stephen H. Sachs*, Attorney General of Maryland, *Hubert H. Humphrey III*, Attorney General of Minnesota, *William L. Webster*, Attorney General of Missouri, *Mike Greely*, Attorney General of Montana, *Robert M. Spire*, Attorney General of Nebraska, *Paul Bardacke*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *Arlene Violet*, Attorney General of Rhode Island, *W. J. Michael Cody*, Attorney General of Tennessee, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Charlie Brown*, Attorney General of West Virginia, and *Bronson C. La Follette*, Attorney General of Wisconsin.

JUSTICE WHITE delivered the opinion of the Court.

This case presents the question whether the Clean Water Act, 33 U. S. C. § 1251 *et seq.*, together with certain regulations promulgated under its authority by the Army Corps of Engineers, authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries.

I

The relevant provisions of the Clean Water Act originated in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, and have remained essentially unchanged since that time. Under §§ 301 and 502 of the Act, 33 U. S. C. §§ 1311 and 1362, any discharge of dredged or fill materials into "navigable waters"—defined as the "waters of the United States"—is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to § 404, 33 U. S. C. § 1344.[1] After initially construing the Act to cover only waters navigable in fact, in 1975 the Corps issued interim final regulations redefining "the waters of the United States" to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce. 40 Fed. Reg. 31320

Briefs of *amici curiae* urging affirmance were filed for the American Petroleum Institute by *Stark Ritchie* and *James K. Jackson;* for the Citizens of Chincoteague for a Reasonable Wetlands Policy by *Richard R. Nageotte;* for the Mid-Atlantic Developers Association by *Kenneth D. McPherson;* and for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun* and *Sam Kazman.*

R. Sarah Compton and *Robin S. Conrad* filed a brief for the Chamber of Commerce of the United States as *amicus curiae.*

[1] With respect to certain waters, the Corps' authority may be transferred to States that have devised federally approved permit programs. CWA § 404(g), as added, 91 Stat. 1600, 33 U. S. C. § 1344(g). Absent such an approved program, the Corps retains jurisdiction under § 404 over all "waters of the United States."

(1975). More importantly for present purposes, the Corps construed the Act to cover all "freshwater wetlands" that were adjacent to other covered waters. A "freshwater wetland" was defined as an area that is "periodically inundated" and is "normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." 33 CFR § 209.120(d) (2) *(h)* (1976). In 1977, the Corps refined its definition of wetlands by eliminating the reference to periodic inundation and making other minor changes. The 1977 definition reads as follows:

> "The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 CFR § 323.2(c) (1978).

In 1982, the 1977 regulations were replaced by substantively identical regulations that remain in force today. See 33 CFR § 323.2 (1985).[2]

Respondent Riverside Bayview Homes, Inc. (hereafter respondent), owns 80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan. In 1976, respondent began to place fill materials on its property as part of its preparations for construction of a housing development. The Corps of Engineers, believing that the property was an "adjacent wetland" under the 1975 regulation defining "waters of the United States," filed suit in the United States District Court for the Eastern District of Michigan, seeking to enjoin respondent from filling the property without the permission of the Corps.

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[2] The regulations also cover certain wetlands not necessarily adjacent to other waters. See 33 CFR §§ 323.2(a)(2) and (3) (1985). These provisions are not now before us.

The District Court held that the portion of respondent's property lying below 575.5 feet above sea level was a covered wetland and enjoined respondent from filling it without a permit. Civ. Action No. 77-70041 (Feb. 24, 1977) (App. to Pet. for Cert. 22a); Civ. No. 77-70041 (June 21, 1979) (App. to Pet. for Cert. 32a). Respondent appealed, and the Court of Appeals remanded for consideration of the effect of the intervening 1977 amendments to the regulation. 615 F. 2d 1363 (1980). On remand, the District Court again held the property to be a wetland subject to the Corps' permit authority. Civ. No. 77-70041 (May 10, 1981) (App. to Pet. for Cert. 42a).

Respondent again appealed, and the Sixth Circuit reversed. 729 F. 2d 391 (1984). The court construed the Corps' regulation to exclude from the category of adjacent wetlands—and hence from that of "waters of the United States"—wetlands that were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation. The court adopted this construction of the regulation because, in its view, a broader definition of wetlands might result in the taking of private property without just compensation. The court also expressed its doubt that Congress, in granting the Corps jurisdiction to regulate the filling of "navigable waters," intended to allow regulation of wetlands that were not the result of flooding by navigable waters.[3] Under the court's reading of the regulation, respondent's property was not within the Corps' jurisdiction, because its semiaquatic characteristics were not the result of frequent flooding by the nearby navigable waters. Respondent was therefore free to fill the property without obtaining a permit.

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[3] In denying the Government's petition for rehearing, the panel reiterated somewhat more strongly its belief that the Corps' construction of its regulation was "overbroad and inconsistent with the language of the Act." 729 F. 2d, at 401.

We granted certiorari to consider the proper interpretation of the Corps' regulation defining "waters of the United States" and the scope of the Corps' jurisdiction under the Clean Water Act, both of which were called into question by the Sixth Circuit's ruling. 469 U. S. 1206 (1985). We now reverse.

II

The question whether the Corps of Engineers may demand that respondent obtain a permit before placing fill material on its property is primarily one of regulatory and statutory interpretation: we must determine whether respondent's property is an "adjacent wetland" within the meaning of the applicable regulation, and, if so, whether the Corps' jurisdiction over "navigable waters" gives it statutory authority to regulate discharges of fill material into such a wetland. In this connection, we first consider the Court of Appeals' position that the Corps' regulatory authority under the statute and its implementing regulations must be narrowly construed to avoid a taking without just compensation in violation of the Fifth Amendment.

We have frequently suggested that governmental land-use regulation may under extreme circumstances amount to a "taking" of the affected property. See, *e. g.*, *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172 (1985); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978). We have never precisely defined those circumstances, see *id.*, at 123–128; but our general approach was summed up in *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980), where we stated that the application of land-use regulations to a particular piece of property is a taking only "if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." Moreover, we have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452

U. S. 264, 293–297 (1981). The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

If neither the imposition of the permit requirement itself nor the denial of a permit necessarily constitutes a taking, it follows that the Court of Appeals erred in concluding that a narrow reading of the Corps' regulatory jurisdiction over wetlands was "necessary" to avoid "a serious taking problem." 729 F. 2d, at 398.[4] We have held that, in general, "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law,

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[4] Even were the Court of Appeals correct in concluding that a narrowing construction of the regulation is necessary to avoid takings of property through the application of the permit requirement, the construction adopted—which requires a showing of frequent flooding before property may be classified as a wetland—is hardly tailored to the supposed difficulty. Whether the denial of a permit would constitute a taking in any given case would depend upon the effect of the denial on the owner's ability to put the property to productive use. Whether the property was frequently flooded would have no particular bearing on this question, for overbroad regulation of even completely submerged property may constitute a taking. See, *e. g.*, *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979). Indeed, it may be more likely that denying a permit to fill frequently flooded property will prevent economically viable use of the property than denying a permit to fill property that is wet but not flooded. Of course, by excluding a large chunk of the Nation's wetlands from the regulatory definition, the Court of Appeals' construction might tend to limit the gross number of takings that the permit program would otherwise entail; but the construction adopted still bears an insufficiently precise relationship with the problem it seeks to avoid.

when a suit for compensation can be brought against the sovereign subsequent to a taking." *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1016 (1984) (footnote omitted). This maxim rests on the principle that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional. *Williamson County*, *supra*, at 194–195. For precisely the same reason, the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred. Under such circumstances, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty, cf. *Ashwander* v. *TVA*, 297 U. S. 288, 341–356 (1936) (Brandeis, J., concurring); it merely frustrates permissible applications of a statute or regulation.[5] Because the Tucker Act, 28 U. S. C. § 1491, which presumptively supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute, see *Ruckelshaus* v. *Monsanto Co.*, *supra*, at 1017, is available to provide compensation for takings that may result from the Corps' exercise of jurisdiction over wetlands, the Court of Appeals' fears that application of the Corps' permit program might result in a taking did not justify the court in adopting a

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[5] *United States* v. *Security Industrial Bank*, 459 U. S. 70 (1982), in which we adopted a narrowing construction of a statute to avoid a taking difficulty, is not to the contrary. In that case, the problem was that there was a substantial argument that retroactive application of a particular provision of the Bankruptcy Code would in every case constitute a taking; the solution was to avoid the difficulty by construing the statute to apply only prospectively. Such an approach is sensible where it appears that there is an identifiable class of cases in which application of a statute will necessarily constitute a taking. As we have observed, this is not such a case: there is no identifiable set of instances in which mere application of the permit requirement will necessarily or even probably constitute a taking. The approach of adopting a limiting construction is thus unwarranted.

more limited view of the Corps' authority than the terms of the relevant regulation might otherwise support.[6]

III

Purged of its spurious constitutional overtones, the question whether the regulation at issue requires respondent to obtain a permit before filling its property is an easy one. The regulation extends the Corps' authority under § 404 to all wetlands adjacent to navigable or interstate waters and their tributaries. Wetlands, in turn, are defined as lands that are "inundated *or saturated* by surface *or ground water* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 CFR § 323.2(c) (1985) (emphasis added). The plain language of the regulation refutes the Court of Appeals' conclusion that inundation or "frequent flooding" by the adjacent body of water is a *sine qua non* of a wetland under the regulation. Indeed, the regulation could hardly state more clearly that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that

[6] Because the Corps has now denied respondent a permit to fill its property, respondent may well have a ripe claim that a taking has occurred. On the record before us, however, we have no basis for evaluating this claim, because no evidence has been introduced that bears on the question of the extent to which denial of a permit to fill this property will prevent economically viable uses of the property or frustrate reasonable investment-backed expectations. In any event, this lawsuit is not the proper forum for resolving such a dispute: if the Corps has indeed effectively taken respondent's property, respondent's proper course is not to resist the Corps' suit for enforcement by denying that the regulation covers the property, but to initiate a suit for compensation in the Claims Court. In so stating, of course, we do not rule that respondent will be entitled to compensation for any temporary denial of use of its property should the Corps ultimately relent and allow it to be filled. We have not yet resolved the question whether compensation is a constitutionally mandated remedy for "temporary regulatory takings," see *Williamson County Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172 (1985), and this case provides no occasion for deciding the issue.

the saturation is sufficient to and does support wetland vegetation.

The history of the regulation underscores the absence of any requirement of inundation. The interim final regulation that the current regulation replaced explicitly included a requirement of "periodi[c] inundation." 33 CFR § 209.120-(d)(2)*(h)* (1976). In deleting the reference to "periodic inundation" from the regulation as finally promulgated, the Corps explained that it was repudiating the interpretation of that language "as requiring inundation over a record period of years." 42 Fed. Reg. 37128 (1977). In fashioning its own requirement of "frequent flooding" the Court of Appeals improperly reintroduced into the regulation precisely what the Corps had excised.[7]

Without the nonexistent requirement of frequent flooding, the regulatory definition of adjacent wetlands covers the property here. The District Court found that respondent's property was "characterized by the presence of vegetation that requires saturated soil conditions for growth and re-

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[7] The Court of Appeals seems also to have rested its frequent-flooding requirement on the language in the regulation stating that wetlands encompass those areas that "under normal circumstances do support" aquatic or semiaquatic vegetation. In the preamble to the final regulation, the Corps explained that this language was intended in part to exclude areas characterized by the "abnormal presence of aquatic vegetation in a nonaquatic area." 42 Fed. Reg. 37128 (1977). Apparently, the Court of Appeals concluded that the growth of wetlands vegetation in soils saturated by ground water rather than flooded by waters emanating from an adjacent navigable water or its tributaries was "abnormal" within the meaning of the preamble. This interpretation is untenable in light of the explicit statements in both the regulation and its preamble that areas saturated by ground water can fall within the category of wetlands. It would be nonsensical for the Corps to define wetlands to include such areas and then in the same sentence exclude them on the ground that the presence of wetland vegetation in such areas was abnormal. Evidently, the Corps had something else in mind when it referred to "abnormal" growth of wetlands vegetation—namely, the aberrational presence of such vegetation in dry, upland areas.

production," App. to Pet. for Cert. 24a, and that the source of the saturated soil conditions on the property was ground water. There is no plausible suggestion that these findings are clearly erroneous, and they plainly bring the property within the category of wetlands as defined by the current regulation. In addition, the court found that the wetland located on respondent's property was adjacent to a body of navigable water, since the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to Black Creek, a navigable waterway. Again, the court's finding is not clearly erroneous. Together, these findings establish that respondent's property is a wetland adjacent to a navigable waterway. Hence, it is part of the "waters of the United States" as defined by 33 CFR § 323.2 (1985), and if the regulation itself is valid as a construction of the term "waters of the United States" as used in the Clean Water Act, a question which we now address, the property falls within the scope of the Corps' jurisdiction over "navigable waters" under § 404 of the Act.

IV

A

An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 125 (1985); *Chevron, U. S. A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984). Accordingly, our review is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as "waters."[8]

[8] We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adja-

On a purely linguistic level, it may appear unreasonable to classify "lands," wet or otherwise, as "waters." Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat. In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority. Neither of these sources provides unambiguous guidance for the Corps in this case, but together they do support the reasonableness of the Corps' approach of defining adjacent wetlands as "waters" within the meaning of § 404(a). Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101, 33 U. S. C. § 1251. This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems is maintained." H. R. Rep. No. 92-911, p. 76 (1972). Protection of aquatic ecosystems, Congress recog-

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cent to bodies of open water, see 33 CFR §§ 323.2(a)(2) and (3) (1985), and we do not express any opinion on that question.

nized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92–414, p. 77 (1972).

In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," see CWA §§ 301(a), 404(a), 502(12), 33 U. S. C. §§ 1311(a), 1344(a), 1362(12), the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term. See S. Conf. Rep. No. 92–1236, p. 144 (1972); 118 Cong. Rec. 33756–33757 (1972) (statement of Rep. Dingell).

Of course, it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of "waters" and include in that term "wetlands" as well. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined. Following the lead of the Environmental Protection Agency, see 38 Fed. Reg. 10834 (1973), the Corps has determined that wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality:

> "The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system.

> Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.
>
> "For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system." 42 Fed. Reg. 37128 (1977).

We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the "waters" of the United States—based as it is on the Corps' and EPA's technical expertise—is unreasonable. In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water. The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, see 33 CFR § 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see §§ 320.4(b)(2)(iv) and (v). In addition, adjacent wetlands may "serve significant natural biological functions, including food chain production, general habitat, and nesting,

spawning, rearing and resting sites for aquatic . . . species." § 320.4(b)(2)(i). In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. Again, we cannot say that the Corps' judgment on these matters is unreasonable, and we therefore conclude that a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act. Because respondent's property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case.[9]

B

Following promulgation of the Corps' interim final regulations in 1975, the Corps' assertion of authority under § 404 over waters not actually navigable engendered some congressional opposition. The controversy came to a head during Congress' consideration of the Clean Water Act of 1977, a major piece of legislation aimed at achieving "interim improvements within the existing framework" of the Clean Water Act. H. R. Rep. No. 95–139, pp. 1–2 (1977). In the

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[9] Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit. See 33 CFR § 320.4(b)(4) (1985).

end, however, as we shall explain, Congress acquiesced in the administrative construction.

Critics of the Corps' permit program attempted to insert limitations on the Corps' § 404 jurisdiction into the 1977 legislation: the House bill as reported out of committee proposed a redefinition of "navigable waters" that would have limited the Corps' authority under § 404 to waters navigable in fact and their adjacent wetlands (defined as wetlands periodically inundated by contiguous navigable waters). H. R. 3199, 95th Cong., 1st Sess., § 16 (1977). The bill reported by the Senate Committee on Environment and Public Works, by contrast, contained no redefinition of the scope of the "navigable waters" covered by § 404, and dealt with the perceived problem of overregulation by the Corps by exempting certain activities (primarily agricultural) from the permit requirement and by providing for assumption of some of the Corps' regulatory duties by federally approved state programs. S. 1952, 95th Cong., 1st Sess., § 49(b) (1977). On the floor of the Senate, however, an amendment was proposed limiting the scope of "navigable waters" along the lines set forth in the House bill. 123 Cong. Rec. 26710–26711 (1977).

In both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation. See *id.*, at 10426–10432 (House debate); *id.*, at 26710–26729 (Senate debate). Proponents of a more limited § 404 jurisdiction contended that the Corps' assertion of jurisdiction over wetlands and other nonnavigable "waters" had far exceeded what Congress had intended in enacting § 404. Opponents of the proposed changes argued that a narrower definition of "navigable waters" for purposes of § 404 would exclude vast stretches of crucial wetlands from the Corps' jurisdiction, with detrimental effects on wetlands ecosystems, water quality, and the aquatic environment generally. The debate, particularly in the Senate, was lengthy. In the House, the debate ended with the adoption of a narrowed definition of "waters"; but in the Senate the limiting

amendment was defeated and the old definition retained. The Conference Committee adopted the Senate's approach: efforts to narrow the definition of "waters" were abandoned; the legislation as ultimately passed, in the words of Senator Baker, "retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act."[10]

The significance of Congress' treatment of the Corps' § 404 jurisdiction in its consideration of the Clean Water Act of 1977 is twofold. First, the scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of "navigable waters." Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it. See *Bob Jones University* v. *United States*, 461 U. S. 574, 599–601 (1983); *United States* v. *Rutherford*, 442 U. S. 544, 554, and n. 10 (1979).

Second, it is notable that even those who would have restricted the reach of the Corps' jurisdiction would have done so not by removing wetlands altogether from the definition of "waters of the United States," but only by restricting the scope of "navigable waters" under § 404 to waters navigable in fact *and their adjacent wetlands*. In amending the definition of "navigable waters" for purposes of § 404 only, the backers of the House bill would have left intact the existing definition of "navigable waters" for purposes of § 301 of the

[10] 123 Cong. Rec. 39209 (1977); see also *id.*, at 39210 (statement of Sen. Wallop); *id.*, at 39196 (statement of Sen. Randolph); *id.*, at 38950 (statement of Rep. Murphy); *id.*, at 38994 (statement of Rep. Ambro).

Act, which generally prohibits discharges of pollutants into navigable waters. As the House Report explained: "'Navigable waters' as used in section 301 includes all of the waters of the United States including their adjacent wetlands." H. R. Rep. No. 95–139, p. 24 (1977). Thus, even those who thought that the Corps' existing authority under § 404 was too broad recognized (1) that the definition of "navigable waters" then in force for both § 301 and § 404 was reasonably interpreted to include adjacent wetlands, (2) that the water quality concerns of the Clean Water Act demanded regulation of at least some discharges into wetlands, and (3) that whatever jurisdiction the Corps would retain over discharges of fill material after passage of the 1977 legislation should extend to discharges into wetlands adjacent to any waters over which the Corps retained jurisdiction. These views provide additional support for a conclusion that Congress in 1977 acquiesced in the Corps' definition of waters as including adjacent wetlands.

Two features actually included in the legislation that Congress enacted in 1977 also support the view that the Act authorizes the Corps to regulate discharges into wetlands. First, in amending § 404 to allow federally approved state permit programs to supplant regulation by the Corps of certain discharges of fill material, Congress provided that the States would not be permitted to supersede the Corps' jurisdiction to regulate discharges into actually navigable waters and waters subject to the ebb and flow of the tide, "including wetlands adjacent thereto." CWA § 404(g)(1), 33 U. S. C. § 1344(g)(1). Here, then, Congress expressly stated that the term "waters" included adjacent wetlands.[11] Second, the

[11] To be sure, § 404(g)(1) does not conclusively determine the construction to be placed on the use of the term "waters" elsewhere in the Act (particularly in § 502(7), which contains the relevant definition of "navigable waters"); however, in light of the fact that the various provisions of the Act should be read *in pari materia*, it does at least suggest strongly that the term "waters" as used in the Act does not necessarily exclude "wetlands."

1977 Act authorized an appropriation of $6 million for completion by the Department of Interior of a "National Wetlands Inventory" to assist the States "in the development and operation of programs under this Act." CWA § 208(i)(2), 33 U. S. C. § 1288(i)(2). The enactment of this provision reflects congressional recognition that wetlands are a concern of the Clean Water Act and supports the conclusion that in defining the waters covered by the Act to include wetlands, the Corps is "implementing congressional policy rather than embarking on a frolic of its own." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 375 (1969).

C

We are thus persuaded that the language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the "waters of the United States." The regulation in which the Corps has embodied this interpretation by its terms includes the wetlands on respondent's property within the class of waters that may not be filled without a permit; and, as we have seen, there is no reason to interpret the regulation more narrowly than its terms would indicate. Accordingly, the judgment of the Court of Appeals is

Reversed.

THOMAS *v.* ARN, SUPERINTENDENT, OHIO REFORMATORY FOR WOMEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-5630. Argued October 7, 1985—Decided December 4, 1985

Petitioner was convicted of homicide in an Ohio court, and ultimately the Ohio Supreme Court upheld the conviction. She sought habeas corpus relief in the Federal District Court, which referred the case to a Magistrate, who issued a report recommending denial of the writ and containing proposed findings and conclusions of law and a notice that failure to file objections within 10 days waived the right to appeal the District Court's order. Petitioner failed to file objections even though she had received an extension of time to do so, but the District Judge *sua sponte* reviewed the entire record *de novo* and dismissed the petition on the merits. On appeal, petitioner provided no explanation for her failure to object to the Magistrate's report. Without reaching the merits, the Court of Appeals affirmed, holding that petitioner had waived the right to appeal by failing to file objections to the Magistrate's report.

Held: A court of appeals may adopt a rule conditioning appeal, when taken from a district court judgment that adopts a magistrate's recommendation, upon the filing of objections with the district court identifying those issues on which further review is desired. Such a rule, at least when (as here) it incorporates clear notice to the litigants and an opportunity to seek an extension of time for filing objections, is a valid exercise of the court's supervisory power that does not violate either the Federal Magistrates Act or the Constitution. Pp. 145-155.

(a) Here, the Court of Appeals intended to adopt a rule of procedure in the exercise of its supervisory power. Neither the intent nor the practical effect of the court's waiver rule is to restrict the court's own jurisdiction. Pp. 145-146.

(b) The courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation. The fact that the Sixth Circuit has deemed petitioner to have forfeited her statutory right to an appeal is not enough, standing alone, to invalidate the court's exercise of its supervisory power. Moreover, the Sixth Circuit's decision to require the filing of objections is supported by sound considerations of judicial economy. Pp. 146-148.

(c) Neither the language nor the legislative history of the Federal Magistrates Act—which provides that a litigant "may" file objections to

the magistrate's report within 10 days and thus obtain *de novo* review by the district judge, 28 U. S. C. § 636(b)(1)(C)—supports petitioner's argument that the Act precludes the waiver rule adopted by the Sixth Circuit. The Act does not require that the district court review the magistrate's report under some lesser standard than *de novo* review when no objection is filed. Nor does the obligatory filing of objections under the Act extend only to findings of fact and not to the magistrate's conclusions of law. Moreover, the waiver of appellate review is not inconsistent with the Act's purposes. Pp. 148–153.

(d) The waiver of appellate review does not violate Article III of the Constitution. Although a magistrate is not an Article III judge, a district court may refer dispositive motions to a magistrate for a recommendation so long as the entire process takes place under the district court's control and jurisdiction, and the judge exercises the ultimate authority to issue an appropriate order. The waiver of appellate review does not implicate Article III, because it is the district court, not the court of appeals, that must exercise supervision over the magistrate, and the waiver rule does not elevate the magistrate from an adjunct to the functional equivalent of an Article III judge. Nor does the waiver rule violate the Due Process Clause of the Fifth Amendment. Petitioner's statutory right of appeal was not denied; it was merely conditioned upon the filing of a piece of paper. Pp. 153–155.

728 F. 2d 813, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 156. STEVENS, J., filed a dissenting opinion, *post*, p. 157.

Christopher D. Stanley argued the cause for petitioner. With him on the brief was *Louis A. Jacobs*.

Richard David Drake, Assistant Attorney General of Ohio, argued the cause for respondent. With him on the brief was *Anthony J. Celebrezze, Jr.*, Attorney General.

JUSTICE MARSHALL delivered the opinion of the Court.

In 1976, Congress amended § 101 of the Federal Magistrates Act, 28 U. S. C. § 636, to provide that a United States district judge may refer dispositive pretrial motions, and petitions for writ of habeas corpus, to a magistrate, who shall conduct appropriate proceedings and recommend dispo-

sitions. Pub. L. 94–577, 90 Stat. 2729.[1] The amendments also provide that any party that disagrees with the magistrate's recommendations "may serve and file written objections" to the magistrate's report, and thus obtain *de novo* review by the district judge.[2] The question presented is whether a court of appeals may exercise its supervisory powers to establish a rule that the failure to file objections to the magistrate's report waives the right to appeal the district court's judgment. We hold that it may.

I

Petitioner was convicted by an Ohio court in 1978 of fatally shooting her common-law husband during an argument.

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[1] Title 28 U. S. C. § 636(b)(1)(B) provides:

"[A] judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement."

The motions excepted in § 636(b)(1)(A), and included by reference in subparagraph (B), are motions

"for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action."

[2] Title 28 U. S. C. § 636(b)(1)(C) provides:

"[T]he magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

"Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions."

The evidence at trial showed that the victim was a violent man who had beaten petitioner on a number of occasions during the previous three years. Petitioner raised the issue of self-defense at trial, and sought to call two witnesses who would present expert testimony concerning the Battered Wife Syndrome. After conducting a *voir dire* of these witnesses in chambers, the trial court refused to admit the testimony, on the grounds that the jury did not need the assistance of expert testimony to understand the case and that the witnesses, who had not personally examined petitioner, could not testify about her state of mind at the time of the shooting.

The Court of Appeals of Cuyahoga County reversed. *State* v. *Thomas*, 64 Ohio App. 2d 141, 411 N. E. 2d 845 (1979). The court's syllabus[3] concluded that testimony concerning the Battered Wife Syndrome is admissible "to afford the jury an understanding of the defendant's state of mind at the time she committed the homicide." App. 9. The Ohio Supreme Court, on discretionary review, reversed. *State* v. *Thomas*, 66 Ohio St. 2d 518, 423 N. E. 2d 137 (1981). The court held that the testimony was irrelevant to the issue of self-defense, and that its prejudicial effect would outweigh its probative value. Having exhausted state remedies, petitioner sought habeas corpus relief in the United States District Court for the Northern District of Ohio. The petition raised, *inter alia*, the question whether petitioner was denied a fair trial by the trial court's refusal to admit testimony concerning the Battered Wife Syndrome. Petitioner filed a memorandum of law in support of the petition. The District Judge, acting pursuant to 28 U. S. C. § 636(b)(1)(B), referred the case, including petitioner's memorandum of law, to a Magistrate. The Magistrate did not hold a hearing. On May 11, 1982, the Magistrate issued his report, containing proposed findings of fact and conclusions of law and recom-

[3] In Ohio, the court's syllabus contains the controlling law. See *Engle* v. *Isaac*, 456 U. S. 107, 111, n. 3 (1982), citing *Haas* v. *State*, 103 Ohio St. 1, 7–8, 132 N. E. 158, 159–160 (1921).

mending that the writ be denied. On the issue of the Battered Wife Syndrome testimony, the Magistrate concluded that the trial court's failure to admit the proffered testimony had not impaired the fundamental fairness of the trial, and therefore was not an adequate ground for habeas corpus relief.

The last page of the Magistrate's report contained the prominent legend:

> "ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. See: *United States* v. *Walters*, 638 F. 2d 947 (6th Cir. 1981)."

Despite this clear notice, petitioner failed to file objections at any time. She sought and received an extension of time to file objections through June 15, 1982, on the grounds that "this case entails many substantive issues and counsel needs more time to write his brief." However, petitioner made no further submissions on the merits to the District Court. Notwithstanding petitioner's failure to file objections, the District Judge *sua sponte* "review[ed] . . . the entire record *de novo*," App. 59, and dismissed the petition on the merits. Petitioner sought and was granted leave to appeal.

Petitioner's brief on appeal raised only the issue of the Battered Wife Syndrome testimony. The brief provided no explanation for petitioner's failure to object to the Magistrate's report. Counsel for petitioner waived oral argument, and the case was decided on the briefs. The Court of Appeals for the Sixth Circuit affirmed. 728 F. 2d 813 (1984). Without reaching the merits, it held that petitioner had waived the right to appeal by failing to file objections to the Magistrate's report. *Id.*, at 815. The court relied upon its prior decision in *United States* v. *Walters*, 638 F. 2d 947 (1981), which established the prospective rule that failure to file timely objections with the district court waives subsequent review in the

court of appeals. We granted the petition for a writ of certiorari, 470 U. S. 1027 (1985), and we now affirm.

II

In *United States* v. *Walters*, *supra*, the appellant failed to object to the Magistrate's report, and the District Court adopted that report as its disposition of the case. The appellant then brought an appeal. The Court of Appeals for the Sixth Circuit considered the threshold question whether the appellant's failure to apprise the District Court of its disagreement with the Magistrate's recommendation waived the right to appeal. The court held:

> "The permissive language of 28 U. S. C. § 636 suggests that a party's failure to file objections is not a waiver of appellate review. However, the fundamental congressional policy underlying the Magistrate's Act—to improve access to the federal courts and aid the efficient administration of justice—is best served by our holding that a party shall file objections with the district court or else waive right to appeal. Additionally, through the exercise of our supervisory power, we hold that a party shall be informed by the magistrate that objections must be filed within ten days or further appeal is waived.
>
> . . . . .
>
> "However, we give our ruling only prospective effect because rules of procedure should promote, not defeat the ends of justice . . . ." *Id.*, at 949–950 (footnote and citations omitted).

The nature of the rule and its prospective application demonstrate that the court intended to adopt a "rul[e] of procedure," *id.*, at 950, in the exercise of its supervisory powers. Later opinions of the Sixth Circuit make it clear that the court views *Walters* in this way. See *Patterson* v. *Mintzes*, 717 F. 2d 284, 286 (1983) ("In *Walters* . . . this Court promulgated [a] rule of waiver"); *United States* v. *Martin*, 704 F. 2d 267, 275 (1983) (Jones, J., concurring) (characterizing *Wal-*

ters as "[r]ulemaking through the exercise of supervisory powers"). Thus, petitioner's first contention—that the Court of Appeals has refused to exercise the jurisdiction that Congress granted it—is simply inaccurate. The Court of Appeals expressly acknowledged that it had subject-matter jurisdiction over petitioner's appeal. 728 F. 2d, at 814. The Sixth Circuit has also shown that its rule is not jurisdictional by excusing the procedural default in a recent case. See *Patterson* v. *Mintzes*, *supra* (considering appeal on merits despite *pro se* litigant's late filing of objections). We therefore conclude that neither the intent nor the practical effect of the Sixth Circuit's waiver rule is to restrict the court's own jurisdiction.[4]

III

It cannot be doubted that the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation. Cf. *Cuyler* v. *Sullivan*, 446 U. S. 335, 346, n. 10 (1980) (approving exercise of supervisory powers to require district court inquiry concerning joint representation of criminal defendants). Indeed, this Court has acknowledged the power of the courts of appeals to mandate "procedures deemed desirable from the viewpoint of sound judicial practice although

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[4] The First, Second, Fourth, and Fifth Circuits have adopted waiver rules similar to the Sixth Circuit rule at issue in the present case. See *Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F. 2d 603 (CA1 1980); *McCarthy* v. *Manson*, 714 F. 2d 234, 237 (CA2 1983); *United States* v. *Schronce*, 727 F. 2d 91 (CA4), cert. denied, 467 U. S. 1208 (1984); *United States* v. *Lewis*, 621 F. 2d 1382, 1386 (CA5 1980), cert. denied, 450 U. S. 935 (1981). The Ninth and Eleventh Circuits have concluded that the failure to file objections waives only factual issues on the appeal. See *Britt* v. *Simi Valley Unified School District*, 708 F. 2d 452, 454 (CA9 1983) (order denying petition for rehearing); *Nettles* v. *Wainwright*, 677 F. 2d 404 (CA11 1982) (en banc); but see *Lorin Corp.* v. *Goto & Co.*, 700 F. 2d 1202, 1205–1207 (CA8 1983) (rejecting waiver rule, at least where parties had not been notified that failure to object would waive appeal). In none of these cases have the courts spoken in jurisdictional terms.

in nowise commanded by statute or by the Constitution." *Cupp* v. *Naughten*, 414 U. S. 141, 146 (1973); see also *Barker* v. *Wingo*, 407 U. S. 514, 530, n. 29 (1972).[5] Had petitioner failed to comply with a scheduling order or pay a filing fee established by a court of appeals, that court could certainly dismiss the appeal. Cf. *Link* v. *Wabash R. Co.*, 370 U. S. 626 (1962) (recognizing "inherent power" of court to dismiss case for want of prosecution). The fact that the Sixth Circuit has deemed petitioner to have forfeited her statutory right to an appeal is not enough, standing alone, to invalidate the court's exercise of its supervisory power.

The Sixth Circuit's decision to require the filing of objections is supported by sound considerations of judicial economy. The filing of objections to a magistrate's report enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute.[6] The Sixth Circuit's rule, by precluding appellate

[5] This power rests on the firmest ground when used to establish rules of judicial procedure. See Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1465 (1984) (federal courts have inherent authority to regulate "technical details and policies intrinsic to the litigation process"). The Courts of Appeals have often exercised that authority. See, *e. g.*, *Tingler* v. *Marshall*, 716 F. 2d 1109, 1112 (CA6 1983) (establishing procedure for *sua sponte* dismissal of complaints); *United States* v. *Florea*, 541 F. 2d 568, 572 (CA6 1976) (prospective rule holding that contact between party's agent and juror is *per se* prejudicial), cert. denied, 430 U. S. 945 (1977); *United States* v. *Schiavo*, 504 F. 2d 1, 7–8 (CA3) (en banc) (establishing procedures for enjoining publication of information concerning criminal trial), cert. denied *sub nom. Ditter* v. *Philadelphia Newspapers, Inc.*, 419 U. S. 1096 (1974).

[6] In the present case, the filing of objections could have resulted in a considerable saving of judicial time. The original petition contained several grounds for relief, but on appeal petitioner raised only the issue of the admissibility of expert testimony on the Battered Wife Syndrome. Had petitioner objected only to that aspect of the Magistrate's report, the Magistrate's review would have served to narrow the dispute for the District Judge, and petitioner would have preserved her right to appeal the exclusion of her expert testimony.

review of any issue not contained in objections, prevents a litigant from "sandbagging" the district judge by failing to object and then appealing. Absent such a rule, any issue before the magistrate would be a proper subject for appellate review. This would either force the court of appeals to consider claims that were never reviewed by the district court, or force the district court to review every issue in every case, no matter how thorough the magistrate's analysis and even if both parties were satisfied with the magistrate's report. Either result would be an inefficient use of judicial resources. In short, "[t]he same rationale that prevents a party from raising an issue before a circuit court of appeals that was not raised before the district court applies here." *United States* v. *Schronce*, 727 F. 2d 91, 94 (CA4) (footnote omitted), cert. denied, 467 U. S. 1208 (1984).

IV

Even a sensible and efficient use of the supervisory power, however, is invalid if it conflicts with constitutional or statutory provisions. A contrary result "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States* v. *Payner*, 447 U. S. 727, 737 (1980). Thus we now consider whether the Sixth Circuit's waiver rule conflicts with statutory law or with the Constitution.

A

Petitioner argues that the Federal Magistrates Act precludes the waiver rule adopted by the Sixth Circuit. Her argument focuses on the permissive nature of the statutory language. The statute provides that a litigant "may" file objections, and nowhere states that the failure to do so will waive an appeal. Petitioner cites the Eighth Circuit's conclusion that "[o]ne would think that if Congress had wished such a drastic consequence to follow from the missing of the ten-day time limit, it would have said so explicitly." *Lorin Corp.* v. *Goto & Co.*, 700 F. 2d 1202, 1206 (1983). However,

we need not decide whether the Act mandates a waiver of appellate review absent objections. We hold only that it does not forbid such a rule.

Section 636(b)(1)(C) provides that "[a] judge of the [district] court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." The statute does not on its face require any review at all, by either the district court or the court of appeals, of any issue that is not the subject of an objection. Petitioner argues, however, that the statutory language and purpose implicitly require the district court to review a magistrate's report even if no party objects. If petitioner's interpretation of the statute is correct, then the waiver of appellate review, as formulated by the Sixth and other Circuits, proceeds from an erroneous assumption—that the failure to object may constitute a procedural default waiving review even at the district court level.[7] Moreover, were the district judge required to review the magistrate's report in every case, the waiver of appellate review would not promote judicial economy as discussed in Part III, *supra*.

Petitioner first argues that a failure to object waives only *de novo* review, and that the district judge must still review the magistrate's report under some lesser standard. However, § 636(b)(1)(C) simply does not provide for such review. This omission does not seem to be inadvertent, because Congress provided for a "clearly erroneous or contrary to law" standard of review of a magistrate's disposition of certain pretrial matters in § 636(b)(1)(A). See *Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F. 2d 603, 605 (CA1 1980). Nor

[7] The Sixth Circuit, in *Walters*, cited with approval the First Circuit's decision in *Park Motor Mart*, which held that "a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration." 616 F. 2d, at 605; see *Walters*, 638 F. 2d, at 950. See also *McCarthy* v. *Manson*, 714 F. 2d, at 237 ("When a party fails to object timely to a magistrate's recommended decision, it waives any right to further judicial review of that decision") (footnote and citation omitted).

does petitioner point to anything in the legislative history of the 1976 amendments mandating review under some lesser standard. We are therefore not persuaded that the statute positively requires some lesser review by the district court when no objections are filed.

Petitioner also argues that, under the Act, the obligatory filing of objections extends only to findings of fact. She urges that Congress, in order to vest final authority over questions of law in an Article III judge, intended that the district judge would automatically review the magistrate's conclusions of law. We reject, however, petitioner's distinction between factual and legal issues. Once again, the plain language of the statute recognizes no such distinction.[8] We also fail to find such a requirement in the legislative history.

It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings. The House and Senate Reports accompanying the 1976 amendments do not expressly consider what sort of review the district court should perform when no party objects to the magistrate's report. See S. Rep. No. 94–625, pp. 9–10 (1976) (hereafter Senate Report); H. R. Rep. No. 94–1609, p. 11 (1976) (hereafter House Report). There is nothing in those Reports, however, that demonstrates an intent to require the district court to give any more consideration to the magistrate's report than the court considers appropriate.[9] Moreover, the Subcommittee

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[8] This is so even though the category of dispositive matters subject to *de novo* review by the district judge as of right only upon filing of objections includes motions for judgment on the pleadings and dismissal for failure to state a claim on which relief can be granted, which consist exclusively of issues of law. See n. 1, *supra*.

[9] Petitioner points to a passage in the House Report that quotes from *Campbell* v. *United States District Court*, 501 F. 2d 196, 206 (CA9), cert. denied, 419 U. S. 879 (1974). The Ninth Circuit concluded: "If neither party contests the magistrate's proposed findings of fact, the court may assume their correctness and decide the motion on the applicable law." See

that drafted and held hearings on the 1976 amendments had before it the guidelines of the Administrative Office of the United States Courts concerning the efficient use of magistrates. Those guidelines recommended to the district courts that "[w]here a magistrate makes a finding *or ruling* on a motion or an issue, his determination should become that of the district court, unless specific objection is filed within a reasonable time." See Jurisdiction of United States Magistrates, Hearings on S. 1283 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 24 (1975) (emphasis added) (hereafter Senate Hearings). The Committee also heard Judge Metzner of the Southern District of New York, the chairman of a Judicial Conference Committee on the administration of the magistrate system, testify that he personally followed that practice. See *id.*, at 11 ("If any objections come in, . . . I review [the record] and decide it. If no objections come in, I merely sign the magistrate's order").[10] The

House Report, at 3. However, that statement was part of a longer quotation setting a *de novo* review standard when objections are filed. The House Report stated that a House amendment, which called for *de novo* review in the same circumstances, was "adopted" from the Ninth Circuit's decision in *Campbell*. House Report, at 3. We believe, therefore, that the House Report used the language from *Campbell* only to support a *de novo* standard upon the filing of objections, and not for any other proposition.

[10] Indeed, Judge Metzner specifically addressed the difference between a magistrate's ruling on a nondispositive motion, which Congress clearly "intended to be 'final' unless a judge of the court exercises his ultimate authority to reconsider the magistrate's determination," Senate Report, at 8, and a ruling on a dispositive motion. Judge Metzner concluded: "I think we are talking more about form, than we are of substance." Senate Hearings, at 12.

Moreover, both Judge Metzner and the Judicial Conference were of the opinion that Congress could probably vest magistrates with the authority to make a final decision on dispositive motions without violating Article III, and that the language of § 636(b)(1)(B), calling for the magistrate to make only recommendations on dispositive motions, was adopted out of an abundance of caution. See Senate Hearings, at 6 (statement of

Judicial Conference of the United States, which supported the *de novo* standard of review eventually incorporated in § 636(b)(1)(C), opined that in most instances no party would object to the magistrate's recommendation, and the litigation would terminate with the judge's adoption of the magistrate's report. See Senate Hearings, at 35, 37. Congress apparently assumed, therefore, that any party who was dissatisfied for any reason with the magistrate's report would file objections, and those objections would trigger district court review.[11] There is no indication that Congress, in enacting § 636(b)(1)(C), intended to require a district judge to review a magistrate's report to which no objections are filed. It did not preclude treating the failure to object as a procedural default, waiving the right to further consideration of any sort. We thus find nothing in the statute or the legislative history that convinces us that Congress intended to forbid a rule such as the one adopted by the Sixth Circuit.

Nor is the waiver of appellate review inconsistent with the purposes of the Act. The Act grew out of Congress' desire to give district judges "additional assistance" in dealing with a caseload that was increasing far more rapidly than the number of judgeships. *Mathews* v. *Weber*, 423 U. S. 261, 268 (1976).[12] Congress did not intend district judges "to devote a

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Judge Metzner); *id.*, at 35 (report of Judicial Conference of the United States). While we express no view on the accuracy of those opinions, we think they are relevant to Congress' intent. See also House Report, at 8 ("it is not feasible for every judicial act, at every stage of the proceeding, to be performed by 'a judge of the court' ").

[11] See Senate Hearings, at 32 (statement of William P. Westphal, chief counsel) (filing objections as provided in the statute "is the procedure for them to follow, if they feel aggrieved by any of these motions").

[12] The 1976 amendments were prompted by this Court's decision in *Wingo* v. *Wedding*, 418 U. S. 461 (1974). That case held that Congress had not intended, in enacting the Federal Magistrates Act in 1968, to permit a magistrate to conduct an evidentiary hearing on a habeas corpus petition. Congress enacted the 1976 amendments to "restat[e] and clarif[y]" Congress' intent to permit magistrates to hold evidentiary hearings and perform other judicial functions. See Senate Report, at 3.

substantial portion of their available time to various procedural steps rather than to the trial itself." House Report, at 7. Nor does the legislative history indicate that Congress intended this task merely to be transferred to the court of appeals. It seems clear that Congress would not have wanted district judges to devote time to reviewing magistrate's reports except to the extent that such review is requested by the parties or otherwise necessitated by Article III of the Constitution. We now turn to the latter question.

B

Petitioner contends that the waiver of appellate review violates Article III and the Due Process Clause of the Fifth Amendment. Article III vests the judicial power of the United States in judges who have life tenure and protection from decreases in salary.[13] Although a magistrate is not an Article III judge, this Court has held that a district court may refer dispositive motions to a magistrate for a recommendation so long as "the entire process takes place under the district court's total control and jurisdiction," *United States* v. *Raddatz*, 447 U. S. 667, 681 (1980), and the judge "'exercise[s] the ultimate authority to issue an appropriate order,'" *id.*, at 682, quoting Senate Report, at 3. The Sixth Circuit's rule, as petitioner sees it, permits a magistrate to exercise the Article III judicial power, because the rule forecloses meaningful review of a magistrate's report at both the district and appellate levels if no objections are filed.

We find that argument untenable. The waiver of appellate review does not implicate Article III, because it is the

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[13] Article III, § 1, of the Constitution provides:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

district court, not the court of appeals, that must exercise supervision over the magistrate. Even assuming, however, that the effect of the Sixth Circuit's rule is to permit both the district judge and the court of appeals to refuse to review a magistrate's report absent timely objection, we do not believe that the rule elevates the magistrate from an adjunct to the functional equivalent of an Article III judge. The rule merely establishes a procedural default that has no effect on the magistrate's or the court's jurisdiction. The district judge has jurisdiction over the case at all times. He retains full authority to decide whether to refer a case to the magistrate, to review the magistrate's report, and to enter judgment. Any party that desires plenary consideration by the Article III judge of any issue need only ask. Moreover, while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard. Indeed, in the present case the District Judge made a *de novo* determination of the petition despite petitioner's failure even to suggest that the Magistrate erred. The Sixth Circuit's rule, therefore, has not removed "'the essential attributes of the judicial power,'" *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 77 (1982) (plurality opinion), quoting *Crowell* v. *Benson*, 285 U. S. 22, 51 (1932), from the Article III tribunal.[14]

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[14] The plurality in *Northern Pipeline*, and the concurrence in *Raddatz*, noted that the magistrate himself remains under the district court's authority. The magistrate is appointed, and subject to removal, by the district court. See *Northern Pipeline*, 458 U. S., at 79, and n. 30; *Raddatz*, 447 U. S., at 685 (BLACKMUN, J., concurring) ("the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department"). Those observations, of course, are also relevant here, and again weigh on the side of concluding that a magistrate remains an adjunct even though the district court and the court of appeals may refuse to entertain issues that are not raised in properly filed objections.

Petitioner claims also that she was denied her statutory right of appeal, in violation of the Due Process Clause. That right was not denied, however; it was merely conditioned upon the filing of a piece of paper. Petitioner was notified in unambiguous terms of the consequences of a failure to file, and deliberately failed to file nevertheless. We recently reiterated our longstanding maxim that "the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 437 (1982). The same rationale applies to the forfeiture of an appeal, and we believe that the Sixth Circuit's rule is reasonable. Litigants subject to the Sixth Circuit's rule are afforded "'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,'" *ibid.*, quoting *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965), to obtain a hearing by the Court of Appeals. We also emphasize that, because the rule is a nonjurisdictional waiver provision, the Court of Appeals may excuse the default in the interests of justice.[15]

V

We hold that a court of appeals may adopt a rule conditioning appeal, when taken from a district court judgment that adopts a magistrate's recommendation, upon the filing of objections with the district court identifying those issues on which further review is desired. Such a rule, at least when it incorporates clear notice to the litigants and an opportunity to seek an extension of time for filing objections, is a valid exercise of the supervisory power that does not violate either the Federal Magistrates Act or the Constitution. The judgment of the Court of Appeals is

Affirmed.

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[15] Cf. Fed. Rule Crim. Proc. 52(b) (court may correct plain error despite failure of party to object). We need not decide at this time what standards the courts of appeals must apply in considering exceptions to their waiver rules.

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN joins, dissenting.

Under the rule adopted by the United States Court of Appeals for the Sixth Circuit and sanctioned by this Court, a party waives his right to appeal the judgment of the district court by failing to file timely objections to a magistrate's report. Because this rule conflicts with the plain language of the Federal Magistrate's Act, I dissent.

The Magistrate's Act states that "any party may serve and file written objections to [the magistrate's] proposed findings and recommendations. . . . A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U. S. C. § 636(b)(1)(C). The Act clearly specifies the penalty for a party's failure to file objections to the magistrate's report—the party loses his right to *de novo* review by the district court. The Act does not *require* a party to file objections. And it does not, contrary to the Sixth Circuit's rule, provide that a party's failure to file objections deprives him of the right to *any* review by the district court,* or by the court of appeals. Rather, the district court judge retains the power, and indeed the obligation, to "accept, reject, or modify" the magistrate's findings and recommendations. 28 U. S. C. § 636(b)(1)(C). The Act leaves unaffected a party's right to appeal the judgment of the district court to the court of appeals.

A habeas applicant is entitled to appeal only the final order of the district court. 28 U. S. C. § 2253. I fail to understand how petitioner could have waived her right to appeal a final order *before* that order was rendered. The majority attempts to justify this result by characterizing the Sixth Circuit's rule as a simple exercise of its supervisory powers.

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*The absence of an objection cannot "relieve[e] the district court of its obligation to act judicially, to decide for itself whether the Magistrate's report is correct." *Lorin Corp.* v. *Goto & Co.*, 700 F. 2d 1202, 1206 (CA8 1983).

While I do not question the Court of Appeals' authority to promulgate reasonable procedural rules, I would not sanction a rule that imposes a penalty for failure to file objections beyond that contemplated by Congress. Because the Sixth Circuit's "supervisory rule" unlawfully deprives petitioner of her statutory right to appeal the District Court's judgment, I respectfully dissent.

JUSTICE STEVENS, dissenting.

The waiver rule adopted by the United States Court of Appeals for the Sixth Circuit is neither required nor prohibited by the Federal Magistrates Act. As a product of that court's supervisory power, it need not conform to the practice followed in other circuits. Hence, despite the appearance of a conflict among the circuits, the interest in uniform interpretation of federal law is not implicated and this Court might have been well advised simply to deny the petition for certiorari. Since the Court has elected to review the application of the Sixth Circuit's rule, however, I believe it should modify it in one respect.

As the Court demonstrates, in most cases it is surely permissible to treat the failure to file timely objections to a magistrate's report as a waiver of the right to review, not only in the district court, but in the court of appeals as well. But our precedents often recognize an exception to waiver rules—namely, when a reviewing court decides the merits of an issue even though a procedural default relieved it of the duty to do so. See, *e. g.*, *Oklahoma City* v. *Tuttle*, 471 U. S. 800, 815–816 (1985) (reaching merits despite failure to object to jury instruction because Court of Appeals overlooked default); *On Lee* v. *United States*, 343 U. S. 747, 750, n. 3 (1952) ("Though we think the Court of Appeals would have been within its discretion in refusing to consider the point, their having passed on it leads us to treat the merits also"). It is for this reason that we may disregard a procedural default in a state trial court if a state appellate court addresses the federal issue. *E. g.*, *Ulster County Court* v.

Allen, 442 U. S. 140, 149 (1979); *Raley* v. *Ohio*, 360 U. S. 423, 436–437 (1959). In such cases, the reasons for relying on the procedural default as a bar to further review are generally, if not always, outweighed by the interest in having the merits of the issue correctly resolved.

A similar exception should be recognized in this case. When the district court elects to exercise its power to review a magistrate's report *de novo* and renders an opinion resolving an issue on the merits, there is no danger of "sandbagging" the district judge. See *ante*, at 148. Moreover, if the district judge has concluded that there is enough merit in a claim to warrant careful consideration and explanation despite the litigant's failure to object before the magistrate, the interest in minimizing the risk of error should prevail over the interest in requiring strict compliance with procedural rules. Because the District Court decided the merits of petitioner's claim in this case, I would hold that she has a right to review in the Court of Appeals. To that admittedly limited extent, I respectfully dissent.

MAINE v. MOULTON

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

No. 84-786. Argued October 8, 1985—Decided December 10, 1985

Respondent, represented by retained counsel, pleaded not guilty in a Maine Superior Court to charges of theft by receiving of automotive vehicles and parts. Respondent's codefendant Colson informed the police that he had received anonymous threatening telephone calls regarding the pending charges and indicated that he wished to talk to the police about the charges. Before meeting with the police, Colson met with respondent to plan for the upcoming trial, and, according to Colson, respondent suggested the possibility of killing a State's witness. Thereafter, Colson and his lawyer met with police officers, and Colson confessed to his participation with respondent in committing the crimes for which they had been indicted and agreed to testify against respondent and cooperate in the prosecution of respondent on the pending charges if no further charges were brought against Colson. Colson also consented to have a recording device placed on his telephone, and agreed to record any anonymous threats or any calls from respondent. Having learned from recorded telephone calls that Colson and respondent were going to meet to plan defense strategy for the upcoming trial, the police obtained Colson's consent to be equipped with a body wire transmitter to record the meeting. Although Colson was instructed not to attempt to question respondent at the meeting, his remarks in fact caused respondent to make incriminating statements. The trial court denied respondent's pretrial motion to suppress the recorded statements he made to Colson as having been obtained in violation of respondent's right to the assistance of counsel under the Sixth and Fourteenth Amendments on the ground that the recordings were made for other reasons. Some of respondent's recorded incriminating statements made at the meeting with Colson were admitted in evidence, and respondent was convicted of some of the charges. The Supreme Judicial Court of Maine reversed and remanded for a new trial.

Held: Respondent's Sixth Amendment right to the assistance of counsel was violated by the admission at trial of incriminating statements made by him to Colson after indictment and at the meeting of the two to plan defense strategy for the upcoming trial. Pp. 168-180.

(a) The assistance of counsel is necessary to safeguard the other procedural safeguards provided to the accused by the criminal justice process. Accordingly, the right to the assistance of counsel is not limited to

participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Whatever else it may mean, the right to counsel means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him. Pp. 168–170.

(b) Once the right to counsel has attached and been asserted, the State must honor it. At the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel. *Spano* v. *New York*, 360 U. S. 315; *Massiah* v. *United States*, 377 U. S. 201; *United States* v. *Henry*, 447 U. S. 264. Pp. 170–174.

(c) The State misreads *Massiah*, *supra*, and *Henry*, *supra*, in contending that the decisive fact in those cases was that the police set up the confrontation between the accused and a police agent at which incriminating statements were elicited, and that thus respondent's Sixth Amendment rights were not violated here because he rather than Colson initiated the recorded conversations. The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. Knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Pp. 174–176.

(d) In this case, the State clearly violated respondent's Sixth Amendment right when it arranged to record conversations between respondent and its undercover informant, Colson. When the police requested that Colson wear a body wire transmitter to the meeting with respondent, the police knew that respondent would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel. By concealing the fact that Colson was an agent of the State, the police denied respondent the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment. Pp. 176–177.

(e) There is no merit to the argument that the incriminating statements obtained by the police should not be suppressed because the police had other, legitimate reasons for listening to respondent's conversations with Colson, namely, to investigate respondent's alleged plan to kill the State's witness and to insure Colson's safety. This same argument was rejected in *Massiah*, *supra*, where the Court held that to allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert the need to investigate other crimes to justify their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the

evisceration of the Sixth Amendment right. Evidence obtained that is relevant to crimes as to which the Sixth Amendment right has not yet attached may be admissible at a trial on those charges. Pp. 178–180.

481 A. 2d 155, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, and in Parts I and III of which O'CONNOR, J., joined, *post*, p. 181.

Wayne S. Moss, Assistant Attorney General of Maine, argued the cause for petitioner. With him on the briefs were *James E. Tierney*, Attorney General, and *Charles K. Leadbetter*, *James T. Kilbreth III*, and *Eric E. Wright*, Assistant Attorneys General.

Anthony W. Beardsley, by appointment of the Court, 470 U. S. 1082, argued the cause for respondent. With him on the brief were *David P. Cluchey* and *Charles S. Sims*.*

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether respondent's Sixth Amendment right to the assistance of counsel was violated by the admission at trial of incriminating statements made by him to his codefendant, a secret government informant, after indictment and at a meeting of the two to plan defense strategy for the upcoming trial.

I

On the night of January 15, 1981, police officers in Belfast, Maine, responded to a fire call in the vicinity of the Belfast Dodge automobile dealership. Arriving at the scene, the officers discovered a burning Chevrolet dump truck which they recognized as a vehicle that had been reported stolen.[1]

Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey, Edwin S. Kneedler, and *Kathleen A. Felton* filed a brief for the United States as *amicus curiae* urging reversal.

[1] Indeed, in pursuing an anonymous tip received earlier that day that the stolen truck could be found at Belfast Dodge, one of the officers had conducted a consent search of the main building of the dealership facility.

After examining the burning truck, the officers searched a building located on the Belfast Dodge property. This building was not part of the dealership, but was leased to respondent Perley Moulton and his codefendant Gary Colson who were using the space to restore and sell old Ford Mustangs. Inside, the officers discovered evidence of several recent automobile and automobile-related thefts.

On April 7, 1981, a Waldo County grand jury returned indictments charging Moulton and Colson with four counts of theft by receiving in violation of Me. Rev. Stat. Ann., Tit. 17–A, § 359 (1983). Specifically, the indictments alleged that Moulton and Colson received, retained, or disposed of a 1978 Ford pickup truck, a 1978 Chevrolet dump truck, a 1970 Ford Mustang automobile, and assorted Ford Motor Company automotive parts knowing these to be stolen and intending to deprive the owners of possession. On April 9, Moulton and Colson, represented by retained counsel, appeared before the Maine Superior Court for Waldo County and entered pleas of not guilty. Both were enlarged on bail pending trial. Numerous proceedings, unnecessary to detail here, occurred during the ensuing year and a half.

On November 4, 1982, Colson complained by telephone to Robert Keating, Chief of the Belfast Police Department, that he had received anonymous threatening telephone calls regarding the charges pending against him and Moulton, and indicated that he wished to talk to the police about the charges. Keating told Colson to speak with his lawyer and to call back.

On November 6, Colson met with Moulton at a Belfast restaurant to plan for their upcoming trial. According to Colson, Moulton suggested the possibility of killing Gary Elwell, a State's witness, and they discussed how to commit the murder.

On November 9 and 10, Colson, accompanied by his lawyer, met with Police Chief Keating and State Police Detective Rexford Kelley. At these meetings, Colson gave full

confessions of his participation with Moulton in committing the crimes for which they had been indicted. In addition, Colson admitted that he and Moulton had not merely received stolen automotive parts, but also had broken into the local Ford dealership to steal the parts. Colson also stated that he and Moulton had set fire to the dump truck and had committed other thefts. The officers offered Colson a deal: no further charges would be brought against him if he would testify against Moulton and otherwise cooperate in the prosecution of Moulton on the pending charges. Colson agreed to cooperate.[2]

Colson also discussed with Keating and Kelley the anonymous threats he had received and Moulton's inchoate plan to kill Gary Elwell. Keating requested, and Colson consented, to have a recording device placed on Colson's telephone. Colson was instructed to turn the recording device on whenever he received a telephone call, but to turn it off immediately unless it was a threat from the anonymous caller or a call from Moulton.

The recording device was on Colson's telephone for over a month. Although he received no threats, Colson spoke to Moulton three times during this period, and the tapes of these calls were turned over to the police. The first conversation, on November 22, concerned primarily personal matters. The only reference to the pending criminal charges was Colson's question whether Moulton had "heard anything from the lawyer," and Moulton's response that he had not, but that he had "come up with a method," that he "ha[d] to work out the details on," and that "[s]ome day [he'd] like to get together and talk to [Colson] about it." Moulton, then

[2] Seven months after the conclusion of Moulton's trial, Colson pleaded guilty to two counts of theft. The prosecutor recommended that Colson be sentenced to 2 years' imprisonment, all but 15 days to be suspended, and placed on probation for 2 years. Colson also agreed to make restitution up to $2,000 during the probationary period. The trial court accepted this recommendation and sentenced Colson accordingly.

living in New Hampshire, said that he was planning to visit Belfast around Christmas.

The second telephone conversation, on December 2, was prompted by Moulton's receipt of copies of statements of three of the State's witnesses, including Elwell; Colson had not yet received copies of the statements. Most of their talk (on Moulton's side particularly) was about the statements of Elwell and Elwell's brother, which accused Moulton and Colson of being guilty of the pending charges and which Moulton complained were an attempt to frame him and Colson. After reading Colson a statement by Elwell that he had received a threatening phone call, Moulton commented "[t]his is a big joke, man."[3] When Colson jokingly suggested that they flee to Acapulco, Moulton vehemently rejected the suggestion, stating: "No, I'm gonna stay here and I'm gonna fight it man. I'm gonna fight it man. I ain't gonna get framed for nothing." Colson assented to this and suggested, "we'll have to get together sometime . . . ." Moulton reminded Colson that he would be visiting at Christmas, and the conversation ended without Moulton having said anything that incriminated him.

The third telephone conversation, which took place on December 14, was similar to the second one. Most of the conversation concerned the pending charges, but Moulton said nothing inculpatory and continued to insist that he and Colson were being framed. Moulton asked Colson to set aside an entire day so that the two of them could meet and plan their defense. They agreed to meet on Sunday, December 26.

After learning from the telephone recordings about the meeting planned for December 26, the police obtained Colson's consent to be equipped with a body wire transmitter to record what was said at the meeting. Chief Keating later testified that he did this for Colson's safety in case Moulton

[3] Colson testified that he never told Moulton about the threatening calls that he had received.

realized that Colson was cooperating with the police, and to record any further conversation concerning threats to witnesses. Keating also testified that he was aware that Moulton and Colson were meeting to discuss the charges for which Moulton was already under indictment. Colson was instructed "not to attempt to question Perley Moulton, just be himself in his conversation . . . ."

The December 26 meeting, as was to be expected from the recorded telephone conversations, consisted of a prolonged discussion of the pending charges—what actually had occurred, what the State's evidence would show, and what Moulton and Colson should do to obtain a verdict of acquittal. The idea of eliminating witnesses was briefly mentioned early in the conversation. After a short discussion, encouraged by Colson,[4] Moulton concluded that he did not think the plan would work. The remainder of the lengthy meeting was spent discussing the case. Moulton and Colson decided to create false alibis as their defense at trial. Because they sought to conform these alibis as closely as possible to what really happened, much of their discussion involved recounting the crimes. Although Colson had described what had happened in detail when he confessed to the police a month earlier, he now frequently professed to be unable to recall the

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[4] The exchange went as follows:

"[Moulton:] You know I thought of a way to eliminate them. Remember we were talking about it before?

"[Colson:] Yes, you thought of a way?

"[Moulton:] Yeah, but . . . I don't think we ought to go for it.

"[Colson:] Is it foolproof?

"[Moulton:] No.

"[Colson:] Is it, is it fairly foolproof?

"[Moulton:] I like it. I think its just for the . . . .

"[Colson:] Well let me [hear it]."

Moulton explained that he had considered using air rifles to shoot poisoned darts and the conversation then turned to joking about a magazine that instructed readers how to build bombs to kill large numbers of people. Exh. S-4, Tr. of Dec. 26 Meeting 18–19.

events. Apologizing for his poor memory, he repeatedly asked Moulton to remind him about the details of what had happened, and this technique caused Moulton to make numerous incriminating statements.[5] Nor were all of Colson's memory lapses related to events that required discussion to fabricate convincing alibis. Colson also "reminisced" about events surrounding the various thefts, and this technique too elicited additional incriminating statements from Moulton. For example, Colson asked Moulton how many locks they had drilled to steal a truck, a fact obviously not relevant to developing an alibi. Similarly, Colson questioned Moulton about whether it was the Mustang or the pickup truck that did not have a heater. Later, Colson jokingly drew forth admissions from Moulton concerning the dumping of a stolen truck into a pond after it had been scavenged for parts, and the dumping of a load of potatoes from another stolen truck onto the road. Each of these statements was later admitted into evidence against Moulton at trial.

Moulton filed a pretrial motion to suppress recorded statements he made to Colson in the three telephone conversations and at the December 26 meeting, arguing, *inter alia*, that the statements were obtained in violation of the Sixth and Fourteenth Amendments. After a hearing, the trial court denied the motion. The trial court found that the recordings were made "in order to gather information concerning the anonymous threats that Mr. Colson had been

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[5] Colson began doing this immediately after Moulton vetoed the plan to eliminate witnesses. Colson indicated that he did not have copies of all the discovery materials, and Moulton went outside to his car to get his copies. While Moulton was gone, Colson sighed heavily and whispered "[o]h boy, I just hope I can make it through this" into the microphone. Then, when Moulton returned moments later, Colson immediately stated, slowly and deliberately: "I want you to help me with some dates. One date I cannot remember Caps [Moulton's nickname], just can't remember, I know it was in December, what night did we break into Lothrop Ford? What date?"

receiving, to protect Mr. Colson and to gather information concerning defendant Moulton's plans to kill Gary Elwell."

Meanwhile, after Colson's role as an informant had been revealed to Moulton, the State had the pending indictments dismissed and obtained seven new indictments against Moulton. These indictments realleged the pending charges, and charged Moulton in addition with burglary, arson, and three more thefts. Moulton pleaded guilty to the charges contained in two of these indictments, and the trial court dismissed two more for improper venue. Moulton waived his right to a jury and proceeded to trial on the remaining three indictments, which covered the subjects of the original indictments and charged him with burglary, arson, and theft. At the trial, the State did not offer into evidence anything from the recorded telephone conversations, but did offer portions of the tapes of the December 26 meeting, principally those involving direct discussion of the thefts for which Moulton was originally indicted. The State did not offer the portion of the meeting during which Moulton and Colson discussed the possibility of killing witnesses and offered only one portion of the discussion about developing false testimony. At the conclusion of the trial, the court dismissed one more count of theft for improper venue and found Moulton not guilty of the arson charge. The court found Moulton guilty, however, of burglary and theft in connection with the Ford pickup truck, the Chevrolet dump truck, and the Ford automotive parts.

Moulton appealed these convictions on the ground that the admission into evidence of his statements to Colson violated his Sixth Amendment right to the assistance of counsel. The State filed a cross-appeal objecting to the dismissal of charges for improper venue. The Supreme Judicial Court of Maine granted both appeals and remanded for a new trial. 481 A. 2d 155 (1984). Regarding the admission of Moulton's recorded statements to Colson, the court agreed that there was "ample evidence" to support the trial court's finding that

the police wired Colson for legitimate purposes, but held that "[r]eference to the State's legitimate motive may be relevant to, but cannot wholly refute, the alleged infringement of Moulton's right to counsel." *Id.*, at 160. The court held that the State cannot use against Moulton at trial recordings of conversations where the State "knew, or should have known" that Moulton would make incriminating statements regarding crimes as to which charges were already pending. Pointing to Moulton's close relationship with Colson, the fact that the purpose of their meeting was to discuss the pending charges and the fact that at the time of the meeting Colson was "fully cooperating with the police and no longer stood in the same adversarial position as did Moulton," the court held:

> "When the police recommended the use of the body wire to Colson they intentionally created a situation that they knew, or should have known, was likely to result in Moulton's making incriminating statements during his meeting with Colson. The police's valid purpose in investigating threats against witnesses does not immunize the recordings of Moulton's incriminating statements from constitutional attack. Those statements may be admissible in the investigation or prosecution of charges for which, at the time the recordings were made, adversary proceedings had not yet commenced. But as to the charges for which Moulton's right to counsel had already attached, his incriminating statements should have been ruled inadmissible at trial, given the circumstances in which they were acquired." *Id.*, at 161.

We granted the State's petition for certiorari. 469 U. S. 1206. We affirm.

II

A

The right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal jus-

tice.[6] Embodying "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself," *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938), the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding. Justice Sutherland's oft-quoted explanation in *Powell* v. *Alabama*, 287 U. S. 45 (1932), bears repetition here:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every stage of the proceedings against him." *Id.*,

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[6] Justice Black explained in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963): "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court . . . cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Id.*, at 344.

at 68–69 (quoted in *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963)).

As indicated in the last sentence of this paragraph, the Court has also recognized that the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade*, 388 U. S. 218, 224 (1967) (quoted in *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984)). See, *e. g.*, *Coleman* v. *Alabama*, 399 U. S. 1 (1970); *Hamilton* v. *Alabama*, 368 U. S. 52 (1961); *White* v. *Maryland*, 373 U. S. 59 (1963); *Escobedo* v. *Illinois*, 378 U. S. 478 (1964); *Kirby* v. *Illinois*, 406 U. S. 682 (1972). And, "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." *Brewer* v. *Williams*, 430 U. S. 387, 398 (1977). This is because, after the initiation of adversary criminal proceedings, "'the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Gouveia*, *supra*, at 189 (quoting *Kirby* v. *Illinois*, *supra*, at 689).

B

Once the right to counsel has attached and been asserted, the State must of course honor it.[7] This means more than

[7] Cf. *Brewer* v. *Williams*, 430 U. S. 387 (1977): "the lawyer is the essential medium through which the demands and commitments of the sover-

simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. We have on several occasions been called upon to clarify the scope of the State's obligation in this regard, and have made clear that, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.

In *Spano* v. *New York*, 360 U. S. 315 (1959), the defendant, who had already been indicted, was coercively interrogated by police until the early hours of the morning despite his repeated requests to see his lawyer. A unanimous Court reversed his conviction on the ground that the confession obtained by this interrogation was involuntary and therefore should not have been admitted into evidence at trial. Four Justices, in two concurring opinions, stated that they would also have reached this result on the ground that Spano's Sixth Amendment right to the assistance of counsel was violated. These Justices reasoned that to permit police to "produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction" in the absence of counsel, after the right to counsel has attached, is to deny the accused "effective representation by counsel at the only stage when legal aid and advice would help him." *Id.*, at 325–326 (Douglas, J., concurring, joined by Black and BRENNAN, JJ.); see also, *id.*, at 326–327 (Stewart, J., concurring, joined by Douglas and BRENNAN, JJ.). As Justice Douglas succinctly put the point, "what use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?" *Id.*, at 326.

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eign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer." *Id.*, at 415 (STEVENS, J., concurring) (footnote omitted).

The position of the concurring Justices in *Spano* was adopted by the Court in *Massiah* v. *United States*, 377 U. S. 201 (1964). Massiah was indicted, along with a man named Colson,[8] for conspiracy to possess and to distribute cocaine. Massiah retained a lawyer, pleaded not guilty and was released on bail. Colson, meanwhile, decided to cooperate with Government agents in their continuing investigation of the narcotics activity in which Massiah and others were thought to be engaged. Colson permitted a Government agent to install a radio transmitter under the front seat of his automobile. Massiah held a lengthy conversation with Colson in this automobile while a Government agent listened over the radio. Massiah made several incriminating statements, and these were brought before the jury through the testimony of the Government agent. We reversed Massiah's conviction on the ground that the incriminating statements were obtained in violation of Massiah's rights under the Sixth Amendment. The Court stressed the fact that the interview took place after indictment, at a time when Massiah was clearly entitled to the assistance of counsel. Relying on Justice Douglas' *Spano* concurrence, the Court concluded that the need for, and consequently the right to, the assistance of counsel applied equally in this extrajudicial setting as at the trial itself. 377 U. S., at 204.[9] Consequently, the Court held:

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[8] The parties have taken pains to assure us that Massiah's friend Colson and Moulton's friend Colson are unrelated.

[9] Justice Stewart noted that this view of the right to counsel "no more than reflects a constitutional principle established as long ago as *Powell* v. *Alabama*," where the Court noted that

"'during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants [are] as much entitled to such aid [of counsel] . . . as at the trial itself.'" *Massiah*, 377 U. S., at 205 (quoting *Powell* v. *Alabama*, 287 U. S. 45, 57 (1932)).

"[Massiah] was denied the basic protections of [the right to the assistance of counsel] when there was used against him at trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.*, at 206.

We applied this principle most recently in *United States* v. *Henry*, 447 U. S. 264 (1980). Henry was arrested and indicted for bank robbery. Counsel was appointed, and Henry was held in jail pending trial. Nichols, an inmate at the same jail and a paid informant for the Federal Bureau of Investigation, told a Government agent that he was housed in the same cellblock as several federal prisoners, including Henry. The agent told Nichols to pay attention to statements made by these prisoners, but expressly instructed Nichols not to initiate any conversations and not to question Henry regarding the bank robbery. Nichols and Henry subsequently engaged in some conversations during which Henry told Nichols about the robbery. Nichols testified about these conversations at Henry's trial, and Henry was convicted.

This Court reversed, finding that the Government had "'deliberately elicited' incriminating statements from Henry within the meaning of *Massiah*." *Id.*, at 270. Several facts were emphasized in THE CHIEF JUSTICE's opinion for the Court: that Nichols was acting as an informant for the Government and therefore had an incentive to produce useful information; that Henry was unaware of Nichols' role as a Government informant; and, finally, that Henry and Nichols were incarcerated together at the time the conversations took place. With respect to this last fact, the Court reasoned that "confinement may bring into play subtle influences that will make [an individual] particularly susceptible to the ploys of undercover Government agents," influences that were facilitated by Nichols' "apparent status as a person sharing a common plight." *Id.*, at 274. Considering Nich-

ols' conversations with Henry in light of these circumstances, the Court concluded that Nichols "deliberately used his position to secure incriminating information from Henry when counsel was not present . . ." in violation of the Sixth Amendment. *Id.*, at 270–271. The Government argued that it should not be held responsible for Nichols' conduct because its agent had instructed Nichols not to question Henry and had not intended that Nichols take affirmative steps to obtain incriminating statements. We rejected this argument, finding that, under the circumstances, the agent "must have known" that Nichols would take affirmative steps to secure incriminating information. *Id.*, at 271. Consequently, the Court held, "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Id.*, at 274.

C

The State contends that the decisive fact in *Massiah* and *Henry* was that the police set up the confrontation between the accused and a police agent at which incriminating statements were elicited. Supported by the United States as *amicus curiae*, the State maintains that the Sixth Amendment is violated only when police intentionally take this or some equivalent step. Because Moulton rather than Colson initiated the recorded telephone conversations and requested the December 26 meeting, the State concludes that Moulton's Sixth Amendment rights were not violated here.

In the first place, the identity of the party who instigated the meeting at which the Government obtained incriminating statements was not decisive or even important to our decisions in *Massiah* or *Henry*. Thus, while in *Massiah* it may have been the Government agent who was responsible for setting up the meeting with the defendant,[10] one discovers

[10] It is not clear whether the informant asked to meet with Massiah or vice versa. Both the opinion for the Second Circuit and the dissent state

this only by looking to the opinions of the Court of Appeals. It is not mentioned in this Court's opinion since the issue of who set up the meeting with whom was not pertinent to our disposition. Moreover, four years after *Massiah*, the Court summarily reversed a conviction where the defendant requested the meeting and initiated and led the conversation in which incriminating statements were made to an undercover informant. *Beatty* v. *United States*, 389 U. S. 45 (1967) *(per curiam)*. In that case, the Solicitor General made the same argument that he and the State make today, see Brief in Opposition, *Beatty* v. *United States*, O. T. 1967, No. 338, pp. 5–8; we rejected this argument in an opinion that simply cited *Massiah*.[11] Finally, in *Henry*, we deemed it "irrelevant that in *Massiah* the agent had to arrange the meeting between Massiah and his codefendant while here the agents were fortunate enough to have an undercover informant already in close proximity to the accused." 447 U. S., at 272, n. 10.

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only that, on the instructions of a Government agent, Colson invited Massiah into his car to discuss their case; neither opinion establishes who requested the meeting in the first place. See *United States* v. *Massiah*, 307 F. 2d 62, 66 (1962); *id.*, at 72 (Hays, J., dissenting). It is quite plausible that Massiah asked to see Colson who then proposed meeting in his car. In fact, there is nothing in the record in *Massiah* to support even the assertion of the Court of Appeals that Colson rather than Massiah suggested meeting in Colson's car, although the inference is logical enough. See App. to Brief for United States in *Massiah* v. *United States*, O. T. 1963, No. 199, pp. 125a–175a (testimony of Agent Murphy).

[11] In his *amicus* brief for the United States in this case, the Solicitor General suggests that *Beatty* did not survive *Brewer* v. *Williams*, 430 U. S. 387 (1977), which, he contends, modified *Massiah* to require affirmative interrogation by the Government. Brief for United States as *Amicus Curiae* 17, n. 12. *That* argument, however, was expressly rejected when the Solicitor General made it in *Henry*. See 447 U. S., at 271 ("While affirmative interrogation, absent waiver, would certainly satisfy *Massiah*, we are not persuaded, as the Government contends, that *Brewer* v. *Williams* . . . , modified *Massiah*'s 'deliberately elicited' test"). Cf. also, Brief for United States in *United States* v. *Henry*, O. T. 1979, No. 121, p. 26, n. 12.

Beyond this, the State's attempt to limit our holdings in *Massiah* and *Henry* fundamentally misunderstands the nature of the right we recognized in those cases. The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached. See *Henry*, 447 U. S., at 276 (POWELL, J., concurring). However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.[12]

III

Applying this principle to the case at hand, it is clear that the State violated Moulton's Sixth Amendment right when it arranged to record conversations between Moulton and its undercover informant, Colson. It was the police who suggested to Colson that he record his telephone conversations with Moulton. Having learned from these recordings that

[12] Direct proof of the State's knowledge will seldom be available to the accused. However, as *Henry* makes clear, proof that the State "must have known" that its agent was likely to obtain incriminating statements from the accused in the absence of counsel suffices to establish a Sixth Amendment violation. See 447 U. S., at 271.

Moulton and Colson were going to meet, the police asked Colson to let them put a body wire transmitter on him to record what was said. Police Chief Keating admitted that, when they made this request, the police knew—as they must have known from the recorded telephone conversations—that Moulton and Colson were meeting for the express purpose of discussing the pending charges and planning a defense for the trial.[13] The police thus knew that Moulton would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel. As in *Henry*, the fact that the police were "fortunate enough to have an undercover informant already in close proximity to the accused" does not excuse their conduct under these circumstances. 447 U. S., at 272, n. 10. By concealing the fact that Colson was an agent of the State, the police denied Moulton the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment.[14]

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[13] Because Moulton thought of Colson only as his codefendant, Colson's engaging Moulton in active conversation about their upcoming trial was certain to elicit statements that Moulton would not intentionally reveal—and had a constitutional right not to reveal—to persons known to be police agents. Under these circumstances, Colson's merely participating in this conversation was "the functional equivalent of interrogation." *Henry*, 447 U. S., at 277 (POWELL, J., concurring). In addition, the tapes disclose and the Supreme Judicial Court of Maine found that Colson "frequently pressed Moulton for details of various thefts and in so doing elicited much incriminating information that the State later used at trial." 481 A. 2d, at 161. Thus, as in *Henry*, *supra*, at 271, n. 9, we need not reach the situation where the "listening post" cannot or does not participate in active conversation and prompt particular replies.

[14] The State argues that it took steps to prevent Colson from inducing Moulton to make incriminating admissions by instructing Colson to "be himself," "act normal," and "not interrogate" Moulton. Tr. of Hearing on Motion to Suppress 42, 51, 56. In *Henry*, we rejected this same argument although the likelihood that the accused would talk about the pending charges to a cellmate was less than here, where the accused invited his codefendant to discuss the upcoming trial, and although the instructions to the agent were far more explicit. See 447 U. S., at 268, 271. More im-

IV

The Solicitor General argues that the incriminating statements obtained by the Maine police nevertheless should not be suppressed because the police had other, legitimate reasons for listening to Moulton's conversations with Colson, namely, to investigate Moulton's alleged plan to kill Gary Elwell and to insure Colson's safety. In *Massiah*, the Government also contended that incriminating statements obtained as a result of its deliberate efforts should not be excluded because law enforcement agents had "the right, if not indeed the duty, to continue their investigation of [Massiah] and his alleged criminal associates . . . ." 377 U. S., at 206. There, as here, the Government argued that this circumstance justified its surveillance and cured any improper acts or purposes. We rejected this argument, and held:

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portantly, under the circumstances of this case, the instructions given to Colson were necessarily inadequate. The Sixth Amendment protects the right of the accused not to be confronted by an agent of the State regarding matters as to which the right to counsel has attached without counsel being present. This right was violated as soon as the State's agent engaged Moulton in conversation about the charges pending against him. Because these charges were the only subject to be discussed at Colson's December 26 meeting with Moulton, a Sixth Amendment violation was inevitable once Colson agreed to this meeting with Moulton.

In any event, we reject the State's suggestion that these instructions were designed to protect Moulton's constitutional rights. The instructions were obviously motivated by the police's concern that Colson, who had never before served as an undercover agent, might behave unnaturally or ask too many questions, thereby tipping Moulton off to the fact that Colson was cooperating with the police. Thus, rather than explain to Colson that actively questioning Moulton might taint any evidence obtained, the police simply told Colson to "be himself," and to "act normal." Tr. of Hearing on Motion to Suppress 42, 51, 56. In addition, the instructions were not limited to questions concerning the pending charges, the only matters as to which active questioning might create problems. On the contrary, according to Chief Keating, Colson was instructed that he could engage Moulton in a conversation but should not try to draw him out on "elimination of witnesses or anything." *Id.*, at 51.

"We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial." *Id.*, at 207 (emphasis omitted).

We reaffirm this holding, which states a sensible solution to a difficult problem. The police have an interest in the thorough investigation of crimes for which formal charges have already been filed. They also have an interest in investigating new or additional crimes. Investigations of either type of crime may require surveillance of individuals already under indictment. Moreover, law enforcement officials investigating an individual suspected of committing one crime and formally charged with having committed another crime obviously seek to discover evidence useful at a trial of either crime.[15] In seeking evidence pertaining to pending charges,

[15] In his brief, the Solicitor General assumes that the only claim made by the Government and answered by the Court in *Massiah* was that the Government was engaged in a continuing investigation of crimes as to which charges were already pending. He concedes that this was an inadequate justification which "had the flavor of a post hoc rationalization of conduct that, at its inception, in fact had as a primary purpose the obtaining of evidence for use at trial on the pending charges." Brief for United States as *Amicus Curiae* 23–24. So saying, he asks us to distinguish from that justification the justification that law enforcement officials are investigating "separate" crimes. In *Massiah*, however, the Government's assertion was that it needed to continue its investigation in order to discover the identities of Massiah's intended buyer and of others who were importing narcotics as well as to find additional evidence of Massiah's crimes. Brief for United States in *Massiah* v. *United States*, O. T. 1963, No. 199, pp. 26–27. The Court in *Massiah* was thus faced with the very same argument made by the Solicitor General in this case. Even were the Solicitor General's characterization of the issue posed in *Massiah* correct, however,

however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in *Massiah*. On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.[16]

Because we hold that the Maine police knowingly circumvented Moulton's right to have counsel present at a confrontation between Moulton and a police agent, the fact that the police had additional reasons for recording Moulton's meeting with Colson is irrelevant. The decision of the Supreme Judicial Court of Maine is affirmed.

It is so ordered.

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we would not draw the distinction he asks us to make. The likelihood of *post hoc* rationalizing is the same whether police claim to be investigating other examples of the same crime or some allegedly "separate" crime. We take what we feel is a more realistic view of police investigations, and instead accept that dual purposes may exist whenever police have more than one reason to investigate someone.

[16] Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, and with whom JUSTICE O'CONNOR joins as to Parts I and III, dissenting.

Today the Court holds that the Sixth Amendment prohibits the use at trial of postindictment statements made to a government informant, even where those statements were recorded as part of a good faith investigation of entirely separate crimes. Nothing whatever in the Constitution or our prior opinions supports this bizarre result, which creates a new "right" only for those possibly habitual offenders who persist in criminal activity even while under indictment for other crimes. I dissent and would reverse.

I

Before reaching the legal issues, it is important that the factual basis on which the State acted here be clearly understood. Since the Court's opinion glosses over some of the more relevant facts, I review them here briefly.

After respondent and a codefendant, Gary Colson, were indicted on several felony counts of theft by receiving stolen goods, Colson telephoned Belfast Police Chief Robert Keating to arrange a meeting. At that meeting, on November 4, 1982, Colson told Chief Keating that he had been receiving "threatening phone calls" and that "it had gone too far." In this conversation, Colson indicated his desire to tell Chief Keating about the circumstances giving rise to the indictment; but Chief Keating appropriately cautioned him to consult with an attorney before saying more.

Two days later, Colson and respondent met. Respondent spoke of "[g]etting rid of a couple of witnesses," including Gary Elwell, a key prosecution witness in the upcoming trial of Colson and respondent. Respondent had formulated a general plan for the murder; Colson's role was to pick up a car to be used in that endeavor.

On November 9 and 10, Colson met with Chief Keating and Detective Rex Kelley of the Maine State Police at the office

of Colson's attorney. At these meetings, Colson revealed to the police respondent's plan to kill Elwell. Keating was aware that several witnesses connected with the case had received threats. One witness, Duke Ducaster, had been threatened personally by respondent. Another witness, Herman Peasley, "had been told . . . that a cup of acid could be thrown in his face" if he talked to the police. Colson then consented to having the police place a recording device on his home telephone. Keating testified that he placed the device on the telephone because respondent was to call Colson back when plans to eliminate Elwell had been finalized and because Colson himself had been receiving anonymous threatening telephone calls.

Three telephone calls initiated by respondent were subsequently recorded. In the first, on November 22, 1982, respondent, in an apparent reference to the plan to do away with Elwell, told Colson that he had "come up with a method" and that he wanted to get together with Colson to talk about it after he had "work[ed] out the details on it." In the second recorded conversation, respondent reviewed with Colson the extent of the evidence against them and made several incriminating statements. In the last of the recorded conversations, respondent again incriminated himself[1] and

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[1] Contrary to the Court's assertion that "the conversation ended without Moulton having said anything that incriminated him," *ante*, at 164, Moulton and Colson in fact rehearsed a fabricated story that they planned to use at trial:

"[Moulton:] The parts I bought. I never denied that. I did buy those. . . .

"[Colson:] The [M]ustang . . . same here.

"[Moulton:] And the [M]ustang, we bought that?

"[Colson:] Yeah.

"[Moulton:] Ok. It's just a coincidence that ah, they happened to be . . . [h]ot or whatever. . . . You've got a bill of sale for the Mustang. I got a bill of sale for parts. So, you know, what the hell? What can they say?" Exh. S-3, Tr. of Dec. 14 Conversation 4–5.

referred to statements by witnesses that they had been threatened. Finally, respondent told Colson that he wanted to meet to "review the whole plan."

Chief Keating and Detective Kelley then arranged for Colson to wear a body recorder/transmitter during this meeting. Both officers testified that the recorder was intended to protect Colson's safety, since respondent might have learned that Colson was cooperating with the police, as well as to record any information concerning threats to other witnesses. Colson himself testified that his understanding of the reasons for using the recorder were "number 1 . . . my safety" and "number 2 . . . for any other plans to do away with any of the witnesses." When asked if there was a "number 3," Colson testified "no." The police instructed Colson "to act like himself, converse normally, and avoid trying to draw information out of Moulton."

During the meeting with Colson, respondent without any prompting brought up the possibility of killing Gary Elwell, by means of an air gun with hollow-tipped darts or explosives.[2] Respondent also suggested developing false testi-

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[2] After a break in the conversation, respondent took a deep sigh and said:

"[Moulton:] You know I thought of a way to eliminate them. Remember we were talking about it before?

"[Colson:] Yes, you thought of a way?

"[Moulton:] Yeah, but, ah, I don't think we ought to go for it. . . .

"[Colson:] Well, let me [hear it].

"[Moulton:] Well you know those air guns. . . . They make little darts for those little feather back darts that you can put in there you've seen em. Those little darts, those little things about that long. I [was] thinking just hollow the tip out like a needle and just put . . . little . . . holes on the side, and you fill it with a lethal injection and the shooting impact would shoot all the stuff out of it into . . . the individuals body [and] poison [th]em. There would be no noise.

"[Colson:] Jesus. . . .

"[Moulton:] That's the only thing that runs through my brain . . . you have a puncture wound, probably take about 20 or 30 minutes to kick off,

mony for presentation at trial. These portions of the transcript were not admitted into evidence at trial. In addition, there was direct discussion of the thefts for which respondent had been indicted; these portions of the transcript were admitted. The trial court refused to suppress these portions since the State had recorded the conversations "for legitimate purposes not related to the gathering of evidence concerning the crime for which [respondent] had been indicted—*i. e.*, in order to gather information concerning the anonymous threats that Mr. Colson had been receiving, to protect Mr. Colson and to gather information concerning [respondent's] plans to kill Gary Elwell." The Maine Supreme Court in a careful opinion found "ample evidence" to support this factual finding.

II

The Court today concludes that "[t]o allow the admission of evidence obtained from an accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance . . . risks the evisceration of the Sixth Amendment right recognized in *Massiah*." *Ante*, at 180. With all deference I am bound to state that this conclusion turns the Sixth Amendment on its head by first positing a constitutional violation and then asking whether "alternative, legitimate reasons" for the police surveillance are sufficient to justify that constitutional viola-

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yeah, and the other problem is the poison, where . . . are you going to get some poison? Small bottles.

"[Colson:] What was that stuff you told me about once?

"[Moulton:] Calcium chlorine . . . , yeah, something like that, just a small drop will make you look like you have a heart attack and . . . you'd never, never, find it unless you were looking . . . exactly for that drug. . . . Stops your heart." Exh. S-4, Tr. of Dec. 26 Meeting 18–20.

Moulton then discussed an alternative scheme for doing away with witnesses, based on making explosives pursuant to directions contained in a magazine that one of his "best friends" was sending. Moulton described him as having belonged to "a motorcycle gang" and also suggested ominously that he had "[p]robably snuffed one or two people." *Id.*, at 21.

tion. As I see it, if "alternative, legitimate reasons" motivated the surveillance, then no Sixth Amendment violation has occurred. Indeed, if the police had failed to take the steps they took here knowing that Colson was endangering his life by talking to them, in my view they would be subject to censure.

Analysis of this issue must begin with *Hoffa* v. *United States*, 385 U. S. 293 (1966), not cited in the Court's opinion. In *Hoffa*, the Court held that postindictment statements obtained by a Government informant "relat[ing] to the commission of a quite separate offense," *id.*, at 308, were properly admitted at a subsequent trial for the separate crime. Other courts have also held that *Massiah*, viewed in light of the later-decided *Hoffa* case, does not prohibit the introduction of incriminating statements obtained in good faith by the Government even after an indictment at a trial involving an offense different from that covered by the indictment. See, *e. g.*, *Mealer* v. *Jones*, 741 F. 2d 1451, 1455 (CA2 1984), cert. denied, 471 U. S. 1006 (1985); *United States* v. *Lisenby*, 716 F. 2d 1355, 1357-1359 (CA11 1983) (en banc).

Applying *Hoffa* to the facts of this case, it is clear that the statements obtained by Colson could have been introduced against respondent at a subsequent trial for crimes apart from those for which respondent had already been indicted, such as conspiracy to commit murder or to obstruct justice. The majority concedes as much: "Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Ante*, at 180, n. 16. It follows from this that the State engaged in no impermissible conduct in its investigation of respondent based on Colson's revelations. By recording conversations between respondent and Colson, Chief Keating and Detective Kelley succeeded in obtaining evidence that the Court's opinion concedes could have been used to convict respondent of further crimes. In fact this record shows clearly that, based on the recordings, the State

was able to obtain additional indictments against respondent for burglary, arson, and three more thefts. The Court's opinion notes that respondent pleaded guilty to several of the additional indictments secured as a result of pursuing Colson's leads. *Ante*, at 167.

Courts ought to applaud the kind of careful and diligent efforts of the police shown by this record. Indeed, the Court's opinion does not suggest that the police should have—or could have—conducted their investigation in any other way. Yet, inexplicably, the Court holds that the highly probative and reliable evidence produced by this wholly legitimate investigation must be excluded from respondent's trial for theft. The anomaly of this position, then, is that the evidence at issue in this case should have been excluded from respondent's theft trial even though the *same evidence* could have been introduced against *respondent himself* at a trial for separate crimes. Far from being "a sensible solution to a difficult problem," *ante*, at 179, as the Court modestly suggests, it is a judicial aberration conferring a windfall benefit to those who are the subject of criminal investigations for one set of crimes while already under indictment for another. I can think of no reason to turn the Sixth Amendment into a "magic cloak," *United States* v. *DeWolf*, 696 F. 2d 1, 3 (CA1 1982), to protect criminals who engage in multiple offenses that are the subject of separate police investigations.

We have held that no Sixth Amendment violation occurs unless the State "deliberately elicit[s]" comments from the defendant. See *Massiah* v. *United States*, 377 U. S. 201, 206 (1964); *United States* v. *Henry*, 447 U. S. 264, 270 (1980). As the foregoing amply demonstrates, however, a finding of "deliberate elicitation" is not the end of the inquiry. In using the phrase "deliberate elicitation," we surely must have intended to denote elicitation for the purpose of using such statements against the defendant in connection with charges for which the Sixth Amendment right to counsel had attached. Here the State indeed set out to elicit information

from a defendant, but it was an investigation with respect to crimes other than those for which the defendant then stood indicted. As two courts found, the State recorded the conversations "'for legitimate purposes not related to the gathering of evidence concerning the crime for which [respondent] had been indicted.'" 481 A. 2d 155, 160 (Me. 1984) (quoting trial court).

No prior holding of this Court recognizes a Sixth Amendment violation in such circumstances. As one court has put it, the Sixth Amendment "speaks only to the situation where in the absence of retained counsel, statements are deliberately elicited from a defendant in connection with a crime for which he has already been indicted." *United States* v. *Hinton*, 543 F. 2d 1002, 1015 (CA2), cert. denied *sub nom. Carter* v. *United States*, 429 U. S. 980 (1976).[3] Thus, in *United States* v. *Henry*, *supra*, at 275, n. 14, we quoted Disciplinary Rule 7–104(A)(1) of the American Bar Association's Code of Professional Responsibility, which provides that "'a lawyer shall not . . . [c]ommunicate or cause another to communicate *on the subject of the representation* with a

[3] The Court's opinion seems to read *Massiah* as if it definitively addresses situations where the police are investigating a separate crime. This reading is belied by the *Massiah* Court's statement of its own holding: "We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents *under the circumstances here disclosed*, could not constitutionally be used by the prosecution as evidence against *him* at his trial." *Massiah* v. *United States*, 377 U. S. 201, 207 (1964) (first emphasis added).

The reference to the "circumstances here disclosed" must be to the fact that the Government, far from pursuing a good faith investigation of different crimes, had "instructed the informant to engage [Massiah] in conversation relating to the crimes [for which he had already been indicted]." *United States* v. *Henry*, 447 U. S. 264, 276 (1980) (POWELL, J., concurring); Brief for Petitioner in *Massiah* v. *United States*, O. T. 1963, No. 199, p. 4.

party he knows to be represented by a lawyer in that matter'" (emphasis added). Our reference in *Henry* to this rule illustrates that we have framed the Sixth Amendment issue in terms of whether the State deliberately circumvented counsel with regard to the "subject of representation." But where, as here, the incriminating statements are gathered for "an alternative, legitimate reason," *ante*, at 180, wholly apart from the pending charges, no such deliberate circumvention exists.

The Court's opinion seems to rest on the notion that the evidence here is excludable because "the State 'must have known' that its agent was likely to obtain incriminating statements from the accused," *ante*, at 176, n. 12, with respect to the crimes for which he was already indicted. But the inquiry mandated by our holdings is whether the State recorded the statements not merely *in spite of*, but *because of* that consequence. Cf. *Wayte* v. *United States*, 470 U. S. 598 (1985). If the State is not seeking to elicit information with respect to the crime for which the defendant is already indicted, it cannot rationally be said that the State has "planned an impermissible interference with the right to the assistance of counsel." *Henry*, *supra*, at 275.

This case is a particularly inappropriate one for invoking the right to counsel. The right to counsel recognized in *Massiah* was designed to preserve the integrity of the trial. See 377 U. S., at 204. Here respondent was under investigation because of his plans to obstruct justice by killing an essential witness. There is no right to consult an attorney for advice on committing crimes. See *United States* v. *Merritts*, 527 F. 2d 713, 716 (CA7 1975). Indeed, any attorney who undertook to offer such advice would undoubtedly be subject to sanction. Disciplinary Rule 7–102(A)(7) of the Code of Professional Responsibility, for example, states "a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." Thus there is no warrant for vindicating respondent's right to con-

sult counsel. An observation of this Court in connection with the attorney-client evidentiary privilege bears mention here: "The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." *Clark* v. *United States*, 289 U. S. 1, 15 (1933). I would let the truth be told in this case rather than exclude evidence that was the product of this police investigation into activities designed to thwart the judicial process.

Even though the *Massiah* rule is inapplicable to situations where the government is gathering information related to a separate crime, police misconduct need not be countenanced. Accordingly, evidence obtained through a separate crimes investigation should be admitted only "so long as investigating officers show no bad faith and do not institute the investigation of the separate offense as a pretext for avoiding the dictates of *Massiah*." *United States* v. *Darwin*, 757 F. 2d 1193, 1199 (CA11 1985). Here the careful actions of Chief Keating and Detective Kelley steered well clear of these prohibitions.

Until today, the clearly prevailing view in the federal and state courts was that *Massiah* and its successors did not protect a defendant from the introduction of postindictment statements deliberately elicited when the police undertook an investigation of separate crimes.[4] As two leading commentators have observed:

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[4] See *United States* v. *DeWolf*, 696 F. 2d 1, 3 (CA1 1982); *Grieco* v. *Meachum*, 533 F. 2d 713, 717–718 (CA1 1976), cert. denied *sub nom. Cassesso* v. *Meachum*, 429 U. S. 858 (1976); *United States* v. *Hinton*, 543 F. 2d 1002, 1015 (CA2), cert. denied *sub nom. Carter* v. *United States*, 429 U. S. 980 (1976); *United States* v. *Merritts*, 527 F. 2d 713, 716 (CA7 1975); *United States* v. *Taxe*, 540 F. 2d 961, 968–969 (CA9 1976), cert. denied, 429 U. S. 1040 (1977); *United States* v. *Darwin*, 757 F. 2d 1193, 1200 (CA11 1985); *Crawford* v. *State*, 377 So. 2d 145, 156 (Ala. Crim. App.), aff'd, 377 So. 2d 159 (Ala. 1979), vacated and remanded, 448 U. S. 904 (1980); *Deskins* v. *Commonwealth*, 512 S. W. 2d 520, 526 (Ky. 1974), cert. denied, 419 U. S. 1122 (1975); *Hall* v. *State*, 47 Md. App. 590, 596, 425 A. 2d 227,

> "Even before [*Brewer* v.] *Williams*, [430 U. S. 387 (1977),] it was generally accepted that the right to counsel did not bar contact with the defendant concerning *other offenses*, particularly if the offenses were clearly unrelated and it did not appear the charge was simply a pretext to gain custody in order to facilitate the investigation. The more recent cases recognize that [*Massiah* and its progeny do] not confer upon charged defendants immunity from investigation concerning other crimes. This is especially true when the offense under investigation is a new or ongoing one, such as illegal efforts to thwart the forthcoming prosecution." 1 W. LaFave & J. Israel, Criminal Procedure §6.4, p. 470 (1984) (emphasis added) (footnotes omitted).

Rather than expand *Massiah* beyond boundaries currently recognized, I would take note of the observation that "*Massiah* certainly is the decision in which Sixth Amendment protections have been extended to their outermost point." *Henry*, 447 U. S., at 282 (BLACKMUN, J., dissenting). I would not expand them more and well beyond the limits of precedent and logic.

III

Even if I were prepared to join the Court in this enlargement of the protections of the Sixth Amendment, I would have serious doubts about also extending the reach of the exclusionary rule to cover this case. "Cases involving Sixth Amendment deprivations are subject to the general rule that

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231 (1981), aff'd, 292 Md. 683, 441 A. 2d 708 (1982); *People* v. *Mealer*, 57 N. Y. 2d 214, 218, 441 N. E. 2d 1080, 1082 (1982); *People* v. *Costello*, 101 App. Div. 2d 244, 247, 476 N. Y. S. 2d 210, 212 (1984); *Hummel* v. *Commonwealth*, 219 Va. 252, 257, 247 S. E. 2d 385, 388 (1978), cert. denied, 440 U. S. 935 (1979). Cf. *United States* v. *Moschiano*, 695 F. 2d 236, 243 (CA7 1982), cert. denied, 464 U. S. 831 (1983); *United States* v. *Boffa*, 89 F. R. D. 523 (Del. 1981). But see *Mealer* v. *Jones*, 741 F. 2d 1451, 1455 (CA2 1984), cert. denied, 471 U. S. 1006 (1985); *State* v. *Ortiz*, 131 Ariz. 195, 202, 639 P. 2d 1020, 1028 (1981), cert. denied, 456 U. S. 984 (1982).

remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U. S. 361, 364 (1981). Application of the exclusionary rule here makes little sense, as demonstrated by "weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence." *United States* v. *Leon*, 468 U. S. 897, 907 (1984).

With respect to the costs, applying the rule to cases where the State deliberately elicits statements from a defendant in the course of investigating a separate crime excludes evidence that is "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." *Stone* v. *Powell*, 428 U. S. 465, 490 (1976). Moreover, because of the trustworthy nature of the evidence, its admission will not threaten "the fairness of a trial or . . . the integrity of the factfinding process." *Brewer* v. *Williams*, 430 U. S. 387, 414 (1977) (POWELL, J., concurring). Hence, application of the rule to cases like this one "deflects the truthfinding process," "often frees the guilty," and may well "generat[e] disrespect for the law and [the] administration of justice." *Stone* v. *Powell*, *supra*, at 490–491.

Against these costs, applying the rule here appears to create precious little in the way of offsetting "benefits." Like searches in violation of the Fourth Amendment, the "wrong" that the Court condemns was "fully accomplished" by the elicitation of comments from the defendant and "the exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered." *Leon*, *supra*, at 906 (internal quotation omitted).

The application of the exclusionary rule here must therefore be premised on deterrence of certain types of conduct by the police. We have explained, however, that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some

right." *United States* v. *Peltier*, 422 U. S. 531, 539 (1975). Here the trial court found that the State obtained statements from respondent "for legitimate purposes not related to the gathering of evidence concerning the crime for which [respondent] had been indicted." Since the State was not trying to build its theft case against respondent in obtaining the evidence, excluding the evidence from the theft trial will not affect police behavior at all. The exclusion of evidence "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Leon*, *supra*, at 919. Indeed, as noted above, it is impossible to identify any police "misconduct" to deter in this case. In fact, if anything, actions by the police of the type at issue here should be encouraged. The diligent investigation of the police in this case may have saved the lives of several potential witnesses and certainly led to the prosecution and conviction of respondent for additional serious crimes.

It seems, then, that the Sixth Amendment claims at issue here "closely parallel claims under the Fourth Amendment," *Brewer*, *supra*, at 414 (POWELL, J., concurring), where we have found the exclusionary rule to be inapplicable by weighing the costs and benefits of its applications. See, *e. g.*, *United States* v. *Leon*, *supra* (exclusionary rule inapplicable where officers rely in good faith on defective search warrant issued by neutral magistrate); *Stone* v. *Powell*, *supra* (where full opportunity to litigate Fourth Amendment issues has been afforded, such issues may not be raised in a state habeas petition). If anything, the argument for admission of the evidence here is even stronger because "[t]his is not a case where . . . 'the constable . . . blundered.'" *United States* v. *Henry*, *supra*, at 274–275 (quoting *People* v. *DeFore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926) (Cardozo, J.)).

Because the Court today significantly and unjustifiably departs from our prior holdings, I respectfully dissent.

CLEAVINGER ET AL. v. SAXNER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-732. Argued October 16, 1985—Decided December 10, 1985

Respondent federal prison inmates were found guilty by the prison's Discipline Committee, composed of petitioner prison officials, of encouraging other inmates to engage in a work stoppage and of other charges, and were ordered to be placed in administrative detention and to forfeit a specified number of days of "good time." On appeals to the Warden and the Regional Director of the Bureau of Prisons, respondents were ordered released from administrative detention and all material relevant to the incident in question was ordered expunged from their records. They were later paroled and released. But in the meantime, they brought suit in Federal District Court against petitioners, alleging a violation of various federal constitutional rights and seeking declaratory and injunctive relief and damages. After initially dismissing the complaint on the ground that petitioners were entitled to absolute immunity from liability, the District Court, on reconsideration, reinstated the suit. The case was tried to a jury. which found that petitioners had violated respondents' Fifth Amendment due process rights, and awarded damages. The Court of Appeals affirmed, rejecting petitioners' claim for absolute immunity.

Held: Petitioners are entitled to only qualified immunity. Pp. 199-208. 727 F. 2d 669, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post*, p. 208.

Deputy Solicitor General Geller argued the cause for petitioners. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Samuel A. Alito, Jr.*, and *Gloria C. Phares*.

G. Flint Taylor argued the cause for respondents. With him on the brief was *Charles W. Hoffman*.*

**John K. Van de Kamp*, Attorney General of California, *Steve White*, Chief Assistant Attorney General, *Arnold O. Overoye*, Assistant Attorney

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether members of a federal prison's Institution Discipline Committee, who hear cases in which inmates are charged with rules infractions, are entitled to absolute, as distinguished from qualified, immunity from personal damages liability for actions violative of the United States Constitution.

I

Respondents David Saxner and Alfred Cain, Jr., in January 1975 were inmates at the Federal Correctional Institution at Terre Haute, Ind. They were serving 4- and 5-year sentences, respectively, and each was within 18 months of a possible release date. Each was soon to appear before the parole board. The prison-conduct record of each was good.

On January 6, 1975, William Lowe, a Negro inmate at Terre Haute died in the prison hospital. He was the first of four Negro inmates to die there within the ensuing 7-month period. A work stoppage to protest Lowe's death took place at the prison on January 7 and 8. Respondent Saxner, a white inmate who had served as a "jailhouse lawyer," and respondent Cain, a Negro inmate who was the librarian for the African and New World Cultural Society, assert that neither of them participated in the stoppage. See Brief for Respondents 1. Each, however, was active in gathering information about Lowe's death and about conditions at the prison hospital, and in passing that information to the press, Members of Congress, prison officials, and Saxner's attor-

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General, *William George Prahl*, Supervising Deputy Attorney General, *Susan J. Orton*, Deputy Attorney General, *Charles A. Graddick*, Attorney General of Alabama, *Michael A. Lilly*, Attorney General of Hawaii, and *A. G. McClintock*, Attorney General of Wyoming, filed a brief for the State of California et al. as *amici curiae* urging reversal.

Stephen M. Latimer filed a brief for Prisoners' Legal Services of New York, Inc., et al. as *amici curiae* urging affirmance.

ney.[1] On February 14, respondents were cited in separate Incident Reports for encouraging other inmates to engage in work stoppage. App. 50, 52. Each was immediately placed in administrative segregation, that is, removed from the general inmate population, and assigned to a separate cell in an unused part of the hospital. See 28 CFR § 541.20(b) (1985).

On the following day, each respondent was given a copy of the Bureau of Prisons Policy Statement 7400.5c (subject: Inmate Discipline) (Oct. 4, 1974). See App. 25–49. Saxner signed a written notice which explained his rights at a hearing to be held before an Institution Discipline Committee. Among these were the right to have a written copy of the charge; the right to have a member of the prison staff represent him; the rights, except where institutional safety would be jeopardized, to be present at the hearing, to call witnesses, and to submit documentary evidence; and the right to receive a written explanation of the committee's decision. *Id.*, at 54.[2] Although the record does not so disclose, we assume that respondent Cain received a similar notice at that time.

Respondents were brought before the Institution Discipline Committee on February 21. The committee was composed of petitioners Theodore Cleavinger, Associate Warden, as chairman; Marvin Marcadis, correctional supervisor; and Tom P. Lockett, chief of case management.[3]

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[1] This activity apparently resulted in a visit to the Terre Haute facility by an Assistant Surgeon General and in a lawsuit concerning the last of the four hospital deaths. See *Green* v. *Carlson*, 581 F. 2d 669 (CA7 1978), aff'd, 446 U. S. 14 (1980).

[2] The Policy Statement did not provide for cross-examination, representation by a lawyer, verbatim record of the proceeding, or nonagency or judicial review. Neither did it specify the standard of proof or the standard of punishment.

[3] The Solicitor General advises us, see Brief for Petitioners 3, n. 4, that a committee of this kind at the Terre Haute facility usually was composed of three members. By regulation, the chairman and one other member must be of department-head level, or higher. See 28 CFR § 541.16(b)

Respondent Saxner was accompanied at the hearing by Ralph Smith, staff counselor, whom Saxner had selected to represent him. After reading the charge and reviewing Saxner's rights, the committee introduced Saxner's Incident Report and three documents found in his cell. These were, respectively, a "press release" Saxner had sent to 50 newspapers; a 4-page document which detailed interviews with inmates about their medical treatment at the prison hospital; and a letter from Saxner to an American Civil Liberties Union lawyer, Saunders, which enclosed the other two documents and which discussed medical conditions, possible litigation on behalf of the Lowe family and other inmates, communications with the press, and the obtaining of local counsel. The press release, among other things, advocated administrative approval of a prisoners' union and amnesty for those who had participated in the work stoppage. *Id.*, at 81. Neither the investigating officer nor the charging officer nor any guard was called as a witness. Saxner, however, testified and introduced affidavits of several inmates. His request that he be permitted to call inmates to confirm that he did not encourage any work stoppage was denied on the ground that such testimony would be cumulative. While admitting that he had written the press release and had mailed it to persons outside the prison without authorization, Saxner asserted his innocence on the specific charge referred. *Id.*, at 60, 71.

The committee found respondent Saxner guilty of encouraging a work stoppage. Also, although not specifically so charged, he was found guilty of unauthorized use of the mail and of possession of contraband, that is, material advocating an illegal prisoners' union. The committee ordered that

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(1985). The reporting officer, investigating officer, and any person who was a witness to the incident or played a significant part in having the charge referred, may not be a member of the committee except "where virtually every staff member in the institution witnessed the incident in whole or in part." *Ibid.*

Saxner be placed in administrative detention and forfeit 84 days of "good time." His transfer to another institution was recommended. *Id.*, at 57.

Respondent Cain's hearing took place the same day before the same committee and immediately prior to Saxner's hearing. *Id.*, at 64. He was accompanied by J. R. Alvarado, a staff representative. He was advised of his rights. His Incident Report was produced. Two documents found in his cell (Saxner's letter to Saunders and a manuscript concerning "Ideals and Proposals of the Prisoner Labor Union") were introduced. Cain testified and denied that he had encouraged inmates not to work. He requested the right to cross-examine his accusers, but no other witness was called.

At the conclusion of Cain's hearing, the committee found him guilty of encouraging a work stoppage and, although not specifically so charged, of possessing contraband, that is, "inflammatory material . . . supporting disruptive conduct in the institution." *Id.*, at 65. The committee ordered that Cain be placed in administrative detention and forfeit 96 days of "good time." His transfer to another institution also was recommended. *Ibid.*

Respondents appealed to the Warden of the institution. The Warden ordered their release from administrative detention, restored the good time, and directed that each respondent's record carry a notation that "the incident not reflect unfavorably" upon consideration for parole. *Id.*, at 74, 77. The Warden refused, however, to expunge respondents' records. *Ibid.* Saxner and Cain were released into the general prison population on March 21.

Respondents next appealed to the Regional Director of the Bureau of Prisons. The Regional Director ruled that the disciplinary report, the action by the committee on the incident, and material relevant thereto were to be expunged from each respondent's record. *Id.*, at 79, 80. Thus, in the end, after these appeals, respondents obtained all the administrative relief they sought. But in the meantime, for a

definite interval, each had been condemned (improperly as it turned out) to "administrative detention."

Respondent Saxner was paroled and released in April 1975. Respondent Cain was granted parole in June and released in December.

Meanwhile, in March 1975, respondents brought suit in the United States District Court for the Southern District of Indiana against petitioners, the Terre Haute Warden, and the institution's administrative supervisor. Their third amended complaint alleged that the defendants had violated their rights under the First, Fourth, Fifth, Sixth, and Eighth Amendments. *Id.*, at 12. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). Respondents sought declaratory and injunctive relief and compensatory damages. App. 22.

The District Court granted petitioners' motion to dismiss the complaint on the ground that their functioning as hearing officers entitled them to absolute immunity. Nearly two years later, however, in April 1981, the District Court, on reconsideration, reinstated the suit in light of its controlling court's decision in *Mary* v. *Ramsden*, 635 F. 2d 590 (CA7 1980), where the Court of Appeals held that members of a disciplinary committee at a Wisconsin juvenile facility were entitled to only qualified immunity. App. 23.

The case then was tried to a jury. In response to special interrogatories, the jury found that petitioners had violated respondents' Fifth Amendment due process rights.[4] The jury awarded each respondent $1,500 compensatory damages against each petitioner, or a total of $4,500; each petitioner was thus subjected to liability totaling $3,000. *Id.*, at 9.

Petitioners' subsequent motion for judgment notwithstanding the verdict was denied. They appealed, contending,

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[4]Judgment was entered in favor of the defendant Warden and the defendant administrative supervisor. Respondents did not contest this aspect of the judgment on appeal.

among other things, that, as members of the discipline committee, they were entitled to absolute immunity.[5]

The United States Court of Appeals for the Seventh Circuit, by a divided vote, affirmed. *Saxner* v. *Benson*, 727 F. 2d 669 (1984). It held that petitioners' claim for absolute immunity was foreclosed by Seventh Circuit precedent denying such immunity to state correctional officers serving in a similar capacity. *Id.*, at 670. See *Redding* v. *Fairman*, 717 F. 2d 1105, 1117 (1983), cert. denied, 465 U. S. 1025 (1984); *Chavis* v. *Rowe*, 643 F. 2d 1281, 1288, cert. denied *sub nom. Boles* v. *Chavis*, 454 U. S. 907 (1981); *Mary* v. *Ramsden*, 635 F. 2d, at 600. Petitioners' request for rehearing en banc was denied by a vote of 5 to 4. App. to Pet. for Cert. 36a.

Because of the importance of the issue, and because the Seventh Circuit rulings, although consistent with *Jihaad* v. *O'Brien*, 645 F. 2d 556, 561 (CA6 1981), were claimed to be in some conflict with the en banc decision of the Fourth Circuit in *Ward* v. *Johnson*, 690 F. 2d 1098 (1982), we granted certiorari. 469 U. S. 1206 (1985).

II

A. This Court has observed: "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Pierson* v. *Ray*, 386 U. S. 547, 553–554 (1967). The Court specifically has pronounced and followed this doctrine of the common law for more than a century. In *Bradley* v. *Fisher*, 13 Wall. 335 (1872), it ruled that a federal judge may not be held accountable in damages for a judicial act taken within his court's jurisdiction. Such immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to

[5] The sole question raised by petitioners in this Court is whether, as committee members, they were entitled to absolute immunity. Petitioners state that they have not challenged—although they do not concede—the ruling that they violated "clearly established constitutional rights" of respondents. See Brief for Petitioners 7, n. 8.

the plaintiff." *Id.*, at 347. "Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed." *Ibid.* In *Pierson* v. *Ray*, *supra*, the Court held that absolute immunity shielded a municipal judge who was sued for damages under 42 U. S. C. § 1983 by clergymen who alleged that he had convicted them unconstitutionally for a peaceful protest against racial segregation. The Court stressed that such immunity was essential to protect the integrity of the judicial process. 386 U. S., at 554. And in *Stump* v. *Sparkman*, 435 U. S. 349 (1978), the Court once again enunciated this principle, despite any "informality with which [the judge] proceeded," and despite any *ex parte* feature of the proceeding. *Id.*, at 363, and n. 12.

With this judicial immunity firmly established, the Court has extended absolute immunity to certain others who perform functions closely associated with the judicial process. The federal hearing examiner and administrative law judge have been afforded absolute immunity. "There can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge." *Butz* v. *Economou*, 438 U. S. 478, 513 (1978). Full immunity also has been given to federal and state prosecutors. *Yaselli* v. *Goff*, 275 U. S. 503 (1927), aff'g 12 F. 2d 396 (CA2 1926); *Imbler* v. *Pachtman*, 424 U. S. 409, 424–426 (1976). The same is true for witnesses, including police officers, who testify in judicial proceedings. Witnesses are "integral parts of the judicial process" and, accordingly, are shielded by absolute immunity. *Briscoe* v. *LaHue*, 460 U. S. 325, 335 (1983). And the Court has noted the adoption in this country of the principle of immunity for grand jurors. See *Imbler* v. *Pachtman*, 424 U. S., at 423, n. 20. See also *Butz* v. *Economou*, 438 U. S., at 509–510.

Although this Court has not decided whether state parole officials enjoy absolute immunity as a matter of federal law, see *Martinez* v. *California*, 444 U. S. 277, 284 (1980), federal

appellate courts have so held. See, *e. g.*, *Sellars* v. *Procunier*, 641 F. 2d 1295, 1303 (CA9), cert. denied, 454 U. S. 1102 (1981); *Evans* v. *Dillahunty*, 711 F. 2d 828, 830–831 (CA8 1983); *United States ex rel. Powell* v. *Irving*, 684 F. 2d 494 (CA7 1982).

B. The Court has extended absolute immunity to the President when damages liability is predicated on his official act. *Nixon* v. *Fitzgerald*, 457 U. S. 731, 744–758 (1982). See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 807 (1982). "For executive officials in general, however, our cases make plain that qualified immunity represents the norm." *Ibid.* See *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974) (State Governor and his aides); *Harlow* v. *Fitzgerald*, *supra* (Presidential aides); *Butz* v. *Economou*, *supra* (Cabinet member, acknowledging, however, that there are "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business," 438 U. S., at 507); *Procunier* v. *Navarette*, 434 U. S. 555 (1978) (state prison officials); *Wood* v. *Strickland*, 420 U. S. 308 (1975) (school board members); *Pierson* v. *Ray*, *supra* (police officers). *Spalding* v. *Vilas*, 161 U. S. 483 (1896) (Postmaster General), and *Barr* v. *Matteo*, 360 U. S. 564 (1959) (Government officials), where full immunity was afforded, both antedated *Bivens*. In any event, "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Butz* v. *Economou*, 438 U. S., at 506; *Harlow* v. *Fitzgerald*, 457 U. S., at 808.

C. The Court has said that "in general our cases have followed a 'functional' approach to immunity law." *Id.*, at 810. "[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant." *Briscoe* v. *LaHue*, 460 U. S., at 342. Absolute immunity flows not from rank or title or "location within the Government," *Butz* v. *Economou*, 438 U. S., at 511, but from the nature of the responsibilities of the individual official. And

in *Butz* the Court mentioned the following factors, among others, as characteristic of the judicial process and to be considered in determining absolute as contrasted with qualified immunity: (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal. *Id.*, at 512.

III

We turn to the application of these principles to the facts of the present case. Judge Cudahy of the Court of Appeals, in his separate concurring opinion, 727 F. 2d, at 673, stressed the *Butz* factors and was persuaded by what he felt were the absence of procedural safeguards, the rare and exceptional character of absolute immunity, and the need for such immunity only when public policy requires it. *Id.*, at 674–676.

Petitioners, in response, and seemingly in order to negate the significance of certain of the specified factors, point out that grand jury proceedings possess few procedural safeguards that are associated with court proceedings, and are largely immune from any type of judicial review. See, *e. g.*, *United States* v. *Calandra*, 414 U. S. 338, 345 (1974); *Costello* v. *United States*, 350 U. S. 359 (1956). Petitioners also observe that prosecutorial decisionmaking is not subject to the formalities of trials; instead, the prosecutor exercises broad and generally unreviewable discretion. Yet grand jurors and prosecutors enjoy absolute immunity. Petitioners finally argue that the Court's cases teach that absolute immunity shields an official if (a) the official performs an adjudicatory function comparable to that of a judge, (b) the function is of sufficient public importance, and (c) the proper performance of that function would be subverted if the offi-

cial were subjected to individual suit for damages. Brief for Petitioners 21.

When we evaluate the claim of immunity for the committee members, we bear in mind that immunity status is for the benefit of the public as well as for the individual concerned. *Pierson* v. *Ray*, 386 U. S., at 554. The committee members, in a sense, do perform an adjudicatory function in that they determine whether the accused inmate is guilty or innocent of the charge leveled against him; in that they hear testimony and receive documentary evidence; in that they evaluate credibility and weigh evidence; and in that they render a decision. We recognize, too, the presence of some societal importance in this dispute-resolution function. The administration of a prison is a difficult undertaking at best, for it concerns persons many of whom have demonstrated a proclivity for antisocial, criminal, and violent conduct. See *Hudson* v. *Palmer*, 468 U. S. 517, 526–527 (1984). We also acknowledge that many inmates do not refrain from harassment and intimidation. The number of nonmeritorious prisoners' cases that come to this Court's notice is evidence of this. Tension between prison officials and inmates has been described as "unremitting." *Wolff* v. *McDonnell*, 418 U. S. 539, 562 (1974). "Retaliation is much more than a theoretical possibility." *Ibid.* And we do not underestimate the fact, stressed by petitioners, that committee members usually are persons of modest means and, if they are suable and unprotected, perhaps would be disinclined to serve on a discipline committee. See *Ward* v. *Johnson*, 690 F. 2d, at 1108.

We conclude, nonetheless, that these concerns, to the extent they are well grounded, are overstated in the context of constitutional violations. We do not perceive the discipline committee's function as a "classic" adjudicatory one, as petitioners would describe it. Tr. of Oral Arg. 9–10. Surely, the members of the committee, unlike a federal or state judge, are not "independent"; to say that they are is to ignore reality. They are not professional hearing officers, as are

administrative law judges. They are, instead, prison officials, albeit no longer of the rank and file, temporarily diverted from their usual duties. See *Ward* v. *Johnson*, 690 F. 2d, at 1115 (dissenting opinion). They are employees of the Bureau of Prisons and they are the direct subordinates of the warden who reviews their decision. They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. They thus are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee. See *Ponte* v. *Real*, 471 U. S. 491, 513 (1985) (dissenting opinion). It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance.

Neither do we equate this discipline committee membership to service upon a traditional parole board. The board is a "neutral and detached" hearing body. *Morrissey* v. *Brewer*, 408 U. S. 471, 489 (1972). The parole board member has been described as an impartial professional serving essentially "'as an arm of the sentencing judge.'" *Sellars* v. *Procunier*, 641 F. 2d., at 1302, n. 15, quoting *Bricker* v. *Michigan Parole Board*, 405 F. Supp. 1340, 1345 (ED Mich. 1975). And in the penalty context, the parole board is constitutionally required to provide greater due process protection than is the institution discipline committee. *Wolff* v. *McDonnell*, 418 U. S., at 561.

We relate this committee membership, instead, to the school board service the Court had under consideration in *Wood* v. *Strickland*, 420 U. S. 308 (1975). The school board members were to function as "adjudicators in the school disciplinary process," and they were to "judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations." *Id.*, at 319. Despite the board's adjudicative function of that extent, the Court concluded that the board members were to be protected by

only qualified immunity. After noting the suggestion of the presence of a deterrence-from-service factor, the Court concluded that "absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Id.*, at 320.

That observation and conclusion are equally applicable here. It is true, of course, that the "prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *Ingraham* v. *Wright*, 430 U. S. 651, 669 (1977). But in *Ingraham* it was also said that even if schoolchildren and their parents do not have a prisoner's motive or proclivity to institute harassing lawsuits, they have "little need for the protection of the Eighth Amendment," for "the openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner." *Id.*, at 670. If qualified immunity is sufficient for the schoolroom, it should be more than sufficient for the jailhouse where the door is closed, not open, and where there is little, if any, protection by way of community observation.

Petitioners assert with some vigor that procedural formality is not a prerequisite for absolute immunity. They refer to well-known summary and *ex parte* proceedings, such as the issuance of search warrants and temporary restraining orders, and the setting of bail. And they sound a note of practicality by stating that recasting prison disciplinary tribunals in the mold of formal administrative bodies would be inimical to the needs of prison discipline and security. It is said that committee procedures fully comply with, and indeed exceed, what *Wolff* v. *McDonnell*, *supra*, requires, that they are sufficiently "judicial" to qualify for absolute immunity, and that *Wolff* "would be undone" as a practical matter if absolute immunity were not afforded. Brief for Petitioners 30.

In any event, it is asserted, committee proceedings contain ample safeguards to ensure the avoidance or correction of constitutional errors. Among these are the qualifications for committee service; prior notice to the inmate; representation by a staff member; the right to present certain evidence at the hearing; the right to be present; the requirement for a detailed record; the availability of administrative review at three levels (demonstrated by the relief obtained on review by these respondents at the first two levels); and the availability of ultimate review in federal court under 28 U. S. C. § 2241. Finally, it is said that qualified immunity would provide insufficient protection for committee members.

We are not persuaded. To be sure, the line between absolute immunity and qualified immunity often is not an easy one to perceive and structure. That determination in this case, however, is not difficult, and we readily conclude that these committee members fall on the qualified-immunity side of the line.

Under the Bureau's disciplinary policy in effect at the time of respondents' hearings, few of the procedural safeguards contained in the Administrative Procedure Act under consideration in *Butz* were present. The prisoner was to be afforded neither a lawyer nor an independent nonstaff representative. There was no right to compel the attendance of witnesses or to cross-examine. There was no right to discovery. There was no cognizable burden of proof. No verbatim transcript was afforded. Information presented often was hearsay or self-serving. The committee members were not truly independent. In sum, the members had no identification with the judicial process of the kind and depth that has occasioned absolute immunity.

Qualified immunity, however, is available to these committee members. That, we conclude, is the proper point at which to effect the balance between the opposing considerations. This less-than-absolute protection is not of small consequence. As the Court noted in *Butz*, 438 U. S., at

507–508, insubstantial lawsuits can be recognized and be quickly disposed of, and firm application of the Federal Rules of Civil Procedure "will ensure that federal officials are not harassed by frivolous lawsuits." *Id.*, at 508. All the committee members need to do is to follow the clear and simple constitutional requirements of *Wolff* v. *McDonnell*, *supra;* they then should have no reason to fear substantial harassment and liability. Qualified immunity has been widely imposed on executive officials who possess greater responsibilities. See, *e. g.*, *Scheuer* v. *Rhodes*, *Butz* v. *Economou*, *Harlow* v. *Fitzgerald*, all *supra*, and *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985). "[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law, and . . . insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz* v. *Economou*, 438 U. S., at 506–507. See also *Barr* v. *Matteo*, 360 U. S., at 588–589 (BRENNAN, J., dissenting); *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S., at 411 (Harlan, J., concurring in judgment). See Gray, Private Wrongs of Public Servants, 47 Calif. L. Rev. 303, 339 (1959). Public policy has not dictated otherwise.

It is the business of prison officials, of course, to maintain order within their institutions. But this fact does not support a claim that every step taken to protect constitutional rights of prisoners will lead to a breakdown in institutional discipline and security. Routine and automatic arguments to this effect have been made before and have been rejected by this Court. See *Johnson* v. *Avery*, 393 U. S. 483, 486–487 (1969); *Lee* v. *Washington*, 390 U. S. 333, 334 (1968); *Ex parte Hull*, 312 U. S. 546 (1941).

We likewise are not impressed with the argument that anything less than absolute immunity will result in a flood of litigation and in substantial procedural burdens and expense for committee members. This argument, too, has been made before. But this Court's pronouncements in *Harlow*

v. *Fitzgerald*, 457 U. S., at 813–820, place the argument in appropriate perspective, for many cases may be disposed of without the necessity of pretrial discovery proceedings. Our experience teaches us that the vast majority of prisoner cases are resolved on the complaint alone. Of those prisoners whose complaints survive initial dismissal, few attempt discovery and fewer still actually obtain it. See Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610 (1979). And any expense of litigation largely is alleviated by the fact that a Government official who finds himself as a defendant in litigation of this kind is often represented, as in this case, by Government counsel. If the problem becomes acute, the Government has alternatives available to it: it might decide to indemnify the defendant official; Congress could make the claim a subject for the Federal Tort Claims Act; and Congress could even consider putting in place administrative law judges to preside at prison committee hearings.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

The Court concludes that the members of the Institution Discipline Committee of a federal prison are more like school board members than they are like administrative law judges or members of a parole board, and that therefore they are not entitled to absolute immunity from liability for damages. Concededly the hearings in which these officials perform their adjudicatory function do not include all of the procedural safeguards or the adherence to written precedent that surround the function of an administrative law judge, but I do not read *Butz* v. *Economou*, 438 U. S. 478 (1978), as making these factors dispositive against a claim for absolute immunity. I also think that the factors peculiar to the prison

environment counsel in favor of such an immunity for these officials.

Litigation before administrative law judges is generally conducted by lawyers, who are trained to suppress their dislike of, or contempt for, the particular judge before whom they try their case. The lawyers and their clients come from their homes and hotels to a government building in the morning, present their case to the judge, go and have lunch, return in the afternoon and again present their case. When the court recesses for the day, the parties and their lawyers return to their homes and hotels. At least one side will be disappointed with the ultimate ruling of the judge, but there is little reason to think that they will bear personal animus or hostility toward the judge as a result of his decision.

Inside the prison walls, however, a considerably different atmosphere appears to obtain. A prisoner charged with a serious violation of prison regulations and threatened with administrative detention and loss of good time may have quite different emotions when appearing before the Institution Discipline Committee than does, for example, the plant manager of an employer charged with a violation of the National Labor Relations Act appearing before an administrative law judge. "Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagration." *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119, 132 (1977).

Our observations in *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973), about the relationship between a State and its prisoners are equally applicable to the relationship between the Federal Government and its prisoners:

> "The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the

State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State." *Id.*, at 492.

In *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), our first major decision applying the Due Process Clause of the Fourteenth Amendment to prison disciplinary proceedings, we said:

> "Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. . . . Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner." *Id.*, at 561–562.

Not only may emotions run higher and tensions be exacerbated in the prison environment, but prisoners simply are not subject to many of the constraints which often deter members of the population at large from litigating at the drop of a hat. We have held, for example, that prisoners in confinement are entitled to free access to lawbooks or some other legal assistance. *Bounds* v. *Smith*, 430 U. S. 817 (1977). And the great majority of prisoners qualify for *in forma pauperis* status, which entitles them to relief from statutory

filing fees. With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population. And prisoners have made increasing use of § 1983 and *Bivens*-type suits in recent years: 18,856 such suits were filed in federal court in the year ending June 30, 1984, as compared to just 6,606 in 1975. Administrative Office of the United States Courts, Annual Report of the Director 143, Table 24 (1984).

In light of the foregoing, I think a slightly different balancing of the ledger is called for in the case of prison disciplinary officials than in the case of administrative law judges. The latter are surrounded by greater procedural protections for the litigants, and are governed by precedent. But the former operate in a far more volatile environment, are called upon to make decisions more quickly, and are much more likely to be the object of harassing litigation in the absence of absolute immunity. If in fact the administrative system set up by the government offers administrative relief from these officials' mistakes, and thereby permits the vindication of constitutional claims in this manner, I believe that the grant of absolute immunity meets the conditions set out in *Butz* v. *Economou*, 438 U. S. 478 (1978).

Here we need not look far for the availability or speed of administrative relief. Both respondents appeared before the Institution Discipline Committee on February 21, 1975. A few days later that committee issued its ruling, and respondents appealed to the Warden. On March 21, 1975, the Warden granted most of the relief requested, ordering respondents released from administrative segregation and restoring their forfeited good time. He also directed that their records carry a notation that the incident should not adversely affect their chances for parole. Respondents then appealed to the Regional Director of the Bureau of Prisons, who on April 11, 1975, granted respondents' final request

that all mention of the incident be expunged from their records. The entire administrative proceeding, from the day on which the hearing before the committee was held to the final ruling of the Regional Director granting respondents all of the relief requested, took less than two months.

In *Price* v. *Johnston*, 334 U. S. 266 (1948), we said that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.*, at 285. It requires no more than a commonsense application of this observation to the general principles laid down in *Butz*, *supra*, to conclude that the members of the Institution Discipline Committee are entitled to absolute immunity from liability for their decisions.

I respectfully dissent.

EASTERN AIR LINES, INC. v. MAHFOUD ON BEHALF OF MAHFOUD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83-1807. Argued January 15, 1985—Reargued October 9, 1985—Decided December 10, 1985

729 F. 2d 777, affirmed by an equally divided Court.

Richard M. Sharp reargued the cause for petitioner. With him on the briefs were *Jeffrey C. Martin, Suzanne E. Meeker, Francis G. Weller,* and *Marc J. Yellin.*

George E. Farrell reargued the cause and filed a brief for respondent.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE BRENNAN took no part in the decision of this case.

**Juanita M. Madole* and *Donald W. Madole* filed a brief for Dina Avecilla et al. as *amici curiae* urging affirmance.

REGENTS OF THE UNIVERSITY OF MICHIGAN *v.* EWING

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-1273. Argued October 8, 1985—Decided December 12, 1985

Respondent was enrolled in a 6-year program of study at the University of Michigan known as "Inteflex." An undergraduate degree and a medical degree are awarded upon successful completion of the program. To qualify for the final two years of the program a student must pass an examination known as "NBME Part I." Respondent was dismissed from the University when he failed this examination with the lowest score recorded in the history of the Inteflex program. After unsuccessfully seeking, from University authorities, readmission to the program and an opportunity to retake the examination, respondent brought suit in Federal District Court, alleging a right to retake the examination on the ground, *inter alia*, that he had a property interest in the Inteflex program and that his dismissal was arbitrary and capricious in violation of his "substantive due process rights" guaranteed by the Fourteenth Amendment. While determining that respondent had a constitutionally protected property interest in continued enrollment in the Inteflex program, the District Court found no violation of his due process rights. The Court of Appeals reversed.

Held: Even if respondent's assumed property interest gave rise to a substantive right under the Due Process Clause to continue enrollment free from arbitrary state action, the facts of record disclose no such action. The record unmistakably demonstrates that the decision to dismiss respondent was made conscientiously and with careful deliberation, based on an evaluation of his entire academic career at the University, including his singularly low score on the NBME Part I examination. The narrow avenue for judicial review of the substance of academic decisions precludes any conclusion that such decision was such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment. Pp. 222-228.

742 F. 2d 913, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court. POWELL, J., filed a concurring opinion, *post*, p. 228.

Roderick K. Daane argued the cause for petitioner. With him on the briefs was *Peter A. Davis*.

Michael M. Conway argued the cause for respondent. With him on the brief was *Mary K. Butler.**

JUSTICE STEVENS delivered the opinion of the Court.

Respondent Scott Ewing was dismissed from the University of Michigan after failing an important written examination. The question presented is whether the University's action deprived Ewing of property without due process of law because its refusal to allow him to retake the examination was an arbitrary departure from the University's past practice. The Court of Appeals held that his constitutional rights were violated. We disagree.

I

In the fall of 1975 Ewing enrolled in a special 6-year program of study, known as "Inteflex," offered jointly by the undergraduate college and the Medical School.[1] An undergraduate degree and a medical degree are awarded upon successful completion of the program. In order to qualify for the final two years of the Inteflex program, which consist of clinical training at hospitals affiliated with the University, the student must successfully complete four years of study including both premedical courses and courses in the basic medical sciences. The student must also pass the "NBME

*Briefs of *amici curiae* urging reversal were filed for the United States by *Acting Solicitor General Wallace, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, Leonard Schaitman*, and *Freddi Lipstein;* for the American Council on Education et al. by *Eugene D. Gulland, Catherine W. Brown, Sheldon Elliot Steinbach*, and *Joseph Anthony Keyes, Jr.;* for the Curators of the University of Missouri et al. by *Marvin E. Wright* and *William F. Arnet;* for Duke University et al. by *Robert B. Donin, Daniel Steiner, Eugene J. McDonald, Estelle A. Fishbein, Michael C. Weston*, and *Peter H. Ruger;* and for the American Association of University Professors by *Ann H. Franke* and *Jacqueline W. Mintz.*

Michael H. Gottesman, Robert M. Weinberg, Joy L. Koletsky, Laurence Gold, and *David M. Silberman* filed a brief for the National Education Association et al. as *amici curiae* urging affirmance.

[1] The Inteflex program has since been lengthened to seven years.

Part I"—a 2-day written test administered by the National Board of Medical Examiners.

In the spring of 1981, after overcoming certain academic and personal difficulties, Ewing successfully completed the courses prescribed for the first four years of the Inteflex program and thereby qualified to take the NBME Part I. Ewing failed five of the seven subjects on that examination, receiving a total score of 235 when the passing score was 345. (A score of 380 is required for state licensure and the national mean is 500.) Ewing received the lowest score recorded by an Inteflex student in the brief history of that program.

On July 24, 1981, the Promotion and Review Board individually reviewed the status of several students in the Inteflex program. After considering Ewing's record in some detail, the nine members of the Board in attendance voted unanimously to drop him from registration in the program.

In response to a written request from Ewing, the Board reconvened a week later to reconsider its decision. Ewing appeared personally and explained why he believed that his score on the test did not fairly reflect his academic progress or potential.[2] After reconsidering the matter, the nine voting members present unanimously reaffirmed the prior action to drop Ewing from registration in the program.

In August, Ewing appealed the Board's decision to the Executive Committee of the Medical School. After giving Ewing an opportunity to be heard in person, the Executive Committee unanimously approved a motion to deny his appeal for a leave of absence status that would enable him to retake Part I of the NBME examination. In the following

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[2] At this and later meetings Ewing excused his NBME Part I failure because his mother had suffered a heart attack 18 months before the examination; his girlfriend broke up with him about six months before the examination; his work on an essay for a contest had taken too much time; his make-up examination in pharmacology was administered just before the NBME Part I; and his inadequate preparation caused him to panic during the examination.

year, Ewing reappeared before the Executive Committee on two separate occasions, each time unsuccessfully seeking readmission to the Medical School. On August 19, 1982, he commenced this litigation in the United States District Court for the Eastern District of Michigan.

II

Ewing's complaint against the Regents of the University of Michigan asserted a right to retake the NBME Part I test on three separate theories, two predicated on state law and one based on federal law.[3] As a matter of state law, he alleged that the University's action constituted a breach of contract and was barred by the doctrine of promissory estoppel. As a matter of federal law, Ewing alleged that he had a property interest in his continued enrollment in the Inteflex program and that his dismissal was arbitrary and capricious, violating his "substantive due process rights" guaranteed by the Fourteenth Amendment and entitling him to relief under 42 U. S. C. § 1983.

The District Court held a 4-day bench trial at which it took evidence on the University's claim that Ewing's dismissal was justified as well as on Ewing's allegation that other University of Michigan medical students who had failed the NBME Part I had routinely been given a second opportunity to take the test. The District Court described Ewing's unfortunate academic history in some detail. Its findings, set forth in the margin,[4] reveal that Ewing "encountered imme-

[3] A fourth count of Ewing's complaint advanced a claim for damages under 42 U. S. C. § 1983. The District Court held that the Board of Regents is a state instrumentality immunized from liability for damages under the Eleventh Amendment, and dismissed this count of the complaint. *Ewing* v. *Board of Regents*, 552 F. Supp. 881 (ED Mich. 1982).

[4] "In the fall of 1975, when Ewing enrolled in the program, he encountered immediate difficulty in handling the work and he did not take the final examination in Biology. It was not until the following semester that he completed this course and received a C. His performance in his other first semester courses was as follows: a C in Chemistry 120, a C in his writing course, and an incomplete in the Freshman Seminar. In the next se-

diate difficulty in handling the work," *Ewing* v. *Board of Regents*, 559 F. Supp. 791, 793 (1983), and that his difficulties—in the form of marginally passing grades and a number of

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mester he took Chemistry 220, a Freshman Seminar, and Psychology 504. He received a B in the Freshman Seminar, a C in Chemistry 220, but he withdrew from Psychology 504. He was advised at that time that he could not take the Patient Care Course, usually given during the fall of an Inteflex student's second year, and he was placed on an irregular program. Because of these difficulties, at the July 14, 1976 meeting of the Promotion and Review Board he requested a leave of absence, and when this was approved, he left the program.

"During the summer of 1976 while on leave, he took two Physics courses at Point Loma College in California. He reentered the Inteflex program at the University of Michigan in the winter 1977 term. In that term he repeated Chemistry 220 in which he received an A−. In the spring of 1977, he passed the Introduction to the Patient Care course.

"In the 1977–78 year, he completed the regular Year II program. But then he encountered new difficulty. In the fall of 1978 he received an incomplete in Clinical Studies 400, which was converted to a Pass; a B in Microbiology 420; and an incomplete in Gross Anatomy 507. The Gross Anatomy incomplete was converted to a C− by a make-up examination. During the winter of 1979 he received a C− in Genetics 505, a C in Microbiology 520, an E in Microanatomy and General Pathology 506, a B in Creative Writing, and a Pass in Clinical Studies 410. He appealed the Microanatomy and General Pathology grade, requesting a change from an E to a D, and a make-up exam to receive a Pass. His appeal was denied by the Grade Appeal Committee, and he was again placed on an irregular program; he took only the Clinical Studies 420 course in the spring 1979 semester.

"In July 1979, Ewing submitted a request to the Promotion and Review Board for an irregular program consisting of a course in Pharmacology in the fall and winter 1979–80 and a course in Human Illness and Neuroscience in 1980–81, thus splitting the fourth year into two years. The Board denied this request and directed him to take the fourth year curriculum in one academic year. He undertook to do so. He removed his deficiency in Microanatomy and General Pathology 506 by repeating the course during the winter 1980 semester and received a C+. In the spring term of 1980 he passed Developmental Anatomy with a B− grade, and he received a C grade in Neuroscience I 509 after a reexamination. In the fall of 1980, he received a passing grade in Neuroscience 609 and Pharmacology 626, and in the winter term of 1981, he received a passing grade in Clinical Studies

incompletes and make-up examinations, many experienced while Ewing was on a reduced course load—persisted throughout the 6-year period in which he was enrolled in the Inteflex program.

Ewing discounted the importance of his own academic record by offering evidence that other students with even more academic deficiencies were uniformly allowed to retake the NBME Part I. See App. 107–111. The statistical evidence indicated that of the 32 standard students in the Medical School who failed Part I of the NBME since its inception, all 32 were permitted to retake the test, 10 were allowed to take the test a third time, and 1 a fourth time. Seven students in the Inteflex program were allowed to retake the test, and one student was allowed to retake it twice. Ewing is the only student who, having failed the test, was not permitted to retake it. Dr. Robert Reed, a former Director of the Inteflex program and a member of the Promotion and Review Board, stated that students were "routinely" given a second chance. 559 F. Supp., at 794. Accord, App. 8, 30, 39–40, 68, 73, 163. Ewing argued that a promotional pamphlet released by the Medical School approximately a week before the examination had codified this practice. The pamphlet, entitled "On Becoming a Doctor," stated:

> "According to Dr. Gibson, everything possible is done to keep qualified medical students in the Medical School. This even extends to taking and passing National Board Exams. Should a student fail either part of the National Boards, an opportunity is provided to make up the failure in a second exam." *Id.*, at 113.

The District Court concluded that the evidence did not support either Ewing's contract claim or his promissory es-

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510 and a deficiency in Pharmacology 627. He was given a make-up examination in this course, and he received a 67.7 grade.

"He then took Part I of the NBME . . . ." *Ewing* v. *Board of Regents*, 559 F. Supp., at 793–794.

toppel claim under governing Michigan law. There was "no sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct to give Ewing a second chance to take Part I of the NBME examination." 559 F. Supp., at 800. With reference to the pamphlet "On Becoming A Doctor," the District Court held that "even if [Ewing] had learned of the pamphlet's contents before he took the examination, and I find that he did not, I would not conclude that this amounted either to an unqualified promise to him or gave him a contract right to retake the examination." *Ibid.*

With regard to Ewing's federal claim, the District Court determined that Ewing had a constitutionally protected property interest in his continued enrollment in the Inteflex program and that a state university's academic decisions concerning the qualifications of a medical student are "subject to substantive due process review" in federal court. *Id.*, at 798. The District Court, however, found no violation of Ewing's due process rights. The trial record, it emphasized, was devoid of any indication that the University's decision was "based on bad faith, ill will or other impermissible ulterior motives"; to the contrary, the "evidence demonstrate[d] that the decision to dismiss plaintiff was reached in a fair and impartial manner, and only after careful and deliberate consideration." *Id.*, at 799. To "leave no conjecture" as to his decision, the District Judge expressly found that "the evidence demonstrate[d] no arbitrary or capricious action since [the Regents] had good reason to dismiss Ewing from the program." *Id.*, at 800.

Without reaching the state-law breach-of-contract and promissory-estoppel claims,[5] the Court of Appeals reversed the dismissal of Ewing's federal constitutional claim. The

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[5] In a footnote, the Court of Appeals stated: "Because we believe this case can be disposed of on the Section 1983 claim, this Court does not expressly reach the breach of contract or promissory estoppel claims." *Ewing* v. *Board of Regents*, 742 F. 2d 913, 914, n. 2 (CA6 1984).

Court of Appeals agreed with the District Court that Ewing's implied contract right to continued enrollment free from arbitrary interference qualified as a property interest protected by the Due Process Clause, but it concluded that the University had arbitrarily deprived him of that property in violation of the Fourteenth Amendment because (1) "Ewing was a 'qualified' student, as the University defined that term, at the time he sat for NBME Part I"; (2) "it was the consistent practice of the University of Michigan to allow a qualified medical student who initially failed the NBME Part I an opportunity for a retest"; and (3) "Ewing was the only University of Michigan medical student who initially failed the NBME Part I between 1975 and 1982, and was not allowed an opportunity for a retest." *Ewing* v. *Board of Regents*, 742 F. 2d 913, 916 (CA6 1984). The Court of Appeals therefore directed the University to allow Ewing to retake the NBME Part I, and if he should pass, to reinstate him in the Inteflex program.

We granted the University's petition for certiorari to consider whether the Court of Appeals had misapplied the doctrine of "substantive due process."[6] 470 U. S. 1083 (1985). We now reverse.

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[6]The University's petition for certiorari also presented the question whether the Eleventh Amendment constituted a complete bar to the action because it was brought against the "Board of Regents of the University of Michigan," App. 13, a body corporate. Cf. *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U. S. 147 (1981) *(per curiam); Alabama* v. *Pugh*, 438 U. S. 781 (1978) *(per curiam)*. After the petition was granted, however, respondent Ewing filed a motion to amend the complaint by joining the individual members of the Board of Regents as named defendants in their official capacities. The University did not oppose that motion. Tr. of Oral Arg. 12–13.

Granting the motion merely conforms the pleadings to the "course of proceedings" in the District Court. Cf. *Kentucky* v. *Graham*, 473 U. S. 159, 167, n. 14 (1985); *Brandon* v. *Holt*, 469 U. S. 464, 469 (1985). The record reveals that the Regents frequently referred to themselves in the plural, as "defendants," indicating that they understood the suit to be against them individually, in their official capacities, rather than against

III

In *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U. S. 78, 91–92 (1978), we assumed, without deciding, that federal courts can review an academic decision of a public educational institution under a substantive due process standard. In this case Ewing contends that such review is appropriate because he had a constitutionally protected property interest in his continued enrollment in the Inteflex program.[7] But remembering Justice Brandeis' admonition not to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (concurring opinion), we again conclude, as we did in *Horowitz*, that the precise facts disclosed by the record afford the most appropriate basis for

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the Board as a corporate entity. App. 11. Likewise, the District Court held that "defendants did not act in violation of Ewing's due process rights," 559 F. Supp., at 799, and accordingly found "in favor of the defendants," *id.*, at 800. We consequently grant the motion, thereby allowing Ewing to name as defendants the individual members of the Board of Regents in their official capacities. See *Patsy* v. *Florida Board of Regents*, 457 U. S. 496, 516, n. 19 (1982). Given our resolution of the case, we need not consider the question whether the relief sought by Ewing would be available under Eleventh Amendment principles.

[7] Ewing and the courts below reasoned as follows: In *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972), this Court held that property interests protected by due process are "defined by existing rules or understandings that stem from an independent source such as state law." See *Goss* v. *Lopez*, 419 U. S. 565, 572–573 (1975). In a companion case, *Perry* v. *Sindermann*, 408 U. S. 593, 601–602 (1972), we held that "agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances'" could be independent sources of property interests. See *Bishop* v. *Wood*, 426 U. S. 341, 344 (1976) (implied contracts). According to an antiquated race discrimination decision of the Michigan Supreme Court (whose principal holding has since been overtaken by events), "when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom." *Booker* v. *Grand Rapids Medical College*, 156 Mich. 95, 99–100, 120 N. W. 589, 591 (1909). From the foregoing, Ewing would have us conclude that he had a protectible property interest in continued enrollment in the Inteflex program.

decision. We therefore accept the University's invitation to "assume the existence of a constitutionally protectible property right in [Ewing's] continued enrollment,"[8] and hold that even if Ewing's assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action.

As a preliminary matter, it must be noted that any substantive constitutional protection against arbitrary dismissal would not necessarily give Ewing a right to retake the NBME Part I. The constitutionally protected interest alleged by Ewing in his complaint, App. 15, and found by the courts below, derives from Ewing's implied contract right to continued enrollment free from arbitrary dismissal. The District Court did not find that Ewing had any separate right to retake the exam and, what is more, explicitly "reject[ed] the contract and promissory estoppel claims, finding no sufficient evidence to conclude that the defendants bound themselves either expressly or by a course of conduct to give Ewing a second chance to take Part I of the NBME examination." 559 F. Supp., at 800. The Court of Appeals did not overturn the District Court's determination that Ewing lacked a tenable contract or estoppel claim under Michigan law,[9] see *supra*, at 220, and n. 5, and we accept its reason-

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[8] Tr. of Oral Arg. 3. Consistent with this suggestion, petitioner's answer to Ewing's complaint "admit[ted] that, under Michigan law, [Ewing] may have enjoyed a property right and interest in his continued enrollment in the Inteflex Program." App. 21.

[9] Although there is some ambiguity in its opinion, we understand the Court of Appeals to have found "clearly erroneous" the District Court's rejection of Ewing's federal substantive due process claim solely because of the "undisputed evidence of a consistent pattern of conduct"—namely, the "substantial and uncontroverted evidence in the trial record that at the time Ewing took the NBME Part I, medical students were routinely given a second opportunity to pass it." 742 F. 2d, at 915. The Court of Appeals found no "rule" to the effect that medical students are entitled to retake failed examinations. Indeed, it relied on the University's "promotional

able rendering of state law, particularly when no party has challenged it.[10]

The University's refusal to allow Ewing to retake the NBME Part I is thus not actionable in itself. It is, however, an important element of Ewing's claim that his dismissal was the product of arbitrary state action, for under proper analysis the refusal may constitute evidence of arbitrariness even

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pamphlet entitled 'On Becoming a Doctor'" only to the extent that it "memorialized the consistent *practice* of the medical school with respect to students who initially fail that examination." *Id.*, at 916 (emphasis added).

A property interest in a second examination, however, cannot be inferred from a consistent practice without some basis in state law. Yet in this case the Court of Appeals did not reverse the District Court's finding that Ewing was not even aware of the contents of the pamphlet and left standing its holding that the statements in this promotional tract did not "amoun[t] either to an unqualified promise to him or . . . a contract right to retake the examination" under state law. 559 F. Supp., at 800. We recognize, of course, that "mutually explicit understandings" may operate to create property interests. *Perry* v. *Sindermann*, 408 U. S., at 601. But such understandings or tacit agreements must support "a legitimate claim of entitlement" under "'an independent source such as state law . . . .'" *Id.*, at 602, n. 7 (quoting *Board of Regents* v. *Roth*, 408 U. S., at 577). The District Court, it bears emphasis, held that the University's liberal retesting custom gave rise to no state-law entitlement to retake the NBME Part I. We rejected an argument similar to Ewing's in *Board of Regents* v. *Roth*. In that case Dr. Roth asserted a property interest in continued employment by virtue of the fact that "of four hundred forty-two non-tenured professors, four were not renewed during [a particular] academic year." Brief for Respondent in *Board of Regents* v. *Roth*, O. T. 1971, No. 71-162, p. 28 (footnote and citation omitted). Absent a state statute or university rule or "anything approaching a 'common law' of reemployment," however, we held that Dr. Roth had no property interest in the renewal of his teaching contract. *Board of Regents* v. *Roth*, 408 U. S., at 578, n. 16.

[10] "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949). Accord, *Haring* v. *Prosise*, 462 U. S. 306, 314, n. 8 (1983); *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 181, n. 11 (1979); *Butner* v. *United States*, 440 U. S. 48, 58 (1979); *Bishop* v. *Wood*, 426 U. S., at 345–347.

if it is not the actual legal wrong alleged. The question, then, is whether the record compels the conclusion that the University acted arbitrarily in dropping Ewing from the Inteflex program without permitting a reexamination.

It is important to remember that this is not a case in which the procedures used by the University were unfair in any respect; quite the contrary is true. Nor can the Regents be accused of concealing nonacademic or constitutionally impermissible reasons for expelling Ewing; the District Court found that the Regents acted in good faith.

Ewing's claim, therefore, must be that the University misjudged his fitness to remain a student in the Inteflex program. The record unmistakably demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment.[11] Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. Cf. *Youngberg* v. *Romeo*, 457 U. S. 307, 323 (1982).

Considerations of profound importance counsel restrained judicial review of the substance of academic decisions. As JUSTICE WHITE has explained:

> "Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history;

[11] "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U. S. 78, 96, n. 6 (1978) (POWELL, J., concurring). See *id.*, at 90–92 (opinion of the Court).

> that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments. This is . . . only to underline Mr. Justice Black's constant reminder to his colleagues that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable." *Moore* v. *East Cleveland*, 431 U. S. 494, 543–544 (1977) (WHITE, J., dissenting).

See *id.*, at 502 (opinion of POWELL, J.). Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment." *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603 (1967).[12] If a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," *Bishop* v. *Wood*, 426 U. S. 341, 349 (1976), far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U. S., at 89–90.

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[12] Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, see *Keyishian* v. *Board of Regents*, 385 U. S., at 603; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957) (opinion of Warren, C. J.), but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself, see *University of California Regents* v. *Bakke*, 438 U. S. 265, 312 (1978) (opinion of POWELL, J.); *Sweezy* v. *New Hampshire*, 354 U. S., at 263 (Frankfurter, J., concurring in result). Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of "the four essential freedoms" of a university. *University of California Regents* v. *Bakke*, 438 U. S., at 312 (opinion of POWELL, J.) (quoting *Sweezy* v. *New Hampshire*, 354 U. S., at 263 (Frankfurter, J., concurring in result)) (internal quotations omitted).

This narrow avenue for judicial review precludes any conclusion that the decision to dismiss Ewing from the Inteflex program was such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment. Certainly his expulsion cannot be considered aberrant when viewed in isolation. The District Court found as a fact that the Regents "had good reason to dismiss Ewing from the program." 559 F. Supp., at 800. Before failing the NBME Part I, Ewing accumulated an unenviable academic record characterized by low grades, seven incompletes, and several terms during which he was on an irregular or reduced course load. Ewing's failure of his medical boards, in the words of one of his professors, "merely culminate[d] a series of deficiencies. . . . In many ways, it's the straw that broke the camel's back." App. 79. Accord, *id.*, at 7, 54–55, 72–73.[13] Moreover, the fact that Ewing was "qualified" in the sense that he was eligible to take the examination the first time does not weaken this conclusion, for after Ewing took the NBME Part I it was entirely reasonable for the faculty to reexamine his entire record in the light of the unfortunate results of that examination. Admittedly, it may well have been unwise to deny Ewing a second chance. Permission to retake the test might have saved the University the expense of this litigation and conceivably might have demonstrated that the members of the Promotion and Review Board misjudged Ewing's fitness for the medical profession. But it nevertheless remains true that his dismissal from the Inteflex program rested on an academic judgment that is not beyond

[13] Even viewing the case from Ewing's perspective, we cannot say that the explanations and extenuating circumstances he offered were so compelling that their rejection can fairly be described as irrational. For example, the University might well have concluded that Ewing's sensitivity to difficulties in his personal life suggested an inability to handle the stress inherent in a career in medicine. The inordinate amount of time Ewing devoted to his extracurricular essay writing may reasonably have revealed to the University a lack of judgment and an inability to set priorities.

the pale of reasoned academic decisionmaking when viewed against the background of his entire career at the University of Michigan, including his singularly low score on the NBME Part I examination.[14]

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, concurring.

Although I join the Court's opinion holding that respondent presents no violation of the substantive due process right that he asserts, I think it unnecessary to assume the existence of such a right on the facts of this case. Respondent alleges that he had a property interest in his continued enroll-

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[14] Nor does the University's termination of Ewing substantially deviate from accepted academic norms when compared with its treatment of other students. To be sure, the University routinely gave others an opportunity to retake the NBME Part I. But despite tables recording that some students with more incompletes or low grades were permitted to retake the examination after failing it the first time, App. 105–111, and charts indicating that these students lacked the outside research and honor grade in clinical work that Ewing received, *id.*, at 119–120, we are not in a position to say that these students were "similarly situated" with Ewing. The Promotion and Review Board presumably considered not only the raw statistical data but also the nature and seriousness of the individual deficiencies and their concentration in particular disciplines—in Ewing's case, the hard sciences. The Board was able to take into account the numerous incompletes and make-up examinations Ewing required to secure even marginally passing grades, and it could view them in connection with his reduced course loads. Finally, it was uniquely positioned to observe Ewing's judgment, self-discipline, and ability to handle stress, and was thus especially well situated to make the necessarily subjective judgment of Ewing's prospects for success in the medical profession. The insusceptibility of promotion decisions such as this one to rigorous judicial review is borne out by the fact that 19 other Inteflex students, some with records that a judge might find "better" than Ewing's, were dismissed by the faculty without even being allowed to take the NBME Part I a first time. *Id.*, at 165–166. Cf. *id.*, at 66 (nine Inteflex students terminated after suffering one deficiency and failing one course after warning).

ment in the University's Inteflex program, and that his dismissal was arbitrary and capricious. The dismissal allegedly violated his substantive due process rights guaranteed by the Fourteenth Amendment, providing the basis for his claim under 42 U. S. C. § 1983.

I

As the Court correctly points out, respondent's claim to a property right is dubious at best. *Ante*, at 222, n. 7. Even if one assumes the existence of a property right, however, not every such right is entitled to the protection of substantive due process. While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972), substantive due process rights are created only by the Constitution.

The history of substantive due process "counsels caution and restraint." *Moore* v. *East Cleveland*, 431 U. S. 494, 502 (1977) (opinion of POWELL, J., for a plurality). The determination that a substantive due process right exists is a judgment that "'certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.'" *Ibid.*, quoting *Poe* v. *Ullman*, 367 U. S. 497, 543 (1961) (Harlan, J., dissenting). In the context of liberty interests, this Court has been careful to examine each asserted interest to determine whether it "merits" the protection of substantive due process. See, *e. g.*, *East Cleveland*, *supra*; *Roe* v. *Wade*, 410 U. S. 113 (1973); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). "Each new claim to [substantive due process] protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." *Poe*, *supra*, at 544 (Harlan, J., dissenting).

The interest asserted by respondent—an interest in continued enrollment from which he derives a right to retake the NBME—is essentially a state-law contract right. It bears little resemblance to the fundamental interests that previ-

ously have been viewed as implicitly protected by the Constitution. It certainly is not closely tied to "respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms," *Griswold, supra*, at 501 (Harlan, J., concurring in judgment). For these reasons, briefly summarized, I do not think the fact that Michigan may have labeled this interest "property" entitles it to join those other, far more important interests that have heretofore been accorded the protection of substantive due process. Cf. *Harrah Independent School District* v. *Martin*, 440 U. S. 194 (1979).

II

I agree fully with the Court's emphasis on the respect and deference that courts should accord academic decisions made by the appropriate university authorities. In view of Ewing's academic record that the Court charitably characterizes as "unfortunate," this is a case that never should have been litigated. After a 4-day trial in a District Court, the case was reviewed by the Court of Appeals for the Sixth Circuit, and now is the subject of a decision of the United States Supreme Court. Judicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate, particularly where orderly administrative procedures are followed—as in this case.*

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*See *Board of Curators, University of Missouri* v. *Horowitz*, 435 U. S. 78, 96, n. 6 (1978) (opinion of POWELL, J.), cited *ante*, at 225, n. 11. See also *University of California Regents* v. *Bakke*, 438 U. S. 265, 312 (1978) (opinion of POWELL, J.) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment"); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603 (1967).

UNITED STATES v. ROJAS-CONTRERAS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1023. Argued October 9, 1985—Decided December 16, 1985

Respondent was indicted by a federal grand jury on February 18, 1983, for felony illegal entry into the United States and reentry by a deported alien, he having been previously convicted for illegal entry "on or about December 17, 1981." Appearing through counsel on February 18, 1983, respondent was arraigned, and the trial was set for April 19, 1983. When it was noticed that the date of the previous conviction was actually December 7, 1981, the grand jury, on April 15, 1983, returned a superseding indictment identical to the original except that it corrected the date of the previous conviction. Respondent then moved for a 30-day continuance of the trial, contending that 18 U. S. C. § 3161(c)(2)—which provides that a trial shall not commence less than 30 days "from the date on which the defendant first appears through counsel"—required a new 30-day trial preparation period following the return of the superseding indictment. The District Court denied the motion, and respondent was convicted. The Court of Appeals reversed, holding that respondent was entitled to the new 30-day trial preparation period.

Held: The Speedy Trial Act, of which § 3161(c)(2) is a part, does not require that the 30-day preparation period be restarted upon the filing of a superseding indictment. Pp. 234–237.

(a) That this was Congress' intention is evident from the unambiguous language of § 3161(c)(2) that clearly fixes the beginning point for the trial preparation period as the first appearance through counsel, and does not refer to the date of the indictment, much less the date of any superseding indictment. This conclusion is further supported by the language of § 3161(c)(1), which establishes the outside time limit within which a trial must commence and explicitly refers to the date of indictment as one of the relevant dates for determining that time limit. Pp. 234–235.

(b) The requirements of § 3161(c)(2) were met here, where the time between the date of respondent's first appearance through counsel and the date of the trial afforded a trial preparation period *twice* as long as the minimum required by § 3161(c)(2). P. 236.

(c) Respondent was clearly not prejudiced by the return of the superseding indictment, which did nothing except correct the date of the previous conviction. Pp. 236–237.

730 F. 2d 771, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which BRENNAN, J., joined, *post*, p. 237.

Patty Merkamp Stemler argued the cause for the United States. With her on the briefs were former *Solicitor General Lee, Acting Solicitor General Fried, Assistant Attorney General Trott, Deputy Solicitor General Frey*, and *Joshua I. Schwartz*.

Judy Clarke, by appointment of the Court, 470 U. S. 1048, argued the cause and filed a brief for respondent.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict in the Circuits[1] as to whether (a) the Speedy Trial Act of 1974, 18 U. S. C. § 3161 *et seq.*, as amended, prohibits commencement of a trial less than 30 days after arraignment on a superseding indictment; and (b) assuming a violation of the Speedy Trial Act in this case, was that error harmless?

I

On December 7, 1981, respondent, who is not a citizen of the United States, was convicted of illegal entry into this country and was sentenced to one year's imprisonment. After serving his sentence, respondent returned to Mexico.

Again, on February 13, 1983, he entered the United States illegally and was apprehended by United States Border

[1] Compare *United States* v. *Guzman*, 754 F. 2d 482 (CA2 1985), cert. pending, No. 84-1604; *United States* v. *Rush*, 738 F. 2d 497 (CA1 1984), cert. denied, 470 U. S. 1004 (1985); *United States* v. *Williford*, No. 83-1376 (CA5, Feb. 27, 1984) (unpublished opinion), cert. denied, 469 U. S. 893 (1984); *United States* v. *Horton*, 676 F. 2d 1165 (CA7 1982), cert. denied, 459 U. S. 1201 (1983); and *United States* v. *Todisco*, 667 F. 2d 255 (CA2 1981), cert. denied, 455 U. S. 906 (1982), with *United States* v. *Rojas-Contreras*, No. 83-5089 (CA9, Mar. 2, 1984) (case below; unpublished opinion). See also *United States* v. *Feldman*, 761 F. 2d 380 (CA7 1985).

Patrol agents. On February 18, 1983, a federal grand jury sitting in the Southern District of California returned a two-count indictment charging respondent with felony illegal entry under 8 U. S. C. § 1325 and with reentry by a deported alien under 8 U. S. C. § 1326. The indictment stated that the judgment of conviction for the prior illegal entry, which formed the predicate for the enhancement of the § 1325 offense to a felony, was "rendered on or about December 17, 1981." The date of the previous conviction was actually December 7, 1981. On February 18, 1983, respondent, appearing through counsel, was arraigned on the indictment. Trial was set for April 19, 1983.

On March 21, 1983, the Government informed respondent of the correct date of the previous conviction, and on April 15, 1983, the grand jury returned a superseding indictment which was identical with the original indictment in all respects except that it stated that the date of the previous conviction was "on or about December 7, 1981."[2] Respondent was arraigned on the superseding indictment on April 18, 1983.

Later that day at a pretrial conference, respondent's counsel moved for a 30-day continuance of the trial scheduled to begin the next day contending that the Speedy Trial Act, as construed by the Court of Appeals for the Ninth Circuit in *United States* v. *Arkus*, 675 F. 2d 245 (1982), required that a new 30-day trial preparation period be granted following the return of a superseding indictment.[3] The District Court denied respondent's motion for a 30-day continuance citing the Seventh Circuit's decision in *United States* v. *Horton*, 676

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[2] The record does not disclose why the indictment was not corrected by a motion for amendment in the District Court.

[3] Respondent's counsel also argued that he needed the additional time to consult a fingerprint expert and to review respondent's immigration file. However, the ultimate fact to which such evidence related, *i. e.* that respondent and the person arrested in 1981 were one and the same, was ultimately stipulated to by respondent.

F. 2d 1165 (1982), and distinguishing *Arkus*. Respondent was convicted of felony illegal entry into the United States.

The Court of Appeals reversed, holding that under its decision in *United States* v. *Harris*, 724 F. 2d 1452 (CA9 1984), which in turn relied on its decision in *Arkus*, respondent was entitled to a new 30-day trial preparation period following his arraignment on the superseding indictment. Citing its decision in *United States* v. *Daly*, 716 F. 2d 1499 (CA9 1983), the Court of Appeals held that reversal of respondent's conviction was required to remedy the Speedy Trial Act violation because "any pretrial preparation period shorter than thirty days is inadequate *per se*. No showing of prejudice is required."

We granted certiorari, 469 U. S. 1207 (1985). We reverse.

II

Our starting point, of course, is the language of the statute. The Speedy Trial Act of 1974, as amended in 1979, 18 U. S. C. §3161 *et seq.*, establishes inside and outside time limits for commencing trial in criminal cases. Section 3161(c)(2), the provision at issue in this case, provides:

> "Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days *from the date on which the defendant first appears through counsel* or expressly waives counsel and elects to proceed pro se" (emphasis added).

The statute clearly fixes the beginning point for the trial preparation period as the first appearance through counsel. It does not refer to the date of the indictment, much less to the date of any superseding indictment. Given this unambiguous language, we have no choice but to conclude that Congress did not intend that the 30-day trial preparation period begin to run from the date of filing of a superseding indictment.

That conclusion finds additional support in the language of § 3161(c)(1). That section establishes the outside time limit within which trial must commence under the Act and explicitly refers to the date of the indictment as one of the relevant dates for determining that time limit:

> "[T]he trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days *from the filing date (and making public) of the information or indictment*, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs" (emphasis added).

It is clear that Congress knew how to provide for the computation of time periods under the Act relative to the date of an indictment. Had Congress intended that the 30-day trial preparation period of § 3161(c)(2) commence or recommence on such a date, it would have so provided.

Because the language of § 3161(c)(2) is a clear expression of Congressional intent, we need not resort to the legislative history of that section. We note, however, that the legislative history is wholly consistent with our reading of that section. The 30-day trial preparation period was not included in the original Speedy Trial Act as it was enacted in 1975 but was incorporated into the Act with the 1979 amendments to the Act. Speedy Trial Act Amendments Act of 1979, Pub. L. 96–43, 93 Stat. 327. The legislative history of the 1979 revisions suggests that the source of the 30-day trial preparation period was a set of guidelines issued by the Judicial Council of the United States Court of Appeals for the Second Circuit. See Hearings on S. 961 and S. 1028 before the Senate Committee on the Judiciary, 96th Cong., 1st Sess., 122, 386–436 (1979). The Guidelines were issued to assist the trial judges sitting in the Second Circuit in interpreting the provisions of the Act. *Id.*, at 386. These Guidelines provided that "whenever the time between arraignment and the scheduled trial date does not exceed thirty (30) days,

the Court shall . . . view a request for an adjournment of trial to a date beyond thirty (30) days but within the sixty (60) day limit, liberally . . . ." *Id.*, at 392–393. The Guidelines also stated that, in the situation where a superseding indictment adds new charges, trial of the original charges must begin "within the time limit for commencement of trial on the original indictment or information." *Id.*, at 417. Taking these two statements from the Guidelines together, it appears that, although the Second Circuit was clearly concerned that a defendant be given a pretrial preparation period of at least 30 days, the filing of a superseding indictment was not enough by itself to require the restarting of that 30-day period.

Applying § 3161(c)(2) to the facts of this case, we conclude that the requirements of that section were met here. The record reflects that respondent's first appearance through counsel occurred on February 18, 1983. Trial was not commenced until April 19, 1983. Respondent was, therefore, afforded a pretrial preparation period *twice* as long as the minimum required by § 3161(c)(2).

In concluding as we do that the Act does not require that the 30-day trial preparation period be restarted upon the filing of a superseding indictment, we do not hold that a defendant must always be compelled to go to trial less than 30 days after the filing of such an indictment. The Act itself places broad discretion in the District Court to grant a continuance when necessary to allow further preparation. Section 3161(h)(8) authorizes the trial judge to grant a continuance if "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." The authority of the District Court to grant an "ends of justice" continuance should take care of any case in which the Government seeks a superseding indictment which operates to prejudice a defendant.

Here respondent was clearly not prejudiced by the return of the superseding indictment. The initial indictment recited that the judgment on the prior illegal entry had been

rendered "on or about December 17, 1981." The superseding indictment did nothing except to correct that phrase to read "on or about December 7, 1981." Even if we were prepared to hold that December 7 is not "on or about" December 17, we would nevertheless be compelled to conclude that respondent was not prejudiced by the change.

Since the Act did not prohibit the commencement of the trial less than 30 days after arraignment on the superseding indictment, we need not address the question of whether the District Court's refusal to grant the continuance requested by respondent was harmless error.

The Court of Appeals' construction of the Act ignored its plain language and would frustrate its basic purpose which is manifest in its very title: The speedy trial of criminal cases. That construction was error, and we reverse.

Reversed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, concurring in the judgment.

I concur in the result the Court reaches and therefore in its judgment. The Court today holds that the Speedy Trial Act does not mandate a new 30-day defense-preparation period following return of a superseding indictment. I agree with the Court that that holding is strongly guided by the express purpose of the Speedy Trial Act. But because I find neither the language of the Act particularly clear nor its legislative history at all helpful, I refrain from joining the opinion's statutory analysis.

The term "superseding indictment" refers to a second indictment issued in the absence of a dismissal of the first. The Act nowhere refers to a superseding indictment, and seems to assume that dismissal of the first indictment will precede issuance of the second. See 18 U. S. C. §§ 3161(d)(1) and 3161(h)(6). Section 3161(c)(2), which establishes the 30-day defense-preparation period "from the date on which the defendant first appears through counsel," therefore can provide only the starting point of the inquiry. The question

before the Court is whether that language may be interpreted to refer to the defendant's appearance on the indictment upon which he ultimately goes to trial, or whether one must read that language to refer to the defendant's appearance on the first indictment. Despite the fact that the legislative history of the Act is of no assistance,[1] we are guided in our task by the purpose and the structure of the Act.

The Speedy Trial Act "gave effect to a Federal defendant's right to speedy trial under the Sixth Amendment and acknowledged the danger to society represented by accused persons on bail for prolonged periods of time." H. R. Rep. No. 96–390, p. 3 (1979). To accomplish these goals, the Act provides strict time limits for each stage of the criminal trial process. The Act, as amended, requires that a defendant be brought to trial within 70 days of his first appearance through

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[1] As the Court observes, *ante*, at 235, the notion that the Act might operate to deny defendants the necessary time adequately to prepare for trial had its genesis in the Guidelines issued by the Judicial Council of the United States Court of Appeals for the Second Circuit (Guidelines). See Hearings on S. 961 and S. 1028 before the Senate Committee on the Judiciary, 96th Cong., 1st Sess., 122, 386–436 (1979) (Hearings). However, in enacting the 1979 amendments, Congress did not adopt the Second Circuit's Guidelines; in fact, Congress rejected the Guidelines' *discretionary* grant of a defense-preparation period, opting instead for a *mandatory* 30-day period. In light of this fundamental difference between the Act and the Guidelines, the latter's details can provide little help for today's decision. In any event, the Guidelines do not answer the question before us. Under them, where a superseding indictment contains charges not included in the original indictment, trial of the original charges must begin "within the time limit for commencement of trial on the original indictment or information." Hearings, at 417. This language plainly instructs that *as to the original charges* contained in a superseding indictment, no new 30-day and 70-day periods begin to run. *As to any new charges*, however, the Guidelines at least suggest that the clock for the 70-day time to trial must be restarted. *Ibid.* It is not obvious under the Guidelines whether a modified charge of the sort before us today would be treated the same as the original charge, and the Guidelines are silent on the question whether to accord the defendant the opportunity to seek an additional discretionary preparation period where the 70-day period ran anew.

counsel. See 18 U. S. C. § 3161(c)(1). For 30 of those days, the Government cannot proceed to trial, in order that the defendant may prepare his case.

Because the criminal process does not always proceed in a linear fashion, the Act addresses second indictments that occur, unlike in this case, following dismissal of the first indictment. When an indictment is dismissed on motion of the defendant, and the defendant is thereafter reindicted, both the 30-day and 70-day periods run anew. See 18 U. S. C. § 3161(d)(1). In contrast, however, when an indictment is dismissed on motion of the Government, and the defendant is thereafter reindicted, both the 30-day and 70-day periods continue to run from the first indictment, with the proviso that the period during which no indictment is outstanding is excluded from the 70-day calculation. See 18 U. S. C. § 3161(h)(6). The difference in treatment protects against governmental circumvention of the speedy-trial guarantee.

Neither of these reindictment provisions applies here, because the second indictment was issued in the absence of dismissal of the first. The provisions demonstrate, however, that the 30-day and 70-day periods were intended to operate in tandem; where one runs anew, so should the other. In this case, therefore, the structure of the statute suggests that either both periods should continue to run upon issuance of a superseding indictment, or both should start anew. To permit a new 30-day period, but not a new 70-day period, could lead to a result surely not intended by Congress, namely, that there is no day on which a defendant could be brought to trial. To avoid that possibility, respondent argues that the second 30-day period could simply be excluded from the continuing 70-day period in which a defendant must be brought to trial. But the Act's comprehensive list of express exclusions counsels one to read Congress' failure to exclude certain periods of time as a considered judgment that those periods are to be included in the speedy-trial

calculation, or as a recognition that the need for such an exclusion will not arise under the statutory scheme.

In light of Congress' intent to bring defendants quickly to trial, it would make little sense to restart both the 30-day and 70-day periods whenever there is a superseding indictment. Frequently, a superseding indictment is used to drop charges or parties or, as here, to make a minor correction, leaving the charges and the evidence necessary to defend against them unaffected. These kinds of changes should not create a need for further preparation time; indeed, in some instances, superseding indictments may lessen the defense burden. Where a superseding indictment of this type is issued, the Court's holding today permits the defendant to be brought to trial without unnecessary delay.

Like the Court, I fully recognize that a superseding indictment may add to a defendant's burden in preparing for trial. In the event of additional charges, or of material changes, a defendant well may need additional preparation time. Under the Act, a defendant then may seek an "ends of justice" continuance, to be granted in the discretion of the trial court.[2] See 18 U. S. C. § 3161(h)(8)(A). This continuance is available whether the need for additional time is occasioned by a superseding indictment or otherwise. Indeed, the 1979 amendments to the Speedy Trial Act not only mandated the 30-day defense-preparation period, but also provided that one basis for granting a continuance is if "the failure to grant such a continuance . . . would deny counsel for the defendant . . . the reasonable time necessary for effective preparation." 18 U. S. C. § 3161(h)(8)(B)(iv). The constitutional right to assistance of counsel is rendered meaningless if a defendant is forced to trial in the absence of adequate time to prepare. To avoid prejudicing a defendant, a continuance should be

[2] Because time granted under an "ends of justice" continuance is expressly excluded from the 70-day period, any preparation time granted would not jeopardize the Government's ability to bring the defendant to trial. See 18 U. S. C. § 3161(h)(8)(A).

granted where there is a meaningful possibility that a superseding indictment will require an alteration or adjustment in the planned defense. Trial courts should bear in mind that counsel may require time fully to analyze the impact of the superseding indictment, and to explore any options it presents or precludes.[3]

The Speedy Trial Act assures that defendants will be brought to trial quickly, but without undermining the Constitution's guarantee of effective assistance of counsel. Because the Court's holding today upholds that essential promise of the Act, I concur in the judgment.

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[3] Following enactment of the 1979 amendments, the Committee on the Administration of the Criminal Law recommended precisely this analysis. The Committee advised district courts that, in the event of a superseding indictment, the 30-day preparation period should not run anew, but "the trial court should use its scheduling discretion to ensure that the defense has time to prepare in the circumstances of the particular case." See Judicial Conference of the United States, Committee on the Administration of the Criminal Law, Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended, p. 14 (1981).

Reporter's Note

The next page is purposely numbered 801. The numbers between 241 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR OCTOBER 7, 1985, THROUGH JANUARY 13, 1986

OCTOBER 7, 1985

Dismissal Under Rule 53

No. 85–561. JONES ET AL. *v.* LIGHTNER, DBA LIGHTNER AUTO SALES. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 752 F. 2d 1251.

Affirmed on Appeal

No. 84–1794. GERACE, COMMISSIONER, NEW YORK DEPARTMENT OF AGRICULTURE AND MARKETS, ET AL. *v.* GROCERY MANUFACTURERS OF AMERICA, INC., ET AL. Appeal from C. A. 2d Cir. Motion of Federation of Homemakers, Inc., for leave to file a brief as *amicus curiae* granted. Judgment affirmed. JUSTICE REHNQUIST and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 755 F. 2d 993.

Appeals Dismissed

No. 84–1791. CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC., ET AL. *v.* TEXAS. Appeal from Sup. Ct. Tex. dismissed for want of substantial federal question. Reported below: 683 S. W. 2d 692.

No. 84–1804. WALKER *v.* CITY OF WARREN. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 135 Mich. App. 267, 354 N. W. 2d 312.

No. 84–1841. METHODIST HOSPITAL OF BROOKLYN ET AL. *v.* STATE INSURANCE FUND ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 64 N. Y. 2d 365, 476 N. E. 2d 304.

No. 84–1882. ST. JOSEPH'S HILL INFIRMARY, INC. *v.* PACIFIC CARE CENTER, INC. Appeal from Ct. App. Mo., Eastern Dist., dismissed for want of substantial federal question. Reported below: 682 S. W. 2d 821.

No. 84-1901. WHALEN *v.* DEAN STEEL ERECTION CO., INC. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question. Reported below: 229 Va. 164, 327 S. E. 2d 102.

No. 84-1921. MARSHALL *v.* COURT OF APPEALS OF MARYLAND. Appeal from Ct. App. Md. dismissed for want of substantial federal question.

No. 84-1933. COREY OUTDOOR ADVERTISING, INC. *v.* BOARD OF ZONING ADJUSTMENT OF THE CITY OF ATLANTA ET AL. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 254 Ga. 221, 327 S. E. 2d 178.

No. 84-1941. CALDER RACE COURSE, INC., ET AL. *v.* DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT OF BUSINESS REGULATION, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 464 So. 2d 128.

No. 84-6766. THOMSEN *v.* AMERICAN LUTHERAN CHURCH, INC., ET AL. Appeal from Ct. App. Minn. dismissed for want of substantial federal question.

No. 84-6800. RHODES *v.* BOARD OF EDUCATION OF THE CHAMA VALLEY INDEPENDENT SCHOOL DISTRICT ET AL. Appeal from Sup. Ct. N. M. dismissed for want of substantial federal question. Reported below: 102 N. M. 293, 694 P. 2d 1358.

No. 84-6888. RASKE *v.* JORANDBY ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 469 So. 2d 750.

No. 84-6997. PENZA *v.* NEW ENGLAND MEDICAL CENTER INC. ET AL. Appeal from App. Ct. Mass. dismissed for want of substantial federal question. Reported below: 19 Mass. App. 1106, 472 N. E. 2d 1390.

No. 85-4. MARESCA ET AL. *v.* CUOMO, GOVERNOR OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 64 N. Y. 2d 242, 475 N. E. 2d 95.

No. 85-72. MAINE STATE TROOPERS ASSN. *v.* MAINE ET AL. Appeal from Sup. Jud. Ct. Me. dismissed for want of substantial federal question. Reported below: 491 A. 2d 538.

No. 85-110. BINT ET AL. *v.* CREATIVE FOREST PRODUCTS ET AL. Appeal from Sup. Ct. Idaho dismissed for want of substantial federal question. Reported below: 108 Idaho 116, 697 P. 2d 818.

No. 85-189. NORTON *v.* ILLINOIS. Appeal from App. Ct. Ill., 3d Dist., dismissed for want of substantial federal question. Reported below: 127 Ill. App. 3d 1169, 483 N. E. 2d 733.

No. 85-205. ASMUSSEN ET AL. *v.* CITY OF AUSTIN, TEXAS, ET AL. (two cases). Appeals from Ct. App. Tex., 3d Sup. Jud. Dist., dismissed for want of substantial federal question.

No. 85-5010. MIHAL ET AL. *v.* SARGIS ET AL. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question.

No. 85-5177. GORDON *v.* IDAHO. Appeal from Ct. App. Idaho dismissed for want of substantial federal question. Reported below: 108 Idaho 178, 697 P. 2d 1192.

No. 84-1824. WHITAKER ET AL. *v.* KNAPP. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 757 F. 2d 827.

No. 84-1835. AMERICAN INSURANCE ASSN. ET AL. *v.* CHU, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 64 N. Y. 2d 379, 476 N. E. 2d 637.

No. 84-1860. ROUSSOS *v.* RETINA CONSULTANTS, P. C., ET AL. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 59 Md. App. 739.

No. 84-1902. STRODE *v.* GREGORY ET AL. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-1945. GALUSZKA *v.* SCHWAB, FOR AND ON BEHALF OF THE MINOR, SCHWAB. Appeal from Ct. App. La., 4th Cir., dismissed for want of jurisdiction. Treating the papers whereon the

appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 463 So. 2d 737.

No. 84-1968. ZUGER *v.* UNITED STATES. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-6832. RUCKER *v.* CITY OF ST. LOUIS ET AL. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-6856. PRENZLER *v.* REYNOLDS, U. S. ATTORNEY, ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-6961. RODMAN *v.* CONTINENTAL INSURANCE COS. ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 753 F. 2d 1083.

No. 85-92. EDGERTON *v.* DELAWARE. Appeal from Sup. Ct. Del. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 497 A. 2d 786.

No. 85-95. MOELLER *v.* CARRADINE ET AL. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-102. MEN'S WEARHOUSE, INC. *v.* HELMS. Appeal from Ct. App. Tex., 1st Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 682 S. W. 2d 429.

No. 85-116. PETERS *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-134. ZUGER *v.* UNITED STATES. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 755 F. 2d 915.

No. 85-5007. PAVILONIS *v.* MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 394 Mass. 1001, 475 N. E. 2d 75.

No. 85-5148. BOWDEN *v.* IDAHO DEPARTMENT OF HEALTH AND WELFARE. Appeal from Sup. Ct. Idaho dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 108 Idaho 101, 697 P. 2d 441.

No. 84-1891. BRUNO *v.* NEW ORLEANS DEPARTMENT OF POLICE. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would postpone consideration of question of jurisdiction to a hearing of the case on the merits. Reported below: 462 So. 2d 139.

No. 84-6865. RUCKER *v.* CITY OF ST. LOUIS ET AL. Appeal from D. C. E. D. Mo. dismissed for want of jurisdiction.

No. 85-57. STOP-N-GO, INC. *v.* BRADFIELD, ADMINISTRATOR OF THE ESTATE OF BRADFIELD. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Reported below: 17 Ohio St. 3d 58, 477 N. E. 2d 621.

No. 85-148. BLUE CROSS & BLUE SHIELD OF MICHIGAN *v.* MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 422 Mich. 1, 367 N. W. 2d 1.

Certiorari Granted—Vacated and Remanded

No. 84-1715. CITY OF LAWTON, OKLAHOMA, ET AL. *v.* LUSBY ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Oklahoma*

City v. *Tuttle*, 471 U. S. 808 (1985). Reported below: 749 F. 2d 1423.

No. 84-1768. ALABAMA DEPARTMENT OF CORRECTIONS *v.* GLOVER. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Kentucky* v. *Graham*, 473 U. S. 159 (1985). Reported below: 734 F. 2d 691 and 753 F. 2d 1569.

No. 84-1971. SUN OIL CO. *v.* WORTMAN ET AL. Sup. Ct. Kan. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797 (1985). Reported below: 236 Kan. 266, 690 P. 2d 385.

No. 84-6842. WILLIAMS *v.* KEMP, WARDEN. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Francis* v. *Franklin*, 471 U. S. 307 (1985).

No. 84-6946. JEFFERSON *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Garrett* v. *United States*, 471 U. S. 773 (1985). Reported below: 760 F. 2d 821.

No. 84-6953. BURGER *v.* KEMP, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Francis* v. *Franklin*, 471 U. S. 307 (1985). Reported below: 753 F. 2d 930.

No. 85-66. FLORIDA *v.* ARANGO. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Bagley*, 473 U. S. 667 (1985). JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS dissent and would deny certiorari. Reported below: 467 So. 2d 692.

No. 85-5078. SOTELO *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the

Court of Appeals for further proceedings, including, if appropriate, the re-entry of its judgment affirming petitioner's conviction and appointment of counsel to assist petitioner in seeking timely review of that judgment in this Court. JUSTICE REHNQUIST dissents. Reported below: 742 F. 2d 1451.

Certiorari Dismissed

No. 84-1862. MORELAND *v.* POSS. Sup. Ct. Ga. Certiorari dismissed for want of a final judgment. Reported below: 253 Ga. 730, 324 S. E. 2d 456.

Miscellaneous Orders

No. ———. C. H. B. FOODS, INC. *v.* ENGLISH; and

No. ———. HYLIN, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HYLIN *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. A-41. PARK COUNTY RESOURCE COUNCIL, INC., ET AL. *v.* UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. D. C. Wyo. Application for stay pending appeal, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A-88. HELFRICHT *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Application to continue a stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-145. SCHUCHMAN ET AL. *v.* UNITED STATES. Application for injunction and all other relief, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D-312. IN RE ERGAZOS, 460 U. S. 1065. Application for reinstatement to the Bar of this Court denied.

No. D-488. IN RE DISBARMENT OF ROUSE. Disbarment entered. [For earlier order herein, see 471 U. S. 1012.]

No. D-496. IN RE DISBARMENT OF HYTER. Charles Kilburn Hyter, of Hutchinson, Kan., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on June 3, 1985 [471 U. S. 1133], is hereby discharged.

No. D-498. IN RE DISBARMENT OF SLONE. Harold G. Slone, of New York, N. Y., having requested to resign as a member of

the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on June 3, 1985 [471 U. S. 1134], is hereby discharged.

No. D-499. IN RE DISBARMENT OF JACOB. Disbarment entered. [For earlier order herein, see 472 U. S. 1005.]

No. D-500. IN RE DISBARMENT OF WALTERS. Harris N. Walters, of Boynton, Fla., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on June 10, 1985 [472 U. S. 1005], is hereby discharged.

No. D-502. IN RE DISBARMENT OF ATKINS. Benjamin Sloan Atkins, of Atlanta, Ga., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on June 10, 1985 [472 U. S. 1005], is hereby discharged.

No. D-520. IN RE DISBARMENT OF WATSON. It is ordered that Roland Watson, of Central Islip, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Exceptions to the Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 472 U. S. 1015.]

No. 83-1968. THORNBURGH, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. *v.* GINGLES ET AL. D. C. E. D. N. C. [Probable jurisdiction noted, 471 U. S. 1064.] Motions of Legal Services of North Carolina, Dennis DeConcini et al., Common Cause, American Civil Liberties Union Foundation, Inc., et al., and James G. Martin, Governor of North Carolina, for leave to file briefs as *amici curiae* granted. Motion of appellants and appellees for leave to file oversized portion of joint appendix granted.

No. 84-127. RICHARDSON-MERRELL INC. *v.* KOLLER, AN INFANT, BY AND THROUGH KOLLER ET UX., HER NATURAL GUARDIANS, ET AL., 472 U. S. 424. Motion of respondents to retax

costs denied. JUSTICE BLACKMUN dissents. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 84-495. THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL. C. A. 3d Cir. [Probable jurisdiction postponed, 471 U. S. 1014]; and

No. 84-1379. DIAMOND ET AL. *v.* CHARLES ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 471 U. S. 1115.] Motion of Women Lawyers' Association of Los Angeles, California, et al. for leave to file a brief as *amici curiae* granted.

No. 84-871. LOUISIANA PUBLIC SERVICE COMMISSION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Probable jurisdiction postponed, 472 U. S. 1025];

No. 84-889. CALIFORNIA ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Certiorari granted, 472 U. S. 1025];

No. 84-1054. PUBLIC UTILITIES COMMISSION OF OHIO ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Certiorari granted, 472 U. S. 1025]; and

No. 84-1069. FLORIDA PUBLIC SERVICE COMMISSION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Certiorari granted, 472 U. S. 1026.] Motion of Telephone Ratepayers Association for Cost-Based and Equitable Rates for leave to file a brief as *amicus curiae* granted. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 84-1077. WHITLEY, INDIVIDUALLY AND AS ASSISTANT SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL. *v.* ALBERS. C. A. 9th Cir. [Certiorari granted, 472 U. S. 1007.] Motion for appointment of counsel granted, and it is ordered that Gene B. Mechanic, Esquire, of Portland, Ore., be appointed to serve as counsel for respondent in this case.

No. 84-1181. NEW YORK *v.* CLASS. Ct. App. N. Y. [Certiorari granted, 471 U. S. 1003.] Motion of William E. Hellerstein, Esquire, to permit Mark C. Cogan, Esquire, to present oral argument *pro hac vice* on behalf on respondent granted.

No. 84-1192. GAF CORP. *v.* CHENG, 472 U. S. 1023. Motion of respondent to retax costs granted.

No. 84-1259. DOW CHEMICAL CO. *v.* UNITED STATES, BY AND THROUGH ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 6th Cir. [Certiorari granted, 472 U. S. 1007.] Motion of petitioner to maintain under seal portions of the record placed under seal by the United States District Court for the Eastern District of Michigan granted.

No. 84-1273. REGENTS OF THE UNIVERSITY OF MICHIGAN *v.* EWING. C. A. 6th Cir. [Certiorari granted, 470 U. S. 1083.] Further consideration of motion of respondent for leave to amend the Amended Complaint deferred to hearing of case on the merits.

No. 84-1480. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* GREENFIELD. C. A. 11th Cir. [Certiorari granted, 471 U. S. 1098.] Motions of Illinois Psychological Association and American Civil Liberties Union for leave to file briefs as *amici curiae* granted.

No. 84-1503. CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, ET AL. *v.* HUDSON ET AL. C. A. 7th Cir. [Certiorari granted, 472 U. S. 1007.] Motion of Chicago Teachers Union, Local No. 1, and Board of Education of City of Chicago for leave to file a joint brief granted.

No. 84-1529. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* AMERICAN HOSPITAL ASSN. ET AL. C. A. 2d Cir. [Certiorari granted, 472 U. S. 1016.] Motion of American Coalition of Citizens with Disabilities et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied. Motion of respondents for divided argument granted.

No. 84-1531. MICHIGAN *v.* JACKSON; and

No. 84-1539. MICHIGAN *v.* BLADEL. Sup. Ct. Mich. [Certiorari granted, 471 U. S. 1124.] Motion of respondents for divided argument granted. Motion of petitioner for divided argument denied.

No. 84-1555. CONNOLLY ET AL., TRUSTEES OF THE OPERATING ENGINEERS PENSION TRUST *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL.; and

No. 84-1567. WOODWARD SAND CO., INC. *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL. D. C. C. D. Cal. [Probable jurisdiction noted, 472 U. S. 1006.] Motion of appellant in

No. 84-1567 for divided argument granted to be divided as follows: 20 minutes for appellants in No. 84-1555 and 10 minutes for appellants in No. 84-1567. Request for additional time for oral argument denied.

No. 84-1601. AETNA LIFE INSURANCE CO. *v.* LAVOIE ET AL. Sup. Ct. Ala. [Probable jurisdiction postponed, 471 U. S. 1134.] Motion of Alabama Defense Lawyers' Association for leave to file a brief as *amicus curiae* granted.

No. 84-1602. ANDERSON ET AL. *v.* LIBERTY LOBBY, INC., ET AL. C. A. D. C. Cir. [Certiorari granted, 471 U. S. 1134.] Motions of Readers' Digest Association, Inc., and Synanon Church et al. for leave to file briefs as *amici curiae* granted.

No. 84-1644. GOLDEN STATE TRANSIT CORP. *v.* CITY OF LOS ANGELES. C. A. 9th Cir. [Certiorari granted, 472 U. S. 1016.] Motion of National League of Cities et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 84-1728. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. D. C. Cir. [Certiorari granted, 472 U. S. 1026.] Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 84-1800. WALTERS ET AL. *v.* SPRUYTTE. C. A. 6th Cir.;
No. 85-23. MARYLAND *v.* LODOWSKI. Ct. App. Md.;
No. 85-24. MARYLAND *v.* ELFADL. Ct. Sp. App. Md.; and
No. 85-100. MICHIGAN *v.* BLACKBURN. Ct. App. Mich. Motions of respondents for leave to proceed *in forma pauperis* granted.

No. 84-1880. CITY OF ALCOA ET AL. *v.* MYERS, ON BEHALF OF HERSELF AND HER THREE MINOR CHILDREN, DIXON ET AL. C. A. 6th Cir. Motion of Tennessee Valley Public Power Association for leave to file a brief as *amicus curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 84-1907. KAISER ALUMINUM & CHEMICAL CORP. ET AL. *v.* BONJORNO ET AL. C. A. 3d Cir.; and
No. 84-2022. 324 LIQUOR CORP., DBA YORKSHIRE WINE & SPIRITS *v.* MCLAUGHLIN ET AL. Appeal from Ct. App. N. Y. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 84-2023. INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE, INC., ET AL. *v.* MARINE MIDLAND BANK, N. A., ET AL. C. A. 2d Cir.;

No. 85-98. ANSCHUETZ & CO., GMBH *v.* MISSISSIPPI RIVER BRIDGE AUTHORITY ET AL. C. A. 5th Cir.;

No. 85-99. MESSERSCHMITT BOLKOW BLOHM, GMBH *v.* WALKER ET AL. C. A. 5th Cir.; and

No. 85-182. NORTHWEST CENTRAL PIPELINE CORP. ET AL. *v.* CORPORATION COMMISSION OF KANSAS ET AL. Appeal from Sup. Ct. Kan. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 84-6263. BATSON *v.* KENTUCKY. Sup. Ct. Ky. [Certiorari granted, 471 U. S. 1052.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84-6807. LEE *v.* ILLINOIS. App. Ct. Ill., 5th Dist. [Certiorari granted, 473 U. S. 904.] Motion for appointment of counsel granted, and it is ordered that Randy E. Blue, Esquire, of Mount Vernon, Ill., be appointed to serve as counsel for petitioner in this case.

No. 84-6811. MCCLESKEY *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir. Motions of International Human Rights Law Group, Congressional Black Caucus, and Dr. Peter Sperlich et al. for leave to file briefs as *amici curiae* granted.

No. 84-6825. PFEIL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PFEIL *v.* ROGERS, FORMER DISTRICT ATTORNEY OF RUSK COUNTY, ET AL. C. A. 7th Cir.; and

No. 84-6838. BARRETT *v.* UNITED STATES CUSTOMS SERVICE ET AL. C. A. 5th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 28, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 84-6974. ALEEM *v.* GENERAL FELT INDUSTRIES, INC., ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until October 28, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85-5028. BURNETTE *v.* UNITED STATES. C. A. 6th Cir.;
No. 85-5150. PREWITT *v.* UNITED STATES POSTAL SERVICE. C. A. 5th Cir.; and
No. 85-5154. GOODLATAW, PERSONAL REPRESENTATIVE FOR THE ESTATE OF GOODLATAW *v.* ALASKA ET AL. Sup. Ct. Alaska. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 28, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 85-5115. JORDAN *v.* UNITED STATES DEPARTMENT OF STATE. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until October 28, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), I would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 84-6923. IN RE DAY. Sup. Ct. Tex. Petition for writ of common-law certiorari denied.

No. 84–1969. IN RE KINNANE;
No. 84–1970. IN RE ZUGER;
No. 85–5103. IN RE FORD; and
No. 85–5129. IN RE BLACK. Petitions for writs of habeas corpus denied.

No. 84–1976. IN RE WALTON;
No. 84–1980. IN RE RATCLIFF;
No. 84–6814. IN RE WORD;
No. 84–6894. IN RE WATKINS;
No. 84–6941. IN RE PALLETT;
No. 85–5003. IN RE WHALEY;
No. 85–5160. IN RE SMITH-BEY; and
No. 85–5196. IN RE JOOST. Petitions for writs of mandamus denied.

No. 85–5099. IN RE DAY. Motion of petitioner to defer consideration of the petition for mandamus denied. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 84–1944. UNITED STATES ET AL. *v.* HEMME ET AL. Appeal from D. C. S. D. Ill. Probable jurisdiction noted.

No. 84–2030. BROWN-FORMAN DISTILLERS CORP. *v.* NEW YORK STATE LIQUOR AUTHORITY. Appeal from Ct. App. N. Y. Probable jurisdiction noted limited to Question 2 presented by the statement as to jurisdiction. Reported below: 64 N. Y. 2d 479, 479 N. E. 2d 764.

Certiorari Granted

No. 84–1667. BETHEL SCHOOL DISTRICT NO. 403 ET AL. *v.* FRASER, A MINOR, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 755 F. 2d 1356.

No. 84–1726. EAST RIVER STEAMSHIP CORP. ET AL. *v.* TRANSAMERICA DELAVAL INC. C. A. 3d Cir. Certiorari granted. Reported below: 752 F. 2d 903.

No. 84–1839. SCHIAVONE ET AL. *v.* FORTUNE, AKA TIME, INC. C. A. 3d Cir. Certiorari granted. Reported below: 750 F. 2d 15.

No. 84–1913. AT&T TECHNOLOGIES, INC. *v.* COMMUNICATIONS WORKERS OF AMERICA ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 751 F. 2d 203.

No. 84-1922. UNITED STATES *v.* KOECHER. C. A. 2d Cir. Certiorari granted. Reported below: 755 F. 2d 1022.

No. 84-1923. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 742 F. 2d 729 and 755 F. 2d 31.

No. 84-1948. BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* PAYNE ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 751 F. 2d 1191.

No. 84-1979. PSFS SAVINGS BANK, FSB *v.* VINSON ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 243 U. S. App. D. C. 323, 753 F. 2d 141, and 245 U. S. App. D. C. 306, 760 F. 2d 1330.

No. 85-5. PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 762 F. 2d 272.

No. 85-21. SQUARE D CO. ET AL. *v.* NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 760 F. 2d 1347.

No. 85-54. LIBRARY OF CONGRESS ET AL. *v.* SHAW. C. A. D. C. Cir. Certiorari granted. Reported below: 241 U. S. App. D. C. 355, 747 F. 2d 1469.

No. 85-215. MCMILLAN ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari granted. Reported below: 508 Pa. 25, 494 A. 2d 354.

No. 85-225. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* MICHIGAN ACADEMY OF FAMILY PHYSICIANS ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 757 F. 2d 91.

No. 84-1656. LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSN. ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 2d Cir. Certiorari granted and case set for oral argument in tandem with No. 84-1999, *Local No. 93, Int'l Assn. of Firefighters* v. *Cleveland, infra.* Reported below: 753 F. 2d 1172.

No. 84-1661. KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL. *v.* MORRISON. C. A. 3d Cir. Motion of respond-

ent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 752 F. 2d 918.

No. 84–1736. HIJAR, SUPERINTENDENT, FEDERAL PRISON CAMP AT BORON, CALIFORNIA *v.* BURRUS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 743 F. 2d 693.

No. 84–1865. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS *v.* MCCREE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 758 F. 2d 226.

No. 84–1974. ROSE, WARDEN *v.* CLARK. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 2 presented by the petition. Reported below: 762 F. 2d 1006.

No. 84–1999. LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL–CIO, C. L. C. *v.* CITY OF CLEVELAND ET AL. C. A. 6th Cir. Certiorari granted and case set for oral argument in tandem with No. 84–1656, *Local 28 of Sheet Metal Workers* v. *EEOC*, *supra*. Reported below: 753 F. 2d 479.

No. 85–202. OFFSHORE LOGISTICS, INC., ET AL. *v.* TALLENTIRE ET AL. C. A. 5th Cir. Motions of Sonat Offshore Drilling, Inc., et al. and Maritime Law Association of the United States for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 754 F. 2d 1274.

No. 85–5023. POLAND *v.* ARIZONA; and

No. 85–5024. POLAND *v.* ARIZONA. Sup. Ct. Ariz. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted in No. 85–5023 limited to Question 1 presented by the petition. Certiorari granted in No. 85–5024. Cases consolidated and a total of one hour allotted for oral argument. Reported below: No. 85–5023, 144 Ariz. 388, 698 P. 2d 183; No. 85–5024, 144 Ariz. 412, 698 P. 2d 207.

Certiorari Denied. (See also Nos. 84–1824, 84–1835, 84–1860, 84–1902, 84–1945, 84–1968, 84–6832, 84–6856, 84–6961, 85–92, 85–95, 85–102, 85–116, 85–134, 85–5007, 85–5148, 84–1891, and 84–6923, *supra*.)

No. 84–1459. HERNANDEZ-CARTAYA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 1390.

No. 84-1508. HARVIS CONSTRUCTION, INC., ET AL. *v.* UNITED STATES EX REL. MARTIN STEEL CONSTRUCTORS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 750 F. 2d 759.

No. 84-1522. DUFRESNE *v.* BAER, CHAIRMAN, UNITED STATES PAROLE COMMISSION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 1543.

No. 84-1526. QUINN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 84-1534. LUTJEHARMS, COMMISSIONER OF EDUCATION OF NEBRASKA, ET AL. *v.* ROSE, AS NEXT FRIEND OF ROSE. C. A. 8th Cir. Certiorari denied. Reported below: 748 F. 2d 1258.

No. 84-1550. SMITH ET AL., INDIVIDUALLY AND DBA SHARP-EYE ENTERPRISES *v.* GOLDEN WEST BROADCASTERS, INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-1564. MONICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1085.

No. 84-1613. HUEBNER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 752 F. 2d 1235.

No. 84-1621. OCCIDENTAL OIL SHALE, INC. *v.* STATE BOARD OF LAND COMMISSIONERS OF COLORADO ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 692 P. 2d 321.

No. 84-1625. CAPITAL CITY PRESS, INC. *v.* BURATT. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 459 So. 2d 1268.

No. 84-1642. KRODEL *v.* YOUNG, ASSOCIATE COMMISSIONER, OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 242 U. S. App. D. C. 11, 748 F. 2d 701.

No. 84-1646. BENZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 903.

No. 84-1654. LAVELLE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 243 U. S. App. D. C. 47, 751 F. 2d 1266.

No. 84-1666. CUMMINGS *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 810.

No. 84-1671. ZEILER ET AL. *v.* OHIO HIGH SCHOOL ATHLETIC ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 934.

No. 84-1679. NOBLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 754 F. 2d 1324.

No. 84-1681. MASTER PRINTERS OF AMERICA *v.* BROCK, SECRETARY OF LABOR. C. A. 4th Cir. Certiorari denied. Reported below: 751 F. 2d 700.

No. 84-1683. DOBEY ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 751 F. 2d 1140.

No. 84-1702. H. F. ALLEN ORCHARDS ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 749 F. 2d 1571.

No. 84-1710. BELLE FOURCHE PIPELINE CO. ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 751 F. 2d 332.

No. 84-1729. SATTERFIELD ET AL. *v.* HUEBNER ET UX. Ct. App. Wash. Certiorari denied. Reported below: 38 Wash. App. 66, 684 P. 2d 752.

No. 84-1748. HEBERT *v.* UNITED STATES;
No. 84-1812. ANTONE *v.* UNITED STATES;
No. 84-1864. AMUNY *v.* UNITED STATES; and
No. 84-1878. MAXWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 753 F. 2d 1301.

No. 84-1759. T. G. & Y. STORES, INC. *v.* LUSBY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 749 F. 2d 1423.

No. 84-1765. NEAL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 689 S. W. 2d 420.

No. 84-1770. WACO FINANCIAL, INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 831.

No. 84-1771. NILSON VAN & STORAGE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 362.

No. 84-1772. KARMUN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 567.

No. 84-1774. EWERT *v.* EXXON CO., USA, A DIVISION OF EXXON CORP., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 755 F. 2d 935.

No. 84-1775. CORONEL-QUINTANA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 752 F. 2d 1284.

No. 84-1776. HANCHARIK *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 84-1778. FISHER *v.* UNITED STATES; and
No. 84-6972. WHEELINGS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 757 F. 2d 1359.

No. 84-1779. PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 38.

No. 84-1780. MCMAHON, CALIFORNIA DIRECTOR OF SOCIAL SERVICES *v.* GREEN ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 161 Cal. App. 3d 678, 207 Cal. Rptr. 830.

No. 84-1781. ALL AMERICAN LIFE & CASUALTY CO. *v.* OCEANIC TRADE ALLIANCE COUNCIL INTERNATIONAL, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 756 F. 2d 474.

No. 84-1784. GRYNBERG ET AL. *v.* DANZIG ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 161 Cal. App. 3d 1128, 208 Cal. Rptr. 336.

No. 84-1788. INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO *v.* NATIONAL ELEVATOR INDUSTRY, INC. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 253.

No. 84-1792. SWEATER BEE BY BANFF, LTD. *v.* MANHATTAN INDUSTRIES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 754 F. 2d 457.

No. 84-1795. TECHNOGRAPH, INC. *v.* GENERAL MOTORS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 1020.

No. 84-1798. COLLINS *v.* ANNDEP STEAMSHIP CORP. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 256.

No. 84-1799. FRENCH *v.* MEAD PAPER CORP., FORMS PAPER DIVISION. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 652.

No. 84-1801. INUPIAT COMMUNITY OF THE ARCTIC SLOPE ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 570.

No. 84-1802. EARL'S PUMP & SUPPLY CO., INC., ET AL. *v.* COLBERG, INC. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 162 Cal. App. 3d 322, 208 Cal. Rptr. 465.

No. 84-1807. GROCERY MANUFACTURERS OF AMERICA, INC. *v.* GERACE, COMMISSIONER, NEW YORK DEPARTMENT OF AGRICULTURE AND MARKETS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 993.

No. 84-1814. MEADOWS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 956, 477 N. E. 2d 1097.

No. 84-1816. SMITH *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 84-1819. AVONDALE SHIPYARDS, INC. *v.* ROSETTI. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 294.

No. 84-1822. KERPELMAN *v.* LAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1071.

No. 84-1823. ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND *v.* COOLEY. Sup. Ct. Miss. Certiorari denied. Reported below: 462 So. 2d 696.

No. 84-1827. SIMONE *v.* GOLDEN NUGGET HOTEL & CASINO, T/A G. N. A. C. CORP. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 261.

No. 84-1828. RADER *v.* WISCONSIN BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY. Sup. Ct. Wis. Certiorari denied. Reported below: 121 Wis. 2d 410, 359 N. W. 2d 156.

No. 84-1829. ILLINOIS COMMERCE COMMISSION ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir.

Certiorari denied. Reported below: 242 U. S. App. D. C. 197, 749 F. 2d 875.

No. 84-1830. LIBERTY NATIONAL BANK & TRUST COMPANY OF LOUISVILLE, FDBA UNITED KENTUCKY BANK, INC. *v.* GEORGE ET UX. C. A. 6th Cir. Certiorari denied. Reported below: 753 F. 2d 50.

No. 84-1831. JONES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-1833. DRAPE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 753 F. 2d 660.

No. 84-1834. BISHOP *v.* INTERNATIONAL PAPER CO. ET AL. Ct. App. Ga. Certiorari denied. Reported below: 173 Ga. App. 34, 325 S. E. 2d 870.

No. 84-1836. DUNN *v.* MEARLS ET AL. C. A. 1st Cir. Certiorari denied.

No. 84-1840. WOODRUM *v.* SOUTHERN RAILWAY CO. C. A. 11th Cir. Certiorari denied. Reported below: 750 F. 2d 876.

No. 84-1844. BURRISS *v.* NORTHERN ASSURANCE COMPANY OF AMERICA. Sup. Ct. Kan. Certiorari denied. Reported below: 236 Kan. 326, 691 P. 2d 10.

No. 84-1846. THOMAS ET AL. *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 14 Ark. App. xviii.

No. 84-1847. LANDES *v.* DEPARTMENT OF JUSTICE. C. A. D. C. Cir. Certiorari denied.

No. 84-1848. KOUTSOUBOS, ADMINISTRATOR OF THE ESTATE OF KOUTSOUBOS *v.* BOEING VERTOL, DIVISION OF BOEING CO., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 352.

No. 84-1849. KEARNS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 178.

No. 84-1853. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 566.

No. 84-1854. NORTHERN OIL CO., INC., ET AL. *v.* STANDARD OIL COMPANY OF CALIFORNIA ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 761 F. 2d 699.

No. 84-1855. STEINES *v.* ROCK ISLAND ARSENAL DEPARTMENT OF ARMY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1078.

No. 84-1856. DAIRYMEN, INC. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 654.

No. 84-1858. LEX TEX LTD. INC. *v.* J. P. STEVENS & CO., INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 747 F. 2d 1553.

No. 84-1861. WIVORKOSKI *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied.

No. 84-1866. DI GILIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 924.

No. 84-1868. PENNZOIL CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 327 S. E. 2d 444.

No. 84-1871. HOROWITZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 1400.

No. 84-1873. WEIDE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 157.

No. 84-1874. BEEKER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1080.

No. 84-1876. TRANSCO EXPLORATION CO., INC. *v.* ROWAN COS., INC. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 679 S. W. 2d 660.

No. 84-1879. CITY OF SUGAR LAND ET AL. *v.* SIGNAD, INC. C. A. 5th Cir. Certiorari denied. Reported below: 753 F. 2d 1338.

No. 84-1883. MCCLINTOCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 748 F. 2d 1278.

No. 84-1884. GONZALEZ-RIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 685.

No. 84-1885. HERIER-DARCHERIEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 2d 1019.

No. 84-1886. GARRETT v. ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 8 Ark. App. xv.

No. 84-1887. CLOPPER v. MERRILL LYNCH RELOCATION MANAGEMENT, INC. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 36.

No. 84-1888. MGPC, INC. v. DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 763 F. 2d 422.

No. 84-1889. MERWINE v. BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 631.

No. 84-1890. CARDINAL RESOURCES, INC. v. EDDIE STEAMSHIP CO., LTD., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 2d 282.

No. 84-1892. CICIRELLO v. NEW YORK TELEPHONE CO. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 990.

No. 84-1893. LA-Z-BOY CHAIR CO. v. WORLD OF SLEEP, INC.; and

No. 85-64. WORLD OF SLEEP, INC. v. LA-Z-BOY CHAIR CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 756 F. 2d 1467.

No. 84-1895. EDWARDS ET AL. v. HANNON, JUDGE, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA; and SOWELLS ET AL. v. HANNON, JUDGE, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 84-1896. QUICK ET AL. v. CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-1897. ROLLESTON v. SEA ISLAND PROPERTIES, INC., ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 254 Ga. 183, 327 S. E. 2d 489.

No. 84-1900. BROWN v. UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1072.

No. 84-1908. ONEIDA INDIAN NATION OF WISCONSIN v. HOUDENOSAUNEE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 757 F. 2d 19.

No. 84-1909. BROWN v. ERMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 372.

No. 84-1910. WILLIAMS v. DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 491 A. 2d 1129.

No. 84-1911. WHEELER v. MENTAL HEALTH AND MENTAL RETARDATION AUTHORITY OF HARRIS COUNTY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 752 F. 2d 1063.

No. 84-1912. LANGENEGGER ET AL. v. UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 756 F. 2d 1565.

No. 84-1915. F. E. L. PUBLICATIONS, LTD. v. CATHOLIC BISHOP OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 754 F. 2d 216.

No. 84-1916. BOLLING v. BAKER. Ct. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. Reported below: 671 S. W. 2d 559.

No. 84-1917. JOHNS v. SUPREME COURT OF OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 753 F. 2d 524.

No. 84-1918. FELT ET AL. v. FIRST BANK OF SOUTH DAKOTA. C. A. 8th Cir. Certiorari denied. Reported below: 745 F. 2d 62.

No. 84-1920. PFLUGER v. INTERNAL REVENUE SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 1291.

No. 84-1924. CITY OF POMPANO BEACH v. CAPALBO. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 455 So. 2d 468.

No. 84-1926. REID ET AL. v. GHOLSON ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 229 Va. 179, 327 S. E. 2d 107.

No. 84-1927. MILLER v. HENRY ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 84-1931. HEISER v. HEISER. Ct. App. N. C. Certiorari denied. Reported below: 71 N. C. App. 223, 321 S. E. 2d 479.

No. 84-1932. SKLUT HIDE & FURS v. PRUDENTIAL LINES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 923.

No. 84-1934. COPY-DATA SYSTEMS, INC., ET AL. *v.* TOSHIBA AMERICA, INC. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 293.

No. 84-1935. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. *v.* BROCK, SECRETARY OF LABOR. C. A. D. C. Cir. Certiorari denied. Reported below: 241 U. S. App. D. C. 122, 746 F. 2d 855.

No. 84-1937. SWAIM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 2d 1530.

No. 84-1940. DOW *v.* UNITED VAN LINES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 256.

No. 84-1943. WOODS *v.* TSUCHIYA. C. A. Fed. Cir. Certiorari denied. Reported below: 754 F. 2d 1571.

No. 84-1946. PORTER *v.* O'FARRELL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 922.

No. 84-1949. LAMONT, ADMINISTRATOR OF THE ESTATE OF LAMONT *v.* WOLF ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-1950. HAMPTON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 164 Cal. App. 3d 27, 209 Cal. Rptr. 905.

No. 84-1951. SOUTHLAND CORP. *v.* UNITED STATES; and
No. 84-1981. MASTROPIERI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 1366.

No. 84-1953. MARCON, LTD. *v.* HELENA RUBINSTEIN, INC. (two cases). C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 999 (second case).

No. 84-1954. MANKIN *v.* OHIO. Ct. App. Ohio, Ross County. Certiorari denied.

No. 84-1956. D. L. AULD CO. *v.* CHROMA-GRAPHICS CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 753 F. 2d 1029.

No. 84-1959. JAMES *v.* ALABAMA STATE PERSONNEL BOARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 95.

No. 84-1960. WELCKER *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 752 F. 2d 1577.

No. 84-1961. WOLF ET UX. *v.* RICHMOND COUNTY HOSPITAL AUTHORITY. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 904.

No. 84-1962. JOHNSON *v.* TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 375.

No. 84-1963. R. O. GIVENS SIGNS, INC. *v.* TOWN OF NAGS HEAD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 648.

No. 84-1964. TERRY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 469 So. 2d 1359.

No. 84-1965. CHRISTIAN *v.* VETERANS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 159.

No. 84-1967. INDEPENDENT NEWS, INC., ET AL. *v.* BANK OF OREGON ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 298 Ore. 434, 693 P. 2d 35.

No. 84-1975. CASTALDI *v.* UNITED STATES; and
No. 84-1982. TUFARO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 991.

No. 84-1977. BERKIC *v.* CRICHTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 2d 1289.

No. 84-1983. TSAI *v.* LI ET UX. Ct. App. D. C. Certiorari denied.

No. 84-1984. GROVE ET AL. *v.* MEAD SCHOOL DISTRICT NO. 354 ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1528.

No. 84-1985. CITY OF EUCLID, OHIO *v.* MABEL ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 19 Ohio App. 3d 235, 484 N. E. 2d 249.

No. 84-1986. FINE ET AL. *v.* BELLEFONTE UNDERWRITERS INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 758 F. 2d 50.

No. 84-1987. MOORE *v.* BONNER, SUPERINTENDENT OF SCHOOLS FOR BERKELEY COUNTY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 648.

No. 84-1988. SCHUBERT *v.* RICHARDSON SECURITIES OF CANADA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 991.

No. 84-1989. SHORTER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHORTER *v.* DRURY ET UX. Sup. Ct. Wash. Certiorari denied. Reported below: 103 Wash. 2d 645, 695 P. 2d 116.

No. 84-1991. FOLAK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 828.

No. 84-1993. HYDE *v.* VAN WORMER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 765 F. 2d 86.

No. 84-1994. LONDON *v.* MANHATTAN LIFE CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 648.

No. 84-1995. SMITH INTERNATIONAL, INC. *v.* HUGHES TOOL CO. C. A. Fed. Cir. Certiorari denied. Reported below: 759 F. 2d 1572.

No. 84-1997. BOBIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 127 Ill. App. 3d 1158, 483 N. E. 2d 727.

No. 84-1998. NEW YORK STATE NURSES ASSN. *v.* ST. JOSEPH'S HOSPITAL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 260.

No. 84-2000. NOKES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 20.

No. 84-2001. COLLARD ET AL. *v.* INCORPORATED VILLAGE OF FLOWER HILL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 759 F. 2d 205.

No. 84-2002. BRUNER *v.* PARKER. Sup. Ct. Mo. Certiorari denied. Reported below: 683 S. W. 2d 265.

No. 84-2003. ETTER *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 756 F. 2d 852.

No. 84-2004. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* MISSOURI STATE HIGHWAY PATROL ET AL.; and

No. 85-42. PRICE *v.* WHITMER, SUPERINTENDENT, MISSOURI STATE HIGHWAY PATROL, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 748 F. 2d 447.

No. 84-2006. JOHNSON ET UX. *v.* RIGHETTI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 738.

No. 84-2007. THOMPSON *v.* UNITED STATES (two cases). C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 995.

No. 84-2010. MEADOWS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 84-2012. BRAND *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 106 App. Div. 2d 260, 484 N. E. 2d 388.

No. 84-2014. FLORES *v.* SOUTHERN PACIFIC TRANSPORTATION CO. ET AL. Ct. App. Tex., 6th Sup. Jud. Dist. Certiorari denied. Reported below: 683 S. W. 2d 31.

No. 84-2017. PALMER *v.* CITY OF SEATTLE. Sup. Ct. Wash. Certiorari denied.

No. 84-2019. BARNEY *v.* HALPERIN, STATE TAX ASSESSOR. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 490 A. 2d 223.

No. 84-2020. PURSUE ENERGY CORP. ET AL. *v.* BERRY. Sup. Ct. Miss. Certiorari denied. Reported below: 463 So. 2d 1031.

No. 84-2021. MCGREEVY *v.* DANNON CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 914.

No. 84-2024. SNAER *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 1341.

No. 84-2025. MONON SHIPPERS ASSN., INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied.

No. 84-2029. GASPARRO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 96, 480 A. 2d 509.

No. 84-2031. MEIRI *v.* DACON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 759 F. 2d 989.

No. 84-2033. HAMMOND *v.* RAPIDES PARISH SCHOOL BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 171.

No. 84-2036. EL SHAHAWY *v.* SARASOTA COUNTY PUBLIC HOSPITAL BOARD. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 467 So. 2d 1006.

No. 84-6422. BRITT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 32.

No. 84-6427. CARSON *v.* SPANISH LAKE ASSN. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 745 F. 2d 63.

No. 84-6444. MCMULLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 65.

No. 84-6465. RUTH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 663 S. W. 2d 844.

No. 84-6477. MAULDIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 376.

No. 84-6487. HUTCHINGS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 751 F. 2d 230.

No. 84-6501. MCALLISTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 747 F. 2d 1273.

No. 84-6506. BEWLEY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 695 P. 2d 1357.

No. 84-6509. KEITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 754 F. 2d 1388.

No. 84-6510. KEMP *v.* UNITED STATES;
No. 84-6541. MERIDA *v.* UNITED STATES;
No. 84-6561. TOLER *v.* UNITED STATES;
No. 84-6585. BARNHILL *v.* UNITED STATES; and
No. 84-6592. TAYLOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 995.

No. 84-6513. DIXON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 654.

No. 84-6516. WILLIAMS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1072.

No. 84-6517. FLYNN *v.* SHULTZ, SECRETARY OF STATE. C. A. 7th Cir. Certiorari denied. Reported below: 748 F. 2d 1186.

No. 84-6528. JAMISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1084.

No. 84-6531. PATTERSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 1299.

No. 84-6560. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 774 F. 2d 1153.

No. 84-6562. WHITAKER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 347, 476 N. E. 2d 294.

No. 84-6584. PEPPER *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 686 S. W. 2d 53.

No. 84-6594. SPANN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 606.

No. 84-6598. KNOBLAUCH ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 749 F. 2d 200 and 752 F. 2d 125.

No. 84-6603. IANNACCIO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 505 Pa. 414, 480 A. 2d 966.

No. 84-6604. LOPEZ *v.* DALLAS OFFSET, INC. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1463.

No. 84-6615. JONES *v.* JONES, SUPERINTENDENT, GREAT MEADOWS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 914.

No. 84-6659. JARRAD *v.* UNITED STATES; and
No. 85-5029. MCMANAMY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 754 F. 2d 1451.

No. 84-6676. BATES *v.* KERR ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1077.

No. 84-6679. ESTRADA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 128.

No. 84-6682. CORLEY *v.* HERMAN, CLERK, DISTRICT OF COLUMBIA COURT OF APPEALS, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 84-6691. WILSON *v.* RAYL, DIRECTOR, EL DORADO HONOR CAMP, ET AL. C. A. 10th Cir. Certiorari denied.

No. 84-6697. WIGGINS *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 84-6702. HARVEY *v.* UNITED STATES; and
No. 84-6835. CLARK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 756 F. 2d 636.

No. 84-6703. BRANTNER *v.* WICKER, ACTING SUPERINTENDENT OF PRISONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 255.

No. 84-6704. CUNNINGHAM *v.* SHAFER. Sup. Ct. Nev. Certiorari denied. Reported below: 101 Nev. 947.

No. 84-6707. HUMPHRIES *v.* CHESAPEAKE CITY POLICE DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1471.

No. 84-6708. BLOCKER *v.* FETHERSTON. Sup. Ct. Mich. Certiorari denied. Reported below: 419 Mich. 961.

No. 84-6711. KORB *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 332 Pa. Super. 642, 481 A. 2d 1374.

No. 84-6712. LEROY *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 757 F. 2d 94.

No. 84-6718. JEFFERSON *v.* MERCER, CLERK, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 696.

No. 84-6719. GONZALEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 866.

No. 84-6720. CUNNINGHAM *v.* CITY OF LAS VEGAS. Sup. Ct. Nev. Certiorari denied. Reported below: 100 Nev. 806.

No. 84-6724. PANDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 84-6730. BASKERVILLE *v.* BAKER, WARDEN, ET AL. Sup. Ct. Va. Certiorari denied.

No. 84-6734. SOTO ET AL. *v.* UNITED STATES;
No. 84-6739. CONTRERAS *v.* UNITED STATES; and
No. 84-6751. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 755 F. 2d 733.

No. 84-6735. HERNANDEZ *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 171.

No. 84-6737. FRITZ *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 765.

No. 84-6741. KOSYLA *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 129 Ill. App. 3d 685, 472 N. E. 2d 1207.

No. 84-6743. DAVID *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-6745. VELILLA *v.* UTC/HAMILTON STANDARD DIVISION, LIBERTY MUTUAL INSURANCE CO., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 373.

No. 84-6749. WILLIAMS *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 84-6750. BUTLER *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 84-6752. DENNIS *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 992.

No. 84-6754. CODER *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 256.

No. 84-6757. ALEEM *v.* SPIGNER ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-6758. ALEEM *v.* MUNICIPAL COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-6761. MANZUR *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 84-6764. RICHARDS *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied.

No. 84-6765. NEWMAN *v.* BAKKO. C. A. 7th Cir. Certiorari denied.

No. 84-6767. CHAMBERS *v.* ARMSTRONG BLUM MFG. CO. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 1292.

No. 84-6768. ZLOMKE *v.* FLYING TIGER LINE, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 661.

No. 84-6772. DOLPHIN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 195 Conn. 444, 488 A. 2d 812.

No. 84-6773. GAMEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 84-6774. CHOU *v.* CAPITAL CIGAR & TOBACCO CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 646.

No. 84-6775. CODY *v.* SOLEM, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 755 F. 2d 1323.

No. 84-6776. LEE *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 990.

No. 84-6779. INGE *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 1010.

No. 84-6785. STRADER *v.* KEITH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 930.

No. 84-6787. YOUNG *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 130 Ill. App. 3d 117, 473 N. E. 2d 974.

No. 84-6788. MARTIN *v.* LITTLE, BROWN & CO. ET AL. C. A. D. C. Cir. Certiorari denied.

No. 84-6789. RATNER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO, ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-6793. HANSEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 755 F. 2d 629.

No. 84-6794. GLICK *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 378.

No. 84-6795. STRADER *v.* ALLSBROOK, SUPERINTENDENT, ODOM CORRECTIONAL COMPLEX, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 649.

No. 84-6797. BIXLER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 471 N. E. 2d 1093.

No. 84-6799. CARRIGAN *v.* LASHLEY. C. A. D. C. Cir. Certiorari denied. Reported below: 245 U. S. App. D. C. Cir. 233, 759 F. 2d 959.

No. 84-6801. DARWIN *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 753 F. 2d 1086.

No. 84-6802. ALLEN *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 161.

No. 84-6803. DARR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 595.

No. 84-6804. BOGGINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 243 U. S. App. D. C. 17, 750 F. 2d 1093.

No. 84-6805. HUBBARD ET AL. *v.* WHITE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 755 F. 2d 692.

No. 84-6806. GORMONG *v.* LOCAL 613, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 174.

No. 84-6809. REEVES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 752 F. 2d 995.

No. 84-6810. WHIDDON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 648.

No. 84-6812. ROACH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 1252.

No. 84-6813. SHEPPARD ET UX. *v.* ERMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 375.

No. 84-6815. BRODIS *v.* DETROIT PUBLIC SCHOOL ADMINISTRATORS ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 419 Mich. 939.

No. 84-6816. LIKAKUR *v.* KING COUNTY SUPERIOR COURT ET AL. Sup. Ct. Wash. Certiorari denied.

No. 84-6818. COOMBS *v.* MCGARRY ET AL. C. A. 3d Cir. Certiorari denied.

No. 84-6819. ARNOLD *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 84-6820. KANE *v.* EDWARDS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 653.

No. 84-6824. SPAN *v.* DELAINE. C. A. 11th Cir. Certiorari denied.

No. 84-6827. ROSS *v.* MAYFIELD, SUPERINTENDENT, FULTON STATE HOSPITAL. C. A. 8th Cir. Certiorari denied.

No. 84-6829. MOSES *v.* MARATHON OIL CO. C. A. 5th Cir. Certiorari denied. Reported below: 749 F. 2d 262.

No. 84-6830. COLSON *v.* BOARD OF REGENTS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 1292.

No. 84-6834. CANTONE *v.* SCULLY, SUPERINTENDENT, NEW YORK CORRECTIONAL FACILITY AT GREEN HAVEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 759 F. 2d 207.

No. 84-6836. ADAMS *v.* GRAHAM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 655.

No. 84-6837. HARROD *v.* CITY OF LINCOLN, NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied.

No. 84-6839. HEREDIA-FERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 1412.

No. 84-6840. SEATON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 366.

No. 84-6844. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 84-6847. CARTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 658.

No. 84-6849. DARWIN *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 285.

No. 84-6850. HOLLOWAY *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 252.

No. 84-6851. BETKA *v.* CITY OF WEST LINN ET AL. C. A. 9th Cir. Certiorari denied.

No. 84-6853. BONDI *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 130 Ill. App. 3d 536, 474 N. E. 2d 733.

No. 84-6855. REED *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 756 F. 2d 654.

No. 84-6857. REED *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 1292.

No. 84-6858. SIMS *v.* BABCOCK & WILCOX CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 753 F. 2d 1570.

No. 84-6860. IN RE WALKER. Sup. Ct. Cal. Certiorari denied.

No. 84-6862. BROWN *v.* LEAVITT, SHERIFF, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1070.

No. 84-6863. HORNE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 755 F. 2d 691.

No. 84-6867. HASSAIN *v.* NEWBLATT, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1007.

No. 84-6868. VALENTINO *v.* SUPERIOR COURT OF THE COUNTY OF CONTRA COSTA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84-6869. MERRILL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84-6870. CORLEY *v.* MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 245 U. S. App. D. C. Cir. 233, 759 F. 2d 959.

No. 84-6871. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 759 F. 2d 633.

No. 84-6874. TILLIS *v.* DAVIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-6875. WADE *v.* FRONTIER PROPERTIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 880.

No. 84-6876. GRIFFITH ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 756 F. 2d 1244.

No. 84-6877. BOWERS *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 123 Wis. 2d 541, 367 N. W. 2d 243.

No. 84-6878. JENNELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 1302.

No. 84-6880. BUNKER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 84-6882. CLEMMONS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 469 So. 2d 1324.

No. 84-6883. GREER *v.* BLACK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 758 F. 2d 327.

No. 84-6885. UNANGST *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 333 Pa. Super. 633, 482 A. 2d 670.

No. 84-6886. MORLAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 1442.

No. 84-6887. RADOGNA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 333 Pa. Super. 632, 482 A. 2d 669.

No. 84-6889. OWENS *v.* FREEMAN, SUPERINTENDENT, PENNSYLVANIA CORRECTIONAL INSTITUTION AT CAMP HILL, ET AL. C. A. 3d Cir. Certiorari denied.

No. 84-6890. JACKSON *v.* OKLAHOMA ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 699 P. 2d 1094.

No. 84-6891. DIAL ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 163.

No. 84-6893. WILLIAMS *v.* KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 84-6896. FISHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1012.

No. 84-6897. VINCENT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 379.

No. 84-6898. MOCK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84-6900. HOBBS *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 752 F. 2d 1079.

No. 84-6901. BOWRING *v.* MILLS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 645.

No. 84-6902. ZELTNER *v.* FAUVER, COMMISSIONER, NEW JERSEY DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 84-6904. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 20.

No. 84-6906. MORENO-SEVANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 696.

No. 84-6908. DARWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 84-6909. SMITH *v.* DEROBERTIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 759 F. 2d 1151.

No. 84-6912. SIMONS *v.* DIETZ ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 765 F. 2d 139.

No. 84-6915. KIRK *v.* REES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 57.

No. 84-6916. RAGIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 696.

No. 84-6917. MCALLISTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 2d 693.

No. 84-6920. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 270.

No. 84-6922. CAWLEY *v.* BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 931.

No. 84-6924. DELBRIDGE *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 84-6925. HEARRON *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 10 Kan. App. 2d 229, 696 P. 2d 418.

No. 84-6926. HART *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 285.

No. 84-6927. ANDINO *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 84-6928. KADOTA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 757 F. 2d 198.

No. 84-6929. OWENS *v.* LUTHER, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 84-6930. OLINGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 759 F. 2d 1293.

No. 84-6933. MITCHELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 84-6934. HACKLEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1000.

No. 84-6936. HAWKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1000.

No. 84-6937. TAMAYO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 277.

No. 84-6939. BLAIR, DBA BLAIRCO, INC. *v.* CHAFIN, DBA H. TRUMAN CHAFIN LEGAL CORP. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 926.

No. 84-6942. TRAVIS *v.* UNITED STATES; and
No. 85-5111. TRAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 657.

No. 84-6943. MAZAK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84-6944. RANDALL *v.* KELLEHER, JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 84-6945. HUNT *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 22 Ohio App. 3d 43, 488 N. E. 2d 901.

No. 84-6947. CLARK *v.* BYRON JACKSON PUMP CO. ET AL. C. A. 10th Cir. Certiorari denied.

No. 84-6948. FIGUEROA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 757 F. 2d 466.

No. 84-6950. DUCHER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 245 U. S. App. D. C. 234, 759 F. 2d 960.

No. 84-6951. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1012.

No. 84-6954. CAMPBELL *v.* OHIO DEPARTMENT OF JUSTICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1006.

No. 84-6955. DAVENPORT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 147.

No. 84-6956. ADAMS *v.* LYKES BROTHERS STEAMSHIP CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 760 F. 2d 267.

No. 84-6957. AUGUSTYNIAK *v.* KOCH, MAYOR OF THE CITY OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 676.

No. 84-6958. ROBINSON *v.* COOKE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-6963. HOOSMAN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 84-6964. GUTHRIE *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-6965. CHATMAN *v.* MARQUEZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 754 F. 2d 1531.

No. 84-6966. GRISSO *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 84-6967. BARALDINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 758 F. 2d 843.

No. 84-6968. ACCORDINO *v.* BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES, ET AL. Ct. App. Ohio, Trumbull County. Certiorari denied.

No. 84-6969. BARTON *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 84-6973. ODINGA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 758 F. 2d 843.

No. 84-6976. BRAY *v.* BEARDEN ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-6977. GREER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1012.

No. 84-6978. GILBERT *v.* CALIFORNIA STATE PERSONNEL BOARD ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 84-6979. CRAIG *v.* TUSCALOOSA NEWS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 659.

No. 84-6984. LIGHTSEY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 84-6985. CASTANEDA *v.* CHRISTENSEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 274.

No. 84-6987. RASULLAH, AKA BARNES *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 136.

No. 84-6988. McGIFFEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 763 F. 2d 368.

No. 84-6989. ORNSBEY, A MINOR, BY HIS GUARDIAN AD LITEM, ORNSBEY, ET AL. *v.* CITY OF TULARE ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 84-6990. CARRION *v.* NEW YORK CITY HEALTH AND HOSPITALS CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 370.

No. 84-6991. HARRIS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 688 S. W. 2d 338.

No. 84-6992. HUNTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1000.

No. 84-6995. ROBINSON *v.* ENGLE, DEPUTY DIRECTOR, CORRECTIONAL PROGRAMS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1011.

No. 84-6996. OWENS *v.* BAER. C. A. 2d Cir. Certiorari denied.

No. 84-6998. THOMAS *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 664 S. W. 2d 56.

No. 84-6999. REED *v.* OREGON WORKERS' COMPENSATION BOARD ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 298 Ore. 597, 695 P. 2d 50.

No. 84-7001. HAYES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 763 F. 2d 368.

No. 84-7004. TATE *v.* COOKE, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 174.

No. 84-7007. BROWN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 182.

No. 85-2. ALLEN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 506 Pa. 500, 486 A. 2d 363.

No. 85-6. ZUCKER ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 637.

No. 85-7. NAPOLITANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 761 F. 2d 135.

No. 85-9. TEXAS *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 419.

No. 85-11. RAPHAN ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 759 F. 2d 879.

No. 85-13. LUCCI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 153.

No. 85-14. THOMAS *v.* GENERAL SERVICES ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 756 F. 2d 86.

No. 85-15. BOGARD *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 687 S. W. 2d 533.

No. 85-16. EDWARDS ET AL. *v.* WILKES-BARRE PUBLISHING CO. PENSION TRUST ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 757 F. 2d 52.

No. 85-20. MORGAN ADHESIVES CO. *v.* CHEMTROL ADHESIVES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 158.

No. 85-22. PIGGY BANK STATIONS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 450.

No. 85-25. MORGAN *v.* FIRESTONE TIRE & RUBBER CO. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 2d 884.

No. 85-26. ROL MFG. CO. ET AL. *v.* NICKSON INDUSTRIES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 160.

No. 85-28. REDCO CORP. *v.* CBS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 758 F. 2d 970.

No. 85-29. EWP CORP. ET AL. *v.* RELIANCE UNIVERSAL, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 755 F. 2d 898.

No. 85-30. TIERNEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 760 F. 2d 382.

No. 85-32. C & C METAL PRODUCTS CORP. ET AL. *v.* DEFIANCE BUTTON MACHINE CO. C. A. 2d Cir. Certiorari denied. Reported below: 759 F. 2d 1053.

No. 85-33. HEWITT, PERSONAL REPRESENTATIVE OF THE ESTATE OF HEWITT, ET AL. *v.* CITY OF TRUTH OR CONSEQUENCES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 758 F. 2d 1375.

No. 85-36. CEASAR *v.* MERRILL LYNCH & CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 135.

No. 85-38. MEACHUM *v.* WORTHEN BANK & TRUST CO., N. A. Ct. App. Ark. Certiorari denied. Reported below: 13 Ark. App. 229, 682 S. W. 2d 763.

No. 85-39. WILLIAMS *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 14 Ark. App. 32, 684 S. W. 2d 821.

No. 85-40. MASSACHUSETTS HOSPITAL SCHOOL ET AL. *v.* STOCK, BY AND THROUGH HIS FATHER AND NEXT FRIEND, STOCK. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 392 Mass. 205, 467 N. E. 2d 448, and 394 Mass. 437, 476 N. E. 2d 210.

No. 85-41. WESTIN, INC. *v.* BLC INSURANCE CO. Ct. App. Minn. Certiorari denied. Reported below: 359 N. W. 2d 752.

No. 85-45. SANDERS *v.* MISSISSIPPI STATE BAR ASSN. Sup. Ct. Miss. Certiorari denied. Reported below: 466 So. 2d 891.

No. 85-48. SUAREZ *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 755 F. 2d 1.

No. 85-49. PACELLA *v.* MILFORD RADIO CORP., DBA RADIO STATION WMRC, ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 394 Mass. 1051, 476 N. E. 2d 595.

No. 85-60. WEST GULF MARITIME ASSN. ET AL. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL-CIO. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 135.

No. 85-61. MCFARLAND *v.* BETHLEHEM STEEL CORP. ET AL. C. A. 9th Cir. Certiorari denied.

No. 85-63. BRADY *v.* PETTIT, FORMER MAYOR OF LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1006.

No. 85-68. GOTTSCHALL ET AL. *v.* JONES & LAUGHLIN STEEL CORP. ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 333 Pa. Super. 493, 482 A. 2d 979.

No. 85-70. SARRACEN *v.* APPLEBY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 271.

No. 85-73. FREEDOM SAVINGS & LOAN ASSN. *v.* WAY, DBA FREEDOM REALTY. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 1176.

No. 85-74. GRIFFIN *v.* RHODE ISLAND ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 760 F. 2d 359.

No. 85-75. TENNECO WEST, INC. *v.* MARATHON OIL CO. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 769.

No. 85-77. RASKIEWICZ *v.* TOWN OF NEW BOSTON ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 754 F. 2d 38.

No. 85-80. CUMBERLAND, MARYLAND, AREA TEAMSTERS PENSION FUND ET AL. *v.* HOOVER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 756 F. 2d 977.

No. 85-83. ZERMAN *v.* MELTON ET AL.; ZERMAN *v.* PRUDENTIAL-BACHE SECURITIES ET AL.; and ZERMAN *v.* JACOBS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 735 F. 2d 751 (first case); 755 F. 2d 915 (second case); 751 F. 2d 82 (third case).

No. 85-86. TUCKER *v.* HARTFORD NATIONAL BANK & TRUST CO. Sup. Ct. Conn. Certiorari denied. Reported below: 195 Conn. 218, 487 A. 2d 528.

No. 85-87. MILIAN-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 759 F. 2d 1558.

No. 85-89. MEEKER *v.* NEW MEXICO ET AL. Sup. Ct. N. M. Certiorari denied.

No. 85-90. JONES DAIRY FARM *v.* LOCAL NO. P-1236, UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-

CIO. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 173.

No. 85-91. DE LA LASTRA PETRIRE ET AL. *v.* SPANTAX, S. A. C. A. 2d Cir. Certiorari denied. Reported below: 756 F. 2d 263.

No. 85-101. ARAIZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 2d 1003.

No. 85-103. GREAT LAKES DREDGE & DOCK CO., INC. *v.* FURKA, ADMINISTRATRIX OF THE ESTATE OF FURKA. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 1085.

No. 85-104. KABANUK *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 363 N. W. 2d 877.

No. 85-105. SISSON *v.* HELMS, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 991.

No. 85-106. NEW YORK COUNCIL ASSOCIATION OF CIVILIAN TECHNICIANS *v.* FEDERAL LABOR RELATIONS AUTHORITY. C. A. 2d Cir. Certiorari denied. Reported below: 757 F. 2d 502.

No. 85-107. CASTORINA *v.* LYKES BROTHERS STEAMSHIP CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 758 F. 2d 1025.

No. 85-108. AKERMAN *v.* BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 367.

No. 85-113. LANDI *v.* SUI ET UX. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 163 Cal. App. 3d 383, 209 Cal. Rptr. 449.

No. 85-114. SHELTON *v.* WINSOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 2d 1019.

No. 85-119. MUELLER *v.* PEVSNER. C. A. 7th Cir. Certiorari denied. Reported below: 762 F. 2d 1015.

No. 85-120. CANYONEERS, INC., DBA GRAND CANYON TRAIL GUIDES *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 754.

No. 85-124. COCHRANE *v.* SIMOR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 135.

No. 85-126. PEACOCK ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 2d 1313.

No. 85-127. CARRILLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 417.

No. 85-128. HOFFER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 106 Ill. 2d 186, 478 N. E. 2d 335.

No. 85-133. SYSTEMS ARCHITECTS, INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 757 F. 2d 373.

No. 85-135. HINTON *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1008.

No. 85-139. PENNZOIL CO. ET AL. *v.* ASSOCIATED GAS DISTRIBUTORS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 244 U. S. App. D. C. 145, 756 F. 2d 166.

No. 85-141. PUGH *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 467 So. 2d 1015.

No. 85-143. TAYLOR *v.* BLACKWELL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 255.

No. 85-145. DOUGLAS *v.* TRAVELERS INNS OF NORTH WILKESBORO, INC., DBA HOLIDAY INN OF WILKESBORO. C. A. 4th Cir. Certiorari denied. Reported below: 760 F. 2d 264.

No. 85-147. SOUTHWEST CHEMICAL SERVICES, INC. *v.* SUPERIOR COURT OF MARICOPA COUNTY ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 85-149. HARNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 277.

No. 85-150. CHEVRON U. S. A. INC. *v.* BELCO PETROLEUM CORP. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 1151.

No. 85-153. BALTIMORE GAS & ELECTRIC CO. ET AL. *v.* HEINTZ ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 760 F. 2d 1408.

No. 85-154. PFLUGER *v.* ILLINOIS DEPARTMENT OF REVENUE ET AL. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 85-158. RUTTER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 466.

No. 85-160. HUME, ADMINISTRATRIX OF THE ESTATE OF HUME *v.* DURWOOD MEDICAL CLINIC, INC., ET AL. Ct. App. S. C. Certiorari denied. Reported below: 282 S. C. 236, 318 S. E. 2d 119.

No. 85-161. GARCIA *v.* SOUTHERN PACIFIC TRANSPORTATION CO. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 85-165. BONWICH *v.* BONWICH. Sup. Ct. Utah. Certiorari denied. Reported below: 699 P. 2d 760.

No. 85-166. AMERICAN STEAMSHIP CO. *v.* OBAD. Ct. App. Mich. Certiorari denied.

No. 85-167. HAWLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 759 F. 2d 237.

No. 85-168. GINNODO *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 753 F. 2d 1061.

No. 85-169. CHAPMAN ET AL. *v.* STATE BAR OF CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305.

No. 85-171. UGARTE *v.* UNITED STATES LINES, INC. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 836, 476 N. E. 2d 333.

No. 85-174. LUNDY *v.* UNION CARBIDE CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 656.

No. 85-176. TRANSCON LINES, INC. *v.* JOSEPH SCHLITZ BREWING CO. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 171.

No. 85-181. COLLINS CO., INC., ET AL. *v.* TECTONICS, INC. OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 753 F. 2d 957.

No. 85-183. AMEND ET AL. *v.* POFF, JUDGE, 47TH JUDICIAL DISTRICT COURT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 141.

No. 85-185. LARSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 2d 852.

No. 85-187. WILLIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 759 F. 2d 1486.

No. 85-190. DENNIE, INDIVIDUALLY AND ON BEHALF OF HIS MINOR SON, NKOSI *v.* UNIVERSITY OF PITTSBURGH SCHOOL OF MEDICINE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1068.

No. 85-192. AUTORINO *v.* SUPERINTENDENT, ARTHUR KILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 157.

No. 85-194. ERLBAUM ET AL. *v.* CLEM ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1067.

No. 85-196. MILLER ET AL. *v.* FIRST FEDERAL OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 760 F. 2d 1428.

No. 85-197. POTTER *v.* MURRAY CITY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 760 F. 2d 1065.

No. 85-203. SIMS *v.* COOKE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 908.

No. 85-207. NATIONAL DISTILLERS & CHEMICAL CORP. *v.* PRATT. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 146.

No. 85-208. CHEADLE ET UX. *v.* APPLEATCHEE RIDERS ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 757 F. 2d 1035.

No. 85-212. MARTIN *v.* TWO-R DRILLING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 763 F. 2d 415.

No. 85-218. LUXURY BLANKETS, INC., ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1012.

No. 85-219. F. I. CORP., DBA FLUIDYNE INSTRUMENTATION *v.* BANK OF AMERICA, N. T. & S. A. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 275.

No. 85-223. AURAND ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 262.

No. 85-226. HACKETT *v.* HOUSING AUTHORITY OF THE CITY OF SAN ANTONIO, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 1308.

No. 85-229. SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA ET AL. *v.* APEX CONSTRUCTION CO., INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 757 F. 2d 221.

No. 85-232. PATCHETT *v.* PATCHETT. App. Ct. Mass. Certiorari denied. Reported below: 19 Mass. App. 1109, 475 N. E. 2d 439.

No. 85-233. FUTURA DEVELOPMENT CORP. *v.* CENTEX CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 761 F. 2d 33.

No. 85-235. THRASHER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 130 Ill. App. 3d 1165, 493 N. E. 2d 759.

No. 85-238. JOHANNS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 20 M. J. 155.

No. 85-240. CHAPMAN *v.* SMITH BARNEY, HARRIS UPHAM & CO., INC. C. A. 2d Cir. Certiorari denied. Reported below: 757 F. 2d 465.

No. 85-243. SERVICE, HOSPITAL, NURSING HOME & PUBLIC EMPLOYEES UNION, LOCAL 47 *v.* COMMERCIAL PROPERTY SERVICES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 499.

No. 85-247. CRANBERG *v.* CONSUMERS UNION OF UNITED STATES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 382.

No. 85-253. NEW YORK MARINE MANAGERS, INC. *v.* HELENA MARINE SERVICES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 758 F. 2d 313.

No. 85-258. MILLER *v.* INTERNATIONAL TELEPHONE & TELEGRAPH CORP. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 20.

No. 85-262. CORDIS CORP. *v.* MEDTRONIC, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 769 F. 2d 733.

No. 85-269. NABORS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 761 F. 2d 465.

No. 85-270. GANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 484.

No. 85-274. STELLY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 2d 1113.

No. 85-277. GOVERN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 767 F. 2d 937.

No. 85-281. SOMMERSTEDT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 752 F. 2d 1494.

No. 85-290. RAYNER ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 760 F. 2d 1217.

No. 85-291. JACOB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 765 F. 2d 140.

No. 85-306. ROSS ET AL. *v.* BOWKER ET AL. Ct. App. Iowa. Certiorari denied. Reported below: 372 N. W. 2d 513.

No. 85-311. COLLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 766 F. 2d 219.

No. 85-319. WOODSIDE, ADMINISTRATOR OF THE ESTATE OF WOODSIDE *v.* NATIONAL DIRECTOR OF VETERAN'S ADMINISTRATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1078.

No. 85-320. PAPPANIKOLAOU *v.* ADMINISTRATOR OF THE VETERANS ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 8.

No. 85-324. FAZZINO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 765 F. 2d 125.

No. 85-5002. OWENS *v.* LUTHER. C. A. 2d Cir. Certiorari denied.

No. 85-5004. SCHRAMM *v.* CITY OF CUDAHY ET AL. C. A. 7th Cir. Certiorari denied.

No. 85-5005. STEVENS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 123 Wis. 2d 303, 367 N. W. 2d 788.

No. 85-5006. SOMMER *v.* COUNTY OF SUFFOLK ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-5008. ROBINSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 486 A. 2d 727.

No. 85-5009. MCQUEEN *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 1174.

No. 85-5012. WEISBRAUT *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 757 F. 2d 83.

No. 85-5014. MILLER *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1009.

No. 85-5015. HEMBREE-BEY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 135.

No. 85-5016. MACK *v.* WILLIAMS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 85-5018. WIEBNER *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 85-5019. SKAGGS *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-5021. SAVOCA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 761 F. 2d 292.

No. 85-5026. BELL ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 132 Ill. App. 3d 354, 476 N. E. 2d 1239.

No. 85-5027. HAYS *v.* HAYS. Sup. Ct. Alaska. Certiorari denied.

No. 85-5030. RAINE *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85-5031. RASPALDO *v.* CARVER, SUPERINTENDENT, LEHIGH COUNTY PRISON. C. A. 3d Cir. Certiorari denied.

No. 85-5032. EAGLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-5033. SMALLWOOD *v.* SCHMIDT, SECRETARY, DEPARTMENT OF PUBLIC SAFETY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 649.

No. 85-5035. HERRERA-CEBALLOS ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 20.

No. 85-5036. HUMPHREY *v.* UNITED STATES DISTRICT COURT OF THE MIDDLE DISTRICT OF GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 85-5037. KELLY *v.* WARDEN, HOUSE OF CORRECTION. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 143.

No. 85-5038. FAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 85-5039. ABRAHAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 909.

No. 85-5041. CHANDLER *v.* LORD. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 907.

No. 85-5043. MASTERS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 685 S. W. 2d 654.

No. 85-5047. BELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 495.

No. 85-5049. SALMAN *v.* UNITED STATES SUPREME COURT. C. A. 9th Cir. Certiorari denied.

No. 85-5050. VAN HORN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 991.

No. 85-5051. THACKER, BY AND THROUGH NORMAN, HIS NEXT FRIEND *v.* ATIYEH ET AL. C. A. 9th Cir. Certiorari denied.

No. 85-5052. LEBLANC *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 502.

No. 85-5054. ABERNATHY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 757 F. 2d 1012.

No. 85-5055. PATTERSON *v.* MCWHERTER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1010.

No. 85-5057. LAYHUE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1072.

No. 85-5059. NOTTINGHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1001.

No. 85-5060. OTIS *v.* SEARS, ROEBUCK & CO. C. A. 7th Cir. Certiorari denied.

No. 85-5061. CARIGON *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 422 Mich. 930, 368 N. W. 2d 871.

No. 85-5063. FAY *v.* O'BRIEN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 85-5066. LIZZANA *v.* SCHWEGMANN GIANT SUPERMARKETS, INC. Sup. Ct. La. Certiorari denied. Reported below: 469 So. 2d 979.

No. 85-5067. BOVEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 146.

No. 85-5068. HAIRSTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 763 F. 2d 233.

No. 85-5069. SMITH *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 303 Md. 361, 493 A. 2d 1082.

No. 85-5070. HALEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 758 F. 2d 1294.

No. 85-5071. PADRON ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 417.

No. 85-5072. HENRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1070.

No. 85-5075. BOWMAN *v.* CINCINNATI MINE MACHINERY CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1005.

No. 85-5076. BUTLER *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85-5077. PARKER *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 763 F. 2d 665.

No. 85-5079. SAKAL *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-5080. SRUBAR ET AL. *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 914.

No. 85-5081. GASSETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 153.

No. 85-5083. JOHNSON *v.* NEW YORK STATE COURT OFFICERS ASSN. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 908.

No. 85-5085. RABON *v.* BRYAN COUNTY BOARD OF EDUCATION. Ct. App. Ga. Certiorari denied. Reported below: 173 Ga. App. 507, 326 S. E. 2d 577.

No. 85-5088. FAIRLEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 467 So. 2d 894.

No. 85-5089. BAD FOOT *v.* BOLT, SHERIFF, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 85-5092. BROWN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 65 N. Y. 2d 813, 482 N. E. 2d 929.

No. 85–5093. CAREY *v.* ALFORD, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 85–5096. COVINGTON *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 997.

No. 85–5097. CAMPBELL *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 85–5104. GLASS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 761 F. 2d 479.

No. 85–5108. BURTON *v.* STOUTS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 2d 273.

No. 85–5109. BROCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1012.

No. 85–5110. ROSE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1075.

No. 85–5114. MUSICANT *v.* TERRY ET AL. Sup. Ct. Haw. Certiorari denied.

No. 85–5118. TRACY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied.

No. 85–5120. CANTERO-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85–5122. MORRIS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 85–5123. LUCERO *v.* COLORADO STATE BOARD OF LAW EXAMINERS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 760 F. 2d 239.

No. 85–5124. AUSTAD *v.* RISLEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 2d 1348.

No. 85–5125. LONG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 85–5128. FAISON *v.* MCLEAN TRUCKING CO. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 646.

No. 85–5130. KARABIN *v.* PETSOCK, SUPERINTENDENT, PENNSYLVANIA STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 3d Cir. Certiorari denied. Reported below: 758 F. 2d 966.

No. 85–5132. REYES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 759 F. 2d 351.

No. 85–5135. FLEMING *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 470 So. 2d 1343.

No. 85–5136. BURNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 146.

No. 85–5137. KNOX *v.* TEAMSTERS UNION LOCAL 222 ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–5138. ANDERSON *v.* STAGNER, SUPERINTENDENT, CORRECTIONAL TRAINING FACILITY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 85–5139. FERGUSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–5142. MILLER ET AL. *v.* DILLON ET AL. C. A. 7th Cir. Certiorari denied.

No. 85–5143. OATES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85–5144. OWENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 85–5146. CLEMENTS *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 334 S. E. 2d 600.

No. 85–5151. HOWARD *v.* HOWARD. Sup. Ct. Ind. Certiorari denied.

No. 85–5152. WILLIAMS *v.* ROCKWELL INTERNATIONAL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 2d 1020.

No. 85–5153. FOSTER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 1144, 480 N. E. 2d 340.

No. 85-5156. GILES *v.* INDIANA. Sup. Ct. Ind. Certiorari denied.

No. 85-5157. BENSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 2d 862.

No. 85-5158. BROWNSTEIN *v.* DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 836.

No. 85-5159. MUHAMMAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1077.

No. 85-5161. WHITTLESEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 61 Md. App. 721.

No. 85-5165. BROWN *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 293, 764 F. 2d 926.

No. 85-5166. ISARAPHANICH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 109 App. Div. 2d 1107, 487 N. Y. S. 2d 451.

No. 85-5168. HARLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1076.

No. 85-5169. BURTON *v.* FORD ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-5170. BENNETT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 130 Ill. App. 3d 1157, 493 N. E. 2d 755.

No. 85-5172. MILLER *v.* WEBSTER ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-5173. HERRERA-VEGA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 153.

No. 85-5174. PHELPS *v.* SOVRAN BANK. Sup. Ct. Va. Certiorari denied.

No. 85-5175. SELF *v.* STEPHENSON, SUPERINTENDENT, CALEDONIA AND ODOM COMPLEX. C. A. 4th Cir. Certiorari denied. Reported below: 765 F. 2d 139.

No. 85-5176. BURTON *v.* DELANIE ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-5178. HODGES *v.* CITY OF ANN ARBOR, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 932.

No. 85-5179. KALTENBACH *v.* ACADIAN METROPOLITAN CODE AUTHORITY. Sup. Ct. La. Certiorari denied. Reported below: 467 So. 2d 1134.

No. 85-5181. YOUNG *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 285.

No. 85-5183. FORD *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 907.

No. 85-5184. MARIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 158.

No. 85-5187. THOMAS *v.* YLST, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 934.

No. 85-5188. IDLEBIRD *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-5191. MERCER *v.* LUTHER, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85-5192. MARTINEZ-TORRES ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 1019.

No. 85-5194. CEDAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 922.

No. 85-5197. BILLINGS *v.* SMITH. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 144.

No. 85-5198. LYLES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 106 Ill. 2d 373, 478 N. E. 2d 291.

No. 85-5199. WILSON *v.* ROCKEFELLER. C. A. D. C. Cir. Certiorari denied.

No. 85-5200. MARTIN-TRIGONA *v.* FERRARI, TRUSTEE. C. A. 1st Cir. Certiorari denied.

No. 85-5201. FROEMAN *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-5202. BROWN *v.* ZANT. Ct. App. Ga. Certiorari denied. Reported below: 173 Ga. App. XXX.

No. 85-5203. LEAHEY *v.* MCGUIRE, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 105 App. Div. 2d 1164, 482 N. Y. S. 2d 406.

No. 85-5204. KALEC *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 925.

No. 85-5206. STREICH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 759 F. 2d 579.

No. 85-5207. KESSLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 759 F. 2d 831.

No. 85-5208. HUGHES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-5210. PATTERSON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 85-5211. KELLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 85-5215. LAUGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 2d 1288.

No. 85-5217. KENNY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 85-5218. BETKA *v.* SMITH ET AL. C. A. 9th Cir. Certiorari denied.

No. 85-5219. ROMAN *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK. C. A. 2d Cir. Certiorari before judgment denied.

No. 85-5223. SOBIN *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 494 A. 2d 1272.

No. 85-5228. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 1022.

No. 85-5229. MIMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-5233. O'NEIL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 468 So. 2d 904.

No. 85-5239. WRIGHT *v.* GIRJALVA, WARDEN. Sup. Ct. Ariz. Certiorari denied.

No. 85-5241. PAPSE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85-5243. PHILLIPS *v.* LOMBARDI ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-5244. PAYNE *v.* COUGHLIN ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-5245. FOSTER *v.* SMITH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 762 F. 2d 1015.

No. 85-5249. BROWN *v.* BRUNO. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 919.

No. 85-5251. ROSBERG *v.* GOERES. Sup. Ct. Neb. Certiorari denied. Reported below: 218 Neb. xxxiv.

No. 85-5253. VIGNE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 85-5254. VIGNE *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied.

No. 85-5255. VIGNE *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 925.

No. 85-5257. CARTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85-5258. NEUMANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 85-5259. BOONE ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 759 F. 2d 345.

No. 85-5261. EDGE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-5265. MEDLIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-5267. TROTMAN *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION, DALLAS. C. A. 3d Cir. Certiorari denied.

No. 85-5268. DISILVESTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 30.

No. 85-5270. LAFFITTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 1119.

No. 85-5272. IGBATAYO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 764 F. 2d 1039.

No. 85-5275. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 992.

No. 85-5276. BRYANT *v.* BRADMAN, JAIL ADMINISTRATOR, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-5285. CAUTHEN-BEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 930.

No. 85-5290. WILSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 909.

No. 85-5292. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 763 F. 2d 773.

No. 85-5295. BLAKE *v.* NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 111 App. Div. 2d 168, 488 N. Y. S. 2d 796.

No. 85-5298. MARTIN *v.* MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-5301. DOTSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 158.

No. 85-5311. SCOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 171.

No. 85-5312. WEEMPE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 763 F. 2d 671.

No. 85-5318. SIMON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 420.

No. 85-5331. HARTFORD *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 145 Ariz. 403, 701 P. 2d 1211.

No. 84-1543. PITTSBURGH & LAKE ERIE RAILROAD CO. *v.* HUMPHRIES. Super. Ct. Pa. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 328 Pa. Super. 119, 476 A. 2d 919.

No. 84-2013. DUQUESNE LIGHT CO. ET AL. *v.* INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 756 F. 2d 284.

No. 85-52. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* ABINGTON MEMORIAL HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 750 F. 2d 242.

No. 85-53. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* HUMANA OF AURORA, INC., DBA AURORA COMMUNITY HOSPITAL. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 753 F. 2d 1579.

No. 84-1559. UNITED VAN LINES, INC. *v.* HUNTER ET AL. C. A. 9th Cir. Motion of American Movers Conference for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 746 F. 2d 635.

No. 84-1796. FOLGER COFFEE CO. *v.* INDIAN COFFEE CORP. C. A. 3d Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 752 F. 2d 891.

No. 84-6742. BAILEY ET AL. *v.* BUCKEYE CELLULOSE CORP. C. A. 11th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 84-1842. TORRES *v.* LITTLE FLOWER'S CHILDREN'S SERVICES ET AL. Ct. App. N. Y. Certiorari denied. JUSTICE BRENNAN and JUSTICE BLACKMUN would grant certiorari. Reported below: 64 N. Y. 2d 119, 474 N. E. 2d 223.

No. 84-1850. TEXAS *v.* CHAMBERS. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 688 S. W. 2d 483.

No. 84-1870. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* THOMAS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 758 F. 2d 658.

No. 84-1957. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* FRANSAW. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 753 F. 2d 1074.

No. 85-138. ABRAMS, ATTORNEY GENERAL OF NEW YORK *v.* ROMAN. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari before judgment denied.

No. 84-1869. MARCONE *v.* PENTHOUSE INTERNATIONAL, LTD. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE WHITE would grant certiorari. Reported below: 754 F. 2d 1072.

No. 84-1898. BLACKMON *v.* OBSERVER TRANSPORTATION CO. C. A. 4th Cir. Motion of petitioner for leave to proceed as a veteran granted. Certiorari denied. Reported below: 756 F. 2d 1000.

No. 84-1899. MUELLER *v.* DIEBALL ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 753 F. 2d 1082.

No. 84-1958. RONWIN *v.* HOLOHAN ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE REHNQUIST and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 758 F. 2d 656.

No. 84-2008. READING CO. ET AL. *v.* SCHWEITZER ET AL. C. A. 3d Cir. Motions of Penn Central Corp. and Amatex Corp.

for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 758 F. 2d 936.

No. 84-2009. DEL MONTE CORP. ET AL. *v.* BLAU ET AL. C. A. 9th Cir. Motion of Organization Resources Counselors, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 748 F. 2d 1348.

No. 84-2035. YORK ET AL. *v.* FIRST PRESBYTERIAN CHURCH OF ANNA, ILLINOIS, ET AL. App. Ct. Ill., 5th Dist. Motion of petitioners to consolidate this case with No. 85-10, *Presbytery of Beaver-Butler* v. *Middlesex Presbyterian Church, infra*, denied. Certiorari denied. Reported below: 130 Ill. App. 3d 611, 474 N. E. 2d 716.

No. 84-6474. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex.;
No. 84-6551. BONHAM *v.* TEXAS. Ct. Crim. App. Tex.;
No. 84-6596. LEWIS *v.* ILLINOIS. Sup. Ct. Ill.;
No. 84-6651. THOMPSON *v.* TEXAS. Ct. Crim. App. Tex.;
No. 84-6653. FLAMER *v.* DELAWARE. Sup. Ct. Del.;
No. 84-6771. ROACH *v.* MARTIN, WARDEN, ET AL. C. A. 4th Cir.;
No. 84-6823. WALKER *v.* GEORGIA. Sup. Ct. Ga.;
No. 84-6833. DUFF-SMITH *v.* TEXAS. Ct. Crim. App. Tex.;
No. 84-6852. BROWN *v.* FRANCIS, WARDEN. Sup. Ct. Ga.;
No. 84-6861. MATHIS *v.* KEMP, WARDEN. Sup. Ct. Ga.;
No. 84-6879. JOHNSON *v.* FLORIDA. Sup. Ct. Fla.;
No. 84-6899. HOPKINSON *v.* WYOMING. Sup. Ct. Wyo.;
No. 84-6907. DICK *v.* GEORGIA. Sup. Ct. Ga.;
No. 84-6911. BURDEN *v.* KEMP, WARDEN. Sup. Ct. Ga.;
No. 84-6970. DAMON *v.* SOUTH CAROLINA. Sup. Ct. S. C.;
No. 85-5044. STAFFORD *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 85-5095. PROVENS *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, ET AL. C. A. 6th Cir.;
No. 85-5119. OATS *v.* FLORIDA. Sup. Ct. Fla.;
No. 85-5212. GRAYSON *v.* ALABAMA. Sup. Ct. Ala.;
No. 85-5220. PINKERTON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;
No. 85-5224. POYNER *v.* VIRGINIA. Sup. Ct. Va; and
No. 85-5225. POYNER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: No. 84-6474, 691 S. W. 2d 619;

No. 84-6551, 680 S. W. 2d 815; No. 84-6596, 105 Ill. 2d 226, 473 N. E. 2d 901; No. 84-6651, 691 S. W. 2d 627; No. 84-6653, 490 A. 2d 104; No. 84-6771, 757 F. 2d 1463; No. 84-6823, 254 Ga. 149, 327 S. E. 2d 475; No. 84-6833, 685 S. W. 2d 26; No. 84-6852, 254 Ga. 83, 326 S. E. 2d 735; No. 84-6879, 465 So. 2d 499; No. 84-6899, 696 P. 2d 54; No. 84-6970, 285 S. C. 125, 328 S. E. 2d 628; No. 85-5044, 700 P. 2d 223; No. 85-5119, 472 So. 2d 1143; No. 85-5212, 479 So. 2d 76; Nos. 85-5224 and 85-5225, 229 Va. 401, 329 S. E. 2d 815.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 84-6527. BAILEY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 284 Ark. 379, 682 S. W. 2d 734.

No. 84-6558. STEWART *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 686 S. W. 2d 118.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The petitioner in this case seeks no revolutionary expansion of the principles underlying this Court's current death penalty jurisprudence. All he asks is the benefit of existing law as proclaimed by a majority of this Court. This Court has declared that a sentence of death may not be imposed on one "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982). Yet the Court's refusal to consider petitioner's case countenances just that result. Even if I believed, therefore, that the death penalty could constitutionally be imposed under certain circumstances,[1] I would grant certiorari in this case and vacate the death sentence imposed here.

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[1] I continue to adhere to my view that the death penalty is, in all circumstances, cruel and unusual punishment prohibited by the Eighth and

I

At his murder trial, petitioner Darryl Elroy Stewart and his accomplice Kelvin Kelly provided conflicting theories about the crime. According to Stewart's statement, which the State introduced at trial, he and Kelly were walking past the deceased's apartment when Kelly saw through the open door a stereo that he wanted to steal. Kelly told Stewart that he was going to run in and grab the stereo, and instructed Stewart to stand guard at the door. Stewart heard a woman scream; heard Kelly attempt to force sexual relations on her; saw glimpses of a struggle; and heard two shots. Thus, Stewart's statement indicated that he agreed to assist in Kelly's theft of the stereo; that Kelly strayed from the plan to steal the stereo and attempted to commit a sexual offense against the occupant of the apartment; and that during the course of this offense Kelly killed the victim. If Stewart's account of the crime is accepted, he did not himself kill, did not attempt to kill, and did not intend that a killing would take place. According to Kelly, however, it was Stewart who entered the apartment to commit burglary, Stewart who had the gun, Stewart who attempted a sexual assault on the victim, and Stewart who killed her, while Kelly waited at the door; the State introduced some evidence corroborating this story. Kelly was promised, in exchange for his testimony, that he would receive no more than 50 years in prison.

II

The jury was asked to resolve this conflicting evidence and determine the guilt or innocence of Stewart on the murder charge. In order to guide the jury in that endeavor, the trial judge gave a lengthy instruction on the Texas "law of parties," set out in full in the margin.[2] 686 S. W. 2d 118, 123 (Tex. Crim. App. 1984).

Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring).

[2] The judge charged the jury as follows:

"'Now, if you find from the evidence beyond a reasonable doubt that . . . the Defendant, Darryl Elroy Stewart, did while in the course of committing or attempting to commit burglary of a habitation, . . . intentionally caused *[sic]* the death of [the victim] by shooting her with a gun, then you will find the Defendant guilty of Capital Murder, as charged in the Indictment. Or if you

The instructions provided the jury with two theories of capital murder. First, the jury could find Stewart guilty of having intentionally shot the victim himself. Alternatively, the jury could find the following series of facts: that Stewart conspired to commit burglary; that the murder was committed by Kelly in the course of the burglary; that Stewart was *intentionally* aiding Kelly in the execution of the *burglary* at the time that Kelly committed the murder; and that the murder was an offense that "should have been anticipated" as a result of the conspiracy. Either of the two findings would support a verdict of guilty of capital murder.

The jury returned a verdict of guilty. Defense counsel requested that the jury be instructed to specify upon which of the two murder offenses it had convicted Stewart, but the trial judge denied the request. The trial proceeded to the sentencing phase, and petitioner was sentenced to die.

III

Under the Texas capital murder statute, a murder does not constitute capital murder merely because it was committed in the course of a burglary or other specified felony. The statute explicitly provides that the murder must have been committed "intentionally" in the course of the other felony. Tex. Penal Code Ann. § 19.03(a)(2) (Supp. 1985). In theory, therefore, a person cannot be required to face the death penalty without having acted with an

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find from the evidence beyond a reasonable doubt that . . . Kelvin Kelly and Darryl Elroy Stewart entered into a conspiracy to burglarize the habitation . . . , and that pursuant thereto they did carry out or attempt to carry out such conspiracy to commit burglary, and while in the course of committing such burglary, if any, Kelvin Kelly did intentionally cause the death of [the victim] by shooting her with a gun and that the Defendant, Darryl Elroy Stewart, pursuant to said conspiracy, if any, with the intent to promote, assist, or aid Kelvin Kelly in the commission or attempted commission of the said burglary, then and there, at the time of the shooting, if any, was acting with and aiding Kelvin Kelly in the execution or attempted execution of said burglary, and that the shooting of [the victim] followed in the execution of the conspiracy and in furtherance of the unlawful purpose of Kelvin Kelly and Darryl Elroy Stewart to commit the burglary, and that the shooting of [the victim] was an offense that should have been anticipated as a result of the carrying out of the conspiracy, then you will find the Defendant, Darryl Elroy Stewart, guilty of Capital Murder as charged in the indictment.'" 686 So. W. 2d, at 123–124.

intent to kill. Ironically, it was this reading of the statute that led this Court, in *Enmund*, to number Texas among the States that did not permit a capital sentence to be imposed upon a person convicted only of felony murder. 458 U. S., at 790, n. 7.

The *Enmund* Court's assessment, however, did not take into account the Texas "law of parties." Under that law, a person can be punished for an offense committed by another if he is "criminally responsible" for the other person. Tex. Penal Code Ann. § 7.01(a) (1974). The "criminal responsibility" of person *A* arises if *A* conspires to commit one felony and, in furtherance of that unlawful purpose, a co-conspirator in the first felony commits a second offense that "should have been anticipated" as a result of the conspiracy. The statute explicitly provides that *A* is guilty of the second offense even "though having no intent to commit it." Tex. Penal Code Ann. § 7.02(b) (1974); see *Ruiz* v. *State*, 579 S. W. 2d 206, 209 (1979) ("section 7.02(b), eliminates any necessity on the part of the State to prove the appellant had any intent to kill"). If the first offense is burglary, and the co-conspirator's second offense happens to be murder, then *A* may be deemed to have committed capital murder—even though the capital murder statute requires that the murder be committed intentionally in the course of a felony. The vulnerability of *A* to a capital charge under these circumstances, therefore, is entirely dependent on the acts of his co-conspirator; *A*'s own criminal accountability is not entirely within his control. In this application of the Texas statutes, every intent element that would normally guard against a capital charge for one who did not kill or intend to kill can be neatly circumvented and substituted with the fiction of vicarious intent. This is no mere theoretical quirk in state law; it is precisely the train of logic that quite possibly led to the death sentence in this case.

The entire conduct of petitioner's trial operated to buttress the prejudice created by the State's reliance on this illusory edifice of intent. For example, every juror who ended up on petitioner's panel had stated in *voir dire* that he or she could find a nontriggerman guilty of capital murder and could impose the death sentence, even if the defendant had no specific intent to kill or to cause a killing.[3] Moreover, when the defense attorney attempted

[3] Petitioner was sentenced before this Court issued its decision in *Enmund*. Petitioner has not made it clear whether defense counsel moved to

to explain to the jury that the law of parties—that is, vicarious intent—is not applicable to sentencing decisions, the trial court sustained the prosecutor's objection on the ground that counsel had misstated the law. Further, the judge did not instruct the jury that at the sentencing stage it was obliged to consider mitigating circumstances, such as the possibility that Stewart played a relatively minor role in the murder.[4] At every step of the way, one or more of these factors contributed to the likelihood that the jury failed to understand that it could not rely on vicarious intent to determine whether a defendant deserves to die.

Respondent contends that any deficiency in the jury's consideration of intent was cured at the sentencing phase. The judge's charge to the jury made it clear that imposition of the death sentence would be contingent upon a jury finding that "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result." See Tex. Code Crim. Proc. Ann., Art. 37.071(b)(1) (Vernon 1981). But the deliberateness of a burglary simply cannot be equated with an intent to kill. Moreover, it seems that the judge informed the jury, over defense objection, that the conduct which must be found to be deliberate as a prerequisite to the death sentence includes the conduct of the triggerman, as attributed to the defendant through the law of parties. Thus, the "individualized consideration" of the

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strike the panel on the basis of its expressed willingness to impose death in the absence of intent. Even if he did not, however, the *Enmund* claim was preserved by counsel's request for a specification of the offense on which petitioner was convicted, his unsuccessful attempt to state to the jury that the law of parties does not apply at sentencing, and other related objections made at trial.

[4] Petitioner argues that this failure of the trial court to instruct the jury that it must consider mitigating circumstances violates *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), in which the Court held that a State may not preclude the sentencer from considering mitigating circumstances. *Id.*, at 113–114. Whether *Eddings* requires such instructions in all cases has not been explicitly decided. In this case, however, the lack of instruction concerning the jury's obligation to consider mitigating factors is particularly troubling, because the determination that the jury was expected to make at sentencing was strikingly similar to the findings it had already made at the guilt phase. Without guidance from the judge, it is quite possible that the jury believed the death sentence to be an automatic result of the conviction.

defendant's own culpability, required by *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978), was entirely neglected. Nor can the constitutional demand for culpable intent be satisfied by the jury's finding that there was a reasonable expectation that death would result from the burglary. Such a finding does not even purport to be a measure of "personal responsibility and moral guilt," without which a defendant cannot be held accountable with his life. *Enmund* v. *Florida*, 458 U. S., at 801.

IV

This case differs from *Enmund* in only one pertinent respect. In *Enmund*, the only evidence implicating the defendant was an inference that he was waiting near the scene of the crime in order to help the principal perpetrators escape. *Id.*, at 788. No conflicting evidence tended to show that Enmund may have been the actual killer. Here, in contrast, there was some evidence tending to establish Stewart as the triggerman. Nevertheless, we cannot be certain whether the jury imposed a sentence of death in the absence of an essential factual premise or not. For purposes of determining whether the Constitution has been violated, therefore, we simply cannot discount the grave possibility that Stewart was sentenced to death without the mental state that *Enmund* recognized as prerequisite to any such sentence.[5] See *Sandstrom* v. *Montana*, 442 U. S. 510, 517 (1979). The courts should not permit unconstitutional death sentences to escape meaningful

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[5]This Term, the Court will consider whether *Enmund* requires that the jury make a finding of intent, or whether an appellate court may make the requisite finding upon review of the evidence. See *Bullock* v. *Lucas*, 743 F. 2d 244 (CA5 1984), cert. granted *sub nom. Cabana* v. *Bullock*, 471 U. S. 1052 (1985). If this Court determines in *Bullock* that a jury finding of intent is required, petitioner's sentence will have to be vacated. Moreover, even if this Court resolves *Bullock* by concluding that an appellate finding of intent will suffice under *Enmund*, petitioner's sentence should still be vacated, because such a finding could not be made by an appellate court in this case. Petitioner's jury did not explicitly convict on one offense or the other, and the evidence supporting an intentional murder conviction conflicts with the evidence supporting a conviction for felony murder. Thus, it would be impossible for an appellate court to divine which of the mutually exclusive sets of testimony was accepted by the jury and should accordingly be examined for indications of intent. We should grant this petition irrespective of *Bullock*.

review merely because one can conceive of an alternative theory under which the execution can be imagined to fall within the terms of this Court's demands. The obligation of the courts is especially compelling here, because the State clearly had the option of eliminating any doubt on the issue by charging only the intentional murder offense and thus forestalling any *Enmund* problem. At least the State might have refrained from objecting to the defense counsel's attempts to inform the jury regarding the inapplicability of the law of parties at the sentencing phase. One cannot help but wonder why the State did not do anything to reduce the confusion, if it is indeed as confident as it claims to be that the jury's finding of guilt was based solely on intentional murder.

The likelihood that Stewart was convicted and sentenced to death on a theory of vicarious intent requires that *Enmund* be our guide in evaluating the legal claims put forward by petitioner. Like Enmund, Stewart has been sentenced to death "in the absence of proof" that he "killed or attempted to kill," or that he "intended or contemplated that life would be taken." 458 U. S., at 801. Some disputed evidence suggested that Stewart had such intent, but we have no proof thereof, and we cannot tell from the verdict whether the jury so found.

V

Although this Court upheld the Texas capital sentencing scheme against certain challenges in *Jurek* v. *Texas*, 428 U. S. 262 (1976), petitioner's case demonstrates that the statute must be measured against a different standard when the State seeks to execute one convicted of felony murder. In this context, the statute is wholly inadequate to meet the constitutional demands articulated in *Enmund*, because it does not ensure that the ultimate sentence will be reserved for those who have intended to kill. Quite simply, that is what *Enmund* demands, and what the Eighth and Fourteenth Amendments, at a minimum, require. I would grant the petition, vacate the sentence, and remand for further proceedings.

No. 84-6589. BROFFORD *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 751 F. 2d 845.

No. 84-6660. BECK *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 254 Ga. 51, 326 S. E. 2d 465.

No. 85-5094. BAILEY *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 490 A. 2d 158.

No. 84-6668. THOMAS *v.* UNITED STATES;
No. 84-6673. THOMAS *v.* UNITED STATES; and
No. 84-6872. THOMAS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: No. 84-6668, 243 U. S. App. D. C. 349, 753 F. 2d 167; No. 84-6673, 243 U. S. App. D. C. 348, 753 F. 2d 166; No. 84-6872, 245 U. S. App. D. C. 234, 759 F. 2d 960.

No. 84-6980. WHITLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 759 F. 2d 327.

No. 85-5045. GROZA *v.* VETERANS ADMINISTRATION ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 755 F. 2d 935.

No. 84-6864. BUSBY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 464 So. 2d 262.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

Once again this Court has declined to correct an error of constitutional magnitude with a defendant's life in the balance. The petitioner's death sentence was unconstitutionally imposed under last Term's decision in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), and this Court's refusal to vacate that sentence is an unwarranted departure from procedures that we follow routinely in the most insignificant case.

I

The petitioner was convicted of first-degree murder. At the sentencing phase of his trial, his counsel attempted to impress upon the jury the significance of its role, in light of the growing number of executions in Louisiana and the Nation as a whole. Counsel admonished the jurors that, should they decide upon the death penalty, they should "'give it with the appreciation that it'll be carried out.'" 464 So. 2d 262, 266 (La. 1985). The prosecutor responded by arguing to the jury:

> "'Though it's difficult to stand before you ladies and gentlemen and ask you to consider imposing upon anyone the pen-

alty of death, but in order to make your task easier, we'll state for you that first of all, you have a solemn obligation to live up to your oath. Second of all, that whatever you decide will be recommendations—and recommendations to the Judge, for the Judge to impose the death penalty. It will be the Judge that sentences this defendant to whatever the sentence might be. You make recommendations.'" *Ibid.*

The jury sentenced petitioner to death.

II

After the Louisiana Supreme Court had affirmed petitioner's conviction and death sentence, and after his petition for certiorari had been filed, this Court decided *Caldwell.** There, the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U. S., at 328–329. In *Caldwell*, the prosecutor argued to the jury that the State Supreme Court would automatically review the death sentence. This Court noted that the jury might not understand the limits on appellate review, and might conclude that the ultimate determination of the appropriateness of a death sentence for that defendant would lie with the court. *Id.*, at 330–331. Furthermore, whether or not the jury was misled as to the appellate court's function, it might decide to "delegate" its responsibility to the court. *Id.*, at 332.

In the present case, we need not speculate about the misleading nature of the prosecutor's argument, for it flatly misstated Louisiana law. In Louisiana, a jury's decision in favor of death is binding on the court. La. Code Crim. Proc. Ann., Art. 905.8 (West 1984). Thus, the prosecutor's argument in this case was not an "accurate statement of a potential sentencing alternative," as in *California* v. *Ramos*, 463 U. S. 992, 1009 (1983); cf. *Caldwell*, *supra*, at 342 (O'CONNOR, J., concurring in part and concurring in judgment). Rather, the prosecutor's argument urged the jury

*This chronology explains the petitioner's failure to raise the *Caldwell* violation in his petition for certiorari. This Court, of course, may correct a plain error not presented in the petition for certiorari. *Washington* v. *Davis*, 426 U. S. 229, 238 (1976). The Louisiana Supreme Court expressly decided the issue, so there is no jurisdictional bar to our considering it.

"to minimize the importance of its role," 472 U. S., at 333, with statements that were both improper under *Caldwell* and factually inaccurate.

Although the Louisiana Supreme Court acknowledged that the prosecutor's remarks were "troublesome," 464 So. 2d, at 266, it concluded that the jury was not misled. The court noted that the trial judge had remarked to the jury, at the *beginning* of the sentencing phase, that the jury "is given the authority to make a binding recommendation to the trial judge as to the sentence." *Ibid.* The judge had also stated that he would impose life imprisonment if the jury could not reach a unanimous recommendation. *Id.*, at 267.

Those statements are inadequate to cure the prosecutor's inaccurate remarks. The judge did not correct the prosecutor's statements in his charge, nor did he acknowledge the binding effect of the jury's decision. Indeed, he compounded the error by telling the jurors that it was their duty "'to make your recommendation as to the sentence that the Court should impose.'" *Ibid.* Because the prosecutor had affirmatively and unambiguously informed the jury that the ultimate responsibility for the decision rested with the judge, the jury could easily have believed that its decision to impose the death penalty was not automatically binding. In this situation, one cannot possibly conclude that the improper argument "had no effect on the sentencing decision," *Caldwell, supra*, at 341. Petitioner's death sentence, therefore, cannot stand.

III

The death sentence in this case was imposed in violation of the Eighth and Fourteenth Amendments as interpreted in *Caldwell, supra*. Our usual practice when an intervening decision of the Court may affect a lower court's decision is to grant the petition, vacate the judgment or sentence as appropriate, and remand for further consideration in light of the intervening case. See, *e. g.*, *Wainwright* v. *Henry*, 463 U. S. 1223 (1983). Because the Court has declined to follow our general practice, with such enormous consequences for the petitioner, I dissent.

No. 84-6866 (A-923). BREEZE *v.* UNITED STATES. C. A. 4th Cir. Application for release and motion for stay of mandate, addressed to JUSTICE BRENNAN and referred to the Court, denied. Certiorari denied. Reported below: 755 F. 2d 930.

No. 84-6873. PATTEN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 467 So. 2d 975.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the judgment below so that the court below can determine the sentence—other than death—that may be appropriate.

JUSTICE MARSHALL, dissenting.

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). I also continue to believe that the death penalty's cruel and unusual nature is made all the more arbitrary when it is imposed by a judge in the face of a jury determination that death is an inappropriate punishment. See *Jones* v. *Alabama*, 470 U. S. 1062, 1063 (1985) (MARSHALL, J., dissenting from denial of certiorari); *Spaziano* v. *Florida*, 468 U. S. 447, 481–490 (1984) (STEVENS, J., dissenting). However, even were I to believe that the death penalty could constitutionally be imposed under certain circumstances and that a jury decision for life could be accorded mere advisory status, I would grant certiorari in this case to decide whether the Double Jeopardy Clause bars the State from forcing a defendant to face a second sentencing jury even though the presumptive validity of his first jury's life recommendation has never been overcome.

I

Petitioner Robert Patten was convicted of first-degree murder, and the State sought the death penalty. During subsequent sentencing deliberations, the jury advised the trial judge that they were deadlocked, 6 to 6; the note concluded: "What now?" Over petitioner's objections, the judge responded by giving an *Allen* charge encouraging further deliberations.[1] After continued deliberations, the jury returned with a 7 to 5 recommendation for death. The court imposed the death sentence. On appeal, the Florida Supreme Court affirmed petitioner's conviction. 467

[1] *Allen* v. *United States*, 164 U. S. 492, 501–502 (1896).

So. 2d 975 (1985). It emphasized, however, that under Florida law, "if seven jurors do not vote to recommend death, then the recommendation is life imprisonment." *Rose* v. *State*, 425 So. 2d 521, 525 (Fla. 1982), cert. denied, 461 U. S. 909 (1983). The court consequently found the giving of the *Allen* charge improper and vacated the death sentence. At this point, though, rather than instructing the trial judge to determine whether it would be appropriate to enter a death sentence regardless of the jury's action, the court chose to remand the case to the trial court for a new sentencing proceeding before a jury. In his motion for rehearing, petitioner urged that the Double Jeopardy Clause barred a second sentencing proceeding. That motion was denied.

II

In *Bullington* v. *Missouri*, 451 U. S. 430 (1981), this Court held that because Missouri's capital sentencing proceeding was comparable to a trial, in which a life sentence constituted a determination that the prosecution had failed to prove its case, the Double Jeopardy Clause barred the State from subjecting a defendant who had received a life sentence in his first trial to the ordeal of a second sentencing proceeding after his conviction had been reversed. In *Arizona* v. *Rumsey*, 467 U. S. 203 (1984), where a life sentence had been imposed by a judge rather than a jury, the Court found that the Double Jeopardy Clause barred resentencing even though the judge's decision to grant life had been based upon what was later held to be a misinterpretation of state law. "[A]n acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." *Id.*, at 211.

In Florida, the jury is not the sole decisionmaker in the sentencing proceedings; the trial judge has the power to override a jury's recommendation for life. See *Spaziano* v. *Florida*, *supra*. Yet the defendant who has persuaded a jury to reject the State's claim that he deserves to die has nonetheless won a significant victory, for Florida has severely limited the trial judge's power to override a life recommendation. In *Tedder* v. *State*, 322 So. 2d 908 (1975), the Florida Supreme Court held an override to be appropriate only where the "facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Id.*, at 910; accord, *Odom* v. *State*, 403 So. 2d 936, 942 (Fla. 1981), cert. denied, 456 U. S. 925 (1982). Thus, while the life recommendation of a Florida jury does not have the conclusive

effect of the Missouri jury's decision for life that was considered in *Bullington*, the recommendation is presumed final, subject to reversal only where "virtually no reasonable person could differ."

Because a Florida jury's life recommendation is not completely final, this Court has held that the Double Jeopardy Clause does not bar the judge's override of a jury's life recommendation. *Spaziano* v. *Florida*, *supra*. However, where a defendant is deprived of the benefits of a jury's life recommendation without any subsequent finding by the trial judge that that recommendation was "clear[ly] and convincing[ly]" unreasonable, I believe there to be a double jeopardy bar to the State's demand that the defendant convince yet another jury that he does not deserve to die. If not held unreasonable, a jury's life recommendation should end a Florida defendant's jeopardy as surely as a life verdict ended that of the Missouri defendant in *Bullington*.

Petitioner was deprived of a jury's life recommendation without any court having found that advisory verdict unreasonable. Under Florida law, a 6-to-6 vote is a life recommendation. See *Rose* v. *State*, *supra*, at 525. When the trial judge received the jury's note indicating that it was deadlocked 6 to 6, there was therefore nothing left for him to do but recall the jury and apply the *Tedder* standard to its life recommendation. I can scarcely believe that the trial judge would have overridden such a recommendation in this case; had he done so, he doubtless would have been reversed on appeal.[2] But instead, the trial judge altered the verdict by giving an *Allen* charge. Then, even while holding the judge to have erred in giving the charge, the Florida Supreme Court proceeded to disregard the fact that the jury's deadlock was a finding for defendant on the issue of death. The Supreme Court's decision to remand was not based upon any finding that a life sentence was unreasonable. The Supreme Court remanded only because the jury's report of a 6-to-6 deadlock had not been contained in a formal recommendation. Since I do not believe that this adherence to formalism is consistent with the double jeopardy concerns implicated by the Supreme Court's demand that petitioner convince yet another jury that he does not deserve to die, I must dissent from this Court's refusal to hear this case.

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[2] Indeed, by "direct[ing] the trial court's attention" to *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), "and its possible application to the facts of this case," the Florida Supreme Court suggested its concern that the trial judge had failed to consider evidence militating in favor of a life sentence. 467 So. 2d 975, 980 (1985).

No. 84-6982. BURR *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 466 So. 2d 1051.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This petition presents the question whether the sentencing jury in a capital case may be prohibited from taking into account its own nagging doubts about the defendant's guilt as it considers whether the defendant deserves to die. The Supreme Court of Florida has squarely resolved that question in the affirmative, despite the clear message of *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), that a capital defendant is entitled to have the jury consider "any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett, supra*, at 604.

Even if I accepted the prevailing view that the death penalty can constitutionally be imposed under certain conditions, I would grant certiorari in this case to consider the grave constitutional question it presents. Today's decision lets stand a ruling that clearly "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett, supra*, at 605 (opinion of BURGER, C. J.), quoted in *Eddings, supra*, at 118 (O'CONNOR, J., concurring).

I

Petitioner, Charlie Burr, was charged with the murder of a convenience-store clerk during a robbery of the store. At trial, the State's key witness was Burr's girlfriend, Domita Williams, who testified that she had been waiting for Burr outside the store when she heard a shot and then saw Burr come out. The State provided some circumstantial evidence in corroboration. The following day, however, Williams took the stand for the defense and recanted her testimony of the previous day. This time she swore that she had not been with Burr at all on the morning of the murder, and recited a different account of her actions that morning. The defense produced witnesses to support this testimony, including an eyewitness who placed Williams elsewhere at the time of the murder. The defense attempted to establish that Williams' first testimony had been the product of coercion by the prosecutor; the State, in turn, attempted to show that her second testimony was contrived out of fear of the petitioner. Without

Williams' first testimony, the State would not have had a case, for while the State introduced evidence implicating Burr in similar robberies of other convenience stores, it adduced no other evidence directly linking Burr with this crime. The jury returned a verdict of guilty.

At the sentencing hearing, defense counsel devoted his entire closing argument to the inconclusive nature of the evidence against Burr. Counsel drove home to the jury the fact of Domita Williams' recantation, repeatedly exhorting each juror to "ask yourself . . . , is it possible that I'm recommending death for an innocent person?" Suggesting that the guilty verdict might have been based on the evidence of the other robberies, he admonished the jury, "if you go back and recommend death . . . and Mr. Burr is eventually electrocuted and put to death, then it's going to be a little too late for the truth to come out . . . ." He concluded, "don't make a recommendation where a man is going to die when he may not have even committed the crime."

The jury recommended a sentence of life imprisonment. The trial judge, however, overrode this recommendation and sentenced petitioner to death, having identified three aggravating circumstances and nothing in mitigation. Petitioner deduced, and argued on appeal, that the jury's recommendation of life had been based, legitimately, on residual doubt of Burr's guilt. The Florida Supreme Court rejected this argument, concluding that "a 'convicted defendant cannot be "a little bit guilty."'" 466 So. 2d 1051, 1054 (1985), quoting *Buford* v. *State*, 403 So. 2d 943, 953 (Fla. 1981), cert. denied, 454 U. S. 1164 (1982).

II

Implicit in the Florida Supreme Court's decision is an assumption about the equation of finality and truth that transgresses law and intuition alike. For our legal system is no pretender to absolute truth. In two important ways, the factfinding process falls short of that ideal. First, the beacon of the truth-seeking process in criminal cases is not absolute certainty, but the "reasonable doubt" standard, which has eluded definition by the courts for centuries. See 9 J. Wigmore, Evidence § 2497 (J. Chadbourn rev. 1981). Attempts at such a definition typically, and often erroneously, include phrases such as "substantial doubt, not a trivial doubt," *Holland* v. *United States*, 209 F. 2d 516, 522 (CA10), aff'd, 348 U. S. 121 (1954), and "substantial, . . . real doubt," *Tay-*

lor v. *Kentucky*, 436 U. S. 478, 488 (1978). Although a uniform definition of the term has never evolved, it is clear that juries are not instructed to return a verdict only when all doubt has been eliminated. Rather, the "reasonable doubt" standard merely attempts "to exclude as nearly as possible the likelihood of an erroneous judgment." *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). Hence, "beyond a reasonable doubt" cannot ensure that a jury will not convict a defendant without foreclosing all possibility of innocence in the jurors' own minds.

Moreover, no instruction can prevent the possibility of human error. "[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened." *In re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J., concurring). Accordingly, the institutions of criminal justice have been adjusted in recognition that a jury's verdict and truth are not unerringly synonymous. Every jurisdiction provides some mechanism for awarding a convicted defendant a new trial on the basis of newly discovered evidence. If a convicted defendant can produce sufficient indication that the jury's finding of guilt beyond a reasonable doubt was wrong, the institutional need for finality yields to the more compelling concerns of truth and fairness. Thus, the "reasonable doubt" foundation of the adversary method attains neither certainty on the part of the factfinders nor infallibility, and accommodations to that failing are well established in our society. See also *Jackson* v. *Virginia*, 443 U. S. 307, 317–318 (1979) (reversal of jury verdict supported by insufficient evidence). In the capital sentencing context, the consideration of possible innocence as a mitigating factor is just such an essential accommodation.

Prominent scholars of our time agree. The Model Penal Code absolutely precludes the imposition of a death sentence if the sentencer is satisfied that, "although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt." ALI, Model Penal Code § 210.6(1), p. 107 (1980). Three Justices of this Court have stated that the possibility of an irrevocable mistake is a valid reason for a jury to conclude that the death penalty is not morally justified. *Spaziano* v. *Florida*, 468 U. S. 447, 488, n. 34 (1984) (STEVENS, J., joined by BRENNAN and MARSHALL, JJ., concurring in part and dissenting in part); *Heiney* v. *Florida*, 469 U. S. 920, 924 (1984) (MARSHALL, J., dissenting). Finally, two Courts of Appeals have determined that

jurors may hold a *genuine*, if not a *reasonable*, doubt of guilt sufficient to support a sentence of life. *Smith* v. *Wainwright*, 741 F. 2d 1248, 1255 (CA11 1984), cert. denied, 470 U. S. 1087 (1985); *Smith* v. *Balkcom*, 660 F. 2d 573, 580–581 (CA5 1981), cert. denied, 459 U. S. 882 (1982).

I have written before to describe the subjective personal horror that must face a juror who contemplates sentencing a man to die without being sure of his guilt. *Heiney* v. *Florida*, *supra*, at 921–922. But there is an additional point to be made: that permitting the consideration of lingering doubt at sentencing is objectively a rational and consistent element of our system of criminal justice. Like postconviction remedies in light of new evidence, the conscience of the jury serves to protect against irremediable errors arising in that grey area known as "reasonable doubt." And when the stakes are life and death, the Constitution forbids the closure of that safety valve, as surely as it forbids the preclusion of other considerations suggesting that a convicted defendant should not die. See *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982).

The defendant who has been condemned to die will not reap the benefits of postconviction remedies designed to compensate for jury fallibility when the basis for such relief arises long after conviction. His only protection lies in the consciences of the jurors, for only they know the degree of certainty with which they voted the defendant guilty.* The State of Florida would wrest from the jurors their only way of expressing their lingering doubts about their verdict, and from the defendant his only hope of vindication.

III

We cannot know the basis for a jury's recommendation of life, as long as the jury is not required to supply its reasons. Nevertheless, in petitioner's case we do know several relevant things. First, we know that little, if any, mitigating evidence other than the possibility of innocence could have accounted for the jury's sentence. Second, we know that the defense counsel rested his

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*To the extent that a jury recommendation of life based on doubt can be said to be inconsistent with that same jury's finding of guilt, the legitimacy of the guilty verdict itself is rendered unreliable and therefore constitutionally suspect. The remedy for such a defect is not a death sentence, but a new trial.

plea for his client's life solely on the striking inconclusiveness of the evidence against petitioner, conceding that this argument had not carried the day at the guilt phase, but imploring the jurors to consider it as a matter of conscience at sentencing. Third, we know that the Supreme Court of Florida considered petitioner's claim on its merits, without questioning the factual premise of the argument, and ruled that doubt as to a convicted defendant's guilt cannot be considered as a factor mitigating against the death sentence. This determination bars consideration of a factor that is both relevant, see *Eddings*, *supra*, at 113–114, and reasonable, see *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975). Under these compelling circumstances, this Court should not shrink from correcting a misguided principle of law that so surely increases the likelihood that innocent people will go to their deaths.

Rather than bristle at a superficial inconsistency between a guilty verdict and a life sentence based on doubt, we should readily acknowledge that a juror may understand the law to demand less than the conscience. In a capital case, the Eighth Amendment does not tolerate such a distinction.

No. 84–7002. DEL VECCHIO *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 105 Ill. 2d 414, 475 N. E. 2d 840.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Despite this Court's demand "for reliability in the determination that death is the appropriate punishment in a specific case," *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976), the Illinois Supreme Court found there to be no error in the admission of two confessions at petitioner's capital sentencing hearing, without any inquiry having been made as to their reliability. Because those confessions had been obtained in connection with charges to which petitioner had long before pleaded guilty, the court found petitioner precluded from challenging their voluntariness later, when he was fighting for his life. Even were I to believe that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari in this case to determine whether the Illinois Supreme Court's decision can be reconciled with "the standard of reliability that the Eighth Amendment requires," *Caldwell* v. *Mississippi*, 472 U. S. 320, 341 (1985). See *Bare-*

foot v. *Estelle*, 463 U. S. 880, 924–925 (1983) (BLACKMUN, J., dissenting).*

I

Petitioner George Del Vecchio was convicted in 1979 of murder, rape, deviate sexual assault, and burglary, and the State sought the death penalty. At his capital sentencing hearing, the prosecutor urged as a statutory aggravating factor the fact that in 1965, when he was 16 years old, petitioner had been convicted upon a plea of guilty to charges of murder, robbery, and attempted robbery. The prosecution also sought to introduce two confessions that petitioner had made to those previous crimes; these confessions, made to a police officer and an Assistant District Attorney respectively, contained detailed statements as to petitioner's role in the 1965 crimes. Petitioner moved to suppress these statements at the sentencing hearing on the grounds that they had been induced through physical and psychological coercion and that their use was therefore barred by the Fifth and Fourteenth Amendments. The trial court denied this motion, refusing even to conduct a hearing on it. In his closing argument, the prosecutor pointed to the 1965 confessions as evidence that petitioner was a career criminal who did not deserve to live. The jury proceeded to find two aggravating circumstances and no mitigating circumstances sufficient to preclude a sentence of death. Petitioner was sentenced to die.

In his appeal to the Illinois Supreme Court, petitioner argued that the use of his 1965 confessions without a hearing as to their voluntariness was prejudicial error. The court rejected this claim, concluding:

> "While defendant contests the voluntariness of his inculpatory statement, he does not contend that the guilty plea was involuntarily entered. This court has held that 'a constitutional right, like any other right of an accused, may be waived, and a voluntary plea of guilty waives all errors or irregularities that are not jurisdictional.' (*People* v. *Brown* (1969), 41 Ill.

*Petitioner also raises a substantial claim that the prosecutor's summation at trial falsely represented to the jury that petitioner would eventually be eligible for discretionary parole if he were to receive a life sentence. Such inaccurate representations may well have "so affect[ed] the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment," *Caldwell* v. *Mississippi*, 472 U. S., at 340, and had this Court granted certiorari, this claim would have merited its attention.

2d 503, 505 [, 244 N. E. 2d 159, 160].) Thus, the issue was waived by the voluntary plea of guilty." 105 Ill. 2d 414, 432–433, 475 N. E. 2d 840, 849 (1985).

II

The Illinois Supreme Court's harsh waiver rule stands in opposition to and must ultimately give way to the constitutional requirement that a defendant facing a death sentence be given an opportunity to challenge the reliability of all evidence urged by the prosecution in support of that sentence. Although this Court has on occasion been divided as to whether this requirement is rooted in the Due Process Clause or the Eighth Amendment, compare *Gardner* v. *Florida*, 430 U. S. 349, 358–360 (1977) (plurality opinion), with *id.*, at 362–364 (WHITE, J., concurring in judgment), a concern for reliability has been one of the central "themes . . . reiterated in our opinions discussing the procedures required by the Constitution in capital sentencing determinations," *Zant* v. *Stephens*, 462 U. S. 862, 884 (1983). See *Barefoot* v. *Estelle*, *supra*, at 924–925 (BLACKMUN, J., dissenting). This concern is squarely implicated by the introduction of confessions whose voluntariness has never been determined.

The constitutional bar to the use of involuntary confessions in criminal proceedings is based in part upon the "strongly felt attitude of our society that important human values are sacrificed where an agency of government . . . wrings a confession out of an accused against his will," *Blackburn* v. *Alabama*, 361 U. S. 199, 206–207 (1960), and upon "the deep-rooted feeling that the police must obey the law while enforcing the law," *Spano* v. *New York*, 360 U. S. 315, 320 (1959). Equally significant, however, is our awareness of "the probable unreliability of confessions that are obtained in a manner deemed coercive." *Jackson* v. *Denno*, 378 U. S. 368, 386 (1964). And if the "inherent untrustworthiness" of involuntary confessions, *Spano* v. *New York*, *supra*, at 320, requires their exclusion from the jury during trial, see *Jackson* v. *Denno*, *supra*, at 383–391, it surely forbids their introduction in a capital sentencing proceeding, where the nature of the punishment faced makes the need for reliable information "of still greater constitutional concern." *Barefoot* v. *Estelle*, *supra*, at 925 (BLACKMUN, J., dissenting).

That petitioner pleaded guilty to the 1965 crimes and made no effort to contest the voluntariness of his confessions to those

crimes has no bearing on the issue of whether the confessions were coerced. "A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against [him]," *Tollett* v. *Henderson*, 411 U. S. 258, 268 (1973), are all considerations that may have led petitioner to plead guilty even while he had a compelling claim under the Fifth and Fourteenth Amendments. See *Haring* v. *Prosise*, 462 U. S. 306, 318–319 (1983). Nor does the fact that petitioner pleaded guilty establish the truth of the confessions as a whole. Even if the plea constituted an admission of the basic facts comprising the elements of the offenses charged, that admission did not necessarily extend to the truth of other aspects of the confessions. And it is the reliability of those other aspects that is at issue here because it was for them that the prosecutor is likely to have sought admission of the confessions in the first place. Had he wished only to establish petitioner's guilt of the 1965 crimes, he could have merely introduced the 1965 convictions without more.

Respondent argues that regardless of the voluntariness of petitioner's confessions, this Court should not review his claim because the Illinois Supreme Court's decision was based upon a reasonable state procedural rule. However, whether the forfeiture rule applied to preclude petitioner's claim constitutes an adequate state ground is a federal question, and if the rule does not serve a legitimate state interest it "ought not be permitted to bar vindication of important federal rights," *Henry* v. *Mississippi*, 379 U. S. 443, 448 (1965). Once a defendant has pleaded guilty, the State has a legitimate interest in barring him from attacking his conviction collaterally by asserting constitutional claims that would have been adjudicated had he stood trial. Since the plea "represents a break in the chain of events which has preceded it in the criminal process," *Tollett* v. *Henderson*, *supra*, at 267, this Court has held that such a conviction is based only on the plea itself, and not whatever might have gone before. See *Haring* v. *Prosise*, *supra*, at 321.

No such state interest supports the extension of the waiver rule to bar an attack, in a subsequent capital sentencing proceeding, on the voluntariness of a confession made by a defendant concerning a crime to which he had previously pleaded guilty. Indeed, were it not for this case, one might have reasonably assumed that a rule so clearly developed to cut off collateral attacks upon a conviction supported by a plea would be applied only in that context. The

Illinois Supreme Court's failure to give any justification for such a radical extension of the rule raises serious questions as to the legitimacy of the state interests implicated. Moreover, any interest the State may have in resolving the voluntariness of a confession soon after the alleged coercion has occurred must in this case be subordinated to the special demand for reliability imposed by the Eighth Amendment. The refusal of the trial court here to inquire into the voluntariness of petitioner's 1965 confessions outside the presence of the jury pursuant to *Jackson* v. *Denno, supra,* was thus error of constitutional magnitude.

Respondent contends that petitioner was not prejudiced by the introduction of the 1965 confessions because this evidence was merely cumulative, the prosecution having already offered evidence of petitioner's conviction and the confessions of two of petitioner's codefendants from that proceeding. But a confession is not merely another aggregate of factual assertions. Even before this Court decided that an involuntary confession could not be admitted at trial, it noted that "such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence." *Stein* v. *New York,* 346 U. S. 156, 192 (1953). What made the introduction of the confessions at petitioner's sentencing hearing so prejudicial is precisely the reason why the prosecution sought their admission: More damning than the information contained in them was the fact that petitioner was heard to tell of his crimes in his own words. Certainly, it cannot be said that the admission of the confessions had "no effect" on the sentencing decision as required by *Caldwell* v. *Mississippi,* 472 U. S., at 341.

Because the trial court here made no effort to determine whether statements so apparently conclusive of petitioner's character had been obtained in a manner that would cast doubt on their trustworthiness, it failed to guarantee the "reliability in the determination that death is the appropriate punishment" that this Court has demanded in capital procedures, *Woodson* v. *North Carolina,* 428 U. S., at 305. I would therefore grant certiorari and vacate petitioner's death sentence.

No. 85-10. PRESBYTERY OF BEAVER-BUTLER OF THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA ET AL. *v.* MIDDLESEX PRESBYTERIAN CHURCH ET AL. Sup. Ct. Pa. Motion of petitioners to consolidate this case with No. 84-2035,

York v. *First Presbyterian Church of Anna, supra*, denied. Certiorari denied. Reported below: 507 Pa. 255, 489 A. 2d 1317.

No. 85–186. BURLINGTON NORTHERN INC. *v.* HEROLD ET AL. C. A. 8th Cir. Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 761 F. 2d 1241.

No. 85–200. O'KANE ET AL. *v.* FORD MOTOR CO. ET AL. C. A. 3d Cir. Petition for writ of certiorari and/or prohibition denied.

No. 85–230. AUTHIER *v.* GINSBERG ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 757 F. 2d 796.

No. 85–5042. TAYLOR, A MINOR, BY HER MOTHER, TAYLOR, ET AL. *v.* O'KEEFE ET AL. C. A. 2d Cir. Motion of Victims of Crime Advocacy League of New York State, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 765 F. 2d 136.

No. 85–5102. POYNER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 229 Va. 401, 329 S. E. 2d 815.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 85–5186. SOUTH *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. JUSTICE BLACKMUN would grant the petition for writ of certiorari, vacate the judgment, and remand the case for further consideration in light of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). Reported below: 285 S. C. 529, 331 S. E. 2d 775.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Last June, this Court held it "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who

has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell* v. *Mississippi*, 472 U. S. 320, 328–329 (1985). In *Caldwell*, the prosecutor had urged the jury not to view its sentence recommendation as determining whether defendant would die because any death sentence would be reviewed by the State Supreme Court. "The argument was inaccurate, both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform." *Id.*, at 336.

I believe the facts of this case similarly demand reversal. At petitioner's sentencing hearing, the prosecutor set the stage for the trial judge's instructions, noting:

> "'He will explain to you about the mitigating parts, things that the defense will say you should consider in imposing life imprisonment.
>
> "'And even behind all of that there are many safeguards built into this law. There are many many guidelines, safeguards for the defendant's benefit. And I have no problems with that. I agree with that. I want it that way.
>
> "'We are talking about the ultimate punishment. *There are even safeguards that I can't tell you about because the law says I am not suppose [sic] to tell you about them*, and I have no problems with that. I am glad it is that way.'" App. to Pet. for Cert. 12a (emphasis supplied).

The jury returned a recommendation for death, and that sentence was accordingly imposed by the trial court. On appeal, the South Carolina Supreme Court deferred to the "wide discretion" of the trial judge "regarding the propriety of the argument," *id.*, at 6a, and refused to disturb his ruling. Seven days later, this Court handed down its decision in *Caldwell*.

In *Caldwell*, the prosecutor's specificity as to the alleged safeguards allowed this Court to assess the degree to which his remarks might have led the jury to "shift its sense of responsibility to an appellate court." 472 U. S., at 330. Such an assessment is impossible here because the prosecutor's vague assurances invited jurors to speculate freely as to the extent to which they could share their duty of deciding whether petitioner should die.

Their ability to shift their responsibility was limited only by their imaginations. But there can be no doubt that, as in *Caldwell*, the argument "urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death—a determination which would eventually be made by others and for which the jury was not responsible." *Id.*, at 336.

The South Carolina Supreme Court asserted that any prejudice attributable to the prosecution's remarks was negated by defense counsel's arguments and the trial judge's instructions. But once the prosecutor had alluded to safeguards that he claimed could not even be disclosed to the jury, the absence of further reference to such safeguards could only corroborate, not cure. Certainly, it cannot be seriously suggested that the remarks had "no effect" upon the jury's decision to recommend that petitioner receive the death sentence. See *Caldwell, supra*, at 341.

Even were I to believe that the death penalty could constitutionally be imposed under certain circumstances, I would grant the petition, vacate the sentence, and remand this case to the South Carolina Supreme Court for reconsideration in light of *Caldwell*. This Court's refusal to treat like cases alike can only add to the unconstitutionally arbitrary nature of the death penalty.

Rehearing Denied

No. 81-1718. DEVEX CORP. ET AL. *v.* GENERAL MOTORS CORP., 456 U. S. 990. Motion of petitioner Technograph, Inc., for leave to file petition for rehearing denied.

No. 83-676. SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC. *v.* UNITED STATES, 465 U. S. 1005. Motion of petitioner for leave to file petition for rehearing denied. JUSTICE BLACKMUN would grant this motion.

OCTOBER 10, 1985

Dismissal Under Rule 53

No. 85-248. CRAWFORD FITTING CO. ET AL. *v.* J. T. GIBBONS, INC. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 760 F. 2d 613.

OCTOBER 11, 1985

Miscellaneous Order

No. A-280. BOWDEN *v.* KEMP, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and a petition for writ of certiorari and would vacate the death sentence in this case.

OCTOBER 12, 1985

Dismissal Under Rule 53

No. 85-5334. IN RE BELLIN. Petition for writ of mandamus dismissed under this Court's Rule 53.

OCTOBER 14, 1985

Miscellaneous Order

No. A-285 (85-5607). BOWDEN *v.* KEMP, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the final disposition of the petition for writ of certiorari.

OCTOBER 15, 1985

Appointment of Deputy Director of Administrative Office of U. S. Courts

It is ordered that James E. Macklin, Jr., be appointed Deputy Director of the Administrative Office of the United States Courts, effective October 1, 1985, pursuant to the provisions of § 601 of Title 28 of the United States Code.

Appeals Dismissed

No. 84-921. NORTHEASTERN INTERNATIONAL AIRWAYS, INC., ET AL. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 457 So. 2d 1008.

No. 84-926. EASTERN AIRLINES INC. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 455 So. 2d 311.

No. 84-929. DELTA AIR LINES, INC. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 455 So. 2d 317.

No. 84-1773. PINE HILL CIVIC CLUB, INC., ET AL. *v.* DEKALB COUNTY, GEORGIA, ET AL. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 254 Ga. 20, 326 S. E. 2d 214.

No. 84-1881. HEDGES *v.* ALLINDER. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question.

No. 85-417. EXOTIC COINS, INC., ET AL. *v.* BEACOM, DISTRICT ATTORNEY FOR COUNTY OF ADAMS, ET AL. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: 699 P. 2d 930.

No. 85-19. FEIN *v.* PERMANENTE MEDICAL GROUP. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 38 Cal. 3d 137, 695 P. 2d 665.

JUSTICE WHITE, dissenting.

California Civ. Code Ann. § 3333.2 (West Supp. 1985) establishes a $250,000 maximum limitation in medical malpractice actions for "noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damage." This statute is part of the Medical Injury Compensation Act of 1975, enacted by the California Legislature in response to the dramatic rise in consumer medical costs caused by the increase in both monetary awards in medical malpractice actions and medical malpractice insurance premiums. See 1975 Cal. Stats., 2d Ex. Sess., ch. 2, § 12.5(1)(b), p. 4007.

Appellant brought a medical malpractice action against appellee, Permanente Medical Group, a partnership of physicians, for failing to diagnose and prevent a myocardial infarction. The jury awarded appellant total damages of $1,287,783, including $500,000 for noneconomic losses. The trial judge, however, pursuant to § 3333.2, reduced the amount of noneconomic damages to $250,000.

The California Supreme Court affirmed, rejecting appellant's challenge that § 3333.2 contravenes both the Due Process and Equal Protection Clauses of the Federal Constitution. 38 Cal. 3d 137, 695 P. 2d 665 (1985). The court found no due process violation based on the theory that "the Legislature retains broad control over *the measure*, as well as *the timing*, of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and . . . the Legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest." *Id.*, at 158, 695 P. 2d, at 680 (emphasis in original). The court then reasoned that the limitation imposed by § 3333.2 was a rational response to the problem of rising medical malpractice insurance costs.

Similarly, the court found that § 3333.2 did not improperly discriminate either between medical malpractice plaintiffs and other tort plaintiffs, or within the class of medical malpractice plaintiffs by denying full recovery to those with noneconomic damages exceeding $250,000. The legislature's decision to limit the application of § 3333.2 to medical malpractice cases, and within those cases to those with large noneconomic damages awards, the court reasoned, was a rational response to escalating malpractice insurance rates.

California thus joins Indiana as the only two States to uphold the constitutionality of this type of medical malpractice damages limits. See *Johnson* v. *St. Vincent Hospital, Inc.*, 404 N. E. 2d 585, 598–601 (Ind. 1980). Four other States which have addressed similar damages limitations have invalidated the challenged provisions on federal constitutional grounds. *Baptist Hospital of Southeast Texas* v. *Baber*, 672 S. W. 2d 296, 298 (Tex. App. 1984) ($500,000 limit on damages other than medical expenses); *Carson* v. *Maurer*, 120 N. H. 925, 941–943, 424 A. 2d 825, 836–838 (1980) ($250,000 limit on "noneconomic" damages); *Arneson* v. *Olsen*, 270 N. W. 2d 125, 135–136 (N. D. 1978) ($300,000 limit on total damages); *Simon* v. *St. Elizabeth Medical Center*, 3 Ohio Ops. 3d 164, 166, 355 N. E. 2d 903, 906–907 (Com. Pl. 1976) ($200,000 limit on "general" damages).*

*In addition, at least one other court has struck down a similar medical malpractice damages cap as violative of the State's Constitution. *Wright* v. *Central Du Page Hospital Assn.*, 63 Ill. 2d 313, 329–330, 347 N. E. 2d 736, 743 (1976). Cf. *Jones* v. *State Board of Medicine*, 97 Idaho 859, 877, 555 P. 2d 399, 416–417 (1976) (remanding for factual determination on whether

One of the reasons for the division among the state courts is a question left unresolved by this Court in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59 (1978). In that case, the Court upheld the provisions of the Price-Anderson Act, 42 U. S. C. § 2210, which place a dollar limit on total liability that would be incurred by a defendant in the event of a nuclear accident. One of the objections raised against the liability limitation provisions was that they violated due process by failing to provide those injured by a nuclear accident with an adequate *quid pro quo* for the common-law right of recovery which the Act displaced. The Court noted: "It is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here. . . ." 438 U. S., at 88 (footnote omitted).

The North Dakota Supreme Court in *Arneson*, *supra*, followed *Duke Power Co.*, and refused to hold that the legislature may not limit a pre-existing right without providing a *quid pro quo*. 270 N. W. 2d, at 134–135. Nevertheless, the court went on to find that the imposition of a damages cap on malpractice claims did not provide a sufficient *quid pro quo* for the severely injured malpractice plaintiff, as his loss of recovery was offset only by lower medical costs for all recipients of medical care, and he received no specific benefit in return. *Id.*, at 136, citing *Wright* v. *Central Du Page Hospital Assn.*, 63 Ill. 2d 313, 328, 347 N. E. 2d 736, 743 (1976). This approach has been followed by the courts in Texas and New Hampshire. See *Baptist Hospital of Southeast Texas*, *supra*, at 298; *Carson*, *supra*, at 941–943, 424 A. 2d, at 837–838. In the instant case, however, the California Supreme Court concluded that "it would be difficult to say that the preservation of a viable medical malpractice insurance industry in this state was not an adequate benefit for the detriment the legislation imposes on malpractice plaintiffs." 38 Cal. 3d, at 160, n. 18, 695 P. 2d, at 681–682, n. 18.

Whether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus ap-

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a medical malpractice "crisis" actually existed in Idaho to justify adoption of damages limitation).

pears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States. The issue is important, and is deserving of this Court's review. Moreover, given the continued national concern over the "malpractice crisis," it is likely that more States will enact similar types of limitations, and that the issue will recur. I find, therefore, that the federal question presented by this appeal is substantial, and dissent from the Court's conclusion to the contrary.

No. 85-37. SPENDLOVE ET AL. *v.* ANCHORAGE MUNICIPAL ZONING BOARD OF EXAMINERS AND APPEALS ET AL. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Reported below: 695 P. 2d 1074.

No. 85-152. THOMPSON ET AL. *v.* FIRST NATIONAL BANK & TRUST CO. Appeal from Cir. Ct. Ky., Kenton County, dismissed for want of jurisdiction.

No. 85-191. ZERMAN ET AL. *v.* AVANT GARDE CONDOMINIUM ASSN., INC., ET AL.; and ZERMAN *v.* WHITE, CLERK OF THE FLORIDA SUPREME COURT, ET AL. Appeals from Sup. Ct. Fla. dismissed for want of jurisdiction. Reported below: 466 So. 2d 218 (first case); 472 So. 2d 1182 (second case).

No. 85-123. MUKA *v.* CARTER, CHIEF DISCIPLINARY COUNSEL. Appeal from Sup. Ct. R. I. dismissed for want of a final judgment. Reported below: 491 A. 2d 334.

No. 85-309. ROUSSOS *v.* RETINA CONSULTANTS, P. C. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 61 Md. App. 717.

No. 85-5263. SMITH *v.* SCULLY. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 72 Ore. App. 184, 695 P. 2d 100.

Certiorari Granted—Vacated and Remanded

No. 85-231. BOATING INDUSTRY ASSNS. ET AL. *v.* MOORE ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U. S. 284 (1985). Reported below: 754 F. 2d 698.

No. 85–5193. YATES *v.* AIKEN, WARDEN, ET AL. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Francis* v. *Franklin*, 471 U. S. 307 (1985).

Miscellaneous Orders

No. A–207 (85–369). TUCKER *v.* HARTFORD FEDERAL SAVINGS & LOAN ASSN. Sup. Ct. Conn. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. D–493. IN RE DISBARMENT OF SURDUT. Disbarment entered. [For earlier order herein, see 471 U. S. 1114.]

No. D–501. IN RE DISBARMENT OF CHARTIER. Disbarment entered. [For earlier order herein, see 472 U. S. 1005.]

No. D–507. IN RE DISBARMENT OF ROTH. Disbarment entered. [For earlier order herein, see 472 U. S. 1024.]

No. D–518. IN RE DISBARMENT OF O'BOYLE. It is ordered that Edwards C. O'Boyle, Jr., of Peacham, Vt., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–519. IN RE DISBARMENT OF DAVIS. It is ordered that James Nelson Davis, of Daytona Beach, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–521. IN RE DISBARMENT OF KLINE. It is ordered that David L. Kline, of Lake City, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–522. IN RE DISBARMENT OF KAMINSKY. It is ordered that James Raymond Kaminsky, of Columbus, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–523. IN RE DISBARMENT OF GANTT. It is ordered that Richard Allison Gantt, of Greenville, S. C., be suspended from the

practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-524. IN RE DISBARMENT OF WETHERBEE. It is ordered that R. Michael Wetherbee, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Motion of Massachusetts for leave to file a reply brief granted. [For earlier order herein, see, *e. g.*, *ante*, p. 808.]

No. 84-1076. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* STATE OIL AND GAS BOARD OF MISSISSIPPI ET AL. Sup. Ct. Miss. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of Louisiana for leave to file a brief as *amicus curiae* out of time denied.

No. 84-1198. TEXAS *v.* MCCULLOUGH. Ct. Crim. App. Tex. [Certiorari granted, 472 U. S. 1007.] Motion of John Mann, Esquire, to permit Jeff Blackburn, Esquire, to present oral argument *pro hac vice* on behalf of respondent granted.

No. 84-1236. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. *v.* BULLOCK. C. A. 5th Cir. [Certiorari granted, 471 U. S. 1052.] Motion of National Association of Criminal Defense Lawyers for leave to file a brief as *amicus curiae* granted.

No. 84-1274. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM *v.* DIMENSION FINANCIAL CORP. ET AL. C. A. 10th Cir. [Certiorari granted, 471 U. S. 1064.] Motion of respondents for divided argument granted. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 84-1279. DELAWARE *v.* VAN ARSDALL. Sup. Ct. Del. [Certiorari granted, 473 U. S. 923.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84-1480. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* GREENFIELD. C. A. 11th Cir. [Certiorari granted, 471 U. S. 1098.] Motion of Illinois Psychological

Association for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 84–1538. FISHER ET AL. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL. Sup. Ct. Cal. [Probable jurisdiction noted, 471 U. S. 1124.] Motion of appellants for divided argument to permit California Apartment Association to present oral argument as *amicus curiae* denied.

No. 84–1554. SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS *v.* CARRIER. C. A. 4th Cir. [Certiorari granted, 473 U. S. 903.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion for appointment of counsel granted, and it is ordered that Sherman Louis Cohn, Esquire, of Washington, D. C., be appointed to serve as counsel for respondent in this case.

No. 84–1731. LORAIN JOURNAL CO. ET AL. *v.* MILKOVICH. Sup. Ct. Ohio. Motion of Ohio Newspaper Association for leave to file a brief as *amicus curiae* granted.

No. 84–1750. BALLAM *v.* UNITED STATES. C. A. 4th Cir. The Solicitor General is requested to state the views of the United States with respect to the jurisdiction of the Court of Appeals to hear the appeal in this case. See the views of the United States stated in its petition for certiorari to review *United States* v. *Squillacote*, 747 F. 2d 432 (CA7 1984), cert. denied, 471 U. S. 1016 (1985).

No. 84–6470. DAVIDSON *v.* CANNON ET AL. C. A. 3d Cir. [Certiorari granted, 471 U. S. 1134.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85–82. BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY ET AL. *v.* ALTEMOSE CONSTRUCTION CO. ET AL. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 85–273. FLORIDA *v.* ROSS. Dist. Ct. App. Fla., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 85–5262. NEWBY ET AL. *v.* DEPARTMENT OF LABOR. C. A. Fed. Cir. Motion of petitioners for leave to proceed in

forma pauperis denied. Petitioners are allowed until November 5, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85-5319. DARDEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. [Certiorari granted, 473 U. S. 928.] Motion of respondent to vacate stay of execution and suggestion that writ was improvidently granted is denied.

No. 85-394. IN RE TRACEY;
No. 85-5284. IN RE SANCHEZ-BERRIDI; and
No. 85-5346. IN RE KRAHN. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 84-1905. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* OWENS ET AL. Appeal from D. C. C. D. Cal. Probable jurisdiction noted.

No. 85-88. PAULUSSEN *v.* HERION. Appeal from Super. Ct. Pa. Probable jurisdiction noted. Reported below: 334 Pa. Super. 585, 483 A. 2d 892.

No. 85-117. BAKER ET AL. *v.* GENERAL MOTORS CORP. ET AL. Appeal from Sup. Ct. Mich. Probable jurisdiction noted. Reported below: 420 Mich. 463, 363 N. W. 2d 602.

No. 85-217. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL-CIO *v.* DAVIS. Appeal from Sup. Ct. Ala. Probable jurisdiction noted. Reported below: 470 So. 2d 1215.

Certiorari Granted

No. 84-1560. PRESS-ENTERPRISE CO. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE. Sup. Ct. Cal. Certiorari granted. Reported below: 37 Cal. 3d 772, 691 P. 2d 1026.

No. 84–1717. UNITED STATES *v.* QUINN. C. A. 9th Cir. Certiorari granted. Reported below: 751 F. 2d 980.

No. 84–1744. HENDERSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. Reported below: 746 F. 2d 619.

No. 84–1777. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. *v.* BROCK, SECRETARY OF LABOR. C. A. D. C. Cir. Certiorari granted. Reported below: 241 U. S. App. D. C. 106, 746 F. 2d 839.

No. 84–1809. FEDERAL TRADE COMMISSION *v.* INDIANA FEDERATION OF DENTISTS. C. A. 7th Cir. Certiorari granted. Reported below: 745 F. 2d 1124.

No. 84–1973. THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION *v.* WOLD ENGINEERING, P. C., ET AL. Sup. Ct. N. D. Certiorari granted. Reported below: 364 N. W. 2d 98.

No. 85–195. ICICLE SEAFOODS, INC. *v.* WORTHINGTON ET AL. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 774 F. 2d 349.

No. 85–246. UNITED STATES *v.* DION. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 762 F. 2d 674.

No. 84–6859. SKIPPER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question I presented by the petition. Reported below: 285 S. C. 42, 328 S. E. 2d 58.

Certiorari Denied. (See also Nos. 85–309 and 85–5263, *supra.*)

No. 84–1805. TULALIP TRIBES OF WASHINGTON ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 1367.

No. 84–1877. STEARNS CO. ET AL. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL.; and

No. 84–1938. GABRIEL ENERGY CORP. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 753 F. 2d 521.

No. 84-1880. CITY OF ALCOA ET AL. *v.* MYERS, ON BEHALF OF HERSELF AND HER THREE MINOR CHILDREN, DIXON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 752 F. 2d 196.

No. 84-1996. TRUCK DRIVERS LOCAL 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 5.

No. 84-6784. YATER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 1058.

No. 84-6821. GRACE *v.* GOLDEN ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-6822. GRACE *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-6828. VILLANUEVA *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 695 P. 2d 858.

No. 84-6846. KIRBY *v.* UNITED STATES;
No. 84-6935. GREENSPUN *v.* UNITED STATES; and
No. 84-6949. BALCHAITIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 758 F. 2d 879.

No. 84-6921. KRAMSVOGEL *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 124 Wis. 2d 101, 369 N. W. 2d 145.

No. 84-6952. KEPREOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 759 F. 2d 961.

No. 85-71. LOCALS 666 AND 780 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES ET AL. *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 141.

No. 85-76. GRAHAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 758 F. 2d 879.

No. 85-81. CHRISTMANN & WELBORN *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 773 F. 2d 317.

No. 85-94. ZIMMER PAPER PRODUCTS INC. *v.* BERGER & MONTAGUE, P. C., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 758 F. 2d 86.

No. 85-115. NATIONAL FREIGHT, INC., ET AL. *v.* LARSON, SECRETARY OF TRANSPORTATION OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 499.

No. 85-122. FIRST CITIZENS BANK OF BILLINGS *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 397.

No. 85-131. LEWIS *v.* BLACKBURN, CLERK OF SUPERIOR COURT FOR MECKLENBURG COUNTY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 759 F. 2d 1171.

No. 85-156. HOOVER ET AL. *v.* DOLE, SECRETARY OF TRANSPORTATION, ET AL. Sp. Ct. R. R. R. A. Certiorari denied. Reported below: 613 F. Supp. 374.

No. 85-163. BALAIR, LTD., ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 43, 762 F. 2d 137.

No. 85-254. KEARNEY & TRECKER CORP. *v.* GULF SOUTH MACHINE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 377.

No. 85-256. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* ST. JAMES HOSPITAL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 1460.

No. 85-261. BINLADEN BSB LANDSCAPING *v.* M. V. "NEDLLOYD ROTTERDAM." C. A. 2d Cir. Certiorari denied. Reported below: 759 F. 2d 1006.

No. 85-264. ARAGON *v.* LOCAL NO. 572, INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 750 F. 2d 1447.

No. 85-265. HALLSTROM ET AL. *v.* STIVERS ET AL. Sup. Ct. Idaho. Certiorari denied.

No. 85-266. WILCO MARSH BUGGIES & DRAGLINES, INC., ET AL. *v.* KORI CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 761 F. 2d 649.

No. 85-267. MATRIX ENTERPRISES, INC., ET AL. *v.* MILLINGTON TELEPHONE CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 653.

No. 85-268. MITSUI & CO. (U. S. A.), INC., ET AL. *v.* WESTERN CONCRETE STRUCTURES CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 1013.

No. 85-271. CALIFORNIA *v.* WALNUT PROPERTIES, INC., ET AL. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 85-272. ARROW NORTHWEST, INC., ET AL. *v.* GREATER HOUSTON TRANSPORTATION CO., DBA YELLOW CAB CO., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 760 F. 2d 607.

No. 85-275. GAY *v.* COATS & CLARK, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 1506.

No. 85-280. LAWHORN ET UX. *v.* KING. C. A. 4th Cir. Certiorari denied. Reported below: 765 F. 2d 139.

No. 85-283. ARGUS CHEMICAL CORP. *v.* FIBRE GLASS-EVERCOAT CO., INC. C. A. Fed. Cir. Certiorari denied. Reported below: 759 F. 2d 10.

No. 85-284. HAYES *v.* CANNON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1081.

No. 85-285. PEIL *v.* SPORCK. C. A. 3d Cir. Certiorari denied. Reported below: 759 F. 2d 312.

No. 85-286. BEARY *v.* WEST PUBLISHING CO. C. A. 2d Cir. Certiorari denied. Reported below: 763 F. 2d 66.

No. 85-288. DEANE ET AL. *v.* THOMSON MCKINNON SECURITIES, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 43, 762 F. 2d 137.

No. 85-292. BECKHAM *v.* HARRIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 756 F. 2d 1032.

No. 85-293. OZARK AIR LINES, INC. *v.* AIR LINE PILOTS ASSN., INTERNATIONAL. C. A. 8th Cir. Certiorari denied. Reported below: 761 F. 2d 1259.

No. 85-296. GEISLER *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 10 Kan. App. 2d xliv.

No. 85-297. BIEKER *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 10 Kan. App. 2d xliii, 700 P. 2d 148.

No. 85-302. MONTGOMERY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 467 So. 2d 972.

No. 85-305. FRYZEL, DIRECTOR, DEPARTMENT OF FINANCIAL INSTITUTIONS *v.* CASH CURRENCY EXCHANGE, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 762 F. 2d 542.

No. 85-310. MONTGOMERY WARD & CO., INC. *v.* DABNEY. C. A. 8th Cir. Certiorari denied. Reported below: 761 F. 2d 494.

No. 85-313. CAVROS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 196 Conn. 519, 494 A. 2d 550.

No. 85-315. ITALIANO *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 18 Ohio St. 3d 38, 479 N. E. 2d 857.

No. 85-317. HESTNES ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 762 F. 2d 1015.

No. 85-323. B & G CRANE SERVICE, INC. *v.* DOLPHIN TITAN INTERNATIONAL, INC. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 2d 1292.

No. 85-325. BRUSCANTINI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 640.

No. 85-327. WARD *v.* L & C MARINE TRANSPORT, LTD. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 1457.

No. 85-336. EUBANKS *v.* O'BRIEN ET AL. Ct. App. Colo. Certiorari denied. Reported below: 701 P. 2d 614.

No. 85-339. JOHNSTON *v.* DOWLING ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 145.

No. 85-341. VILLARREAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 764 F. 2d 1048.

No. 85-344. DUTKA *v.* DEPARTMENT OF THE TREASURY. C. A. Fed. Cir. Certiorari denied.

No. 85-347. JACOB *v.* ATTORNEY GRIEVANCE COMMISSION OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 303 Md. 172, 492 A. 2d 905.

No. 85-352. NORTH AMERICAN REPORTING, INC., ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 238 U. S. App. D. C. 300, 740 F. 2d 50.

No. 85-355. BROWN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 763 F. 2d 984.

No. 85-396. DUFF *v.* VIRGINIA. Cir. Ct. Rockingham County, Va. Certiorari denied.

No. 85-418. CRAWFORD, SPECIAL ADMINISTRATRIX OF THE ESTATES OF PAWLISA ET AL. *v.* EDMONSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 764 F. 2d 479.

No. 85-427. MCGEE *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BRUNSWICK. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 647.

No. 85-433. BISIG *v.* UNITED STATES;
No. 85-5330. GREEN *v.* UNITED STATES;
No. 85-5368. HARDIN *v.* UNITED STATES; and
No. 85-5379. HARDIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85-443. KWIATECKI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 914.

No. 85-450. BRIDGEPORT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 277.

No. 85-452. DALE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied.

No. 85-5025. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 830.

No. 85-5062. GRIFFIN *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 85-5073. ALONGI *v.* UNITED STATES; and
No. 85-5134. MUSTACCHIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 759 F. 2d 1099.

No. 85-5149. FUENTES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 993, 478 N. E. 2d 203.

No. 85-5226. WILLIAMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 483 A. 2d 292.

No. 85-5231. TURNER *v.* MORRIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 277.

No. 85-5246. DELESPINE *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85-5247. ENRIQUEZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 449 So. 2d 845.

No. 85-5250. STURM *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 85-5252. SANFORD *v.* BRADLEY, JUDGE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-5256. MOORE *v.* ORNER, SHAYNE & REIZNER, INC. C. A. 7th Cir. Certiorari denied.

No. 85-5266. IN RE BAKER. Ct. App. Wash. Certiorari denied.

No. 85-5269. STEWART *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 123 Wis. 2d 547, 371 N. W. 2d 375.

No. 85-5274. WILLIAMS *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1001.

No. 85-5279. GOLDMAN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 395 Mass. 496, 480 N. E. 2d 1023.

No. 85-5280. KALTENBACH *v.* ACADIAN METROPOLITAN CODE AUTHORITY. Ct. App. La., 3d Cir. Certiorari denied.

No. 85-5281. GREIF ET AL. *v.* CITY OF BEDFORD, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1007.

No. 85-5282. WELCH *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 85-5289. AGUILERA *v.* COOK COUNTY POLICE AND CORRECTIONS MERIT BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 844.

No. 85-5294. MCAFEE *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 2d 1124.

No. 85-5296. CODER *v.* GRINE ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-5297. KOSYLA *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1168, 481 N. E. 2d 365.

No. 85-5300. WILSON *v.* BARNES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 909.

No. 85-5303. HOWARD *v.* RADIO CORPORATION OF AMERICA ET AL. C. A. 7th Cir. Certiorari denied.

No. 85-5305. FARRIS *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 177.

No. 85-5315. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 2d 1222.

No. 85-5324. MASTERS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 656.

No. 85-5340. LOVELACE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1166.

No. 85-5341. ARBELAEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85-5342. BEARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 1477.

No. 85-5357. BROWN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-5363. GILLIS *v.* ORR, SECRETARY OF THE UNITED STATES AIR FORCE. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 998.

No. 85-5364. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 766 F. 2d 1452.

No. 85-5369. BLANDON-GAVIRIA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85-5377. STAPLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 763 F. 2d 415.

No. 85-5382. WALLACE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1001.

No. 85-5383. LAZARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 916.

No. 85-5390. REVELS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 926.

No. 85-5391. BRISBON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 106 Ill. 2d 342, 478 N. E. 2d 402.

No. 85-5396. POINTER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 85-5407. FAULISI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85-5410. VEATCH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1077.

No. 85-5416. HARRELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 1153.

No. 85-5420. MARSHALL ET AL. *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 491 A. 2d 554.

No. 85-5423. SWAIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 173.

No. 85-5429. SWEENEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85-5435. COMO *v.* UNITED STATES. C. A. 9th Cir. Cer-
rari denied. Reported below: 767 F. 2d 935.

No. 85-5442. HAWES *v.* UNITED STATES. C. A. 11th Cir.
rtiorari denied. Reported below: 768 F. 2d 1352.

No. 84-1699. PUBLIC SERVICE COMPANY OF INDIANA, INC. *v.*
TERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir.
otion of National Association of Regulatory Utility Commission-
s for leave to file a brief as *amicus curiae* granted. Certiorari
nied. Reported below: 242 U. S. App. D. C. 75, 749 F. 2d 753.

No. 84-1738. SACKETT-CHICAGO, INC. *v.* MIDGETT. Sup. Ct.
. Motion of respondent for leave to proceed *in forma pauperis*
nied. Certiorari denied. Reported below: 105 Ill. 2d 143, 473
E. 2d 1280.

No. 84-1821. FORD, WARDEN *v.* FORD. C. A. 11th Cir. Mo-
n of respondent for leave to proceed *in forma pauperis* granted.
rtiorari denied. Reported below: 749 F. 2d 681.

No. 84-1857. LUCKER ET AL. *v.* UNITED STATES. C. A. Fed.
r. Certiorari denied. JUSTICE WHITE and JUSTICE POWELL
uld grant certiorari. Reported below: 765 F. 2d 161.

No. 85-65. SHANGHAI POWER CO. *v.* UNITED STATES. C. A.
d. Cir. Certiorari denied. JUSTICE WHITE and JUSTICE POW-
L would grant certiorari. Reported below: 765 F. 2d 159.

No. 84-1925. NATIONAL TREASURY EMPLOYEES UNION ET
. *v.* O'CONNOR, SPECIAL COUNSEL, MERIT SYSTEMS PRO-
CTION BOARD. C. A. D. C. Cir. Certiorari denied. JUSTICE
HITE would grant certiorari. Reported below: 241 U. S. App.
C. 311, 747 F. 2d 748.

No. 84-1928. PACIFIC EMPLOYERS INSURANCE CO. *v.* M/V
PT. W. D. CARGILL ET AL. C. A. 5th Cir. Certiorari denied.
STICE BLACKMUN took no part in the consideration or decision
this petition. Reported below: 751 F. 2d 801.

JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Fifth
cuit held, respecting the District Court's dismissal of a declara-
y action, that review is limited to the question of whether the
trict Court abused its discretion. 751 F. 2d 801, 804 (1985).

This standard of review conflicts with that adopted by other Courts of Appeals. See, *e. g.*, *Bilbrey* v. *Brown*, 738 F. 2d 1462, 1470 (CA9 1984) (whether a district court properly exercised its discretion to grant declaratory relief is subject to more searching review on appeal than under the "abuse of discretion" standard); *International Harvester Co.* v. *Deere & Co.*, 623 F. 2d 1207, 1217 (CA7 1980) (a court of appeals, in deciding whether jurisdiction should be taken in a declaratory action, does not defer to the judgment of the district court, but must exercise its own sound discretion). I would grant certiorari to resolve this conflict among the Courts of Appeals.

No. 84-2016. GREYHOUND LINES, INC. *v.* WILHITE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 278.

JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Ninth Circuit held that *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983) (actions brought under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, are governed by the 6-month statute of limitations provided in § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b)), was not to be applied retroactively because such retroactive application would shorten the applicable limitations period. Cf. *Glover* v. *United Grocers, Inc.*, 746 F. 2d 1380 (CA9 1984) (applying *DelCostello* retroactively when doing so lengthened time for filing). In so holding, the Court of Appeals followed a prior decision in that court that relied on the factors outlined in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106-107 (1971), in deciding this retroactivity question. See *Barina* v. *Gulf Trading & Transportation Co.*, 726 F. 2d 560, 563-564 (CA9 1984).

The decision below conflicts with those in other Circuits which have held that *DelCostello* should be applied retroactively. See, *e. g.*, *Smith* v. *General Motors Corp.*, 747 F. 2d 372 (CA6 1984) (en banc); *Graves* v. *Smith's Transfer Corp.*, 736 F. 2d 819 (CA1 1984). Other Circuits have also held that the *Huson* analysis is not necessary to determine whether retroactivity is appropriate in this context. See, *e. g.*, *Welyczko* v. *U. S. Air, Inc.*, 733 F. 2d 239 (CA2), cert. denied, 469 U. S. 1036 (1984); *Smith*, *supra*. I would grant certiorari to resolve these conflicts.

No. 84-2034. SAVILLE *v.* WESTINGHOUSE ELECTRIC CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 261.

JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Third Circuit held that *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983) (actions brought under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, are governed by the 6-month statute of limitations provided in § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b)), applies retroactively. In so holding, the Court of Appeals followed a prior decision in that court which relied on the factors outlined in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971), in making that retroactivity determination. See *Perez* v. *Dana Corp., Parish Frame Div.*, 718 F. 2d 581 (CA3 1983). For the reasons stated in my dissent in *Greyhound Lines, Inc.* v. *Wilhite*, *ante*, p. 910, I would grant certiorari in this case.

No. 84-6962. CAPE *v.* FRANCIS, WARDEN. C. A. 11th Cir.;
No. 84-6975. ALDERMAN *v.* GEORGIA. Sup. Ct. Ga.; and
No. 85-5171. WILSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: No. 84-6962, 741 F. 2d 1287; No. 84-6975, 254 Ga. 206, 327 S. E. 2d 168; No. 85-5171, 467 So. 2d 503.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85-5116. LUCAS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 105 App. Div. 2d 545, 481 N. Y. S. 2d 789.

JUSTICE WHITE, dissenting.

The issue presented in this case is whether the prohibition established in *New Jersey* v. *Portash*, 440 U. S. 450 (1979), against using a statement obtained from a criminal defendant in violation of his Fifth Amendment right against self-incrimination for im-

peachment purposes applies equally to statements taken in violation of the Sixth Amendment right to counsel. The United States Court of Appeals for the Second Circuit in *United States* v. *Brown*, 699 F. 2d 585 (1983), and the Tenth Circuit in *United States* v. *McManaman*, 606 F. 2d 919 (1979) (pre-*Portash*), have answered this question in the affirmative. The Appellate Division of the Supreme Court of New York in the present case, 105 App. Div. 2d 545, 481 N. Y. S. 2d 789 (1984), and the New York Court of Appeals in *New York* v. *Ricco*, 56 N. Y. 2d 320, 437 N. E. 2d 1097 (1982), however, have given the opposite answer. I would grant certiorari to resolve this conflict.

Rehearing Denied

No. 84-6738. SHAHRYAR *v.* MARTIN, WARDEN, 472 U. S. 1031. Motion for leave to file petition for rehearing denied.

OCTOBER 18, 1985

Dismissal Under Rule 53

No. 85-304. CURTIS *v.* DOUBLEDAY & CO., INC. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 763 F. 2d 495.

OCTOBER 21, 1985

Appeals Dismissed

No. 84-2011. OETTINGER *v.* OETTINGER. Appeal from Ct. App. La., 2d Cir., dismissed for want of substantial federal question. Reported below: 463 So. 2d 875.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

Appellant Albert Oettinger and appellee Leona Gordon Oettinger were married in Louisiana in 1967. Both had been married before, and both had substantial property of their own at the time of the marriage. Unbeknownst to appellant, at the time of the marriage appellee recorded a declaration of paraphernality under the authority of Article 2386 of the Louisiana Civil Code. This declaration allowed a wife to reserve for herself any fruits from her paraphernal property (nondotal property she brought into the marriage); it also gave her the right to manage such property and the fruits from such property. See La. Civ. Code Ann., Art.

2386 (West 1971).* Under the Louisiana marital property laws in effect at that time, the husband would, absent such a declaration, have the right to manage the fruits of the wife's paraphernal property, and those fruits would thus normally fall into the community property. See La. Civ. Code Ann., Arts. 2402, 2404 (West 1971).

Under Louisiana law at that time, no similar provision existed for the husband. For a husband to reserve the fruits of his separate property to himself, he had to *prove* that they were separate property; a simple declaration was not possible for him. See La. Civ. Code Ann., Art. 2405 (West 1971). Thus, although a husband had the right to manage his separate property (because he had the right under law, with certain exceptions, to manage all separate and community property), the fruits from that property that accrued during the marriage would normally become community property.

During their marriage, appellant and appellee attempted to maintain their finances separately. In 1980, they were divorced. In 1982, appellee sued for a partition of former community property and for settlement of the former community. Appellant, mindful of this Court's recent gender-discrimination decisions, see, *e. g.*, *Orr* v. *Orr*, 440 U. S. 268 (1979), challenged inclusion in the community of the property that he had brought into the marriage and of the fruits from that property on the ground that the Louisiana Civil Code provision that allowed the wife but not the husband to reserve the fruits of such property to herself by a mere declaration of paraphernality was an unconstitutional denial of equal protection. That provision, Article 2386, had been repealed by the

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*Article 2386 stated:

"The fruits of the paraphernal property of the wife, wherever the property be located and however administered, whether natural, civil, including interest, dividends and rents, or from the result of labor, fall into the conjugal partnership, if there exists a community of acquets and gains; unless the wife, by written instrument, shall declare that she reserves all of such fruits for her own separate use and benefit and her intention to administer such property separately and alone. The said instrument shall be executed before a Notary Public and two witnesses and duly recorded in the Conveyance Records of the Parish where the community is domiciled.

"If there is no community of gains, each party enjoys, as he chooses, that which comes to his hand; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the things which produce them."

Louisiana Legislature in 1979, but appellee's declaration effected under it in 1967 remained valid.

The state trial court considered and rejected appellant's constitutional argument. The trial court noted that the laws effective in 1967 gave the husband, without any action on his part or his wife's part, the ability to manage the community property, his separate property, and her separate property. Although the law did discriminate on the basis of sex, the trial court held that the paraphernality provision was substantially related to important governmental objectives. Specifically, the trial court held that the purpose of Article 2386 had been to "suppl[y] the wife with a limited degree of protection with respect to her separate property against her husband." App. to Juris. Statement B–3.

On appeal from this decision, the Louisiana Court of Appeal cited the legal standard set forth by this Court for addressing gender-discrimination cases, *i. e.*, a gender classification must be substantially related to an important governmental interest, noted the various gender-discrimination cases of this Court—some of which upheld gender-based classifications and some of which struck them down, and concluded that the challenged provision was substantially related to the important state interest of "allowing wives an opportunity to manage their own separate property on an equal basis with their husbands." 463 So. 2d 875, 878 (1985). The Court of Appeal concluded that any law attempting to equalize the status of wives and husbands could not be unconstitutional. The Supreme Court of Louisiana denied appellant's application for a writ of certiorari. 466 So. 2d 467 (1985).

In his jurisdictional statement, appellant again asserts that the application of former Article 2386 constitutes a violation of equal protection. I believe that this argument presents a substantial federal question. Article 2386 treated husbands and wives differently. The only justification for this differential treatment that appears in the record was that of allowing the wife some parity in the management of her separate property. To begin with, this justification assumes that the overall statutory scheme governing the management of marital property, under which the husband is the automatic manager of all property owned by the spouses together or separately, is seriously suspect under our prior decisions in this area. See, *e. g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455 (1981); *Orr* v. *Orr*, *supra*. I believe that there is

a substantial federal question as to whether a facially discriminatory provision may be justified on the ground that it is a remedial exception to an overall statutory scheme that is constitutionally defective. See *Parham* v. *Hughes*, 441 U. S. 347, 361–368 (1979) (WHITE, J., dissenting).

Further, I do not see that such a justification, even assuming its validity, can support a provision that enables a wife not only to manage the fruits of her paraphernal property but also to keep those fruits separate from the community property with a mere declaration, which latter ability is not given to her husband. I thus believe that there is also a substantial question as to whether the justification, even if valid, is adequately tailored to the asserted governmental interest.

Nor do I believe that the fact that Article 2386 is no longer in effect should prevent our considering this issue. Although it has been repealed, former Article 2386 remains relevant with respect to declarations filed before that date. Further, we have previously considered the application of a statutory scheme which had been repealed prior to our decision. See, *e. g.*, *Kirchberg*, *supra*, at 459, n. 6. I do not believe that this fact renders the federal question presented by this case insubstantial. Consequently, I would note probable jurisdiction.

No. 85–118. TRUMP ET AL. *v.* CHU, COMMISSIONER OF NEW YORK STATE TAX COMMISSION. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 65 N. Y. 2d 20, 478 N. E. 2d 971.

No. 85–446. ROBERTS ENTERPRISES, INC. *v.* SECRETARY OF TRANSPORTATION OF KANSAS. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. Reported below: 237 Kan. 276, 699 P. 2d 479.

No. 85–159. REMMENGA ET UX. *v.* CALIFORNIA COASTAL COMMISSION. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 163 Cal. App. 3d 623, 209 Cal. Rptr. 628.

No. 85–204. CHICAGO TRIBUNE CO. ET AL. *v.* JOHNSON, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL. Appeal

from Sup. Ct. Ill. dismissed for want of substantial federal question. JUSTICE WHITE, JUSTICE STEVENS, and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 106 Ill. 2d 63, 477 N. E. 2d 482.

No. 85–330. GLENWOOD T. V., INC., ET AL. *v.* RATNER, COMMISSIONER, DEPARTMENT OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 65 N. Y. 2d 642, 481 N. E. 2d 252.

No. 85–375. LUPERT *v.* CALIFORNIA STATE BAR ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 761 F. 2d 1325.

Certiorari Granted—Vacated and Remanded

No. 85–278. HUTTO, INDIVIDUALLY AND AS STATE CORRECTIONS COMMISSIONER, ET AL. *v.* JONES ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals with instructions to dismiss the appeal for want of a final judgment. *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U. S. 737, 742–745 (1976). Reported below: 763 F. 2d 979.

Certiorari Dismissed

No. 85–172. CATALDO *v.* MESKILL, JUDGE, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. C. A. 2d Cir. Certiorari dismissed for want of jurisdiction.

Miscellaneous Orders

No. ———. DEAN *v.* UNITED STATES. Motion to direct the Clerk to waive the Rules and file the petition for writ of certiorari denied.

No. A–232 (85–5403). HANDLEY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Application to recall and stay mandate, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D–497. IN RE DISBARMENT OF MOORE. Disbarment entered. [For earlier order herein, see 471 U. S. 1133.]

No. D–505. IN RE DISBARMENT OF HURD. Disbarment entered. [For earlier order herein, see 472 U. S. 1024.]

No. D-525. IN RE DISBARMENT OF PHELPS. It is ordered that Robert Edward Phelps, Jr., of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-526. IN RE DISBARMENT OF DOBBS. It is ordered that Hubert Lee Dobbs, Jr., of Phoenix, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-527. IN RE DISBARMENT OF MANN. It is ordered that Michael Benjamin Mann, of Panama City, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 104, Orig. NEW JERSEY *v.* NEVADA ET AL. Motion to expedite consideration of motion for leave to file bill of complaint denied. Motion for preliminary injunction denied. Motion for leave to file bill of complaint granted and defendants allowed 60 days within which to answer.

No. 84-1661. KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL. *v.* MORRISON. C. A. 3d Cir. [Certiorari granted, *ante*, p. 815.] Motion for appointment of counsel granted, and it is ordered that William E. Staehle, Esquire, of Chatham, N. J., be appointed to serve as counsel for respondent in this case.

Probable Jurisdiction Noted or Postponed

No. 84-2015. MACDONALD, SOMMER & FRATES *v.* COUNTY OF YOLO ET AL. Appeal from Ct. App. Cal., 3d App. Dist. Probable jurisdiction noted.

No. 84-1903. POSADAS DE PUERTO RICO ASSOCIATES, DBA CONDADO HOLIDAY INN *v.* TOURISM COMPANY OF PUERTO RICO ET AL. Appeal from Sup. Ct. P. R. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

Certiorari Granted

No. 85-224. CITY OF RIVERSIDE ET AL. *v.* RIVERA ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 763 F. 2d 1580.

No. 85-289. UNITED STATES DEPARTMENT OF TRANSPORTATION ET AL. *v.* PARALYZED VETERANS OF AMERICA ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 243 U. S. App. D. C. 237, 752 F. 2d 694.

No. 85-363. NEW YORK *v.* P. J. VIDEO, INC., DBA NETWORK VIDEO, ET AL. Ct. App. N. Y. Certiorari granted. Reported below: 65 N. Y. 2d 566, 483 N. E. 2d 1120.

No. 84-1972. FEDERAL DEPOSIT INSURANCE CORPORATION *v.* PHILADELPHIA GEAR CORP. C. A. 10th Cir. Motion of Council on International Banking, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 751 F. 2d 1131.

No. 85-162. NEW MEXICO *v.* EARNEST. Sup. Ct. N. M. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 103 N. M. 95, 703 P. 2d 872.

No. 85-410. MEMPHIS COMMUNITY SCHOOL DISTRICT ET AL. *v.* STACHURA. C. A. 6th Cir. Certiorari granted limited to Questions I and III presented by the petition. Reported below: 763 F. 2d 211.

No. 85-5487. SMITH *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 769 F. 2d 170.

Certiorari Denied. (See also Nos. 85-330 and 85-375, *supra.*)

No. 84-1826. PREVATTE *v.* GIBSON, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 84-1845. SORENSEN *v.* FITZGERALD, TRUSTEE. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 20.

No. 84-1872. CONSOLIDATED RAIL CORPORATION *v.* HALLAMORE MOTOR TRANSPORTATION, INC. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 394 Mass. 56, 473 N. E. 2d 1137.

No. 84-1919. PARKS ET AL. *v.* BELLETIRE, DIRECTOR, DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABIL-

ITIES, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1397.

No. 84-1930. MONTANA *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 242 U. S. App. D. C. 62, 749 F. 2d 740.

No. 84-2018. DIALAMERICA MARKETING, INC. *v.* BROCK, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 757 F. 2d 1376.

No. 84-6994. SHELOR *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 84-7005. ABDULLAH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 108 App. Div. 2d 817, 485 N. Y. S. 2d 330.

No. 84-7006. HOOPER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 103 Wash. 2d 1029.

No. 85-18. PITTSBURGH TERMINAL CORP. ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 260.

No. 85-27. LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL. *v.* LOS ANGELES NAACP ET AL.; and
No. 85-213. LOS ANGELES BRANCH NAACP ET AL. *v.* LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 750 F. 2d 731.

No. 85-96. AIELLO ET AL. *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 394 Mass. 727, 477 N. E. 2d 972.

No. 85-201. LOVINGER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 130 Ill. App. 3d 105, 473 N. E. 2d 980.

No. 85-308. ANDERSON COUNTY, TENNESSEE, ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 761 F. 2d 1169.

No. 85-312. BOHEMIA, INC., ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1482.

No. 85-322. EAGLE BOOKS, INC. v. JONES ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 130 Ill. App. 3d 407, 474 N. E. 2d 444.

No. 85-326. GOLDBERG ET AL. v. UNITED PARCEL SERVICE OF AMERICA, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 907.

No. 85-328. WARNICK ET AL. v. JIN CHA ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 476 N. E. 2d 109.

No. 85-338. REDIC v. SCHWARTZ. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1181.

No. 85-340. HART SCHAFFNER & MARX ET AL. v. NATURAL FOOTWEAR, LTD., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 1383.

No. 85-348. VAL/DEL, INC. v. SUPERIOR COURT OF ARIZONA, PIMA COUNTY, ET AL. (PASCUA YAQUI TRIBE, REAL PARTY IN INTEREST). Ct. App. Ariz. Certiorari denied. Reported below: 145 Ariz. 558, 703 P. 2d 502.

No. 85-354. ORTHO PHARMACEUTICAL CORP. v. MACDONALD ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 394 Mass. 131, 475 N. E. 2d 65.

No. 85-357. JOHNSON v. JOHNSON ET AL. Ct. App. Mich. Certiorari denied.

No. 85-368. SEIBOLD v. UNR-ROHN CO. C. A. 7th Cir. Certiorari denied.

No. 85-369. TUCKER v. HARTFORD FEDERAL SAVINGS & LOAN ASSN. Sup. Ct. Conn. Certiorari denied. Reported below: 196 Conn. 172, 491 A. 2d 1084.

No. 85-402. AWREY v. PROGRESSIVE CASUALTY INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 728 F. 2d 352.

No. 85-404. SHELTON ET UX. v. WASHINGTON ET AL. Ct. App. Wash. Certiorari denied.

No. 85-412. WRIGHT v. UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1078.

No. 85-416. SCAGLIONE v. COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1395, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 759 F. 2d 201.

No. 85-448. ATWELL v. UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 766 F. 2d 416.

No. 85-486. BOYKIN v. REAGAN ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 907.

No. 85-496. WOOLARD v. UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 2d 1349.

No. 85-505. ZOELLER v. UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 922.

No. 85-5074. TAFOYA v. UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 2d 1522.

No. 85-5098. MARRAPESE v. RHODE ISLAND ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 749 F. 2d 934.

No. 85-5112. RICKUS v. UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1077.

No. 85-5195. GREEN v. SCHWARZER, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied.

No. 85-5309. ROBINSON v. DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 497 A. 2d 790.

No. 85-5314. GREEN v. SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 85-5316. WILSON v. UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1078.

No. 85-5317. COLE v. FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied. Reported below: 758 F. 2d 124.

No. 85-5320. DEACON v. ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 130 Ill. App. 3d 280, 473 N. E. 2d 1354.

No. 85-5321. COLE v. BENSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 2d 226.

No. 85-5326. PICKARD v. ANGELONE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-5327. PITT v. NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 110 App. Div. 2d 723, 488 N. Y. S. 2d 38.

No. 85-5328. SHAW v. WOODARD, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Ct. App. N. C. Certiorari denied. Reported below: 75 N. C. App. 363, 331 S. E. 2d 330.

No. 85-5335. MABIN v. HOWARD UNIVERSITY. Ct. App. D. C. Certiorari denied.

No. 85-5338. COLLINS v. UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 656.

No. 85-5345. FELLS v. SNYDER ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-5352. SANDERS v. JUNIOR COLLEGE DISTRICT OF METROPOLITAN KANSAS CITY, MISSOURI. C. A. D. C. Cir. Certiorari denied.

No. 85-5358. GORHAM v. FRANZEN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 786.

No. 85-5385. DAY v. BLACK, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-5392. CHAGRA v. UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 1186.

No. 85-5409. GOBELY v. MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 366 N. W. 2d 600.

No. 85-5413. PETRILLO v. NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 85-5419. HAYES v. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 1247.

No. 85-5440. FRAZIER ET AL. v. UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 914.

No. 85-5453. CORCORAN *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 757 F. 2d 207.

No. 85-5456. BODINE *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1059.

No. 85-5458. HILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 766 F. 2d 856.

No. 85-5460. IRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 171.

No. 85-5462. SPIVEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1352.

No. 85-5464. PETERSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 768 F. 2d 64.

No. 85-5470. LATHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85-5472. ESDAILLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 769 F. 2d 104.

No. 85-5482. BARRETT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 766 F. 2d 609.

No. 84-1584. BONNER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 84-1810. GLADNEY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 745 F. 2d 955.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN and JUSTICE POWELL join, dissenting.

Section 4945 of the Internal Revenue Code, 26 U. S. C. § 4945, imposes a substantial excise tax on noncharitable expenditures by a private foundation. Transfers remain taxable under this section only as long as the organization retains its foundation status. Upon the termination of that status, tax liability is assessed pursuant to § 507(c). Petitioners are trustees and residuary legatees of a testamentary trust established in 1905 and later organized as a private foundation. In 1971, a Louisiana court ordered the dis-

solution of the trust and the distribution of its remaining assets to the settlor's heirs. The Internal Revenue Service acknowledged that the trust's § 507(c) liability was zero. Nonetheless, viewing the distributions as § 4945 "taxable expenditures" by a still extant foundation, it imposed a 100% excise tax on the transfer. Petitioners contested liability, and an action in Tax Court ensued. Concluding that the trust's private foundation status terminated upon the issuance of the state court judgment, the court found for petitioners. 45 TCM 280, ¶ 82-707 P-H Memo TC (1982). A divided panel of the Court of Appeals for the Fifth Circuit reversed, holding that notwithstanding the prior dissolution of the trust and the absence of any § 507(c) liability whatever, the distribution qualified as a § 4945 taxable expenditure. 745 F. 2d 955 (1984). Because I seriously question whether the harsh result reached by the Court of Appeals is consistent with either the letter or intent of the relevant provisions of the Code, I would grant the petitions for certiorari.

No. 84-1914. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 759 F. 2d 342.

JUSTICE WHITE, dissenting.

Title 18 U. S. C. § 649(a) makes it a crime for one having "money of the United States" under his or her control to fail to deposit it when required to do so. Petitioner, who was convicted under this statute, argued on appeal that the evidence on certain counts was insufficient because it showed only her failure to deposit checks payable to the United States. The United States Court of Appeals for the Fourth Circuit rejected petitioner's argument that checks are not "money of the United States" for purposes of § 649(a). 759 F. 2d 342 (1985). This holding conflicts with the Tenth Circuit's interpretation of the statute. See *United States* v. *Fernando*, 745 F. 2d 1328 (1984) (strictly construing "money of the United States" to include only currency and not negotiable documents). I would grant certiorari to resolve this conflict between two Courts of Appeals.

No. 84-1978. SPICER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 20 M. J. 188.

No. 84-2032. GREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 1205.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

This case presents the question of whether, in a prosecution for mail fraud under 18 U. S. C. § 1341, a defendant who makes out an adequately supported defense of good faith is entitled to a separate jury instruction on that issue when the court gives a sufficient instruction on specific intent. Here, the United States Court of Appeals for the Ninth Circuit held that if a specific-intent instruction adequately covers the issue of good faith, that is sufficient to present the defense to the jury, and the defendant is not entitled to a separate good-faith instruction. 745 F. 2d 1205 (1984). Three other Courts of Appeals have reached the same conclusion. *United States* v. *Gambler*, 213 U. S. App. D. C. 278, 281, 662 F. 2d 834, 837 (1981); *United States* v. *Bronston*, 658 F. 2d 920, 930 (CA2 1981), cert. denied, 456 U. S. 915 (1982); *United States* v. *Sherer*, 653 F. 2d 334, 337–338 (CA8), cert. denied, 454 U. S. 1034 (1981). Both the Fifth Circuit in *United States* v. *Fowler*, 735 F. 2d 823, 828 (1984), and the Tenth Circuit in *United States* v. *Hopkins*, 744 F. 2d 716, 718 (1984) (en banc), however, have reached the opposite conclusion. Both of these courts have held that when the defendant presents evidentiary support for his good-faith defense, the trial court must give a separate instruction to the jury on this issue. See also *United States* v. *McGuire*, 744 F. 2d 1197, 1201 (CA6 1984). Given this square conflict among the Courts of Appeals, I would grant certiorari in this case.

No. 84-6780. SMITH *v.* FRANCIS, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 253 Ga. 782, 325 S. E. 2d 362.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

I would vacate the judgment of the Georgia Supreme Court insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). The petitioner has presented an important question concerning the Eighth Amendment's ban on cruel and unusual punishment as applied to the execution of a mentally retarded person.

I

The petitioner is mentally retarded, with an IQ of 65 and mental abilities roughly equivalent to those of a 10-year-old child. He was tried for the murder of one Dan Turner, a friend of the petitioner and his family. There were no eyewitnesses to the crime. The petitioner had gone into Turner's grocery store to buy some cigarettes. The petitioner testified at trial that he grabbed Turner when the latter opened the cash register. Turner reacted by picking up a hammer, and the petitioner then stabbed him and hit him with the hammer after it fell from the victim's hand. The petitioner took money from the cash register and Turner's wallet and fled.

The petitioner turned himself in to the police and gave a lengthy statement in which he admitted stabbing Turner. When asked about the reasons for his actions, the petitioner stated that he had wanted to get money. At trial, however, the petitioner stated that he had not entered the store intending to rob Turner, and did not know why he had grabbed Turner as the latter was getting the petitioner's cigarettes.

A psychiatrist who examined the petitioner stated that the petitioner showed considerable remorse in discussing the murder. The petitioner testified at trial that he "didn't mean to kill Mr. Dan," but had gotten "carried away" after he saw the victim wielding the hammer in what petitioner interpreted as a threatening manner. There was evidence that the petitioner was under considerable stress in the days preceding the murder. The petitioner's counsel argued that the petitioner was insane or, at minimum, lacked the requisite mental intent because of his retardation. Nevertheless, the jury found the petitioner guilty of malice murder and armed robbery and sentenced him to death.

II

In *Furman* v. *Georgia*, 408 U. S. 238, 363–369 (1972) (MARSHALL, J., concurring), I concluded that the death penalty was "morally reprehensible" to contemporary society based, in part, on its discriminatory imposition. Statistically, it was "evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society." *Id.*, at 365–366 (footnote omitted). The petitioner suffers the unfortunate distinction of meeting each of these criteria. His case, like so many others coming before this Court, convinces me of the continuing validity of my observations in *Furman*.

I need not recount here our country's shameful history with respect to the mentally retarded. See *Cleburne* v. *Cleburne Living Center*, 473 U. S. 432, 455 (1985) (MARSHALL, J., concurring in judgment in part and dissenting in part). I believe, however, that the courts bear a special responsibility when faced with the possible execution of a member of a group that has been subject for so long to irrational social stigma.[1] This is particularly true in the instant case, because the petitioner's handicap necessarily diminishes his culpability. A mentally retarded person who is susceptible to confusion and impulsive reaction when put in a stressful situation[2] is the very opposite of the cold-blooded, calculating killers that populate this Court's opinions validating the death penalty. See, *e. g.*, *Gregg* v. *Georgia*, *supra*, at 185–186 (opinion of Stewart, POWELL, and STEVENS, JJ.).

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[1] It cannot be denied that American communities have traditionally shown a strong desire to be rid of the mentally retarded in any way possible. See *Cleburne*, 473 U. S., at 462 (retarded subjected during end of 19th and beginning of 20th centuries to a "regime of state-mandated segregation and degradation . . . that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow"). See also *Buck* v. *Bell*, 274 U. S. 200, 207 (1927) (upholding compulsory sterilization as alternative to "waiting to execute degenerate offspring for crime"); *Halderman* v. *Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1299–1300 (ED Pa. 1977) (noting history of institutionalization of mentally retarded), aff'd in part and rev'd in part, 612 F. 2d 84 (CA3 1979), rev'd, 451 U. S. 1 (1981).

[2] A psychiatrist who examined the petitioner testified that he exhibits these characteristics. See Affidavit of Dr. Fisher, App. H to Pet. for Cert. The characteristics are typically found in the mentally retarded. See M. Sternlicht & M. Deutsch, Personality Development and Social Behavior in the Mentally Retarded 81–82 (1972).

This Court has demanded that a capital sentencing scheme provide, at a minimum, a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not," *Furman, supra*, at 313 (WHITE, J., concurring); see *Godfrey* v. *Georgia*, 446 U. S. 420, 427–428 (1980) (plurality opinion). In this case, the mechanical application of the Georgia sentencing scheme undermined one purpose that the Court has determined to underlie such procedures—to reserve the penalty of death for the most culpable killers, thus satisfying society's "'instinct for retribution,'" *Gregg* v. *Georgia, supra*, at 183 (quoting *Furman, supra*, at 308 (Stewart, J., concurring)).[3] The execution of a

[3] Courts have often shown reluctance to impute to a retarded defendant the necessary culpability to uphold a sentence of death. See, *e. g.*, *State* v. *Hall*, 176 Neb. 295, 309–310, 125 N. W. 2d 918, 926–927 (1964) (exercising its statutory prerogative to "'reduce the sentence rendered . . . when in its opinion the sentence is excessive,'" court concluded that where the defendant, had an IQ of 64, "reduction of the death penalty to one of life imprisonment is warranted"); *State* v. *Behler*, 65 Idaho 464, 474–475, 146 P. 2d 338, 343 (1944) ("Undoubtedly, one possessing a normal mind should be held to a full, strict accountability for his conduct, but, should a person with a pronounced subnormal mind be held to the same high degree of accountability?"); *Commonwealth* v. *Green*, 396 Pa. 137, 151 A. 2d 241 (1959) (vacating death sentence where sentencer had failed to consider mitigating factors, including defendant's youth and subnormal intelligence). See also *Thompson* v. *State*, 456 So. 2d 444, 448 (Fla. 1984) (trial judge erred in overriding jury recommendation of life imprisonment on the grounds that no mitigating circumstances existed, where "appellant's mental retardation could have been considered by the jury as a basis for recommending life imprisonment"). Legislatures have also acknowledged that the retarded are less deserving of the death penalty than other offenders. Many state statutes make mental disease or defect at the time of the criminal act a mitigating factor. See Ark. Stat. Ann. § 41–1304(3) (1977); Cal. Penal Code Ann. § 190.3(h) (West Supp. 1985); Conn. Gen. Stat. § 53a–46a(f)(2) (1985); Ind. Code § 35–50–2–9(c)(6) (1985); Ky. Rev. Stat. § 532.025(2)(b)(7) (1985); La. Code Crim. Proc. Ann., Art. 905.5(e) (West 1984); Md. Ann. Code, Art. 27, § 413(g)(4) (Supp. 1985); Neb. Rev. Stat. § 29–2523(2)(g) (1979); N. J. Stat. Ann. § 2C:11–3(c)(5)(d) (West 1982); Ohio Rev. Code Ann. § 2929.04(B)(3) (1982); Tenn. Code Ann. § 39–2–203(j)(8) (1982); Wash. Rev. Code § 10.95.070(6) (1983). See also Ala. Code § 13A–5–51(6) (1982); Ariz. Rev. Stat. Ann. § 13–703(G)(1) (Supp. 1984–1985); Fla. Stat. § 921.141(6)(f) (1983); Miss. Code Ann. § 99–19–101(6)(f) (Supp. 1985); Mo. Rev. Stat. § 565.032(3)(6) (Supp. 1984); Mont. Code Ann. § 46–18–304(4) (1983); N. H. Rev. Stat. Ann. § 630:5(II)(b)(4) (1983); N. M. Stat. Ann. § 31–20A–6(C) (1981); N. C. Gen. Stat. § 15A–2000(f)(6) (1983); 42 Pa. Cons. Stat. § 9711(e)(3) (1982); S. C. Code § 16–3–20(C)(b)(6) (1985); Va. Code § 19.2–264.4(B)(iv) (1983); Wyo. Stat. § 6–2–102(j)(vi) (1983).

mentally retarded person serves this retributive function extremely poorly, because the level of "personal responsibility and moral guilt," *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982), is so much lower than in the case of a fully competent person who commits the same crime.[4] As applied to the petitioner, the death penalty is "nothing more than the purposeless and needless imposition of pain and suffering," *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion), and therefore unconstitutional.

No. 84-6792. KERR *v.* FINKBEINER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 757 F. 2d 604.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting.

In April 1979, fugitive warrants were issued against petitioner Kerr by the Circuit Court of Spotsylvania County, Virginia. At that time, Kerr was incarcerated in North Carolina. On May 21, 1979, Kerr filed a "Motion and Request for a Speedy Trial Upon Pending Charge or for Dismissal of Detainer" in the Spotsylvania County Circuit Court. Receipt of the motion was acknowledged by that court on May 23, 1979. On September 25, 1979, Kerr was transported to Virginia from North Carolina. A preliminary hearing was set for November 7, 1979, but the hearing was rescheduled for November 28, 1979, at the request of Kerr's attorney. On the latter date, Kerr waived his right to a preliminary hearing and consented to the State's proceeding by grand jury indictment. The Spotsylvania County grand jury indicted Kerr on January 21, 1980, and his trial was set for May 22, 1980.

May 19, 1980, Kerr moved to dismiss the indictment. He based this motion on Article III(a) of the Interstate Agreement on Detainers (IAD), which provides that a prisoner against whom a detainer has been lodged "shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court . . . written notice of . . . his request for a final disposition to be made of the indictment, information, or complaint . . . ," as set forth in 18 U. S. C. App. § 2. Article V(c) of the IAD further provides that

[4] Recognizing the greatly lower culpability of the mentally defective is certainly not novel; Blackstone notes that "by the law . . . ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment." 4 W. Blackstone, Commentaries *23.

> "in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III . . . hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice . . . ."

Kerr's motion was denied, and he was tried and found guilty as charged. His petition to the Supreme Court of Virginia for a writ of error was denied.

Kerr then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia. He asserted in that petition that he was entitled to relief because he had not been tried within the time limits prescribed by Article III(a) of the IAD. The District Court dismissed the complaint on the ground that it did not state a claim for relief under 28 U. S. C. § 2254.

The United States Court of Appeals for the Fourth Circuit affirmed the dismissal of Kerr's habeas corpus petition. 757 F. 2d 604 (1985). The Fourth Circuit cited *Davis* v. *United States*, 417 U. S. 333 (1974), as setting forth the inquiry for determining whether habeas relief is warranted: "'whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent."'" 757 F. 2d, at 606 (quoting *Davis*, *supra*, at 346 (in turn quoting *Hill* v. *United States*, 368 U. S. 424, 428 (1962))). The court then noted that in a similar case concerning Article IV(e) of the IAD (under which a prisoner must be tried before being returned to his original place of incarceration and to which the same Article V sanction applies), a previous panel of the Circuit had held that the IAD violation did not present a cognizable habeas claim under the *Davis* test. See *Bush* v. *Muncy*, 659 F. 2d 402 (CA4 1981). In that case, the court had concluded that "only those statutory rights of a fundamental nature closely related to constitutionally secured rights to fair prosecution and adjudication should be subject to vindication by collateral review of criminal convictions." *Id.*, at 409.

The Court of Appeals also noted in this case that the Circuits are divided on the question whether Article III and IV IAD viola-

tions present cognizable habeas claims under *Davis*. The Third and Ninth Circuits have held that they do. The Third Circuit, for example, has held that such a violation constitutes a "fundamental defect" because, although it does not go to the question of guilt or innocence, Congress made such a violation an absolute defense to prosecution; this strong congressional policy comprises the type of "exceptional circumstance" that makes habeas relief appropriate. See *United States* v. *Williams*, 615 F. 2d 585, 590 (1980). See also *Cody* v. *Morris*, 623 F. 2d 101 (CA9 1980).

All the other Circuits that have addressed the issue have determined that habeas relief is not appropriate in this context, although it may be if prejudice or special circumstances are shown. See, *e. g.*, *Greathouse* v. *United States*, 655 F. 2d 1032 (CA10 1981), cert. denied, 455 U. S. 926 (1982); *Mars* v. *United States*, 615 F. 2d 704 (CA6), cert. denied, 449 U. S. 849 (1980); *Fasano* v. *Hall*, 615 F. 2d 555 (CA1), cert. denied, 449 U. S. 867 (1980); *Huff* v. *United States*, 599 F. 2d 860 (CA8), cert. denied, 444 U. S. 952 (1979); *Edwards* v. *United States*, 564 F. 2d 652 (CA2 1977). The Court of Appeals below followed the latter group of cases and held that since Kerr had introduced no evidence of prejudice, his petition had properly been dismissed.

The conflict among the Circuits on this issue is clear. In some Circuits an IAD violation that constitutes an absolute defense under the Agreement can, without more, serve as the basis for habeas relief. In others, prejudice must be shown. Furthermore, it is obvious that the issue is a recurring one. I would grant the petition to settle this conflict.

No. 85–59. NORTH SIDE LUMBER CO. ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1482.

JUSTICE WHITE, dissenting.

This is a suit brought in Federal District Court by various lumber companies who had contracted to purchase timber from the United States. The plaintiffs—petitioners here—seek both a declaratory judgment to the effect that the contracts are void as a matter of federal common law and an injunction restraining the United States from enforcing them. The District Court granted preliminary injunctive relief, but the Court of Appeals for the Ninth Circuit reversed, holding that the District Court lacked jurisdiction over petitioners' underlying claim for declaratory

relief. Although conceding that such a suit arose under federal law for purposes of 28 U. S. C. § 1331, the court concluded that the Tucker Act, 28 U. S. C. §§ 1346 and 1491, impliedly barred the relief sought. The court reasoned that the Tucker Act, under which declaratory relief is not available, see *Richardson* v. *Morris*, 409 U. S. 464 (1973), defined the extent of the United States' waiver of sovereign immunity against the types of claims for which the Tucker Act authorizes monetary relief.[1] Because, in the view of the Court of Appeals, the suit to void the contracts was a "claim against the United States . . . founded . . . upon [an] express or implied contract," 28 U. S. C. § 1346(a)(2), the relief available was governed by the Tucker Act, and declaratory relief was therefore unavailable.

My doubts about the correctness of this ruling and its consistency with the decision of another Court of Appeals lead me to believe that review of the Ninth Circuit's conclusion in this Court is warranted. Even accepting the Court of Appeals' view that the Tucker Act impliedly bars declaratory and injunctive relief in all cases in which assertion of a claim of damages would require invocation of the Tucker Act,[2] the Court of Appeals' conclusion that

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[1] The court concluded that the United States' general waiver of sovereign immunity against suits seeking relief other than money damages, 5 U. S. C. § 702, was inapplicable by virtue of its proviso, which states that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The court concluded that the Tucker Act impliedly denied consent to suit for nonmonetary relief with respect to all cases involving claims of the type for which the Act authorizes damages actions.

[2] The Tucker Act also applies to claims for damages "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department." 28 U. S. C. §§ 1346(a)(2) and 1491(a). Thus, the Ninth Circuit's reasoning, if taken literally, would also bar a suit for injunctive or declaratory relief against officers of the United States Government founded upon the Constitution, a federal statute, or a federal regulation, even if the claim for declaratory or injunctive relief was not accompanied by a claim for damages. Title 5 U. S. C. § 702, the provision of the Administrative Procedure Act waiving the United States' sovereign immunity against claims other than claims for money damages, would thus be rendered a dead letter. As the Second Circuit has observed, "[a] literal reading of the 'founded either upon' language of § 1491(a) would mean that all claims of wrongful action by federal officials involving more than $10,000 would have to be brought in the Claims Court—a result clearly in conflict with historic practice and with the

petitioners' suit was a "claim against the United States . . . founded . . . upon [a] . . . contract" is highly questionable. In fact, the claim is precisely the opposite of a claim founded upon a contract: it is a claim that no contract exists. At least one United States Court of Appeals has ruled the suits seeking declaratory judgments to the effect that valid contracts *exist* are not claims founded upon a contract for purposes of the Tucker Act. See *B. K. Instrument, Inc.* v. *United States*, 715 F. 2d 713, 726–728 (CA2 1983). If *B. K. Instrument* was correctly decided, it would follow *a fortiori* that a federal common-law claim that a contract does *not* exist is not "founded upon a contract."

The Ninth Circuit's conclusion that a district court lacks jurisdiction to issue a declaratory judgment that a contract between a private party and the United States is void is problematic from another standpoint as well. Had petitioners breached their contracts rather than first seeking a declaratory judgment, the District Court would have had jurisdiction under 28 U. S. C. § 1345 over an action for breach of contract brought by the United States as plaintiff. In such an action, petitioners could have raised as a defense their claim that the contracts were void as a matter of federal common law; and surely no one would argue that, were the defense valid, the District Court would lack *jurisdiction* to declare the contracts void. Why, then, should similar relief be barred in a claim brought in anticipation of the breach? In both cases, the claim is in essence a defense to the Government's contractually based claim; and if petitioners' declaratory judgment action meets ordinary standards of ripeness and arises under federal law for purposes of 28 U. S. C. § 1331, I see no reason to hold that the relief that would be available to petitioners as defendants should be denied them as plaintiffs. In such instances, "[i]t is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative." *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 244 (1937). Cf. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667 (1950).[3] The

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plain intent of Congress . . . ." *B. K. Instrument, Inc.* v. *United States*, 715 F. 2d 713, 727 (1983).

[3] In *Skelly Oil*, the Court observed:

"Prior to [the Declaratory Judgment] Act, a federal court would entertain a suit on a contract only if the plaintiff asked for an immediately enforceable remedy like money damages or an injunction, but such relief could only be given if the requisites of jurisdiction, in the sense of a federal right or diver-

contrary rule, as announced by the Ninth Circuit in this case, leaves a person who has contracted with the Government but who believes the contract to be void no choice but to breach the contract and assert his claim as a defense, thereby risking liability for damages. I had thought this was precisely the situation the Declaratory Judgment Act was designed to remedy.[4]

Concededly, this case does not at first glance appear to be one of great moment, and I certainly do not mean to express any view of the merits of petitioners' underlying substantive claims. Nonetheless, the Ninth Circuit's expansive reading of the Tucker Act as precluding a declaratory judgment as to the validity of a contract with the United States appears to be in tension with the law of the Second Circuit as well as with ordinary principles governing declaratory actions. I would grant certiorari to consider and resolve the jurisdictional issues this case presents.

No. 85-151. McCotter, Director, Texas Department of Corrections *v.* Muniz. C. A. 5th Cir. Motion of respondent

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sity, provided foundation for resort to the federal courts. The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked." 339 U. S., at 671–672.

Of course, the specific holding in *Skelly* was that a declaratory judgment as to the validity of a contract was unavailable where the only basis for federal subject-matter jurisdiction was a federal-law defense to a state-law contract claim. This problem is not present here, as federal jurisdiction is not predicated solely on petitioners' asserted federal-law defense to the contract action. First, the "coercive action" that would be available for resolution of the issues presented—that is, the Government's claim for breach of contract—would be within the District Court's jurisdiction by virtue of 28 U. S. C. § 1345. Second, the coercive action for breach of contract in this case would also arise under federal law for purposes of 28 U. S. C. § 1331, for "[t]he validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States* v. *County of Allegheny*, 322 U. S. 174, 183 (1944). See also *United States* v. *Seckinger*, 397 U. S. 203, 209–210 (1970); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943).

[4] I do not mean to suggest that the Declaratory Judgment Act, 28 U. S. C. § 2201, itself constitutes consent to suit by the United States. I refer to the policies of the Act only insofar as they bear on the wisdom of construing the Tucker Act to render inoperative in cases of this type the waiver of sovereign immunity found at 5 U. S. C. § 702.

for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 760 F. 2d 588.

No. 85-421. PRUDENTIAL-BACHE SECURITIES INC. *v.* ANGELASTRO. C. A. 3d Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 764 F. 2d 939.

No. 85-5164. COLLINS ET AL. *v.* ILLINOIS. Sup. Ct. Ill.;
No. 85-5180. MADEJ *v.* ILLINOIS. Sup. Ct. Ill.;
No. 85-5291. COOKS *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 85-5308. THOMAS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir.;
No. 85-5310. BAXTER *v.* GEORGIA. Sup. Ct. Ga.; and
No. 85-5477. HARRELL *v.* ALABAMA. Ct. Crim. App. Ala.
Certiorari denied. Reported below: No. 85-5164, 106 Ill. 2d 237, 478 N. E. 2d 267; No. 85-5180, 106 Ill. 2d 201, 478 N. E. 2d 392; No. 85-5291, 699 P. 2d 653; No. 85-5308, 767 F. 2d 916; No. 85-5310, 254 Ga. 538, 331 S. E. 2d 561; No. 85-5477, 470 So. 2d 1303.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 84-1597. MANN *v.* SPIEGEL, 471 U. S. 1136. Petition for rehearing denied.

OCTOBER 22, 1985

Dismissal Under Rule 53

No. 85-5447. TOWLES *v.* UNITED STATES. Ct. App. D. C. Certiorari dismissed under this Court's Rule 53. Reported below: 496 A. 2d 560.

NOVEMBER 4, 1985

Appeals Dismissed

No. 85-244. ADVENTURERS WHITESTONE CORP. *v.* CITY OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of

substantial federal question. Reported below: 65 N. Y. 2d 83, 479 N. E. 2d 241.

No. 85-422. COLONIAL PIPELINE CO. *v.* ALABAMA. Appeal from Ct. Civ. App. Ala. dismissed for want of substantial federal question. Reported below: 471 So. 2d 408.

No. 85-5387. NELSON *v.* PLEASANT GROVE CITY CORP. Appeal from Sup. Ct. Utah dismissed for want of substantial federal question.

No. 85-367. HUSKEY *v.* TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed for want of jurisdiction. Reported below: 688 S. W. 2d 417.

No. 85-380. CAMDEN FIRE INSURANCE ASSN. *v.* JUSTICE. Appeal from Sup. Ct. App. W. Va. Motion of appellee for award of costs and damages for delay denied. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: —— W. Va. ——, 332 S. E. 2d 127.

No. 85-415. PERRUZZA *v.* COUNTY OF LOS ANGELES ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 765 F. 2d 149.

No. 85-534. WILMSHURST ET AL. *v.* NEW MOTOR VEHICLE BOARD ET AL. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Reversed and Remanded. (See No. 85-214, *ante*, p. 15.)

Certiorari Granted—Vacated and Remanded. (See No. 85-5260, *ante*, p. 25.)

Certiorari Granted—Reversed. (See also Nos. 84-1634 and 85-170, *ante*, p. 3.)

No. 85-295. COUNTY OF LOS ANGELES ET AL. *v.* KLING. C. A. 9th Cir. Certiorari granted and judgment reversed. *Anderson* v. *Bessemer City*, 470 U. S. 564 (1985). Reported below: 769 F. 2d 532.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

JUSTICE STEVENS, dissenting.

Respondent is afflicted with Crohn's disease. Although originally accepted, her application for admission to the Los Angeles County School of Nursing was ultimately denied, at least in part, because of the school physician's opinion that the school program was "too stressful" for her. Finding of Fact No. 12, App. to Pet. for Cert. D–40. Nevertheless, the District Court concluded that respondent had "failed to show that she was denied admission to the School solely by reason of her affliction or because she had Crohn's disease." Finding of Fact No. 18, App. to Pet. for Cert. D–43. Based on this critical finding, the District Court denied respondent any relief under § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794.

The Court of Appeals for the Ninth Circuit reversed. After reviewing the prior history of the case and explaining why it had previously reversed the District Court's order denying respondent's motion for a preliminary injunction, the Court of Appeals wrote:

> "The trial in the district court did not produce substantially different evidence from that which we considered in *Kling I*. The district court's findings are clearly erroneous and in many instances are inconsistent. We find that Mary Kling is an 'otherwise qualified handicapped individual' within the meaning of section 504 of the Rehabilitation Act[1] and that she was denied admission to the School of Nursing solely because of her handicap.[2] The school's physician, Dr. Crary, rejected Kling because she suffers from Crohn's Disease. He assumed that merely because of her disease she would be unable to complete the school's program. He did not evaluate her on an individual basis and even testified that had he known more about Kling's medical history, he would have been 'swayed very strongly toward acceptance.' It is precisely this type of general assumption about a handicapped person's ability that section 504 was designed to avoid. *See*

Bentivegna v. *United States Department of Labor*, 694 F. 2d 619 (9th Cir. 1982); *Pushkin* v. *Board of Regents of the University of Colorado*, 658 F. 2d 1372, 1385 (10th Cir. 1981). This district court's legal conclusions are similarly erroneous.

"[1] 29 U. S. C. § 794. *See* 34 CFR § 104.3(j).

"[2] The School of Nursing's claim that Kling was not otherwise qualified because she failed to meet the mathematical entrance requirement is meritless. Because Kling was rejected solely because of her handicap and because this decision was made without regard to her mathematical deficiency and before she had an opportunity to submit evidence that she had or had not remedied the deficiency, it is irrelevant that the deficiency may have existed."

App. to Pet. for Cert. A–6—A–7, and nn. 1, 2.

As this Court's summary disposition today demonstrates, the Court of Appeals would have been well advised to discuss the record in greater depth. One reason it failed to do so is that the members of the panel decided that the issues presented by this case did not warrant discussion in a published opinion that could be "cited to or by the courts of this circuit, save as provided by Rule 21(c)." *Id.*, at A–2, n. **. That decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong.[1]

The brevity of analysis in the Court of Appeals' unpublished, noncitable opinion, however, does not justify the Court's summary reversal.[2] Presumably, the Court's reversal is not based on

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[1] The proliferation of this secret law has prompted extensive comment. See, *e. g.*, R. Posner, The Federal Courts 120–126 (1985); Wald, The Problem with the Courts: Black-robed Bureaucracy, or Collegiality Under Challenge?, 42 Md. L. Rev. 766, 781–783 (1983); Reynolds & Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U. Chi. L. Rev. 573 (1981); Reynolds & Richman, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167 (1978); Stevens, Address to the Illinois State Bar Association's Centennial Dinner, 65 Ill. Bar J. 508, 510 (1977). Cf. Grodin, The Depublication Practice of the California Supreme Court, 72 Calif. L. Rev. 514 (1984).

[2] The petition for certiorari submitted the Ninth Circuit's opinion as it was issued, with the footnote explaining that the opinion could not be published or cited. Two days after the petition for certiorari was filed, the Ninth Circuit panel issued an order, as part of the publication of the slip opinion, that "redesignated" the earlier decision as "an authored opinion." See *Kling* v. *County of Los Angeles*, No. 83–6193, Order and Opinion (Aug. 23, 1985). The opinion is now published. See 769 F. 2d 532 (1985).

a view that the Court of Appeals misapprehended the governing standard: as the Ninth Circuit stated, findings of fact by the District Court are reviewable to determine if they are "clearly erroneous." Fed. Rule Civ. Proc. 52(a). Apparently, the Court disagrees with the Ninth Circuit's application of that standard. However, the Court's reversal is not accompanied by a review of the District Court's factual findings or a determination that they are not, in fact, "clearly erroneous." The Court is thus spared the necessity of explaining the apparent inconsistencies in the District Court's findings.[3] The Court is also spared the necessity of addressing the fact that the petitioners' own rendition of the incidents in question suggests that the District Court's findings give a less than complete accounting of certain events—events that may well influence a court's view of the matter at hand.[4]

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[3] Compare Finding of Fact No. 16, App. to Pet. for Cert. D–42 ("Plaintiff has failed to show that she is a person who has a physical or mental impairment which substantially limits one or more of her major life activities, or has a record of such impairment or is regarded as having such an impairment") with Finding of Fact No. 4, App. to Pet. for Cert. D–36 ("Plaintiff at all times herein mentioned suffered from Crohn's disease, an inflamatory *[sic]* bowel disorder involving the digestive tract which prevents passage and absorption of food and causes in plaintiff unpredictable episodes of nausea, vomiting, fever, headaches, loss of weight and acute abdominal pain among other things and which can require rest, medication, treatment, and hospitalization") and Finding of Fact No. 10, App. to Pet. for Cert. D–39 ("The record reflected that in the ten months preceding Dr. Crary's review, plaintiff had been hospitalized four times for Crohn's disease, although plaintiff only reported three hospitalizations").

Compare also Finding of Fact No. 12, App. to Pet. for Cert. D–40—D–41 (Dr. Crary's "rejection of plaintiff as a candidate for the School on June 11, 1979 was for health reasons, because he believed it was unlikely she could complete the rigorous program and because he believed her health would be endangered if she attempted to complete the program") and Finding of Fact No. 13, App. to Pet. for Cert. D–41 ("Neither the Admissions Committee nor Mary Duncan, Registrar, had the authority to overrule Dr. Crary's medical decision") with Finding of Fact No. 18, App. to Pet. for Cert. D–43 ("Plaintiff has failed to show that she was denied admission to the School solely by reason of her affliction or because she had Crohn's disease").

[4] Compare Finding of Fact No. 7, App. to Pet. for Cert. D–37 ("Plaintiff's application was considered by the Admissions Committee of the School on April 5, 1979. Her acceptance academically by the School was conditional due to her failure to achieve a passing score in mathematics") with Pet. for Cert. 4–5 ("In April, 1979, by mistake, respondent was given a letter unconditionally accepting her application, even though her score on a mathematics

Finally, the Court is spared the necessity of analyzing the District Court's factual findings in the context of the record. The absence of such an analysis is somewhat puzzling. The entirety of the majority's analysis is a reference to *Anderson* v. *Bessemer City*, 470 U. S. 564 (1985). In that case, the Court found it necessary to review the record before it reversed the Court of Appeals' conclusion that the District Court's findings were clearly erroneous. *Id.*, at 576–581. The Court's refusal to undertake such a review for its summary disposition in the case before us is especially disturbing when it is recalled that, under current Court practice, the petitioner does not usually file the record with a petition for certiorari.[5]

In my judgment, this Court does not use its scarce resources wisely when it undertakes to engage in the *de novo* review of factual records in relatively routine litigation. Cf. *United States* v. *Hasting*, 461 U. S. 499, 516–518 (1983) (STEVENS, J., concurring in judgment). When such review is necessary to a disposition, however, and the Court fails to provide it, the problems of this Court's review are still more troubling. For, like a court of appeals that issues an opinion that may not be printed or cited, this Court then engages in decisionmaking without the discipline and accountability that the preparation of opinions requires.[6]

I respectfully dissent from the Court's summary reversal.

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portion of the entrance examination was deficient, and even though she had not been cleared for admission by the School's Student Health Physician, Gerald C. Crary, M. D. . . . In an interview on April 20, 1979, the School's Registrar, Mary J. Duncan, told respondent that her acceptance was actually conditional on her presenting evidence of tutoring and testing to establish the requisite thirteenth-grade level of proficiency in mathematics concepts and problems, and on her passing the physical requirements").

[5] See this Court's Rule 21; Stevens, The Life Span of a Judge-Made Rule, 58 N. Y. U. L. Rev. 1, 13 (1983); R. Stern & E. Gressman, Supreme Court Practice 424–429 (5th ed. 1978).

[6] "In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aids reckonability."

K. Llewellyn, The Common Law Tradition 26 (1960), quoted in Reynolds & Richman, *supra* n. 1, at 1204.

JUSTICE BRENNAN dissents from the Court's summary reversal substantially for the reasons stated by JUSTICE STEVENS.

Certiorari Granted in Part—Reversed. (See No. 85-130, *ante*, p. 9.)

Miscellaneous Orders

No. ——. JURECZKI *v.* CITY OF SEABROOK, TEXAS, ET AL. Motion to direct the Clerk to file the petition for writ of certiorari which does not comply with the Rules of this Court denied.

No. A-223. DODSON *v.* COOPER, SUPERINTENDENT, SHADOW MOUNTAIN CORRECTIONAL FACILITY. Sup. Ct. Colo. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A-251. JENNINGS *v.* JENNINGS. Sup. Ct. Iowa. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D-528. IN RE DISBARMENT OF LARKIN. It is ordered that Tom L. Larkin, of Birmingham, Ala., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-529. IN RE DISBARMENT OF MENDELL. It is ordered that Stephen W. Mendell, of St. Joseph, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-530. IN RE DISBARMENT OF SIEGFRIED. It is ordered that Scott Thomas Siegfried, of Wadsworth, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 103, Orig. SOUTH DAKOTA *v.* NEBRASKA ET AL. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 83-2004. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. *v.* ZENITH RADIO CORP. ET AL. C. A. 3d Cir. [Certiorari granted, 471 U. S. 1002.] Motion of the Solicitor General to

permit Charles F. Rule, Esquire, to present oral argument *pro hac vice* granted.

No. 84–773. BENDER ET AL. *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL. C. A. 3d Cir. [Certiorari granted, 469 U. S. 1206.] Motion of petitioners for leave to file a supplemental brief after argument granted.

No. 84–1362. PUBLIC SERVICE COMMISSION OF MARYLAND *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF MARYLAND. C. A. 4th Cir. [Certiorari granted, 472 U. S. 1026.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 84–1484. WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS ET AL. *v.* GOULD INC. C. A. 7th Cir. [Probable jurisdiction noted, 471 U. S. 1115.] Motion of Chamber of Commerce of the United States of America for leave to file a brief as *amicus curiae* granted.

No. 84–1531. MICHIGAN *v.* JACKSON; and

No. 84–1539. MICHIGAN *v.* BLADEL. Sup. Ct. Mich. [Certiorari granted, 471 U. S. 1124.] Motion of petitioner to reconsider order denying motion for divided argument [*ante*, p. 810] denied.

No. 84–1948. BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* PAYNE ET AL. C. A. 11th Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 84–6263. BATSON *v.* KENTUCKY. Sup. Ct. Ky. [Certiorari granted, 471 U. S. 1052.] Motion of Elizabeth Holtzman, District Attorney for Kings County, New York, for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 84–6859. SKIPPER *v.* SOUTH CAROLINA. Sup. Ct. S. C. [Certiorari granted, *ante*, p. 900.] Motion for appointment of counsel granted, and it is ordered that David I. Bruck, Esquire, of Columbia, S. C., be appointed to serve as counsel for petitioner in this case.

No. 85–129. WIMBERLY *v.* LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI ET AL. Sup. Ct. Mo.; and

No. 85-279. AMERICAN PETROFINA COMPANY OF TEXAS *v.* OIL CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION LOCAL NO. 4-23 ET AL. C. A. 5th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 85-188. KEMP, WARDEN *v.* BLAKE. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 85-5023. POLAND *v.* ARIZONA; and

No. 85-5024. POLAND *v.* ARIZONA. Sup. Ct. Ariz. [Certiorari granted, *ante*, p. 816.] Motions for appointment of counsel granted, and it is ordered that H. K. Wilhelmsen, Esquire, of Prescott, Ariz., be appointed to serve as counsel for petitioners in these cases.

No. 85-5401. IN RE DAY. Sup. Ct. Tex. Petition for writ of common-law certiorari denied.

No. 85-5381. IN RE PALLETT;

No. 85-5414. IN RE MEADOWS;

No. 85-5430. IN RE PARRISH; and

No. 85-5441. IN RE JOKINEN. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 84-902. WARDAIR CANADA INC. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Fla. Probable jurisdiction noted. Reported below: 455 So. 2d 326.

No. 84-1904. UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* GALIOTO. Appeal from D. C. N. J. Probable jurisdiction noted. Reported below: 602 F. Supp. 682.

No. 85-62. MAINE *v.* TAYLOR ET AL. Appeal from C. A. 1st Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 752 F. 2d 757.

Certiorari Granted

No. 85-140. BOWERS, ATTORNEY GENERAL OF GEORGIA *v.* HARDWICK ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 760 F. 2d 1202.

No. 85-198. CELOTEX CORP. *v.* CATRETT, ADMINISTRATRIX OF THE ESTATE OF CATRETT. C. A. D. C. Cir. Certiorari granted. Reported below: 244 U. S. App. D. C. 160, 756 F. 2d 181.

No. 85-227. SMALIS ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari granted. Reported below: 507 Pa. 344, 490 A. 2d 394.

No. 85-385. BROCK, SECRETARY OF LABOR *v.* PIERCE COUNTY. C. A. 9th Cir. Certiorari granted. Reported below: 759 F. 2d 1398.

No. 85-5189. MCLAUGHLIN *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted.

Certiorari Denied. (See also Nos. 85-380, 85-415, 85-534, and 85-5401, *supra.*)

No. 84-1645. WEISS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 752 F. 2d 777.

No. 84-1766. SMITH *v.* THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 760 F. 2d 267.

No. 84-1952. WOOD *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 156.

No. 84-2005. IN RE GROTHE. Ct. Crim. App. Tex. Certiorari denied. Reported below: 687 S. W. 2d 736.

No. 84-6748. WILEY *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 84-6753. CARSON *v.* TURNER ET AL. C. A. 5th Cir. Certiorari denied.

No. 84-6756. LEWIS *v.* PORT AUTHORITY OF NEW YORK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 921.

No. 84-6759. MIDWIFE ET AL. *v.* WOODS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 67.

No. 84-6786. WILSON *v.* REES, SUPERINTENDENT, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1014.

No. 84-6845. MARK, AKA WILLIAMS *v.* CALDWELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 1260.

No. 84-6931. MARTINEZ-VALDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 1204.

No. 84-6932. CHITTY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 425.

No. 85-17. VERNON *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 68.

No. 85-43. SENFT ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 991.

No. 85-44. BERGMAN *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 751 F. 2d 314.

No. 85-79. TOLAND *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 285 Ark. 415, 688 S. W. 2d 718.

No. 85-211. DRACOS, ADMINISTRATRIX FOR THE ESTATE OF DRACOS *v.* HELLENIC LINES LTD. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 348.

No. 85-221. JENSEN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 383.

No. 85-222. BAKER, INDIVIDUALLY AND DBA BAKER COAL CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1076.

No. 85-234. UNITED ARTISTS COMMUNICATIONS, INC. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 756 F. 2d 502.

No. 85-263. MAGGETTE *v.* COOK COUNTY POLICE AND CORRECTIONS MERIT BOARD ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 129 Ill. App. 3d 1149, 491 N. E. 2d 1382.

No. 85-273. FLORIDA *v.* ROSS. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 471 So. 2d 196.

No. 85-287. COURT HOUSE PLAZA CO. *v.* CITY OF PALO ALTO ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 85-321. PETERSON *v.* AIR LINE PILOTS ASSN., INTERNATIONAL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 759 F. 2d 1161.

No. 85-343. PRUDENTIAL FEDERAL SAVINGS & LOAN ASSN. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 763 F. 2d 1166.

No. 85-345. ALLEN *v.* CITY OF KINLOCH, MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 763 F. 2d 335.

No. 85-349. TOMCZAK *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 765 F. 2d 633.

No. 85-351. W. A. FOOTE MEMORIAL HOSPITAL, INC. *v.* GRUBB. C. A. 6th Cir. Certiorari denied. Reported below: 759 F. 2d 546.

No. 85-360. WASSERSTROM *v.* EISENBERG ET AL.;
No. 85-407. WEINSTEIN *v.* EISENBERG ET AL.; and
No. 85-514. PELINO, WASSERSTROM, CHUCAS & MONTEVERDE, P. C. *v.* EISENBERG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 766 F. 2d 770.

No. 85-365. RUSTIN ET AL. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 491 A. 2d 496.

No. 85-370. HEPLER *v.* COLUMBIA BROADCASTING SYSTEM, INC. Ct. App. Wash. Certiorari denied. Reported below: 39 Wash. App. 838, 696 P. 2d 596.

No. 85-371. GENESIS BROADCASTING LTD. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 245 U. S. App. D. C. 233, 759 F. 2d 959.

No. 85-373. REED ET AL. *v.* TERRELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 472.

No. 85-374. DENSON *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 162.

No. 85-378. ROBERTS ET AL. *v.* SIMPSON, EXECUTRIX OF THE ESTATE OF BEEL, ET AL. Ct. App. Ark. Certiorari denied. Reported below: 15 Ark. App. xix.

No. 85-381. PATEL *v.* FLYING TIGER LINE, INC. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 2d 1018.

No. 85-382. HEGGY *v.* WELTY ET UX. Ct. App. Wis. Certiorari denied. Reported below: 124 Wis. 2d 318, 369 N. W. 2d 763.

No. 85-383. JOHNSTON *v.* CITY OF ANN ARBOR ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 920.

No. 85-384. BROWN *v.* FERRO CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 763 F. 2d 798.

No. 85-387. MAINES ET AL. *v.* SECRETARY OF STATE OF MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 493 A. 2d 326.

No. 85-389. CHAPMAN ET AL. *v.* LUNA ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 102 N. M. 768, 701 P. 2d 367.

No. 85-397. FUDGER *v.* COUNTY OF MONTGOMERY. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 135.

No. 85-399. YOUNG ET AL. *v.* GREAT ATLANTIC & PACIFIC TEA CO. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 263.

No. 85-401. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* JONES. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 101.

No. 85-403. SCHELLER *v.* AMERICAN MEDICAL INTERNATIONAL, INC., ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 462 So. 2d 1.

No. 85-409. HUNT, BY AND THROUGH HIS FATHER AND NEXT FRIEND, HUNT, ET AL. *v.* GUILFORD COUNTY BOARD OF EDUCATION. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 998.

No. 85-414. AMBROSE *v.* SPERRY RAND CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 2d 273.

No. 85-419. GENERAL DRIVERS & HELPERS UNION, LOCAL NO. 554 *v.* MID-CONTINENT BOTTLERS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 482.

No. 85–424. MEAD, A MINOR, BY MEAD, HIS FATHER AND NEXT FRIEND *v.* UNITED STATES C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 924.

No. 85–435. CITY OF GAINESVILLE, FLORIDA *v.* ISLAND CREEK COAL SALES CO. C. A. 6th Cir. Certiorari denied. Reported below: 764 F. 2d 437.

No. 85–436. FLORIDA STATE UNIVERSITY HEALTH CENTER ET AL. *v.* JOSHI. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1227.

No. 85–439. CALIFORNIA EX REL. COOPER, CITY ATTORNEY OF SANTA ANA, CALIFORNIA *v.* MITCHELL BROTHERS' SANTA ANA THEATER ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 165 Cal. App. 3d 378, 211 Cal. Rptr. 501.

No. 85–449. ISLAMIC REPUBLIC OF IRAN ET AL. *v.* MCDONNELL DOUGLAS CORP. C. A. 8th Cir. Certiorari denied. Reported below: 758 F. 2d 341.

No. 85–453. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT *v.* CITY OF SAN ANTONIO. Ct. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. Reported below: 683 S. W. 2d 67.

No. 85–454. SIBAJA ET AL. *v.* DOW CHEMICAL CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 1215.

No. 85–464. MEYERS INDUSTRIES, INC. *v.* PRILL ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 244 U. S. App. D. C. 42, 755 F. 2d 941.

No. 85–479. MEDINA *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 760 F. 2d 252.

No. 85–480. STRODE *v.* GREGORY ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 85–491. RAZZANO ET AL. *v.* DUNLOP TIRE & RUBBER CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 760 F. 2d 265.

No. 85–511. PAK-MOR MANUFACTURING CO. *v.* JONES ET AL. Sup. Ct. Ariz. Certiorari denied. Reported below: 145 Ariz. 121, 700 P. 2d 819.

No. 85-518. PINCKARD ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 1477.

No. 85-520. HOLWAY *v.* BURGER, CHIEF JUSTICE OF THE UNITED STATES, ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-543. MORENO *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 471 So. 2d 395.

No. 85-564. PROVENZANO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1077.

No. 85-565. WOODSIDE, EXECUTOR OF THE ESTATE OF WOODSIDE *v.* HOERNER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 897.

No. 85-580. MARTORANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 767 F. 2d 63.

No. 85-582. SPARROW *v.* DEVINE, DIRECTOR, U. S. OFFICE OF PERSONNEL MANAGEMENT, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 85-593. PAPPANIKOLAOU ET AL. *v.* SECRETARY OF THE ARMY. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 157.

No. 85-5001. MCCRARY, AKA EVANS *v.* FRANKLIN STATE BANK. Sup. Ct. N. J. Certiorari denied.

No. 85-5017. WIGLEY *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 467 So. 2d 429.

No. 85-5034. APPOLONEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 2d 520.

No. 85-5056. MITCHELL *v.* DAVIS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 760 F. 2d 279.

No. 85-5090. SMITH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 127 Ill. App. 3d 1163, 483 N. E. 2d 729.

No. 85-5107. BURTON *v.* REED ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-5145. MULLADY *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-5162. CORTEZ *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 507 Pa. 529, 491 A. 2d 111.

No. 85-5329. SMITH *v.* CITY OF PITTSBURGH. C. A. 3d Cir. Certiorari denied. Reported below: 764 F. 2d 188.

No. 85-5336. SCOTT *v.* DENTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 921.

No. 85-5344. PAGE ET AL. *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 472 So. 2d 362.

No. 85-5351. DANO *v.* SZOMBATHY. Sup. Ct. N. J. Certiorari denied. Reported below: 101 N. J. 282, 501 A. 2d 945.

No. 85-5353. MAHDAVI *v.* SHIRANI. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85-5355. WEEKS *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-5359. KAHIKINA *v.* HAWAII. Sup. Ct. Haw. Certiorari denied.

No. 85-5361. COLEMAN ET AL. *v.* DELAWARE ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 497 A. 2d 785.

No. 85-5366. JONES *v.* CALIFORNIA INSTITUTION FOR MEN. C. A. 9th Cir. Certiorari denied.

No. 85-5367. IN RE JAMES. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 160.

No. 85-5373. REED *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 174.

No. 85-5374. BALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1170.

No. 85-5376. HOLLIDAY *v.* HAUPTMAN, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied.

No. 85-5378. BISHOP *v.* DAVIS. Sup. Ct. Ala. Certiorari denied.

No. 85-5388. MILLER *v.* ELROD, SHERIFF, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85-5389. GAY *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 993.

No. 85-5393. EARL *v.* ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 765 F. 2d 91.

No. 85-5395. FOWLER *v.* SOUTHEAST TOYOTA DISTRIBUTORS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 998.

No. 85-5397. WILLIAMS *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 2d 1002.

No. 85-5398. MILLER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 65 N. Y. 2d 502, 482 N. E. 2d 892.

No. 85-5399. YOUNG *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 834.

No. 85-5402. GRADY *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 691 S. W. 2d 301.

No. 85-5403. HANDLEY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1401.

No. 85-5405. AMES *v.* ALASKA ET AL. C. A. 9th Cir. Certiorari denied.

No. 85-5406. DUPREE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 196 Conn. 655, 495 A. 2d 691.

No. 85-5412. MCDONALD *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 85-5415. ROBERTS *v.* RUTGERS STATE UNIVERSITY OF NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1074.

No. 85-5422. ZELLERS *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 763 F. 2d 250.

No. 85-5424. STOCKI *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 129 Ill. App. 3d 1158, 491 N. E. 2d 1386.

No. 85-5426. FULSOM *v.* MORRIS, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1170.

No. 85-5427. ENGLAND *v.* RYAN, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 85-5432. GOLDBLATT *v.* VOGEL ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-5438. HICKS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85-5450. CARDENAS-MONTILLA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 942.

No. 85-5452. PREWITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 916.

No. 85-5459. KOUHESTANIAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 253.

No. 85-5465. MCDOWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1076.

No. 85-5479. CRESPO-DIAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 1514.

No. 85-5483. HATCHER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-5484. POQUIZ *v.* DEPARTMENT OF TRANSPORTATION. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 176.

No. 85-5490. GIVENS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 574.

No. 85-5505. PASCUEL-SOLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 173.

No. 85-5507. KOTVAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85-5515. BRYANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1164.

No. 85-5537. BRAKEFIELD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 908.

No. 85-5549. LAMB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 914.

No. 85-5582. WALKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-5597. VANOVER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 689 S. W. 2d 11.

No. 83-1250. KEWANEE OIL CO. *v.* HOLMES, EXECUTRIX OF THE ESTATE OF HOLMES, ET AL. Sup. Ct. Kan. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 233 Kan. 544, 664 P. 2d 1335.

No. 84-1731. LORAIN JOURNAL CO. ET AL. *v.* MILKOVICH. Sup. Ct. Ohio. Certiorari denied. Reported below: 15 Ohio St. 3d 292, 473 N. E. 2d 1191.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Error and misstatement are inevitable in any scheme of truly free expression and debate. Because punishment of error may induce a cautious and restrained exercise of the freedoms of speech and press, the fruitful exercise of these essential freedoms requires a degree of "breathing space." *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). Accordingly, "we protect some falsehood in order to protect speech that matters." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 341 (1974); see also *St. Amant* v. *Thompson*, 390 U. S. 727, 732 (1968). The *New York Times* actual malice

standard defines the level of constitutional protection appropriate in the context of defamation of a public official. It rests on our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). In *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), the *New York Times* standard was extended to statements criticizing "public figures" because we recognized that "'public figures,' like 'public officials,' often play an influential role in ordering society" and that therefore "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" 388 U. S., at 164 (Warren, C. J., concurring in result). In *Gertz* v. *Robert Welch, Inc.*, *supra*, we limited the applicability of the *New York Times* standard by holding that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U. S., at 347 (footnote omitted).

In this case, the Ohio Supreme Court found *Gertz* rather than *New York Times* applicable to respondent Milkovich's libel suit against petitioners. Ostensibly, then, the issue presented in this petition is simply the narrow one whether petitioners will be required to pay damages upon a showing of negligence or actual malice. However, by allowing damages to be awarded upon a showing of negligence, thereby diminishing the "breathing space" allowed for free expression in the *New York Times* case, the decision in *Gertz* exacerbated the likelihood of self-censorship with respect to reports concerning "private individuals." See 418 U. S., at 365–368 (BRENNAN, J., dissenting). Consequently, the rules we adopt to determine an individual's status as "public" or "private" powerfully affect the manner in which the press decides what to publish and, more importantly, what not to publish. In finding *New York Times* inapplicable, the Ohio Supreme Court read the "public official" and "public figure" doctrines in an exceptionally narrow way that is sure to restrict expression by the press in Ohio. Its decision is especially unfortunate in that it most affects reporting by local papers about the local controversies that constitute their primary content. Moreover, it is these local papers that are most coerced by the threat of libel damages

they can least afford the expense of damages awards. I ore dissent and would grant certiorari in order to review nportant constitutional question.

I

February 9, 1974, a melee occurred at a high school wres-match between Maple Heights and Mentor High Schools; l wrestlers were injured, four of them requiring treat-at a hospital. The Ohio High School Athletic Association AA) conducted a hearing into the occurrence and censured el Milkovich, the Maple Heights coach and a teacher at the school, for his conduct in encouraging the brawl. In addi-he OHSAA placed the Maple Heights team on probation for hool year and declared it ineligible to compete in the state ing tournament. Ted Diadiun, a sports columnist for the Herald of Willoughby, Ohio, attended and reported on both atch and the hearing.

group of parents and wrestlers subsequently filed suit in lin County Common Pleas Court, alleging that the OHSAA enied the team due process and seeking to reverse the dec-n of ineligibility. Milkovich, though not a party to this law-ppeared as a witness for the plaintiffs. On January 7, 1975, urt held that the wrestling team had been denied due proc-d enjoined the team's suspension.

next day, Diadiun wrote another column entitled "Maple he law with the 'big lie.'" Diadiun, who had not attended urt hearing, based the story on a description of the judicial dings given him by an OHSAA Commissioner and on his ecollection of the wrestling match and ensuing OHSAA hear-After reporting the result of the lawsuit, the column stated there is something much more important involved here than er Maple was denied due process by the OHSAA":

"When a person takes on a job in a school, whether it be as teacher, coach, administrator or even maintenance worker, is well to remember that his primary job is that of educator.

"There is scarcely a person concerned with school who esn't leave his mark in some way on the young people who ss his way—many are the lessons taken away from school students which weren't learned from a lesson plan or out of book. They come from personal experiences with and ob-

servations of their superiors and peers, from watching actions and reactions.

"Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out."

Diadiun stated that Milkovich and others had "misrepresented" the occurrences at the OHSAA hearing but that Milkovich's testimony "had enough contradictions and obvious untruths so that the six [OHSAA] board members were able to see through it." Diadiun then asserted that by the time the court hearing was held, Milkovich and a fellow witness "apparently had their version of the incident polished and reconstructed, and the judge apparently believed them." Diadiun opined that anyone who had attended the match "knows in his heart that Milkovich . . . lied at the hearing after . . . having given his solemn oath to tell the truth. But [he] got away with it." The column concluded:

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not."

Milkovich filed a libel action in state court against Diadiun, the News-Herald, and the latter's parent, the Lorain Journal Company (petitioners). The court denied petitioners' motion for summary judgment, but held that Milkovich was a public figure and, as such, was required to meet the standards established in *New York Times*. After five days of trial, at the close of Milkovich's case, petitioners moved for a directed verdict. The court granted this motion, finding that Milkovich's evidence failed to establish actual malice as a matter of law. The Ohio Court of Appeals reversed and remanded. *Milkovich* v. *Lorain Journal Co.*, 65 Ohio App. 2d 143, 416 N. E. 2d 662 (1979). It noted that the Common Pleas Court had accepted Milkovich's testimony, and ruled that this alone constituted sufficient evidence of actual malice to survive a motion for a directed verdict. The Ohio Supreme Court dismissed the appeal as raising no substantial constitutional question. This Court denied certiorari; I dissented. *Lorain Journal Co.* v. *Milkovich*, 449 U. S. 966 (1980).

On remand and before a new judge in the Common Pleas Court, petitioners filed a second motion for summary judgment. The court reaffirmed the earlier holding that Milkovich was a public figure for purposes of the *New York Times* test and granted the motion. The court held that Milkovich had failed to proffer sufficient evidence for a jury to conclude that Diadiun's column was published with actual malice. Alternatively, the court found that the column constituted a privileged expression of opinion. This time the Ohio Court of Appeals affirmed, holding that the law of the case did not bar a second motion for summary judgment and agreeing with both of the trial court's particular holdings.

The Ohio Supreme Court reversed. *Milkovich* v. *News-Herald*, 15 Ohio St. 3d 292, 473 N. E. 2d 1191 (1984). Concluding "upon a careful review of the record" that Milkovich had not waived the right to challenge the earlier determination of his status as a public figure, the court held that Milkovich was neither a "public official" nor a "public figure," and that the contents of the challenged article were facts which, if false, are not protected by the First Amendment. *Id.*, at 294–297, 473 N. E. 2d, at 1193–1196. This petition followed.

II

A

In *New York Times*, we had no occasion "to determine how far down into the lower ranks of government employees the 'public official' designation would extend . . . ." 376 U. S., at 283, n. 23. That question was addressed two Terms later in *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966). Consistent with the premise of *New York Times* that "[c]riticism of those responsible for government operations must be free, lest criticism of government itself be penalized," the Court in *Rosenblatt* held that "[i]t is clear . . . that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." 383 U. S., at 85. We recognized there, however, that First Amendment protection cannot turn on formalistic tests of how "high" up the ladder a particular government employee stands. Rather, we determined, the focus must be on the nature of the public employee's function and the public's particular concern with his work. Accordingly, we held:

> "Where a position in government has such apparent importance that the public has *an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees*, . . . the *New York Times* malice standards apply." *Id.*, at 86 (emphasis added).

In *Rosenblatt* itself, we found this standard satisfied with respect to Baer, a supervisor of a county ski resort employed by and responsible to county commissioners.

The Ohio court apparently read the language in *Rosenblatt* referring to government employees having "substantial responsibility for or control over the conduct of government affairs" as restricting the public official designation to officials who set governmental policy. This interpretation led it to conclude that finding a public employee like Milkovich to be a "public official" for purposes of defamation law "would unduly exaggerate the 'public official' designation beyond its original intendment." 15 Ohio St. 3d, at 297, 473 N. E. 2d, at 1195–1196.

The Ohio court has seriously misapprehended our decision in *Rosenblatt*. Indeed, the status of a public school teacher as a "public official" for purposes of applying the *New York Times* rule follows *a fortiori* from the reasoning of the Court in *Rosenblatt*. As this Court noted in holding that the Equal Protection Clause does not bar a State from excluding aliens from teaching positions in the public schools, "public school teachers may be regarded as performing a task 'that go[es] to the heart of representative government.'" *Ambach* v. *Norwick*, 441 U. S. 68, 75–76 (1979) (quoting *Sugarman* v. *Dougall*, 413 U. S. 634, 647 (1973)). We have repeatedly recognized public schools as the Nation's most important institution "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." 441 U. S., at 76–77. See also *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 29–30 (1973); *Wisconsin* v. *Yoder*, 406 U. S. 205, 213 (1972); *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). The public school teacher is unquestionably the central figure in this institution:

> "Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-

to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy." *Ambach*, *supra*, at 78–79 (footnotes omitted).[1]

"[T]eachers . . . possess a high degree of responsibility and discretion in the fulfillment of a basic governmental obligation," *Bernal* v. *Fainter*, 467 U. S. 216, 220 (1984),[2] and it is self-evident that "the public has an independent interest in the qualifications and performance" of those who teach in the public high schools that goes "beyond the general public interest in the qualifications and performance of all government employees," *Rosenblatt*, *supra*, at 86.[3] Public school teachers thus fall squarely

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[1] JUSTICE BLACKMUN's dissent in *Ambach*, which I joined, expressed identical sentiments. See 441 U. S., at 88 ("One may speak proudly of the role model of the teacher, of his ability to mold young minds, of his inculcating force as to national ideals, and of his profound influence in the impartation of our society's values").

[2] See also *Board of Education* v. *Pico*, 457 U. S. 853, 864 (1982) (plurality opinion); *Cabell* v. *Chavez-Salido*, 454 U. S. 432, 457, n. 8 (1982); *Zykan* v. *Warsaw Community School Corp.*, 631 F. 2d 1300, 1307 (CA7 1980).

[3] This perfectly obvious conclusion has led at least one other court to reach a conclusion directly contrary to that of the Ohio Supreme Court. See *Johnston* v. *Corinthian Television Corp.*, 583 P. 2d 1101 (Okla. 1978) (grade school wrestling coach is "public official"). On the other hand, the state courts are in general disarray over the application of the *New York Times* standard to various other types of public employees. See Annot., Libel and Slander: Who is a Public Official or Otherwise Within the Federal Constitutional Rule

within the rationale of *New York Times* and *Rosenblatt*. Moreover, Diadiun's column challenged Milkovich's qualifications to teach young students in light of his conduct in connection with the Maple Heights/Mentor High School incident. It is precisely this type of discussion that *New York Times* and its progeny seek to protect.

B

The Ohio Supreme Court also held that Milkovich was not a "public figure" within the meaning of our decisions. It concluded that this Court has "retreated" from prior holdings and "redefined" public figure status to include only two narrowly defined classes of individuals. 15 Ohio St. 3d, at 294–297, 473 N. E. 2d, at 1193–1195. Milkovich was found to fit in neither of these categories. *Ibid.* Here too, the state court misreads our decisions.

Our first encounter with the application of the *New York Times* test to nongovernment officials came in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967). *Butts* actually decided two separate cases that were consolidated for review. In the first case, Butts, the athletic director at the University of Georgia[4] and "a well-known and respected figure in coaching ranks," *id.*, at 136, filed a libel action after the Saturday Evening Post published an article accusing Butts of having conspired to fix a football game with the University of Alabama. In the second case, Walker, a retired career Army officer who was prominent in the local community, sued the Associated Press after it filed a news dispatch giving an eyewitness account of a riot that erupted at the University of Mississippi when federal officers tried to enforce a court decree ordering the enrollment of James Meredith, a black, as a student at the University. The report stated that Walker had taken command of the violent crowd and personally had led a charge against federal marshals. Although the Court in *Butts* failed to reach a consensus on the standard of liability in suits brought by "public figures," seven Members of the Court agreed that both Butts and

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Requiring Public Officials to Show Actual Malice, 19 A. L. R. 3d 1361 (1968 and 1985 Supp.). I would also grant certiorari to clarify the law in this regard.

[4] Although the University of Georgia was a state university, Butts was employed by the Georgia Athletic Association, a private corporation, rather than by the State itself. His case thus did not raise the issue whether he was a "public official" for purposes of the *New York Times* test. See *Butts*, 388 U. S., at 135, and n. 2.

ker occupied this status.[5] Justice Harlan explained in his ality opinion:

"[B]oth Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled 'public figures' under ordinary tort rules. . . . Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements. . . ." *Id.*, at 154–155.

Justice Harlan's opinion indicates, the two cases considered *utts* exemplify alternative ways in which an individual may be a "public figure."[6] Our subsequent cases have elaborated is framework; we have held that "[i]n some instances an indial may achieve such pervasive fame or notoriety that he bes a public figure for all purposes and in all contexts," while, ore commonly, an individual voluntarily injects himself or is n into a particular controversy and thereby becomes a public e for a limited range of issues." *Gertz*, 418 U. S., at 351; see *Time, Inc.* v. *Firestone*, 424 U. S. 448, 453 (1976); *Hutchin-* v. *Proxmire*, 443 U. S. 111, 134 (1979); *Wolston* v. *Reader's*

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stices Black and Douglas found it unnecessary to reach the issue consistith their views that the First Amendment completely prohibits damages el. *Id.*, at 170 (Black, J., joined by Douglas, J., concurring in result in r's case and dissenting in Butts' case); see also *New York Times*, 376 , at 293 (Black, J., concurring).

ke Butts and Walker, Milkovich would be labeled a "public figure" under ry tort rules. See W. Prosser, Law of Torts § 118, pp. 823–824 (4th ed. cf. *Stryker* v. *Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P. 2d 951); *Molony* v. *Boy Comics Publishers*, 277 App. Div. 166, 98 N. Y. S. (1950); *Wilson* v. *Brown*, 189 Misc. 79, 73 N. Y. S. 2d 587 (1947). Insince in my opinion the scope of the constitutional privilege exceeds that privilege recognized at common law for reports about public figures, act alone should be sufficient to conclude that Milkovich is a "public fig- However, our subsequent decisions have treated the constitutional ege without reference to the common-law privilege, *e. g.*, *Time, Inc.* v. *one*, 424 U. S. 448, 453 (1976); *Wolston* v. *Reader's Digest Assn., Inc.*, S. 157, 165–169 (1979), and I therefore discuss Milkovich's status under ecisions without reference to the common law.

Digest Assn., Inc., 443 U. S. 157, 164 (1979). However, the ultimate touchstone is always whether an individual has "assumed [a] rol[e] of especial prominence in the affairs of society [that] invite[s] attention and comment." *Gertz*, *supra*, at 345. These categories are merely descriptive; they are not, as the Ohio Supreme Court assumed, rigid, technical standards.

Petitioners spend most of their efforts attempting to analogize their case to that of Butts, and, indeed, the analogy is a strong one.[7] A better argument can be made, however, that Milkovich is a "public figure," like Walker, for purposes of this particular public controversy. Under this prong of "public figure" analysis, an individual who "voluntarily injects himself or is drawn into a particular public controversy" becomes a public figure with respect to public discussion of that controversy. *Gertz*, *supra*, at 351. Walker, for example, was deemed to have "thrus[t] his personality into the 'vortex' of an important public controversy" by allegedly encouraging a riot. Milkovich's conduct was remarkably similar to Walker's—the allegedly libelous publication was inspired by a brawl that resulted in injuries to a number of students;

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[7] Like Butts, Milkovich is "a well-known and respected figure in coaching ranks." Indeed, he is unquestionably one of America's outstanding coaches. No other wrestling coach in America has achieved a record even close to his, a fact that has been recognized by numerous organizations. He has received the National Coach of the Year Award, the National Council of High School Coaches Award, the Scholastic Wrestling News National Achievement Award, a United States Wrestling Federation Award, and numerous other gifts, proclamations, and awards. He was inducted into the National Helms Hall of Fame and the Ohio Coaches Hall of Fame and received the Kent State University Hall of Fame Award. He has been cited in the Congressional Record and in the records of both the Ohio Senate and House of Representatives. He was similarly honored by the city of Cleveland and by his own city of Maple Heights, which celebrated "Mike Milkovich Day." He is a much sought after speaker by Coaches Associations throughout the United States and conducts wrestling clinics across the country under the aegis of various state and coaches organizations. See *Milkovich* v. *News-Herald*, 15 Ohio St. 3d 292, 296, and n. 1, 473 N. E. 2d 1191, 1194, and n. 1 (1984). Nor will it do simply to dismiss Milkovich's achievements as merely those of a high school coach. To be sure, as a general matter collegiate athletics obtains wider exposure than high school athletics. But with the exception of a few rather flamboyant figures who gain national exposure, most coaches—like Butts—are unknown outside sports' circles and the local community. Milkovich is probably as well known both locally and in the wrestling community as was Butts in his respective circles.

Milkovich was alleged to have incited the fracas by egging on the crowd. While this fight did not compare in size or ferocity to the riots in which Walker participated at the University of Mississippi, it was a public controversy of concern to residents of the local community, as important to them as larger events are to the Nation. Significantly, it was only in this community that the challenged article was circulated. See *Rosenblatt* v. *Baer*, 383 U. S., at 83 ("The subject matter may have been only of local interest, but at least here, where publication was addressed primarily to the interested community, that fact is constitutionally irrelevant"). The conclusion that Milkovich was a limited purpose public figure therefore seems quite straightforward.

The Ohio Supreme Court nevertheless concluded that Milkovich could not be classed a "public figure" because he "never thrust himself to the forefront of [the] controversy in order to influence its decision." 15 Ohio St. 3d, at 297, 473 N. E. 2d, at 1195. However, the *New York Times* standard is not limited to discussion of individuals who deliberately seek to involve themselves in public issues to influence their outcome. Our decisions in this area rest at bottom on the need to protect public discussion about matters of legitimate public concern. See *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 755–761 (1985) (opinion of POWELL, J., joined by REHNQUIST and O'CONNOR, JJ.); *id.*, at 763–764 (opinion of BURGER, C. J.); *id.*, at 777–789 (opinion of BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ.). Although not every person connected to a public controversy is a "public figure," *Gertz*, *supra*, the *New York Times* protections do, and necessarily must, encompass the major figures around which a controversy rages. See *Wolston* v. *Reader's Digest Assn.*, *supra*, at 167; see also *Gertz*, *supra*, at 351 (public figure is one who "voluntarily injects himself *or is drawn* into a particular public controversy" (emphasis added)).[8]

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[8] In *Wolston*, we held that although an individual's failure to appear before a grand jury investigating Soviet espionage was newsworthy, "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." 443 U. S., at 167. Rather, we emphasized, "a court must focus on the 'nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'" *Ibid.* (quoting *Gertz*, 418 U. S., at 352). Because it was "clear that [Wolston] played only a minor role in whatever public controversy there may have been concerning the investigation of Soviet espio-

We only recently acknowledged the "compelling" nature of the local interest in preventing violence and preserving discipline in the Nation's high schools. *New Jersey* v. *T. L. O.*, 469 U. S. 325, 350 (1985). A large fight between the students of two rival schools quite legitimately raises serious concerns for the entire community, particularly when, as here, it results in injury to students.[9] The present controversy centered primarily around the conduct of one man—Milkovich—in encouraging the fight; that conduct allegedly resulted in an OHSAA hearing, his censure by that association, and the disqualification of his team from eligibility in the state wrestling tournament.[10] To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense.

III

The "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times*, 376 U. S., at 270, applies as much to debate in the local media about local issues as it does to debate in the na-

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nage," he was held not to be a public figure. 443 U. S., at 167. Milkovich, on the other hand, was clearly the major player in this public controversy.

[9] At one point in its opinion, the Ohio Supreme Court cited our holding in *Time, Inc.* v. *Firestone*, 424 U. S. 448 (1976), that Mrs. Firestone's divorce was "not the sort of 'public controversy' envisioned in *Gertz*." 15 Ohio St. 3d, at 296, 473 N. E. 2d, at 1194. The nature of the controversy here is completely different. This was not a private matter of public concern merely to gossips. Rather, the controversy in which Milkovich was involved was of immediate importance to parents and others in the community.

[10] These facts distinguish this case from *Hutchinson* v. *Proxmire*, 443 U. S. 111 (1979). In *Hutchinson*, a hitherto unknown research scientist was allegedly libeled when Senator Proxmire awarded his Government sponsor a "Golden Fleece of the Month Award" to publicize what the Senator perceived to be the most egregious examples of wasteful Government spending. Proxmire argued that Hutchinson became a limited purpose public figure as a result of the publicity surrounding his being awarded a "Golden Fleece." We rejected this argument on the ground that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.*, at 135. The controversy surrounding the fight at the high school, on the other hand, was not created by Diadiun's column. The event itself created a stir, leading to a hearing, censure of Milkovich, and disqualification of his team. Diadiun's column merely reported his view, as an observer of the initial fight, that such a man ought not be allowed to teach young students.

ional media over national issues. This Court's *obligation* to preerve the precious freedoms established in the First Amendment s every bit as strong in the context of a local paper's report of n incident at a local high school as it is in the context of an dvertisment in one of the Nation's largest newspapers supporting he struggle for racial freedom in the South. Because the decion below will stifle public debate about important local issues, respectfully dissent.

No. 84–1955. PERNSLEY ET AL. *v.* HARRIS ET AL. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE REHNQUIST and USTICE O'CONNOR would grant certiorari. Reported below: 55 F. 2d 338 and 758 F. 2d 83.

THE CHIEF JUSTICE, dissenting.

For the past nine years, the prison system in Philadelphia has een operating under the supervision of the Court of Common leas of Philadelphia County, following that court's finding in 1972 at prison conditions violated both the Pennsylvania Constitution nd the Eighth Amendment of the United States Constitution. ince 1976, a full-time, court-appointed Special Master has been in lace and numerous remedial orders have been issued, including rders requiring the building of new prison facilities and contempt rders imposing over $500,000 in fines for failure to comply with rior orders. In addition, the parties have entered into consent ecrees aimed at controlling the population in the prison system. eginning in 1984, the Pennsylvania Supreme Court assumed pleary jurisdiction over the entire state proceeding.

The state suit commenced by the filing of a class action in 1971 behalf of all inmates in the Philadelphia prisons, seeking equible relief from alleged unconstitutional prison conditions; dendants are officials of Philadelphia. In the case now before us, spondent Harris, an inmate who admits he is a member of the me class represented in the state action, brought a separate ass action in the Eastern District of Pennsylvania on behalf of persons confined in the Philadelphia prisons; defendants include ity and State officials. The federal complaint similarly makes aims like those in the state suit, and asserts that the Philalphia prisons are overcrowded, thereby violating the Eighth mendment of the United States Constitution; it seeks extensive junctive relief and monetary damages under 42 U. S. C. § 1983.

The District Court dismissed the equitable relief claims sought in this second class action on the alternative grounds of res judicata, or abstention under the doctrine of *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976); it dismissed the damages claim on grounds of sovereign and qualified official immunity. A divided Court of Appeals for the Third Circuit reversed, rejecting each of the District Court's holdings. 755 F. 2d 338 (1985). In his dissenting opinion, Judge Garth agreed that while *Colorado River* did not support abstention, *Younger* v. *Harris*, 401 U. S. 37 (1971), mandated it:

> "I do not believe that Supreme Court teachings, comity, or reason support a federal court's intrusion into a state's administration of its prison system when the state courts have been, and presently are, exercising supervision over these institutions and are doing so in accordance with both state and federal constitutional requirements." 755 F. 2d, at 347.

Rehearing was denied over two dissents. 758 F. 2d 83 (1985).

Respondents essentially ask the federal courts to duplicate the ongoing state court regulation of the Philadelphia prison system. The District Court recognized that the substantial and ongoing state court proceedings involve an important state interest, namely, the administration of a prison system. The Court of Appeals nevertheless found *Younger* abstention restricted to pending state criminal or quasi-criminal proceedings initiated by the State. Our cases, however, recognize that "[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex County Ethics Committee* v. *Garden State Bar Assn.*, 457 U. S. 423, 432 (1982). See also *Moore* v. *Sims*, 442 U. S. 415, 423 (1979) (the *Younger* doctrine is "fully applicable to civil proceedings in which important state interests are involved").

The *Younger* doctrine is rooted in the concept of comity, because

> "interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies." *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 604 (1975).

There is no question that the State is a party to the ongoing state proceedings and that important state policies are implicated

in the management of the county prison system. The state courts continue to exercise comprehensive jurisdiction over the prison system's administration through use of a Special Master, by holding hearings, and by issuing remedial orders and ordering fines. Should the District Court exercise its equitable powers as sought in this second suit, the Philadelphia prisons may thus become subject to potentially conflicting and contrary determinations as to the appropriate remedy for the alleged unconstitutional conditions. Although plaintiffs here additionally seek damages, there is no bar to the assertion of that claim in the state proceedings. So long as plaintiffs have an opportunity to raise their federal claims in the state action, "[n]o more is required to invoke *Younger* abstention." *Juidice* v. *Vail*, 430 U. S. 327, 337 (1977).

I would grant the writ of certiorari and reverse the Court of Appeals judgment.

No. 84-1990. JOHNSON *v.* REX. C. A. 10th Cir. Certiorari denied. Reported below: 753 F. 2d 840.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

In this case the United States Court of Appeals for the Tenth Circuit held that a prosecutor is not entitled to absolute immunity from liability in a civil rights suit brought under 42 U. S. C. § 1983 based upon the prosecutor's presence during questioning of the plaintiff. Absolute immunity was denied even though the prosecutor was present not as an investigator but as a counsel to advise on compliance with *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

In *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), this Court established an absolute immunity for prosecutors engaged in activities associated with the criminal process. This Court left open the extent to which investigative activities by prosecutors would also come within the umbrella of absolute immunity. But the principle of absolute immunity established in *Imbler* was based on the need to ensure sound decisionmaking by the prosecutor by protecting from fear of retaliatory suits for vigorous law enforcement. Here the prosecutor was acting as an officer of the court in ensuring compliance with the *Miranda* requirements, and I would grant the petition for certiorari in order to define the applicability of absolute immunity in this context; surely the prosecutor's action was well within his function as a prosecutor and officer of the court.

No. 85–3. ATLANTA GAS LIGHT CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 11th Cir. Motion of Georgia-Pacific Corp. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 751 F. 2d 1188.

No. 85–78. ALASKA *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 754 F. 2d 851.

No. 85–84. HAGERTY *v.* KELLER, EXECUTOR OF THE SUCCESSION OF CLEMENT, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 749 F. 2d 217.

CHIEF JUSTICE BURGER.

I agree that we should deny the petition for certiorari, but I would award respondents costs and fees under Rule 49.2. The time has come—indeed it is long past—when the Court should enforce Rule 49.2 or strike it. This petition, like much which preceded it, is utterly frivolous. On this record I can only conclude that petitioner and his counsel have filed actions designed to delay the orderly settlement of the estate of respondent Keller's decedent. This misuse of judicial processes should subject the attorney who filed the petition here to the sanction of Rule 49.2.[1]

On July 14, 1978, petitioner brought suit in Louisiana state court to contest the probate of the will of his aunt, Laura Clement. Petitioner requested and received no fewer than three continuances. The trial was finally set for May 12, 1980. Three days before trial, petitioner requested and was denied a fourth continuance.

On the day of trial, petitioner appeared before Judge Melvin Duran, objected to the proceedings, offered no evidence, and stood mute. Judge Duran accordingly dismissed the suit with prejudice. The intermediate state appellate court unanimously affirmed. *Succession of Clement*, 402 So. 2d 702 (La. App. 1981). That court noted that petitioner had "succeeded in delaying implementation of Mrs. Clement's bequests for three years, possibly longer if this matter goes to a higher court." *Id.*, at 703. The court concluded that Judge Duran had not abused his discretion, after granting three continuances, in refusing to grant a fourth.

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[1] Rule 49.2 provides: "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages."

The Louisiana Supreme Court unanimously declined to review the case. 407 So. 2d 733 (1981).

Petitioner then brought a 42 U. S. C. § 1983 action in the United States District Court for the Eastern District of Louisiana. Petitioner contended that the State trial court, by refusing his request for a fourth continuance, had deprived him of due process of law. He named as defendants the Clerk of the Orleans Parish Civil District Court, Dan Foley; the Succession of Laura Clement; the executor of the will, Thomas Keller; and Judge Duran. The defendants, respondents in this Court, moved for dismissal of the action. The District Court correctly granted the motion, concluding that the complaint should be dismissed for lack of subject-matter jurisdiction and for failure to state a claim. Petitioner then took an appeal to the United States Court of Appeals for the Fifth Circuit.

That court unanimously affirmed, holding that the District Court had properly dismissed the action on jurisdictional grounds. 749 F. 2d 217 (1984). Petitioner's suit was brought in the face of the "well-settled rule" that a plaintiff may not seek reversal of a state-court judgment simply by casting his complaint in the form of a civil rights action; Supreme Court and Fifth Circuit precedent "clearly prohibit[ed]" the effort made by petitioner. The Court of Appeals also held that the District Court had properly dismissed petitioner's suit for failure to state a claim. The court explained that ordinarily it would not be inclined to give this issue any attention since the District Court's judgment in its entirety could be affirmed for lack of subject-matter jurisdiction. However, "to further demonstrate the frivolousness of the appeal," the court addressed this point as well, concluding that the trial court had properly dismissed the claims against all defendants on this basis.[2]

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[2] Petitioner had named as a defendant Dan Foley, the Clerk of the Orleans Parish Civil District Court. But Foley was without any power or authority under state law to grant or deny continuances. Moreover, there was no allegation that Foley was involved in any sort of a conspiracy to deprive petitioner of his constitutional rights. Indeed, the complaint did not even allege any act or omission on Foley's part that caused injury. Petitioner had also named the succession of Laura Clement and Thomas Keller, the executor of the estate, as defendants. But, the Fifth Circuit noted, in order to sustain an action under § 1983, the plaintiff must prove that the defendant, acting under color of state law, deprived him of a right secured by the Constitution and laws of the United States. Petitioner had not alleged that either the succession or Keller had conspired with the state trial court. In fact, petitioner's complaint contained no allegation or facts concerning either of these defend-

The court assessed double costs and fees against both petitioner and his attorney under Federal Rule of Appellate Procedure 38 and under 28 U. S. C. §§ 1912 and 1927; it held that petitioner had imposed an unnecessary burden on it and had infringed upon the right of respondents to have a prompt adjudication of this dispute. The court noted, however, that awarding costs against petitioner alone would not deter his attorney from bringing similar frivolous appeals in the future. The court therefore remanded to the District Court for an apportionment of the amount of damages between petitioner and his attorney.

Petitioner continued to protract these proceedings by seeking a writ of certiorari in this Court. In his filing to this Court, however, petitioner did not attempt to refute the careful analysis of the Court of Appeals. Although petitioner was clearly confronted with numerous adverse precedents from this Court and from other courts, he advanced no "good faith argument for an extension, modification, or reversal of existing law." ABA Code of Professional Responsibility DR 7-102(A)(2) (1980).

It is evident, therefore, that petitioner and his counsel have filed in this Court a completely frivolous petition as the most recent in a series of patently unfounded suits, whose effect has been to keep issues involving decedent's will in state and federal courts for more than seven years. Since this appears to be a case where "unmeritorious litigation has been prolonged merely for the purposes of delay, with no legitimate prospect of success," *Talamini v. Allstate Insurance Co.*, 470 U. S. 1067, 1071 (1985) (STEVENS, J., concurring), I would award respondents $1000 against Jesse S. Guillot, Esq., petitioner's attorney.

No. 85-257. GRACZYK ET AL. *v.* UNITED STEELWORKERS OF AMERICA. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 763 F. 2d 256.

No. 85-356. OMAN ET AL. *v.* H. K. PORTER CO. ET AL. C. A. 4th Cir. Motions of Blatt & Fales, Henderson & Goldberg, P. C.,

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ants, only the conclusion that petitioner was entitled to damages from them. Finally, the Fifth Circuit considered the claims against state trial judge Melvin Duran. Judges are clearly entitled to absolute immunity from § 1983 suits involving actions taken in their judicial capacity. Petitioner had sued Judge Duran only because he exercised his judicial discretion in a case properly before his court.

Association of Trial Lawyers of America, and Asbestos Victims of America for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 764 F. 2d 224.

No. 85-364. DEPARTMENT OF SOCIAL SERVICES OF RUSK COUNTY ET AL. *v.* J. C. Ct. App. Wis. Motion of National Association of Counsel for Children for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 124 Wis. 2d 776, 370 N. W. 2d 293.

No. 85-366. KING *v.* LOVE. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 766 F. 2d 962.

No. 85-388. DILLON *v.* POTOMAC HOSPITAL CORP. Sup. Ct. Va. Motion of Virginia Brown et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 229 Va. 355, 329 S. E. 2d 41.

No. 85-463. MEYERS INDUSTRIES, INC. *v.* PRILL ET AL. C. A. D. C. Cir. Motion of petitioner for leave to intervene denied. Certiorari denied. Reported below: 244 U. S. App. D. C. 42, 755 F. 2d 941.

No. 85-482. FIRESTONE TIRE & RUBBER CO. *v.* COUSINEAU, PERSONAL REPRESENTATIVE OF THE ESTATE OF COUSINEAU, ET AL. Ct. App. Mich. Motion of National Association of Manufacturers for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 140 Mich. App. 19, 363 N. W. 2d 721.

No. 85-607. BURCHE *v.* CATERPILLAR TRACTOR CO. C. A. 7th Cir. Motion of respondent to strike purported revision of the petition denied. Certiorari denied.

No. 85-5046. ADAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 759 F. 2d 1099.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

This case presents the issue of the agreement necessary to support a conviction for so-called RICO conspiracy. For his part in a large-scale narcotics distribution scheme, petitioner Adams was convicted of both the substantive RICO offense defined by 18

U. S. C. § 1962(c)* and conspiracy to commit this offense. Petitioner requested a jury instruction that he could not be found guilty on the conspiracy count unless the evidence showed that he had personally agreed to commit two acts of racketeering activity. The District Judge refused this instruction. In affirming petitioner's RICO conspiracy conviction, the United States Court of Appeals for the Third Circuit held that, to be convicted of conspiracy to violate § 1962(c), a defendant need only agree to the commission of two predicate acts of racketeering activity, and need not agree to personally commit those acts. 759 F. 2d 1099, 1116 (1985).

The Courts of Appeals disagree as to the proper interpretation of 18 U. S. C. § 1962(d), the RICO conspiracy statute. Some require, as the predicate for conviction under § 1962(d) of conspiracy to violate § 1962(c), an agreement to personally commit two acts of racketeering activity. See, *e. g.*, *United States* v. *Ruggiero*, 726 F. 2d 913, 921 (CA2), cert. denied *sub nom. Rabito* v. *United States*, 469 U. S. 831 (1984); *United States* v. *Winter*, 663 F. 2d 1120, 1136 (CA1 1981), cert. denied, 460 U. S. 1011 (1983). Other Courts of Appeals agree with the Third Circuit that § 1962(d) also makes unlawful an agreement that another violate § 1962(c) by committing two acts of racketeering activity. See, *e. g.*, *United States* v. *Carter*, 721 F. 2d 1514, 1529–1531 (CA11), cert. denied *sub nom. Morris* v. *United States*, 469 U. S. 819 (1984).

Surprisingly, even the Government's interpretation of the RICO conspiracy statute has not been wholly consistent. In *Winter*, *supra*, the Government conceded that a count under § 1962(d) of conspiracy to violate § 1962(c) requires proof that the defendant "agreed to commit personally two or more predicate crimes constituting a pattern of racketeering activity." 663 F. 2d, at 1136.

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*In writing the Racketeer Influenced and Corrupt Organizations Act, 18 U. S. C. § 1961 *et seq.*, Congress defined three new substantive offenses, 18 U. S. C. §§ 1962(a), (b), (c), and also made it unlawful to conspire to commit these substantive offenses, 18 U. S. C. § 1962(d). Title 18 U. S. C. § 1962(c), the relevant substantive offense in this case, provides:

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

Title 18 U. S. C. § 1961(5) provides that the term "pattern of racketeering activity" requires at least two acts of racketeering activity, a term which in turn is defined at 18 U. S. C. § 1961(1).

In other cases, including this one, the Government has argued for the interpretation of § 1962(d) adopted by the Third Circuit.

"The legislative history [of the RICO statute] clearly demonstrates that [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello* v. *United States*, 464 U. S. 16, 26 (1983). If the Third Circuit's interpretation of § 1962(d) is correct, Congress' intent is being frustrated in those circuits which adhere to the narrower view of RICO conspiracy. If the Third Circuit's interpretation is incorrect, defendants are being exposed to conviction for behavior Congress did not intend to reach under § 1962(d). I would grant certiorari to resolve the conflict among the Courts of Appeals.

No. 85–5141. DEGARMO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 691 S. W. 2d 657.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), six Justices concluded that a capital sentencing scheme that directs and limits the jury's discretion minimizes the risk of arbitrary and freakish imposition of the death penalty and thereby cures the defects that led the Court in *Furman* v. *Georgia*, 408 U. S. 238 (1972), to invalidate capital punishment as unconstitutionally cruel and unusual. I dissented in *Gregg* because I do not believe that the unconstitutionality of capital punishment depends upon the procedures under which the penalty is inflicted. In my view, the constitutional infirmity in the punishment of death is that "it treats 'members of the human race as nonhumans, as objects to be toyed with and discarded'" and is thus "'inconsistent with the fundamental premise of the [Eighth Amendment] that even the vilest criminal remains a human being possessed of common human dignity.'" *Gregg*, *supra*, at 230 (BRENNAN, J., dissenting) (quoting *Furman* v. *Georgia*, *supra*, at 273).

I have adhered to this view that capital punishment is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. I do so again today. But even if I agreed that capital punishment is constitutional if imposed in a rational and nondiscriminatory manner, I remain convinced that the Court deludes itself when it insists that the infliction of the death penalty, as currently administered, is not

arbitrary or capricious under any meaningful definition of those terms. See *Pulley* v. *Harris*, 465 U. S. 37, 59 (1984) (BRENNAN, J., dissenting). This case demonstrates just one way in which capital sentencing schemes have failed to eliminate arbitrariness in the choice of who is put to death.

With the aid of Helen Mejia, Roger DeGarmo kidnaped and murdered a young woman. DeGarmo was subsequently convicted of capital murder and condemned to die by lethal injection. As part of a plea bargain, Mejia—whose participation made her equally subject to prosecution under the capital murder statute—received a sentence of only 10 years' deferred probation. In other words, while the State sought and may soon succeed in putting DeGarmo to death, it did not care to see his accomplice serve even a day in jail for participating in the same offense. This gross disparity in treatment is solely a product of the prosecutor's unfettered discretion to choose who will be put in jeopardy of life and who will not.*

I believe that such a disparity in treatment is alone sufficient grounds to set aside DeGarmo's death sentence as disproportionate under the circumstances. Cf. *Pulley* v. *Harris*, *supra*, at 43; *Solem* v. *Helm*, 463 U. S. 277 (1983). More importantly, however, this disparity in treatment highlights the utter failure of the elaborate sentencing schemes approved by the Court in *Gregg* and its companion cases to meaningfully limit the arbitrary infliction of

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*Although Mejia testified for the State at trial, the prosecutor's decision to let her go free was not needed to obtain DeGarmo's conviction. Mejia's plea and sentence were not entered until over 18 months after DeGarmo's trial. On appeal, DeGarmo alleged that the State had offered this remarkably lenient deal to Mejia *before* his trial to persuade her to testify. DeGarmo argued that the prosecutor's failure to disclose this promise violated his right to have the agreement disclosed to the jury. See *Giglio* v. *United States*, 405 U. S. 150 (1972). The State responded that the agreement to let Mejia off on probation was made after DeGarmo's trial and that, at the time of the trial, Mejia was promised only that she would not be prosecuted for capital murder. Without a hearing and based solely on the record on appeal, the Texas Court of Criminal Appeals accepted the State's version of the facts. Of course, DeGarmo may raise this claim again in federal habeas proceedings, and, if the district judge so orders, may obtain a hearing to show that such was not the case. See 28 U. S. C. § 2254(d). However, in the absence of contrary findings, I accept the conclusions of the state court. Based on these facts, the decision not to seek at least imprisonment for Mejia while seeking the death penalty for DeGarmo is puzzling.

death by the States. When *Gregg* was decided several Members of the Court expressed the belief that channeling juror discretion would minimize the risk that the death penalty "would be imposed on a capriciously selected group of offenders," thereby making it unnecessary to channel discretion at earlier stages in the criminal justice system. See *Gregg*, *supra*, at 199 (opinion of Stewart, POWELL, and STEVENS, JJ.). But discrimination and arbitrariness at an earlier point in the selection process nullify the value of later controls on the jury. The selection process for the imposition of the death penalty does not begin at trial; it begins in the prosecutor's office. His decision whether or not to seek capital punishment is no less important than the jury's. Just like the jury, then, where death is the consequence, the prosecutor's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U. S., at 189.

Instead, the decisions whether to prosecute, what offense to prosecute, whether to plea bargain or not to negotiate at all are made at the unbridled discretion of individual prosecutors. The prosecutor's choices are subject to no standards, no supervision, no controls whatever. There are, of course, benefits associated with granting prosecutors so much discretion, but there are also costs. Some of these costs are simply accepted as part of our criminal justice system. But if the price of prosecutorial independence is the freedom to impose death in an arbitrary, freakish, or discriminatory manner, it is a price the Eighth Amendment will not tolerate. I dissent and would grant the petition in order to vacate the sentence below.

No. 85-5417. EDMONDS *v.* VIRGINIA. Sup. Ct. Va.;

No. 85-5478. MARTINEZ-VILLAREAL *v.* ARIZONA. Sup. Ct. Ariz.;

No. 85-5486. BOOKER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.; and

No. 85-5548. KENNEDY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 85-5417, 229 Va. 303, 329 S. E. 2d 807; No. 85-5478, 145 Ariz. 441, 702 P. 2d 670; No. 85-5486, 764 F. 2d 1371; No. 85-5548, 472 So. 2d 1106.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153,

227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

NOVEMBER 6, 1985

Dismissal Under Rule 53

No. 85-635. LIBBEY-OWENS-FORD CO. ET AL. *v.* SHATTERPROOF GLASS CORP. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 758 F. 2d 613.

NOVEMBER 8, 1985

Miscellaneous Order

No. A-362. UKRAINIAN-AMERICAN BAR ASSN., INC., ET AL. *v.* SHULTZ, SECRETARY OF STATE, ET AL. Application for injunctive relief, or in the alternative to treat the application as a petition for writ of habeas corpus, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

NOVEMBER 12, 1985

Appeals Dismissed. (See also No. 85-390, *infra.*)

No. 85-485. GIBSON *v.* BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY OF WISCONSIN. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. Reported below: 124 Wis. 2d 466, 369 N. W. 2d 695.

No. 85-497. IN RE MATTER OF N. P. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 361 N. W. 2d 386.

Certiorari Granted—Reversed and Remanded. (See No. 84-1852, *ante*, p. 28.)

Certiorari Granted—Vacated and Remanded

No. 85-5271. FELDER *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Ake* v. *Oklahoma*, 470 U. S. 68 (1985). Reported below: 470 So. 2d 1330.

Miscellaneous Orders

No. ———. BARKER ET AL. *v.* E. I. DU PONT DE NEMOURS & CO., INC., ET AL. Motion to direct the Clerk to file the petition

for writ of certiorari out of time denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. A-301. MAINSAH *v.* IMMIGRATION AND NATURALIZATION SERVICE. Application for stay of deportation, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A-345. IN RE ALEXANDER. Ct. App. D. C. Application for recall and stay of mandate, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. D-506. IN RE DISBARMENT OF DANIELS. Disbarment entered. [For earlier order herein, see 472 U. S. 1024.]

No. D-509. IN RE DISBARMENT OF ALEXANDER. It is ordered that Harry Toussaint Alexander, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-510. IN RE DISBARMENT OF CODY. Disbarment entered. [For earlier order herein, see 473 U. S. 930.]

No. D-514. IN RE DISBARMENT OF LEBOVITZ. Disbarment entered. [For earlier order herein, see 473 U. S. 931.]

No. D-517. IN RE DISBARMENT OF SABISTON. It having been reported to the Court that William Devine Sabiston, Jr., has died, the rule to show cause, heretofore issued on September 18, 1985 [473 U. S. 931], is hereby discharged.

No. 84-1279. DELAWARE *v.* VAN ARSDALL. Sup. Ct. Del. [Certiorari granted, 473 U. S. 923.] Motion of respondent for divided argument denied.

No. 84-2030. BROWN-FORMAN DISTILLERS CORP. *v.* NEW YORK STATE LIQUOR AUTHORITY. Ct. App. N. Y. [Probable jurisdiction noted, *ante*, p. 814.] Motion of appellant to dispense with printing the joint appendix denied. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 84-6270. GREEN ET AL. *v.* MANSOUR, DIRECTOR, MICHIGAN DEPARTMENT OF SOCIAL SERVICES. C. A. 6th Cir. [Certiorari granted, 471 U. S. 1003.] Motion of petitioners for leave to file a supplemental brief after argument granted.

No. 85-195. ICICLE SEAFOODS, INC. *v.* WORTHINGTON ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 900.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 85-246. UNITED STATES *v.* DION. C. A. 8th Cir. [Certiorari granted, *ante*, p. 900.] Motion for appointment of counsel granted, and it is ordered that Terry L. Pechota, Esquire, of Rapid City, S. D., be appointed to serve as counsel for respondent in this case.

No. 85-441. ROBERTS, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK *v.* BURLINGTON INDUSTRIES, INC.; and

No. 85-460. GILBERT ET AL. *v.* BURLINGTON INDUSTRIES, INC. Appeals from C. A. 2d Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 85-5434. IN RE SMITH-BEY; and

No. 85-5443. IN RE JACKSON. Petitions for writs of mandamus denied.

Probable Jurisdiction Postponed

No. 85-488. OHIO CIVIL RIGHTS COMMISSION ET AL. *v.* DAYTON CHRISTIAN SCHOOLS, INC., ET AL. Appeal from C. A. 6th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 766 F. 2d 932.

Certiorari Granted

No. 85-434. UNITED STATES *v.* JAMES ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 760 F. 2d 590.

No. 85-437. ARCARA, DISTRICT ATTORNEY OF ERIE COUNTY *v.* CLOUD BOOKS, INC., DBA VILLAGE BOOK & NEWS STORE, ET AL. Ct. App. N. Y. Certiorari granted. Reported below: 65 N. Y. 2d 324, 480 N. E. 2d 1089.

No. 85-519. RANDALL ET AL. *v.* LOFTSGAARDEN ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 768 F. 2d 949.

No. 85-93. BAZEMORE ET AL. *v.* FRIDAY ET AL.; and

No. 85-428. UNITED STATES ET AL. *v.* FRIDAY ET AL. C. A. 4th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 751 F. 2d 662.

No. 85-390. CITY OF LOS ANGELES ET AL. *v.* PREFERRED COMMUNICATIONS, INC. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari granted. Reported below: 754 F. 2d 1396.

No. 85-5404. ALLEN *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 107 Ill. 2d 91, 481 N. E. 2d 690.

Certiorari Denied

No. 84-1992. GREEN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 465 So. 2d 999.

No. 84-6701. MCGAHARAN *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied.

No. 84-6736. GOUDLOCK *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 865.

No. 84-6881. BEANS *v.* BLACK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 757 F. 2d 933.

No. 84-6905. SHABAZZ *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84-6914. SIMONS *v.* MONTGOMERY COUNTY DEPARTMENT OF PAROLE AND PROBATIONS. C. A. 4th Cir. Certiorari denied. Reported below: 765 F. 2d 139.

No. 84-6940. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 1528.

No. 84-6959. MONTGOMERY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 19.

No. 84-6986. OCHOA *v.* LENNON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 1345.

No. 85-144. MOSS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 758 F. 2d 211.

No. 85-300. EVANS *v.* UNITED STATES DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 180.

No. 85–318. EL SHAHAWY *v.* ELLIOTT. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 696.

No. 85–358. KENNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1077.

No. 85–423. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 763 F. 2d 897.

No. 85–425. REYNOLDS *v.* FLORIDA. Cir. Ct. Fla., Escambia County. Certiorari denied.

No. 85–442. ECKELS, COUNTY COMMISSIONER, HARRIS COUNTY, TEXAS *v.* GREATER HOUSTON CHAPTER OF THE AMERICAN CIVIL LIBERTIES UNION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 426 and 763 F. 2d 180.

No. 85–447. MAX DAETWYLER CORP. *v.* MEYER. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 290.

No. 85–462. MULLEN *v.* SKINNER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 999.

No. 85–467. ILLINOIS PRO-LIFE COALITION, INC., III *v.* KEITH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 764 F. 2d 1265.

No. 85–468. BOARDMAN ET AL. *v.* UNITED SERVICES AUTOMOBILE ASSN. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 2d 718.

No. 85–470. CORTEZ ET UX., INDIVIDUALLY AND DBA CORTEZ AGENCY *v.* UNAUTHORIZED PRACTICE COMMITTEE, STATE BAR OF TEXAS. Sup. Ct. Tex. Certiorari denied. Reported below: 692 S. W. 2d 47.

No. 85–475. MINTZ *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 85–476. BLANKFIELD *v.* TEXAS STATE BOARD OF DENTAL EXAMINERS. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 85–477. PHILADELPHIA ELECTRIC CO. *v.* HERCULES INC. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 303.

No. 85-478. PAR PHARMACEUTICAL, INC. *v.* MERCK & CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1072.

No. 85-481. STANLEY *v.* AUBERT ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85-510. SIMMONS ET AL. *v.* CAMDEN COUNTY BOARD OF EDUCATION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 1187.

No. 85-536. MIR *v.* FOSBURG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 933.

No. 85-557. SIERRA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85-563. SHEFFIELD *v.* NORTH CAROLINA STATE BAR. Ct. App. N. C. Certiorari denied. Reported below: 73 N. C. App. 349, 326 S. E. 2d 320.

No. 85-577. HAAS *v.* WEINER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 765 F. 2d 123.

No. 85-595. DELLA PORTA *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 182.

No. 85-597. TYPHOON CAR WASH, INC. *v.* MOBIL OIL CORP. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 770 F. 2d 1085.

No. 85-605. VILLANO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-620. HELMINSKI, ET AL., AS NEXT FRIENDS OF HELMINSKI *v.* AYERST LABORATORIES. C. A. 6th Cir. Certiorari denied. Reported below: 766 F. 2d 208.

No. 85-643. MUHAMMAD, AKA JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 763 F. 2d 518.

No. 85-5086. POWELL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 485 A. 2d 596.

No. 85-5105. HUDSON *v.* MORAN, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 1027.

No. 85–5117. BROWN *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85–5131. PRESSLEY *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 469 So. 2d 908.

No. 85–5133. SAILOR *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 65 N. Y. 2d 224, 480 N. E. 2d 701.

No. 85–5140. PITTS *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 753 F. 2d 689.

No. 85–5167. HEMPHILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 922.

No. 85–5185. TAYLOR *v.* BEST ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 220.

No. 85–5230. HELLER *v.* BOYD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 1022.

No. 85–5237. CORNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 922.

No. 85–5408. DISE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 763 F. 2d 586.

No. 85–5421. LOWE *v.* COX COMMUNICATIONS, INC. Ct. App. Ga. Certiorari denied. Reported below: 173 Ga. App. 812, 328 S. E. 2d 384.

No. 85–5425. PITTMAN *v.* BLACK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 764 F. 2d 545.

No. 85–5428. PRESTON *v.* TEXAS. Ct. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 675 S. W. 2d 598.

No. 85–5433. SANCHEZ *v.* ROTH ET AL. C. A. 9th Cir. Certiorari denied.

No. 85–5436. IN RE STURM. Sup. Ct. Cal. Certiorari denied.

No. 85–5444. LEWINGDON ET AL. *v.* OHIO ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 85–5457. FORSYTH *v.* LARSEN, ACTING WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 911.

No. 85-5461. BRAY *v.* DODGE COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-5463. WESER *v.* SAFFELS, JUDGE, UNITED STATES DISTRICT COURT, DISTRICT OF KANSAS. C. A. 10th Cir. Certiorari denied.

No. 85-5469. MOORE *v.* RICE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 912.

No. 85-5480. WOLD *v.* LERNER. C. A. 7th Cir. Certiorari denied.

No. 85-5492. GAY *v.* HENRY, PROTHONOTARY, SUPERIOR COURT OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-5499. BROWN *v.* BELZ. C. A. 11th Cir. Certiorari denied.

No. 85-5501. DARUD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 85-5526. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 915.

No. 85-5558. GOODPASTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 769 F. 2d 374.

No. 85-5559. CALHOUN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 18 Ohio St. 3d 373, 481 N. E. 2d 624.

No. 85-5574. WICKHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 162.

No. 85-5575. VIGNE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 85-5579. MITCHELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 765 F. 2d 130.

No. 85-5580. PELLETIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 171.

No. 85-5586. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1083.

No. 85-5621. DIMAGGIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 2d 902.

No. 85-5622. HUTCHINGS VON LUDWITZ *v.* UNITED STATES PAROLE COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 84-6838. BARRETT *v.* UNITED STATES CUSTOMS SERVICE ET AL. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* granted, and order entered October 7, 1985 [*ante*, p. 812], denying leave to proceed *in forma pauperis* vacated. Certiorari denied. Reported below: 753 F. 2d 1074.

No. 85-8. MCCOMMON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 467 So. 2d 940.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

It is well recognized that the Fourth Amendment "imposes substantive standards for searches and seizures; but with them one of the important safeguards it establishes is a procedure; and [that] central to this procedure is an independent control over the actions of officers effecting searches of private premises." *Abel* v. *United States*, 362 U. S. 217, 251-252 (1960) (BRENNAN, J., dissenting). Thus this Court has long insisted that the determination whether probable cause exists to support a search warrant be made by "a *neutral* and *detached* magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948) (emphasis added). See also *United States* v. *Leon*, 468 U. S. 897, 913-914 (1984); *Illinois* v. *Gates*, 462 U. S. 213, 240 (1983); *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319, 326-327 (1979); *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977); *Shadwick* v. *City of Tampa*, 407 U. S. 345, 350 (1972); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 450 (1971); *Aguilar* v. *Texas*, 378 U. S. 108, 111 (1964); *Giordenello* v. *United States*, 357 U. S. 480, 486 (1958), *United States* v. *Lefkowitz*, 285 U. S. 452, 464 (1932). Just two Terms ago in *United States* v. *Leon*, *supra*, the Court vigorously reaffirmed that the probable-cause decision must be made by a neutral and detached magistrate, stating that "the courts must . . . insist that the magistrate purport to 'perform his "neutral and detached" function and not serve merely as a rubber stamp for the police.'" *Id.*, at 914 (quoting *Aguilar* v. *Texas*, *supra*, at 111). And, as we explained in *Shadwick* v. *City of Tampa*, *supra*, at 350, "[w]hatever else neutrality and detach-

ment might entail, it is clear that they require severance and disengagement from activities of law enforcement." Today the Court refuses to act on its convictions, denying certiorari in a case in which the judge who issued the search warrant indisputably "rubber-stamped" the police request.

In this case, a large quantity of marijuana was discovered in the trunk of petitioner's automobile when it was searched pursuant to a warrant. Petitioner challenged the validity of the warrant at a pretrial suppression hearing, arguing that it was not supported by probable cause. The judge who granted the warrant testified at the hearing. With remarkable candor, he explained that he had relied principally on the fact that *police officers* had asked for the warrant, rather than on the underlying facts and circumstances set forth in the affidavit. The pertinent portion of the judge's testimony on cross-examination follows:

> "Q. You would have issued [the search warrant even if a certain statement in the affidavit either had not been included or the judge had known it not to be true]?
> "A. Certainly, because the officer—you've got to have enough faith and confidence in the officer that's asking for the search warrant to warrant it for him and then it is proves it's invalid, well, or whatever, there's nothing there what they're hunting—that's not the first time I ever made a Search Warrant.
> "Q. So, you were relying on the fact that these officers were of the law—
> "A. Of the law sworn—
> "Q. —and they were in there—they were sworn officers—
> "A. That's right.
> "Q. —they were in there telling you that this fellow was a drug dealer and they wanted to search his car—
> "A. That's exactly right.
> "Q. —and you relied on that rather than any particulars of this thing?
> "A. That's right.
>
> . . . . .
>
> "Q. So, you really issued the Search Warrant because you were asked for it by two sworn officers of law rather than any particular thing they told you?
> "A. Well, I based my decision not primarily on that, but because—if Sheriff Jones walked in there and said, 'Judge,

I need a Search Warrant to search John Doe for Marijuana,' drugs or whatever—liquor or whatever it might be, I'm going to go on his word because he's—I take him to be an honest law enforcement officer and he needs help to get in to search these places and it's my duty to help him to fulfill that.

"Q. Okay. And it's really based on the request other than any particular thing he might tell you?

"A. That's right. That's right.

"Q. And that's what the situation was here?

"A. Well, if I didn't feel like it was warranted, now, then, naturally, I wouldn't issue it.

"Q. Okay, but . . . the swaying fact was that this was two sworn officers of the law rather than anything they told you in these Underlying Facts and Circumstances?

"A. That's right. They were officers of the Narcotics."

The trial court rejected petitioner's arguments and admitted the evidence. The Mississippi Supreme Court affirmed petitioner's conviction, holding both that the warrant was supported by probable cause and that the conduct of the judge who signed the warrant, although not a model of judicial deportment, had satisfied the constitutional requirements of detachment and neutrality. 467 So. 2d 940 (1985).

The respondent argues before this Court that even if the judge failed to evaluate the request for the warrant in a neutral and detached fashion, the warrant was nonetheless valid because it was, in fact, supported by probable cause.* This attempt to evade review of the judge's lack of independence should not succeed. In

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*Relying on *Carroll* v. *United States*, 267 U. S. 132 (1925), *Chambers* v. *Maroney*, 399 U. S. 42 (1970), and *Texas* v. *White*, 423 U. S. 67 (1975), respondent also argues that the instant case involves an automobile search that is supported by probable cause and thus no search warrant was required. Apart from my view that automobile searches presenting no exigent circumstances should be fully subject to the Fourth Amendment's warrant requirement, see, *e. g.*, *United States* v. *Johns*, 469 U. S. 478, 488–489 (1985) (BRENNAN, J., joined by MARSHALL, J., dissenting); *United States* v. *Ross*, 456 U. S. 798, 836–837 (1982) (MARSHALL, J., joined by BRENNAN, J., dissenting); *South Dakota* v. *Opperman*, 428 U. S. 364, 384 (1976) (MARSHALL, J., joined by BRENNAN and Stewart, JJ., dissenting), respondent may not be heard to make this argument since it appears that it was not advanced below, see, *e. g.*, *Illinois* v. *Gates*, 462 U. S. 213, 221–224 (1983).

Coolidge v. *New Hampshire*, 403 U. S., at 450–451, we firmly rejected the argument that "the existence of probable cause renders noncompliance with the warrant procedure an irrelevance." Indeed, in *Coolidge* the Court declared that because the warrant was not issued by "the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all." *Id.*, at 453.

As the transcript of the suppression hearing clearly demonstrates, the judge who issued the warrant to search petitioner's automobile, although formally separate from law enforcement officials, viewed himself as a facilitator of police investigations and simply acquiesced in police requests, without giving serious and independent consideration to the facts set forth in supporting affidavits. The Court's failure to grant certiorari in this case suggests that our admonitions that probable cause must be determined by a neutral and detached magistrate are hollow pronouncements.

I find the Court's refusal to take this case particularly disturbing in light of the good-faith exception to the Fourth Amendment exclusionary rule created by *United States* v. *Leon*, 468 U. S. 897 (1984). In *Leon*, the Court held that physical evidence seized by police officers reasonably relying upon a warrant issued by a detached and neutral magistrate is admissible in the prosecution's case-in-chief, even though a reviewing court has subsequently determined that the warrant was defective or that the officers failed to demonstrate when applying for the warrant that there was probable cause to conduct the search. The Court justified its holding to a large extent on the special protective role that a neutral and detached magistrate plays in safeguarding the Fourth Amendment right against unreasonable searches and seizures, *id.*, at 913–917. In fact, the Court indicated that suppression of evidence is appropriate where "the magistrate [has] abandoned his detached and neutral role," *id.*, at 926. In my dissent, I warned that creation of a good-faith exception implicitly tells magistrates that they need not take much care in reviewing warrant applications, since their mistakes will have virtually no consequence, *id.*, at 956. Today the Court tacitly informs magistrates that not only need they not worry about mistakes, they also need no longer be neutral and detached in their review of supporting affidavits. The combined message of *Leon* and the Court's refusal to grant certiorari in this case is that the

police may rely on the magistrates and the magistrates may rely on the police. On whom may citizens rely to protect their Fourth Amendment rights?

I would grant certiorari and summarily reverse, or at least set the case for oral argument.

No. 85-35. GREBER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 68.

JUSTICE WHITE, dissenting.

Petitioner Greber was convicted in United States District Court on several counts of making false statements "in any matter within the jurisdiction of any department or agency of the United States." See 18 U. S. C. § 1001. In connection with these convictions, the District Court refused to submit the question of the materiality of Greber's statements to the jury, holding that materiality was a question of law to be decided by the court. The United States Court of Appeals for the Third Circuit affirmed the convictions and upheld the District Court's determination that materiality was a question of law. See 760 F. 2d 68, 72-73 (1985). Other Circuits have also concluded that materiality is a question of law. See, *e. g.*, *Nilson Van & Storage Co.* v. *Marsh*, 755 F. 2d 362, 367 (CA4), cert. denied, *ante*, p. 818; *United States* v. *Abadi*, 706 F. 2d 178, 180 (CA6), cert. denied, 464 U. S. 821 (1983). Two Circuits, however, have held that materiality under § 1001 is a question of fact and should thus be submitted to the jury. See *United States* v. *Irwin*, 654 F. 2d 671, 677, n. 8 (CA10 1981); *United States* v. *Valdez*, 594 F. 2d 725, 729 (CA9 1979). I would grant certiorari to resolve this conflict.

No. 85-46. ROEDER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 688 S. W. 2d 856.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the judgment below so that the court below can determine the sentence, other than death, that may be appropriate.

No. 85-58. MORAN, AS FATHER TO HIS MINOR SON, MORAN, ET AL. *v.* PIMA COUNTY ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 145 Ariz. 183, 700 P. 2d 881.

JUSTICE WHITE, dissenting.

Petitioner Moran filed this suit in Pima County Superior Court against respondents Pima County, Arizona, and various of its law enforcement officials. In his complaint, Moran alleged unlawful arrest, detention, and excessive use of force and sought relief under 42 U. S. C. § 1981 and § 1983. The case was tried to a jury, and the jury awarded Moran $500 in damages. The Superior Court summarily denied Moran's motion for attorney's fees under 42 U. S. C. § 1988. The Arizona Court of Appeals affirmed this denial, concluding in part that the "moral victory" that the verdict represented was not sufficient to warrant an award of attorney's fees under § 1988. See 145 Ariz. 183, 184, 700 P. 2d 881, 882 (1985). The Supreme Court of Arizona denied review.

The Arizona Court of Appeals' decision in this case is in accord with Circuit decisions that have held that a plaintiff receiving only nominal damages is not truly prevailing and is therefore not entitled to attorney's fees. See, *e. g.*, *Fast* v. *School Dist. of City of Ladue*, 712 F. 2d 379, 380 (CA8 1983); *Huntley* v. *Community School Board of Brooklyn*, 579 F. 2d 738, 742 (CA2 1978). This conclusion, however, has been rejected by other Circuits. See *Skoda* v. *Fontani*, 646 F. 2d 1193, 1194 (CA7 1981) *(per curiam)*; *Burt* v. *Abel*, 585 F. 2d 613, 617–618 (CA4 1978). I would grant certiorari to resolve this conflict.

No. 85-100. MICHIGAN *v.* BLACKBURN. Ct. App. Mich. Certiorari denied. THE CHIEF JUSTICE and JUSTICE WHITE would grant certiorari. Reported below: 135 Mich. App. 509, 354 N. W. 2d 807.

No. 85-5443. WHITLEY *v.* BAIR, WARDEN. Sup. Ct. Va. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 84-6799. CARRIGAN *v.* LASHLEY, *ante*, p. 834;

No. 84-6806. GORMONG *v.* LOCAL 613, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL., *ante*, p. 834;

No. 84-6824. SPAN *v.* DELAINE, *ante*, p. 835;

No. 84-6889. OWENS *v.* FREEMAN, SUPERINTENDENT, PENNSYLVANIA CORRECTIONAL INSTITUTION AT CAMP HILL, ET AL., *ante*, p. 838;

No. 84-6954. CAMPBELL *v.* OHIO DEPARTMENT OF JUSTICE ET AL., *ante*, p. 840;

No. 84-7007. BROWN *v.* UNITED STATES, *ante*, p. 842;

No. 85-5003. IN RE WHALEY, *ante*, p. 814;

No. 85-5144. OWENS *v.* UNITED STATES, *ante*, p. 857;

No. 85-5202. BROWN *v.* ZANT, *ante*, p. 860;

No. 85-5211. KELLEY *v.* UNITED STATES, *ante*, p. 860;

No. 85-5220. PINKERTON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 865;

No. 85-5245. FOSTER *v.* SMITH ET AL., *ante*, p. 861; and

No. 85-5268. DISILVESTRO *v.* UNITED STATES, *ante*, p. 862. Petitions for rehearing denied.

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Appeals Dismissed

No. 85-216. ROA ET AL., INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR ROA *v.* LODI MEDICAL GROUP, INC., ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 37 Cal. 3d 920, 695 P. 2d 164.

No. 85-342. PAINTER *v.* ALASKA. Appeal from Ct. App. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 695 P. 2d 241.

No. 85-5529. PRENZLER *v.* DEAN FORWARDING CO., INC. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-5531. MEYER *v.* OREGON. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon

the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 73 Ore. App. 344, 698 P. 2d 1054.

No. 85-522. ALLIED BOND & COLLECTION AGENCY *v.* MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. JUSTICE POWELL and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 394 Mass. 608, 476 N. E. 2d 955.

Certiorari Granted—Vacated and Remanded

No. 85-5113. MINOR *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Dowling* v. *United States*, 473 U. S. 207 (1985). Reported below: 756 F. 2d 731.

Miscellaneous Orders

No. A-323 (84-1244). DAVIS ET AL. *v.* BANDEMER ET AL. D. C. S. D. Ind. [Probable jurisdiction noted, 470 U. S. 1083.] Appellants having reapplied for a stay in this case pending its final resolution in this Court and it appearing that all of the requirements for the issuance of a stay are satisfied, the application is granted and it is ordered that the judgment of the District Court for the Southern District of Indiana is stayed until further order of the Court.

No. A-355. CHEESEMAN ET AL. *v.* UNITED STATES. Application to vacate a stay entered by the United States Court of Appeals for the Second Circuit, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D-504. IN RE DISBARMENT OF HOWARD. Disbarment entered. [For earlier order herein, see 472 U. S. 1024.]

No. D-515. IN RE DISBARMENT OF KANTER. Disbarment entered. [For earlier order herein, see 473 U. S. 931.]

No. D-516. IN RE DISBARMENT OF MCKABA. Disbarment entered. [For earlier order herein, see 473 U. S. 931.]

No. D-531. IN RE DISBARMENT OF CAMACHO. It is ordered that Francisco M. Camacho, of Mukwonago, Wis., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-532. IN RE DISBARMENT OF HEFNER. It is ordered that Stephen Frank Hefner, of Sherman, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84-1744. HENDERSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 900.] Motion of petitioner Ruth Freedman for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Alex Reisman, Esquire, of San Francisco, Cal., be appointed to serve as counsel for petitioner Ruth Freedman in this case.

No. 84-1922. UNITED STATES *v.* KOECHER. C. A. 2d Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 85-54. LIBRARY OF CONGRESS ET AL. *v.* SHAW. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 85-289. UNITED STATES DEPARTMENT OF TRANSPORTATION ET AL. *v.* PARALYZED VETERANS OF AMERICA ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 918.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 84-1993. HYDE *v.* VAN WORMER ET AL., *ante*, p. 827. Motion of federal respondents for award of damages granted, and damages awarded to federal respondents only in the amount of $500 pursuant to this Court's Rule 49.2. Motion of respondents Inland Steel Co. et al. for award of damages granted, and damages in the amount of $500 awarded pursuant to this Court's Rule 49.2. Request of Inland Steel Co. et al. for award of double costs pursuant to Rule 50.7 denied. Motion of petitioner for award of costs and fees denied. JUSTICE BLACKMUN dissents from the awards of damages.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting from award of damages.

Supreme Court Rule 49.2 states that "[w]hen an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages." The Rule sets

no standards for determining when a petition for certiorari is "frivolous," or the amount of damages which may be "appropriate." Absent such criteria, I believe that any award of damages imposed by the Court can only be arbitrary. In this case, the Court has decided to award respondents $500 apiece in damages. It makes no effort to justify this award, or to explain how it arrived at the $500 figure. For these reasons, I dissent from the award of damages.

No. 85-552. SAKAMOTO ET AL. *v.* DUTY FREE SHOPPERS, LTD., ET AL. C. A. 9th Cir.; and

No. 85-616. SHARON STEEL CORP. *v.* CITY OF FAIRMONT, WEST VIRGINIA, ET AL. Appeal from Sup. Ct. App. W. Va. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 85-556. KEMP, WARDEN *v.* DRAKE. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 85-5487. SMITH *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. [Certiorari granted, *ante*, p. 918.] Motion for appointment of counsel granted, and it is ordered that J. Lloyd Snook III, Esquire, of Charlottesville, Va., be appointed to serve as counsel for petitioner in this case.

No. 85-5563. FONDEL *v.* FORD MOTOR CO. ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 9, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85-525. IN RE FRYAR; and

No. 85-5504. IN RE SCHMID. Petitions for writs of madamus denied.

Probable Jurisdiction Noted

No. 85-250. BLOCK, SECRETARY OF AGRICULTURE *v.* CASTILLO ET AL. Appeal from D. C. S. D. Tex. Probable jurisdiction noted.

Certiorari Granted

No. 85-546. UNITED STATES *v.* MOTTAZ. C. A. 8th Cir. Certiorari granted. Reported below: 753 F. 2d 71.

Certiorari Denied. (See also Nos. 85-342, 85-5529, and 85-5531, *supra.*)

No. 84-1894. SADE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84-6721. JOHNSON ET AL. *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 84-6817. LEHMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 725.

No. 84-6919. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 570.

No. 85-34. CAUBLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 2d 282.

No. 85-51. RANDLES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 147.

No. 85-69. MILBURN ET AL. *v.* UNITED STATES; and
No. 85-5232. MILBURN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 759 F. 2d 1316.

No. 85-136. MULVEY *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 259.

No. 85-157. JACKSON, AKA ROE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 757 F. 2d 1486.

No. 85-164. WASHINGTON ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 759 F. 2d 1353.

No. 85-206. PASCARELLA *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 85-316. OWEN *v.* JUDGE OF THE COUNTY COURT, SCHENECTADY COUNTY, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 65 N. Y. 2d 658, 481 N. E. 2d 243.

No. 85-361. BYKOFSKY *v.* HESS ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 65 N. Y. 2d 730, 481 N. E. 2d 569.

No. 85-507. COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY *v.* LOS ANGELES COUNTY EMPLOYEES ASSN., LOCAL 660, ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 38 Cal. 3d 564, 699 P. 2d 835.

No. 85-517. MILLER ET AL. *v.* CITY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 755 F. 2d 1390.

No. 85-523. ARANGO ET AL. *v.* COMPANIA DOMINICANA DE AVIACION. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 1527.

No. 85-524. TUDOR *v.* GLAESMAN ET UX. Ct. App. Kan. Certiorari denied. Reported below: 10 Kan. App. 2d xxxviii.

No. 85-533. SILENT HOIST & CRANE CO., INC. *v.* DIRECTOR, DIVISION OF TAXATION. Sup. Ct. N. J. Certiorari denied. Reported below: 100 N. J. 1, 494 A. 2d 775.

No. 85-540. COLE ET AL. *v.* MCEVERS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 925.

No. 85-544. SUBURBAN FORD, INC., ET AL. *v.* FORD MOTOR CREDIT CO. Sup. Ct. Kan. Certiorari denied. Reported below: 237 Kan. 195, 699 P. 2d 992.

No. 85-545. WYRICK, WARDEN, ET AL. *v.* PARTON. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 336.

No. 85-548. AHO *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 166 Cal. App. 3d 984, 212 Cal. Rptr. 686.

No. 85-566. ANDERSEN ET AL. *v.* CIBA-GEIGY CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 759 F. 2d 1518.

No. 85-575. BARA ET AL. *v.* AURORA CIVIL SERVICE COMMISSION OF THE CITY OF AURORA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1166.

No. 85-578. ROYCE INTERNATIONAL BROADCASTING CO. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 44, 762 F. 2d 138.

No. 85-651. LEPMAN *v.* NEW JERSEY RACING COMMISSION. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85-676. BOCK *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 253.

No. 85-679. WENDOLKOWSKI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 765 F. 2d 253.

No. 85-5048. CHILDRESS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 929.

No. 85-5091. MASIELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 909.

No. 85-5115. JORDAN *v.* UNITED STATES DEPARTMENT OF STATE. C. A. D. C. Cir. Certiorari denied. Reported below: 245 U. S. App. D. C. 234, 759 F. 2d 960.

No. 85-5154. GOODLATAW, PERSONAL REPRESENTATIVE FOR THE ESTATE OF GOODLATAW *v.* ALASKA ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 698 P. 2d 1190.

No. 85-5216. SMITH *v.* MASCHNER, DIRECTOR, KANSAS STATE PENITENTIARY. Sup. Ct. Kan. Certiorari denied. Reported below: 237 Kan. 365, 699 P. 2d 521.

No. 85-5286. DANIELS *v.* PAPASAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 2d 171.

No. 85-5288. QUAN YOUNG ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 450.

No. 85-5299. CROOKS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 766 F. 2d 7.

No. 85-5418. ELMORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 935.

No. 85-5471. HOWELL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 62 Md. App. 278, 489 A. 2d 55.

No. 85-5489. SEARCY *v.* GREER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 906.

No. 85-5494. THORNE *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 333 S. E. 2d 817.

No. 85-5495. McGLORY *v.* YOKA. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85-5497. ABBITT *v.* SAIED, JUDGE, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-5498. HUNTER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 106 Ill. 2d 557.

No. 85-5508. HADDIX *v.* OHIO LIQUOR CONTROL COMMISSION. Sup. Ct. Ohio. Certiorari denied.

No. 85-5510. BURTON *v.* WILSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 2d 273.

No. 85-5511. BURTON *v.* SMITH. C. A. 8th Cir. Certiorari denied.

No. 85-5514. CUNNINGHAM *v.* SHAFER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1169.

No. 85-5518. FLEMING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 85-5519. GLICK *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 769 F. 2d 471.

No. 85-5521. JEFFERSON *v.* MUNCY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 912.

No. 85-5528. ZIMMERMAN *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-5556. IN RE BURNLEY. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 1154.

No. 85-5569. TUBBS *v.* McCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85-5577. ROTHSCHILD *v.* UNITED STATES SUPREME COURT ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-5578. MARSH *v.* OREGON. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 912.

No. 85-5581. KOLMAN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1049.

No. 85-5587. JEMMOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 914.

No. 85-5588. MAYS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1295.

No. 85-5596. ANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85-5598. HAKIM *v.* WOLVERINE PACKING CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 145.

No. 85-5604. CLARK *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 286 S. C. 432, 334 S. E. 2d 121.

No. 85-5631. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 925.

No. 85-5632. CARTER *v.* SPANIOL, CLERK OF THE UNITED STATES SUPREME COURT. C. A. D. C. Cir. Certiorari denied.

No. 85-5639. GRANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 909.

No. 85-5644. POLI *v.* MAZURKIEWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW. C. A. 3d Cir. Certiorari denied.

No. 84-6843. SPAULDING *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari.

No. 85-56. CONNOR *v.* UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS. C. A. Fed. Cir. Motion of petitioner to strike brief in opposition denied. Certiorari denied. Reported below: 765 F. 2d 160.

No. 85-188. KEMP, WARDEN *v.* BLAKE. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 523.

JUSTICE WHITE, dissenting.

This case presents the question of whether, in a habeas corpus proceeding presenting multiple claims for relief, an appellate court has jurisdiction to review an order of the district court without disposing of all of petitioner's claims. In his habeas petition to

the District Court, respondent presented 59 constitutional claims. The District Court found that three of these claims had merit and granted the writ, but expressly refused to rule on the remaining claims. *Blake* v. *Zant*, 513 F. Supp. 772 (SD Ga. 1981). On appeal, the Eleventh Circuit originally held that, because the District Court's order did not finally determine all of the claims presented in the habeas petition, under Federal Rule of Civil Procedure 54(b),[1] there was no final judgment, and therefore, the court was without jurisdiction to consider the appeal under 28 U. S. C. § 1291.[2] *Blake* v. *Zant*, 737 F. 2d 925, 928 (1984). On *sua sponte* reconsideration, however, the court determined that a district court order granting a writ of habeas corpus is a final judgment within the meaning of § 1291, regardless of the district court's refusal to consider the remainder of petitioner's claims. 758 F. 2d 523, 524–525 (1985).

This later decision of the Eleventh Circuit conflicts with the practice of the Eighth Circuit. That court has held that, when a district court grants habeas relief to a petitioner on some but not all of the claims presented for consideration, the court of appeals does not have jurisdiction to review the trial court's decision unless its order also finally disposes of the remainder of petitioner's claims. *Stewart* v. *Bishop*, 403 F. 2d 674, 679–680 (1968). See also *Gray* v. *Swenson*, 430 F. 2d 9, 11 (CA8 1970) (Rule 54(b) applies to prohibit appeals when fewer than all habeas claims are

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[1] Rule 54(b) provides as follows:

"(b) *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

[2] Section 1291 provides, in pertinent part, as follows:

"The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

finally determined by the district court's order, but finding all claims to have been decided). Given this direct conflict among the Courts of Appeals, I would grant certiorari in this case.

No. 85-242. WEST CENTRAL COOPERATIVE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR would grant certiorari. Reported below: 758 F. 2d 1269.

No. 85-5561. EAST *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 702 S. W. 2d 606.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 84-1924. CITY OF POMPANO BEACH *v.* CAPALBO, *ante*, p. 824;

No. 84-6589. BROFFORD *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, *ante*, p. 872;

No. 84-6947. CLARK *v.* BYRON JACKSON PUMP CO. ET AL., *ante*, p. 840;

No. 84-6975. ALDERMAN *v.* GEORGIA, *ante*, p. 911;

No. 84-6984. LIGHTSEY *v.* OKLAHOMA, *ante*, p. 841;

No. 85-5006. SOMMER *v.* COUNTY OF SUFFOLK ET AL., *ante*, p. 852;

No. 85-5080. SRUBAR ET AL. *v.* DEPARTMENT OF THE TREASURY ET AL., *ante*, p. 855;

No. 85-5083. JOHNSON *v.* NEW YORK STATE COURT OFFICERS ASSN. ET AL., *ante*, p. 855;

No. 85-5089. BAD FOOT *v.* BOLT, SHERIFF, ET AL., *ante*, p. 855;

No. 85-5148. BOWDEN *v.* IDAHO DEPARTMENT OF HEALTH AND WELFARE, *ante*, p. 805;

No. 85-5161. WHITTLESEY *v.* MARYLAND, *ante*, p. 858;

No. 85-5188. IDLEBIRD *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL., *ante*, p. 859; and

No. 85-5206. STREICH *v.* UNITED STATES, *ante*, p. 860. Petitions for rehearing denied.

NOVEMBER 22, 1985

Dismissal Under Rule 53

No. 85-180. AMERICAN AIRLINES, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 743 F. 2d 1114.

NOVEMBER 29, 1985

Dismissal Under Rule 53

No. 84-1832. ROCK *v.* ZINN, JUDGE, SECOND JUDICIAL DISTRICT. Sup. Ct. N. M. Certiorari dismissed under this Court's Rule 53.

DECEMBER 2, 1985

Appeals Dismissed

No. 85-506. ASCANI, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF ASCANI, ET AL. *v.* HUGHES ET AL. Appeal from Ct. App. La., 4th Cir., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 470 So. 2d 207.

No. 85-583. FAHEY *v.* BECKLEY ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-551. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL. *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction.

Certiorari Granted—Vacated and Remanded

No. 84-1815. HOFFMAN *v.* ETI-QUETTE ASSAF LTD. ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sedima, S. P. R. L. v. Imrex Co.*, 473 U. S. 479 (1985). Reported below: 760 F. 2d 253.

No. 85-5496. TUCKER *v.* KEMP, WARDEN. C. A. 11th Cir. Motions of National Legal Aid and Defender Association et al. and Vivian O. Berger et al. for leave to file briefs as *amici curiae*

granted. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). Reported below: 762 F. 2d 1480.

No. 85–5503. ROGERS *v.* OHIO. Sup. Ct. Ohio. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). Reported below: 17 Ohio St. 3d 174, 478 N. E. 2d 984.

Miscellaneous Orders

No. D–511. IN RE DISBARMENT OF STOCK. Disbarment entered. [For earlier order herein, see 473 U. S. 930.]

No. D–533. IN RE DISBARMENT OF EVANS. It is ordered that Levi W. Evans III, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84–773. BENDER ET AL. *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL. C. A. 3d Cir. [Certiorari granted, 469 U. S. 1206.] Motion of respondents for leave to file a supplemental brief after argument granted.

No. 84–871. LOUISIANA PUBLIC SERVICE COMMISSION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Probable jurisdiction postponed, 472 U. S. 1025];

No. 84–889. CALIFORNIA ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Certiorari granted, 472 U. S. 1025];

No. 84–1054. PUBLIC UTILITIES COMMISSION OF OHIO ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Certiorari granted, 472 U. S. 1025]; and

No. 84–1069. FLORIDA PUBLIC SERVICE COMMISSION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. [Certiorari granted, 472 U. S. 1026.] Motion of the Solicitor General for divided argument granted. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 84–902. WARDAIR CANADA INC. *v.* FLORIDA DEPARTMENT OF REVENUE. Sup. Ct. Fla. [Probable jurisdiction noted,

ante, p. 943.] Motion of appellant to dispense with printing the joint appendix granted.

No. 84-6646. TURNER *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. [Certiorari granted, 471 U. S. 1098.] Further consideration of motion of petitioner to strike ex parte affidavit is deferred to the hearing of the case on the merits.

No. 85-202. OFFSHORE LOGISTICS, INC., ET AL. *v.* TALLENTIRE ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 816.] Motion of Sonat Offshore Drilling, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 85-615. CALIFORNIA DEPARTMENT OF TRANSPORTATION *v.* NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., ET AL.; and

No. 85-639. DESERT OUTDOOR ADVERTISING, INC. *v.* NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC. Sup. Ct. Cal. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 85-5189. MCLAUGHLIN *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, *ante*, p. 944.] Motion for appointment of counsel granted, and it is ordered that Stephen J. Cribari, Esquire, of Baltimore, Md., be appointed to serve as counsel for petitioner in this case.

No. 85-5688. JONES *v.* AMERICAN POSTAL WORKERS UNION ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 23, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85-5541. IN RE BETKA. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 85–521. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT ET AL. Appeal from D. C. E. D. Cal. Probable jurisdiction noted. Reported below: 613 F. Supp. 558.

Certiorari Granted

No. 85–298. CONNOLLY *v.* BURT. C. A. 10th Cir. Certiorari granted. Reported below: 757 F. 2d 242.

No. 85–499. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL. *v.* ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 756 F. 2d 1087.

No. 85–554. UNITED STATES *v.* HUGHES PROPERTIES, INC. C. A. Fed. Cir. Certiorari granted. Reported below: 760 F. 2d 1292.

No. 85–588. UNIVERSITY OF TENNESSEE ET AL. *v.* ELLIOTT. C. A. 6th Cir. Certiorari granted. Reported below: 766 F. 2d 982.

No. 85–619. MERRELL DOW PHARMACEUTICALS INC. *v.* THOMPSON ET AL., AS NEXT FRIENDS AND GUARDIANS OF THOMPSON, ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 766 F. 2d 1005.

No. 85–599. UNITED STATES *v.* AMERICAN BAR ENDOWMENT ET AL. C. A. Fed. Cir. Certiorari granted. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 761 F. 2d 1573.

Certiorari Denied. (See also Nos. 85–506 and 85–583, *supra.*)

No. 84–6717. HOLSEY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 302 Md. 130, 486 A. 2d 173.

No. 84–6760. EDWARDS *v.* HARRIS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1007.

No. 84–6841. SPIESS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 758 F. 2d 1201.

No. 84–6892. WILLIAMS, AKA ANTHONY, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 649.

No. 85-47. WHITT, EXECUTOR OF THE ESTATE OF WHITT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 751 F. 2d 1548.

No. 85-109. DEAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85-175. GARWOOD *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 20 M. J. 148.

No. 85-178. DE LE PUENTE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 313.

No. 85-179. CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION *v.* BONNEVILLE POWER ADMINISTRATION. C. A. 9th Cir. Certiorari denied. Reported below: 754 F. 2d 1470.

No. 85-199. DELLINGER, INC., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 760 F. 2d 527.

No. 85-220. BURLINGTON NORTHERN RAILROAD CO. *v.* CHERNER, JUDGE OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 470 So. 2d 1094.

No. 85-241. MCSURELY ET AL. *v.* MCCLELLAN ET AL.; and
No. 85-420. BRICK *v.* MCSURELY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 243 U. S. App. D. C. 270, 753 F. 2d 88.

No. 85-260. MANHATTAN INDUSTRIES, INC. *v.* GOLDSTEIN. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 1435.

No. 85-333. MODINE MANUFACTURING CO. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1073.

No. 85-350. FARLEY *v.* ROBERTS. Ct. App. Tex., 6th Sup. Jud. Dist. Certiorari denied.

No. 85-362. CALIFORNIA STATE LANDS COMMISSION *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 752 F. 2d 393.

No. 85–398. JONES ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 766 F. 2d 994.

No. 85–457. WESTBROOK *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 286 Ark. 192, 691 S. W. 2d 123.

No. 85–490. JOSEPH ET AL. *v.* NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 628.

No. 85–503. SPARROW *v.* HAJIMAHOLIS ET AL. Ct. App. D. C. Certiorari denied.

No. 85–527. FAITH CENTER, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 43, 762 F. 2d 137.

No. 85–571. SIMPLOT ET AL. *v.* STROBL. C. A. 2d Cir. Certiorari denied. Reported below: 768 F. 2d 22.

No. 85–572. RINGSBY TRUCK LINES, INC., ET AL. *v.* TRUCKING EMPLOYERS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 934.

No. 85–579. WARREN *v.* LOCAL 1759, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 1395.

No. 85–585. DISTRICT 2, UNITED MINE WORKERS OF AMERICA, ET AL. *v.* HELEN MINING CO. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 1155.

No. 85–589. HALL ET AL. *v.* SIMCOX ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 766 F. 2d 1171.

No. 85–590. MAZZELLA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 768 F. 2d 235.

No. 85–594. ON-DECK, INC. *v.* ROSTAD ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 372 N. W. 2d 717.

No. 85–600. SLOAN ET AL. *v.* HICKS, TRUSTEE IN BANKRUPTCY OF BECKNELL & CRACE COAL CO., INC., BANKRUPT. C. A. 6th Cir. Certiorari denied. Reported below: 761 F. 2d 319.

No. 85-606. DORAN *v.* TRAVELERS INDEMNITY CO. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1082.

No. 85-610. PIAROWSKI *v.* ILLINOIS COMMUNITY COLLEGE DISTRICT 515, PRAIRIE STATE COLLEGE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 759 F. 2d 625.

No. 85-611. MCQUAY ET AL. *v.* CITY OF JUNCTION CITY, KANSAS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-612. PROGRAM ENGINEERING, INC. *v.* CALIFORNIA JOCKEY CLUB. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 149.

No. 85-617. KULLBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85-618. MILLER ET AL. *v.* HOGG BROTHERS PARTNERSHIP ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 929.

No. 85-624. CARBALAN *v.* VAUGHN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 760 F. 2d 662.

No. 85-627. FRYE *v.* UNITED STEELWORKERS OF AMERICA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 1216.

No. 85-628. BIPPUS ET AL. *v.* LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 165.

No. 85-629. CUNNINGHAM *v.* HOUSING AUTHORITY OF THE CITY OF OPELOUSAS, DBA OPELOUSAS HOUSING AUTHORITY. C. A. 5th Cir. Certiorari denied. Reported below: 764 F. 2d 1097.

No. 85-630. GRIMMER ET AL. *v.* HARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 760 F. 2d 1158.

No. 85-644. NAZARIAN *v.* NAZARIAN. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-647. MANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 915.

No. 85-648. FULLER *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 767 F. 2d 937.

No. 85-649. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL-CIO, LOCAL 1414, ET AL. *v.* WARD. C. A. 11th Cir. Certiorari denied.

No. 85-650. MCCORSTIN *v.* UNITED STATES STEEL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85-661. RUSSELL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 161.

No. 85-662. TEXAS *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 764 F. 2d 278.

No. 85-687. KELLY *v.* WHITING, JUDGE, COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 17 Ohio St. 3d 91, 477 N. E. 2d 1123, and 17 Ohio St. 3d 254, 479 N. E. 2d 254.

No. 85-689. MUTH *v.* SHOWERS. Super. Ct. Pa. Certiorari denied. Reported below: 343 Pa. Super. 628, 494 A. 2d 492.

No. 85-696. HELFRICHT *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85-699. DESANTIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85-707. CITY OF PHILADELPHIA *v.* BOROUGH OF GLASSBORO ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 100 N. J. 134, 495 A. 2d 49.

No. 85-710. RANDELL ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 35.

No. 85-719. BORNTRAGER *v.* STEVAS, FORMER CLERK OF SUPREME COURT OF UNITED STATES, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 772 F. 2d 419.

No. 85-722. KAPRELIAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 893.

No. 85-726. BARLOW ET AL. *v.* BREWERY WORKERS LOCAL UNION NO. 1010 ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-5064. STURM *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 85-5065. MATECKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85-5084. ROSSER-EL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-5106. FREDERICK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 925.

No. 85-5121. FREELAND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85-5182. LAMP *v.* FARRIER. C. A. 8th Cir. Certiorari denied. Reported below: 763 F. 2d 994.

No. 85-5209. KLEIN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 20 M. J. 26.

No. 85-5222. MALLOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 979.

No. 85-5325. REMIGIO, AKA CUERVO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 767 F. 2d 730.

No. 85-5343. GORDON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 111 App. Div. 2d 409, 489 N. Y. S. 2d 608.

No. 85-5349. PRAYLOW *v.* MARTIN, ASSISTANT REGIONAL ADMINISTRATOR, MIDLANDS CORRECTIONAL REGION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 761 F. 2d 179.

No. 85-5384. GAERTNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 763 F. 2d 787.

No. 85-5468. RODMAN *v.* MCMACKIN, SUPERINTENDENT, HOCKING CORRECTIONAL FACILITY. C. A. D. C. Cir. Certiorari denied.

No. 85-5475. HUGHES *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: 494 A. 2d 85.

No. 85-5509. CORBETT *v.* MINTZES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 905.

No. 85-5524. MCCORMICK *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 770 F. 2d 163.

No. 85-5525. VEALE ET AL. *v.* VEALE ET AL. C. A. 1st Cir. Certiorari denied.

No. 85-5527. DAVIS *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 85-5530. CAREY *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 440.

No. 85-5536. GANS *v.* MUNDY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 338.

No. 85-5539. BUCHANAN *v.* REES, SUPERINTENDENT, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 905.

No. 85-5540. ABDUL-RAHIM *v.* HARDCASTLE, SHERIFF. C. A. 11th Cir. Certiorari denied.

No. 85-5544. WELCH *v.* OHIO; and

No. 85-5545. PATTERSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 18 Ohio St. 3d 88, 480 N. E. 2d 384.

No. 85-5547. SPELLMAN *v.* INTEGON GENERAL INSURANCE CORP. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 913.

No. 85-5550. ADAMS *v.* BRIERTON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 546.

No. 85-5560. GANNON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 85-5562. ALMON *v.* SHARP ET AL. Sup. Ct. Ala. Certiorari denied.

No. 85-5566. LOVELACE *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 765 F. 2d 742.

No. 85–5568. McLaurin *v.* Syracuse University et al. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 157.

No. 85–5570. Williams *v.* Maggio, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 917.

No. 85–5573. Turner *v.* North Carolina Department of Human Resources, Division of Services for the Blind, et al. C. A. 4th Cir. Certiorari denied.

No. 85–5576. Whigham *v.* New York Telephone. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 37.

No. 85–5583. Burton *v.* Sargent, Warden. C. A. 8th Cir. Certiorari denied.

No. 85–5584. Burton *v.* Lockhart, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 929.

No. 85–5585. Jones *v.* Greer, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85–5590. Morris *v.* McCotter, Director, Texas Department of Corrections. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 2d 902.

No. 85–5592. Ridley *v.* Goldman et al. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 926.

No. 85–5593. Isadore *v.* Kincheloe, Superintendent, Washington State Reformatory. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 932.

No. 85–5601. Burnley *v.* Superintendent of the Capron Correctional Unit. Sup. Ct. Va. Certiorari denied.

No. 85–5602. Snowden *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 393.

No. 85–5603. Phelps *v.* Duckworth, Warden, et al. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 1410.

No. 85–5605. A. E. R., a Child *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 464 So. 2d 152.

No. 85-5611. WOOD *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 341 Pa. Super. 621, 491 A. 2d 923.

No. 85-5612. SHAW *v.* HUNT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 913.

No. 85-5613. PRINCE *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 2d 902.

No. 85-5614. MIDWIFE ET AL. *v.* DIRECTOR, STATE DEPARTMENT OF SOCIAL SERVICES. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-5616. CUSHING-GALE *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 85-5618. EVATT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 169.

No. 85-5629. BURDEN *v.* BOLGER, POSTMASTER GENERAL OF THE UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85-5630. GHOLSTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 165.

No. 85-5638. BUSH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 765 F. 2d 683.

No. 85-5641. BERTONIERE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 916.

No. 85-5645. PETTIT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1351.

No. 85-5646. SWICEGOOD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 767 F. 2d 936.

No. 85-5647. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 915.

No. 85-5652. VERDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 2d 902.

No. 85-5654. STERLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 764 F. 2d 530.

No. 85-5655. PATTERSON *v.* BUENA VISTA DISTRIBUTION CO. ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-5669. MOFFITT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-5672. HART *v.* RISLEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 911.

No. 85-5674. VIDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 37.

No. 85-5677. EISSA *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 485 A. 2d 610.

No. 85-5692. MURIEL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 36.

No. 85-5734. SIMON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 524.

No. 85-5740. ADAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 771 F. 2d 783.

No. 85-5743. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85-5745. HINKE *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85-331. ISRAEL, WARDEN *v.* WALBERG. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 766 F. 2d 1071.

No. 85-395. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* COLLINS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 754 F. 2d 258.

No. 85-500. CARROLL ET AL. *v.* ALBERTS ET AL. Sup. Jud. Ct. Mass. Motion of General Council on Finance and Administration of the United Methodist Church et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE BRENNAN

and JUSTICE WHITE would grant certiorari. Reported below: 395 Mass. 59, 479 N. E. 2d 113.

No. 85–609. WANSONG *v.* WANSONG. Sup. Jud. Ct. Mass. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 395 Mass. 154, 478 N. E. 2d 1270.

No. 85–5606. DAVIS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 477 N. E. 2d 889.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 84–1534. LUTJEHARMS, COMMISSIONER OF EDUCATION OF NEBRASKA, ET AL. *v.* ROSE, AS NEXT FRIEND OF ROSE, *ante*, p. 817;

No. 84–1559. UNITED VAN LINES, INC. *v.* HUNTER ET AL., *ante*, p. 863;

No. 84–1666. CUMMINGS *v.* UNITED STATES ET AL., *ante*, p. 817;

No. 84–1759. T. G. & Y. STORES, INC. *v.* LUSBY ET AL., *ante*, p. 818;

No. 84–1845. SORENSEN *v.* FITZGERALD, TRUSTEE, *ante*, p. 918;

No. 84–1847. LANDES *v.* DEPARTMENT OF JUSTICE, *ante*, p. 821;

No. 84–1869. MARCONE *v.* PENTHOUSE INTERNATIONAL, LTD., *ante*, p. 864;

No. 84–1926. REID ET AL. *v.* GHOLSON ET AL., *ante*, p. 824;

No. 84–1940. DOW *v.* UNITED VAN LINES ET AL., *ante*, p. 825;

No. 84–1976. IN RE WALTON, *ante*, p. 814;

No. 84–2036. EL SHAHAWY *v.* SARASOTA COUNTY PUBLIC HOSPITAL BOARD, *ante*, p. 829;

No. 84–6768. ZLOMKE *v.* FLYING TIGER LINE, INC., ET AL., *ante*, p. 833; and

No. 84–6771. ROACH *v.* MARTIN, WARDEN, ET AL., *ante*, p. 865. Petitions for rehearing denied.

No. 84-6818. COOMBS *v.* MCGARRY ET AL., *ante*, p. 835;
No. 84-6823. WALKER *v.* GEORGIA, *ante*, p. 865;
No. 84-6832. RUCKER *v.* CITY OF ST. LOUIS ET AL., *ante*, p. 804;
No. 84-6851. BETKA *v.* CITY OF WEST LINN ET AL., *ante*, p. 836;
No. 84-6861. MATHIS *v.* KEMP, WARDEN, *ante*, p. 865;
No. 84-6864. BUSBY *v.* LOUISIANA, *ante*, p. 873;
No. 84-6865. RUCKER *v.* CITY OF ST. LOUIS ET AL., *ante*, p. 805;
No. 84-6866. BREEZE *v.* UNITED STATES, *ante*, p. 875;
No. 84-6922. CAWLEY *v.* BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN ET AL., *ante*, p. 839;
No. 84-6957. AUGUSTYNIAK *v.* KOCH, MAYOR OF THE CITY OF NEW YORK, ET AL., *ante*, p. 840;
No. 84-6958. ROBINSON *v.* COOKE, WARDEN, ET AL., *ante*, p. 840;
No. 84-6970. DAMON *v.* SOUTH CAROLINA, *ante*, p. 865;
No. 84-6990. CARRION *v.* NEW YORK CITY HEALTH AND HOSPITALS CORP. ET AL., *ante*, p. 842;
No. 84-7002. DEL WECCHIO *v.* ILLINOIS, *ante*, p. 883;
No. 85-66. FLORIDA *v.* ARANGO, *ante*, p. 806;
No. 85-218. LUXURY BLANKETS, INC., ET AL. *v.* UNITED STATES, *ante*, p. 849;
No. 85-258. MILLER *v.* INTERNATIONAL TELEPHONE & TELEGRAPH CORP., *ante*, p. 851;
No. 85-5010. MIHAL ET AL. *v.* SARGIS ET AL., *ante*, p. 803;
No. 85-5050. VAN HORN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 854;
No. 85-5067. BOVEE *v.* UNITED STATES, *ante*, p. 854;
No. 85-5174. PHELPS *v.* SOVRAN BANK, *ante*, p. 858;
No. 85-5218. BETKA *v.* SMITH ET AL., *ante*, p. 860;
No. 85-5308. THOMAS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 935; and
No. 85-5346. IN RE KRAHN, *ante*, p. 899. Petitions for rehearing denied.

DECEMBER 6, 1985

Miscellaneous Order

No. A-440. GUZMON *v.* TEXAS. Application for stay of execution of sentence of death scheduled for Monday, December 9,

1985, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the filing of a petition for writ of certiorari on or before January 6, 1986. In the event the petition for writ of certiorari is filed by said date, this order is to continue pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

DECEMBER 9, 1985

Appeal Dismissed

No. 85-5685. HAMILTON *v.* CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question.

Vacated and Remanded After Certiorari Granted

No. 84-1736. HIJAR, SUPERINTENDENT, FEDERAL PRISON CAMP AT BORON, CALIFORNIA *v.* BURRUS. C. A. 9th Cir. [Certiorari granted, *ante*, p. 816.] Judgment vacated and case remanded to the United States District Court for the Northern District of California with instructions to vacate the injunction and to dismiss the cause as moot.

Miscellaneous Orders

No. A-353. ERNEST *v.* UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF ALABAMA ET AL. Application for an injunction or writ of habeas corpus, addressed to JUSTICE REHNQUIST and referred to the Court, denied. Motion to recuse JUSTICE POWELL denied.

No. D-523. IN RE DISBARMENT OF GANTT. Richard Allison Gantt, of Greenville, S. C., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on October 15, 1985 [*ante*, p. 896], is hereby discharged.

No. D-534. IN RE DISBARMENT OF PESNER. It is ordered that David I. Pesner, of Spring Valley, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-535. IN RE DISBARMENT OF ROMANO. It is ordered that Salvatore L. Romano, Jr., of Providence, R. I., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 29, Orig. TEXAS ET AL. *v.* COLORADO. Stipulated motion for dismissal granted and cause dismissed with prejudice. JUSTICE MARSHALL took no part in the consideration or decision of this case. [For earlier order herein, see, *e. g.*, 391 U. S. 901.]

No. 84-1273. REGENTS OF THE UNIVERSITY OF MICHIGAN *v.* EWING. C. A. 6th Cir. [Certiorari granted, 470 U. S. 1083.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 84-1560. PRESS-ENTERPRISE CO. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE. Sup. Ct. Cal. [Certiorari granted, *ante*, p. 899.] Motion of respondent to supplement the record and leave to file supplemental appendix granted.

No. 84-1737. UNITED STATES *v.* AMERICAN COLLEGE OF PHYSICIANS. C. A. Fed. Cir. [Certiorari granted, 473 U. S. 904.] Motion of respondent to dismiss writ of certiorari as improvidently granted is denied.

No. 85-21. SQUARE D CO. ET AL. *v.* NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 815.] Motions of C. D. Ambrosia Trucking Co., Inc., et al. and Western Fuels Association, Inc., for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-88. PAULUSSEN *v.* HERION. Super. Ct. Pa. [Probable jurisdiction noted, *ante*, p. 899.] Motion of Children's Defense Fund et al. for leave to file a brief as *amici curiae* granted.

No. 85-202. OFFSHORE LOGISTICS, INC., ET AL. *v.* TALLENTIRE ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 816.] Motion of Kenneth G. Engerrand for leave to file a brief as *amicus curiae* granted.

No. 85-406. ARIYOSHI, GOVERNOR OF HAWAII, ET AL. *v.* ROBINSON ET AL. C. A. 9th Cir.; and

No. 85-455. POLO FASHIONS, INC. *v.* STOCK BUYERS INTERNATIONAL, INC., ET AL. C. A. 6th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

Probable Jurisdiction Noted

No. 85-755. REED *v.* CAMPBELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF RICKER. Appeal from Ct. App. Tex., 8th Sup. Jud. Dist. Probable jurisdiction noted. Reported below: 682 S. W. 2d 697.

No. 85-568. NANTAHALA POWER & LIGHT CO. ET AL. *v.* THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. Appeal from Sup. Ct. N. C. Motions of Edison Electric Institute and United Steelworkers of America, AFL-CIO, Local Union 309, for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted. Reported below: 313 N. C. 614, 332 S. E. 2d 397.

Certiorari Granted

No. 85-664. YOUNG, COMMISSIONER OF FOOD AND DRUG ADMINISTRATION *v.* COMMUNITY NUTRITION INSTITUTE ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 244 U. S. App. D. C. 279, 757 F. 2d 354.

No. 85-530. O'CONNOR ET AL. *v.* ORTEGA. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 764 F. 2d 703.

No. 85-621. COMMODITY FUTURES TRADING COMMISSION *v.* SCHOR ET AL.; and

No. 85-642. CONTICOMMODITY SERVICES, INC. *v.* SCHOR ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour alotted for oral argument. Reported below: 248 U. S. App. D. C. 155, 770 F. 2d 211.

No. 85-632. ATKINS, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE *v.* RIVERA ET AL. Sup. Jud. Ct. Mass. Motion of respondent Madeline McKenna for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 395 Mass. 189, 479 N. E. 2d 639.

No. 85-5238. CRANE *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 690 S. W. 2d 753.

No. 85-5542. FORD *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Motions of National Association of Criminal Defense Lawyers and Office of the Capital Collateral Representative for the State of Florida et al. for leave to file briefs as *amici curiae* granted. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 752 F. 2d 526.

Certiorari Denied

No. 84-1906. ALABAMA *v.* CALLAHAN. Sup. Ct. Ala. Certiorari denied. Reported below: 471 So. 2d 463.

No. 84-6287. CARR *v.* HUTTO, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 737 F. 2d 433.

No. 84-6884. ZABEL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 928.

No. 84-6910. ETHERIDGE *v.* MITCHELL, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 646.

No. 84-6938. PAUL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 2d 1002.

No. 84-7003. LACAYO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 1559.

No. 85-228. LASSITER-GEERS *v.* REICHENBACH. Ct. App. Md. Certiorari denied. Reported below: 303 Md. 88, 492 A. 2d 303.

No. 85-251. MORRISON *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 610.

No. 85-252. CENTRAL & SOUTHERN MOTOR FREIGHT TARIFF ASSN. ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 244 U. S. App. D. C. 226, 757 F. 2d 301.

No. 85-282. MATURO ET AL. v. UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1076.

No. 85-335. DI NAPOLI v. NORTHEAST REGIONAL PAROLE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 764 F. 2d 143.

No. 85-379. OHIO NEW & REBUILT PARTS, INC., ET AL. v. NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 760 F. 2d 1443.

No. 85-413. BLACKWOOD v. UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 131.

No. 85-458. SCHIAVONE ET AL. v. UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 766 F. 2d 70.

No. 85-466. SOFT DRINK WORKERS, LOCAL 812, ET AL. v. MONARCH LONG BEACH CORP.; and

No. 85-667. MONARCH LONG BEACH CORP. v. SOFT DRINK WORKERS, LOCAL 812, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 228.

No. 85-538. MEDFORD ASSEMBLY OF GOD v. CITY OF MEDFORD, OREGON. Ct. App. Ore. Certiorari denied. Reported below: 72 Ore. App. 333, 695 P. 2d 1379.

No. 85-622. PIETRONIRO ET AL. v. BOROUGH OF OCEANPORT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 764 F. 2d 976.

No. 85-623. DALLAS COUNTY, TEXAS, ET AL. v. CRANE; and

No. 85-646. WADE v. CRANE. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 412 and 766 F. 2d 193.

No. 85-626. ACCIDENT FUND ET AL. v. BAERWALDT, COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 919.

No. 85-631. CAPRITO ET AL. v. MAYHEW, AKA CAPRITO, ET AL. Sup. Ct. La. Certiorari denied. Reported below: 468 So. 2d 561.

No. 85-640. HUGHES ET AL. v. HOUSTON NORTHWEST MEDICAL CENTER, INC., ET AL. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 680 S. W. 2d 838.

No. 85-641. HATCH ET AL. *v.* RELIANCE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 409.

No. 85-655. TEMPLEMEN *v.* CHRIS CRAFT CORP. C. A. 1st Cir. Certiorari denied. Reported below: 770 F. 2d 245.

No. 85-657. ROEHLER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 167 Cal. App. 3d 353, 213 Cal. Rptr. 353.

No. 85-665. PLEASANT VIEW ELEMENTARY SCHOOL PTA *v.* GROUP I DEFENDANTS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 763 F. 2d 652.

No. 85-669. AD HOC COMMITTEE FOR AKWESASNE RIGHTS *v.* REYNOLDS METALS CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 157.

No. 85-680. KOMOTO *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 40 Wash. App. 200, 697 P. 2d 1025.

No. 85-682. BAIR, DIRECTOR, DEPARTMENT OF REVENUE OF IOWA *v.* TRAILER TRAIN CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 765 F. 2d 744.

No. 85-694. DOWTY *v.* PIONEER RURAL ELECTRIC COOPERATIVE, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 52.

No. 85-698. EL CID, LTD. *v.* NEW JERSEY ZINC CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 157.

No. 85-709. CAMPBELL *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 479 So. 2d 1299.

No. 85-738. CHAMBERS *v.* KENTUCKY. Cir. Ct. Ky., Campbell County. Certiorari denied.

No. 85-739. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1351.

No. 85-741. DAVIS ET AL. *v.* BETHLEHEM STEEL CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 769 F. 2d 210.

No. 85-765. BLACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 1334.

No. 85-770. DISTRICT COUNCIL 33, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 36.

No. 85-784. PAUTZ *v.* WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 927.

No. 85-804. LIKA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 37.

No. 85-5020. DALY *v.* UNITED STATES;
No. 85-5101. HULSEY ET AL. *v.* UNITED STATES;
No. 85-5235. KLIR *v.* UNITED STATES; and
No. 85-5236. ROSS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 1076.

No. 85-5155. MCKINNEY *v.* ELLIS ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-5287. HAISLIP *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 237 Kan. 461, 701 P. 2d 909.

No. 85-5306. SILAS *v.* WINANS, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 85-5313. BURNSIDE *v.* WHITE, SUPERINTENDENT, ALGOA CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 2d 217.

No. 85-5332. HOPKINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 767 F. 2d 705.

No. 85-5333. TAYLOR *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied.

No. 85-5538. ACOSTA *v.* KRACO, INC., ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 471 So. 2d 24.

No. 85-5643. CHATMAN *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 480 So. 2d 1274.

No. 85-5620. FRONEBERGER *v.* ARMSTRONG ET AL. C. A. th Cir. Certiorari denied.

No. 85-5627. HENDERSON *v.* BLACKBURN, WARDEN. C. A. th Cir. Certiorari denied.

No. 85-5636. DAVIS *v.* GUPTON, SUPERINTENDENT, PIED-IONT CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certio-ari denied. Reported below: 767 F. 2d 911.

No. 85-5637. BEZOTTE *v.* MADISON COUNTY COMMISSIONERS T AL. C. A. 11th Cir. Certiorari denied. Reported below: 765 . 2d 1122.

No. 85-5567. BULLOCK *v.* DIRECTOR, DEPARTMENT OF COR-ECTIONS. Ct. App. Va. Certiorari denied. Reported below: Va. App. 70, 334 S. E. 2d 150.

No. 85-5671. KIMBLE *v.* DUCKWORTH, SUPERINTENDENT, IN-DIANA STATE PRISON, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1166.

No. 85-5675. DISBROW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 768 F. 2d 976.

No. 85-5689. GRANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 772 F. 2d 901.

No. 85-5690. JANKOWSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 771 F. 2d 70.

No. 85-5696. PARRA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 165 Cal. App. 3d 874, 212 Cal. Rptr. 53.

No. 85-5697. SPRINGSTON *v.* PACIFIC INTERMOUNTAIN EX-PRESS CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85-5706. COLA *v.* UNITED STATES. C. A. 3d Cir. Cer-tiorari denied. Reported below: 774 F. 2d 1153.

No. 85-5709. FOREMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 771 F. 2d 1382.

No. 85-5710. DARLING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 766 F. 2d 1095.

No. 85-5713. LEWIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 771 F. 2d 454.

No. 85-5716. SAWYER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 867.

No. 85-5722. COLLINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 909.

No. 85-5728. CROOKER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 774 F. 2d 1148.

No. 85-5732. PATTERSON *v.* GEORGIA THEATRE CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 1055.

No. 85-5751. GATI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85-5759. LAPSLEY *v.* LEGAL SERVICES OF MAUMEE VALLEY. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 926.

No. 85-5781. CASWELL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 85-111. MICHIGAN *v.* LITTLE. Ct. App. Mich. Certiorari denied.

CHIEF JUSTICE BURGER, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

In this case, an informant told police that he had made a purchase of narcotics from one James Johnson at Johnson's home. Based on this information, police secured search warrants for Johnson and for his home. Before executing the warrants, one of the police officers purchased heroin from Johnson in Johnson's backyard. Shortly thereafter, police went to the house, announced their authority, presence, and purpose, and entered. They arrested Johnson and seized packets of heroin he had tried to throw away. Officer Allen then noticed respondent in an adjacent room. Allen made a "patdown" prophylactic search for

weapons. He testified that he felt what seemed "to be a coin envelope or narcotics paraphernalia" in respondent's pocket. Allen removed the envelope and discovered heroin inside. The trial court granted respondent's motion to suppress the evidence, and the Michigan Court of Appeals affirmed, relying on *Ybarra* v. *Illinois*, 444 U. S. 85 (1979).

Ybarra in no sense controls this case. In *Ybarra*, police obtained a warrant authorizing the search of a *public bar* and of the bartender. Police entered the bar and immediately searched nearly a dozen patrons, including Ybarra, for weapons. The initial search of Ybarra revealed no weapons. Police returned several minutes later, searched Ybarra again, and found a small packet of heroin. The Court's holding in *Ybarra* that the second search violated Ybarra's Fourth Amendment rights was based on the presence of Ybarra in a *public place* under circumstances which, in the view of the Court, did not legitimately focus suspicion on Ybarra. *Id.*, at 91.

Here, however, respondent Little was not a member of the public present in a public place. He and Johnson were the only two people present in a dwelling that a Magistrate had determined was probably a center of illicit drug activity. Upon entering Johnson's home, the police discovered packets of heroin which Johnson had attempted to dispose of, indicating that illicit drug activity had occurred as recently as moments before their entry. Evidence of such activity could have been placed on the person of someone in the premises as easily as it could have been hidden in a dresser drawer. Under the circumstances, the police reasonably concluded that the nexus between respondent Little and the illicit drug activity was sufficiently close to give them probable cause to conduct a cursory search of respondent's person as part of their search of Johnson's home pursuant to a valid search warrant.

The Michigan Court of Appeals concluded that the search became unreasonable as soon as Officer Allen discovered that respondent was unarmed; Allen's determination coincided, however, with his discovery of what he reasonably suspected was narcotics paraphernalia. At that point, Officer Allen could confirm or dispel that suspicion by removing the object, only marginally increasing the intrusiveness of the search. Under these circumstances, the justification for the search outweighed the invasion that the

search entailed. The Michigan Court of Appeals misconstrued *Ybarra*, and its decision represents an unwarranted expansion of our holding in that case. This is the kind of result that undermines public confidence in the administration of justice. I would grant certiorari to give plenary consideration to this case.

No. 85-314. JAMES, WARDEN *v.* TYLER. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 755 F. 2d 741.

No. 85-5283. ASPERO, AKA ROSEBERRY *v.* SHEARSON AMERICAN EXPRESS, INC. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 768 F. 2d 106.

No. 85-5551. HOPKINSON *v.* WYOMING. Sup. Ct. Wyo.;

No. 85-5608. SMITH *v.* NORTH CAROLINA. Super. Ct. N. C., Halifax County; and

No. 85-5648. MOORE *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: No. 85-5551, 704 P. 2d 1323; No. 85-5648, 479 N. E. 2d 1264.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85-5557. GRACE ET AL. *v.* BURGER, CHIEF JUSTICE OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 246 U. S. App. D. C. 167, 763 F. 2d 457.

Rehearing Denied

No. 84-2016. GREYHOUND LINES, INC. *v.* WILHITE ET AL., *ante*, p. 910;

No. 84-6780. SMITH *v.* FRANCIS, WARDEN, *ante*, p. 925; and

No. 85-83. ZERMAN *v.* MELTON ET AL.; ZERMAN *v.* PRUDENTIAL-BACHE SECURITIES ET AL.; and ZERMAN *v.* JACOBS ET AL., *ante*, p. 845. Petitions for rehearing denied.

No. 85-123. MUKA *v.* CARTER, CHIEF DISCIPLINARY COUNSEL, *ante*, p. 895;

No. 85-152. THOMPSON ET AL. *v.* FIRST NATIONAL BANK & TRUST CO., *ante*, p. 895;

No. 85-159. REMMENGA ET UX. *v.* CALIFORNIA COASTAL COMMISSION, *ante*, p. 915;

No. 85-204. CHICAGO TRIBUNE CO. ET AL. *v.* JOHNSON, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL., *ante*, p. 915;

No. 85-284. HAYES *v.* CANNON ET AL., *ante*, p. 903;

No. 85-607. BURCHE *v.* CATERPILLAR TRACTOR CO., *ante*, p. 971;

No. 85-5164. COLLINS ET AL. *v.* ILLINOIS, *ante*, p. 935;

No. 85-5171. WILSON *v.* LOUISIANA, *ante*, p. 911;

No. 85-5195. GREEN *v.* SCHWARZER, U. S. DISTRICT JUDGE, *ante*, p. 921;

No. 85-5338. COLLINS *v.* UNITED STATES, *ante*, p. 922; and

No. 85-5456. BODINE *v.* DEPARTMENT OF TRANSPORTATION ET AL., *ante*, p. 923. Petitions for rehearing denied.

No. 84-6962. CAPE *v.* FRANCIS, WARDEN, *ante*, p. 911. Motion for leave to file petition for rehearing denied.

DECEMBER 16, 1985

Appeals Dismissed

No. 85-636. NYFLOT *v.* MINNESOTA COMMISSIONER OF PUBLIC SAFETY. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 369 N. W. 2d 512.

JUSTICE WHITE, with whom JUSTICE STEVENS joins, dissenting.

Shortly after 1:30 o'clock on the morning of September 23, 1984, appellant Janice Nyflot was arrested for driving under the influence of alcohol. She immediately requested that she be allowed to speak with an attorney, but this request was denied. She was then taken to the local law enforcement center. There, she was advised that state law required that she be tested to determine if she was under the influence of alcohol or a controlled substance and that refusal to allow such a test would result in her driver's license being revoked for a minimum of one year. She was

further advised that refusal to take the test could be offered in evidence against her at trial. Finally, she was told that if she consented to the test and the test indicated that she was under the influence of alcohol or a controlled substance, she would be subject to criminal prosecution and her right to drive could be revoked for a minimum of 90 days. And she was advised that she had the right, *after* submitting to the testing, to consult with an attorney and to have additional tests done by someone of her own choosing. These admonitions complied with the advice requirements of the state implied consent statute. See Minn. Stat. § 169.123, subd. 2(b) (1984).

After being thus advised, Nyflot informed the police officer that she would not submit to testing without first speaking to an attorney. She was again told that she would not be allowed to speak with an attorney before deciding whether to take the test. She again declined to consent to the test. The police officer then informed her that she had effectively refused the test and allowed her to contact her attorney. Immediately after contacting her attorney, she indicated her willingness to take the test, but she was told that she had been deemed to have refused it and could no longer consent. Her license was then revoked for one year based on her refusal.

The state trial court upheld the revocation against Nyflot's challenge that she had a right to counsel for the purpose of determining whether to consent to the blood alcohol test, which right had been unconstitutionally denied. The Minnesota Court of Appeals reversed, holding that a limited right to counsel was provided by state law. 365 N. W. 2d 266 (1985). The Minnesota Supreme Court, with two justices dissenting, reversed again and upheld the revocation. 369 N. W. 2d 512 (1985).

The Minnesota Supreme Court first rejected the Court of Appeals' conclusion that a right to counsel in this situation was provided by state law. Then, turning to Nyflot's federal constitutional challenge, the court held that no Sixth Amendment right to counsel extended to the decision whether to consent to testing. The court reasoned that *Kirby* v. *Illinois*, 406 U. S. 682 (1972), concluded that "the Sixth Amendment right to counsel did not attach until judicial proceedings are formally commenced (by indictment, complaint or substitute for complaint)." 369 N. W. 2d, at 516. See also *United States* v. *Gouveia*, 467 U. S. 180 (1984). Although acknowledging that this Court has recognized exceptions

to this rule for the purposes of protecting a defendant's Fifth Amendment rights, see, *e. g.*, *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Minnesota Supreme Court concluded that this Court "is unlikely to find other situations requiring a triggering of the right to counsel before the formal initiation of a criminal prosecution" and that "[i]t is also clear that the right to counsel recognized in *Miranda* does not apply to the limited questioning of a driver to determine if he will consent to a chemical test." 369 N. W. 2d, at 516 (citing *South Dakota* v. *Neville*, 459 U. S. 553, 564 n. 15 (1983)).

Nyflot now appeals, claiming that she had a Sixth Amendment right to counsel with respect to the decision whether to consent to the blood alcohol test. She asserts that in the special context of a driving-while-intoxicated offense, formal proceedings must be considered to have commenced with the issuance of a traffic ticket, which is in essence a summons to appear in court and the functional equivalent of a complaint. Since the ticket could be given *before* the test (because the driver is not taken in for testing unless she is unable to pass field sobriety or breath tests), the actual police procedures may not be manipulated so as to change the time when adversary proceedings are considered to have begun. Thus, adversary proceedings should be deemed to have been initiated before the test. The right to counsel having attached, Nyflot then argues that the decision whether to consent to the test is a "critical stage" in the proceeding, since it in essence is a decision as to what type of evidence will be available to be used against the driver—the results of the test or the refusal to consent to it. See *Gouveia*, *supra*, at 189.

Most of the courts that have considered this issue have rejected the argument that the Sixth Amendment right to counsel covers the stage at which the decision whether to consent to the blood alcohol test must be made. See, *e. g.*, *Sites* v. *State*, 300 Md. 702, 711, 481 A. 2d 192 (1984) (collecting cases). A few, however, have found that the Sixth Amendment right to counsel does extend to this stage. See, *e. g.*, *Heles* v. *South Dakota*, 530 F. Supp. 646 (SD), vacated as moot, 682 F. 2d 201 (CA8 1982); *Forte* v. *State*, 686 S. W. 2d 744 (Tex. App.), review granted by Tex. Ct. App., Oct. 23, 1985, No. 2–84–012–Cr.; *State* v. *Welch*, 135 Vt. 316, 376 A. 2d 351 (1977) (superseded by state statutory right to counsel, see *State* v. *Duff*, 136 Vt. 537, 394 A. 2d 1145 (1978)). Other courts have found a right to counsel based on state law,

see, *e. g.*, *State* v. *Fitzsimmons*, 94 Wash. 2d 858, 620 P. 2d 999 (1980), or on general due process guarantees, see, *e. g.*, *State* v. *Newton*, 291 Ore. 788, 636 P. 2d 393 (1981) (en banc plurality).

Given these varying results, I would note probable jurisdiction to settle the question presented.

No. 85-5686. GAINES *v.* MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS. Appeal from C.A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 776 F. 2d 1050.

No. 85-5761. MIHAL *v.* JAFFE, JUDGE, CUYAHOGA COUNTY COURT OF COMMON PLEAS. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Miscellaneous Orders

No. D-503. IN RE DISBARMENT OF SMITH. Disbarment entered. [For earlier order herein, see 472 U. S. 1014.]

No. D-513. IN RE DISBARMENT OF NASH. Disbarment entered. [For earlier order herein, see 473 U. S. 931.]

No. D-518. IN RE DISBARMENT OF O'BOYLE. Disbarment entered. [For earlier order herein, see *ante*, p. 896.]

No. D-520. IN RE DISBARMENT OF WATSON. Disbarment entered. [For earlier order herein, see *ante*, p. 808.]

No. D-521. IN RE DISBARMENT OF KLINE. Disbarment entered. [For earlier order herein, see *ante*, p. 896.]

No. D-537. IN RE DISBARMENT OF KIDWELL. It is ordered that Wesley Earl Kidwell, Jr., of Rockville, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84-1076. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* STATE OIL AND GAS BOARD OF MISSISSIPPI ET AL. Sup. Ct. Miss. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of appellee Coastal Exploration, Inc., for leave to file a supplemental brief after argument granted.

No. 84–1181. NEW YORK *v.* CLASS. Ct. App. N. Y. [Certiorari granted, 471 U. S. 1003.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 84–1728. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. D. C. Cir. [Certiorari granted, 472 U. S. 1026.] Motion of respondent American Federation of Government Employees, AFL–CIO, National Council of EEOC Locals, for divided argument denied.

No. 84–1903. POSADAS DE PUERTO RICO ASSOCIATES, DBA CONDADO HOLIDAY INN *v.* TOURISM COMPANY OF PUERTO RICO ET AL. Sup. Ct. P. R. [Probable jurisdiction postponed, *ante*, p. 917.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 85–88. PAULUSSEN *v.* HERION. Super. Ct. Pa. [Probable jurisdiction noted, *ante*, p. 899.] Motion of Neighborhood Legal Services Association for leave to file a brief as *amicus curiae* granted.

No. 85–473. CARGILL, INC., ET AL. *v.* MONFORT OF COLORADO, INC. C. A. 10th Cir. Motion of petitioners for leave to submit Rule 28.1 material under seal granted. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 85–541. BARCLAYSAMERICAN/CREDIT, INC. *v.* QUILLER ET UX.;

No. 85–584. GRANT ET AL. *v.* GENERAL ELECTRIC CREDIT CORP.; and

No. 85–717. QUILLER ET UX. *v.* BARCLAYSAMERICAN/CREDIT, INC. C. A. 11th Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States. JUSTICE BLACKMUN took no part in the consideration or decision of this order.

No. 85–5487. SMITH *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. [Certiorari granted, *ante*, p. 918.] Motion of New Jersey Department of the Public Advocate for leave to file a brief as *amicus curiae* granted.

No. 85–5304. IN RE WARD. Petition for writ of mandamus denied.

No. 85-815. IN RE DAVIS ET AL. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied. (See also Nos. 85-5686 and 85-5761, *supra.*)

No. 84-6831. FERGUSON ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 758 F. 2d 843.

No. 84-6918. WANDEL *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 696 P. 2d 288.

No. 85-67. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 20.

No. 85-142. KASVIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 887.

No. 85-245. UTZ *v.* UNITED STATES; and
No. 85-5323. WELLINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 754 F. 2d 1457.

No. 85-255. SUNNYSIDE VALLEY IRRIGATION DISTRICT *v.* UNITED STATES ET AL.; and
No. 85-451. UNION GAP IRRIGATION DISTRICT ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 763 F. 2d 1032.

No. 85-471. NORDGREN ET AL. *v.* MILLIKEN, DIRECTOR, UTAH DIVISION OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 762 F. 2d 851.

No. 85-483. ROTHMAN *v.* NEW YORK STATE DEPARTMENT OF TRANSPORTATION. C. A. 2d Cir. Certiorari denied. Reported below: 763 F. 2d 507.

No. 85-493. REEHLMAN *v.* MCNAMARA, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 763 F. 2d 670.

No. 85-501. GREENSPUN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1076.

No. 85-537. CAMPBELL *v.* MAINE; and FRIEL *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 497 A. 2d 467 (first case); 497 A. 2d 475 (second case).

No. 85-652. STONE *v.* MERIT SYSTEMS PROTECTION BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 293, 764 F. 2d 926.

No. 85-658. MORGANSTERN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 771 F. 2d 143.

No. 85-671. PRUESSNER ET AL. *v.* BENTON, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 368 N. W. 2d 74.

No. 85-672. COHRAN *v.* CARLIN ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 254 Ga. 580, 331 S. E. 2d 523.

No. 85-677. NEGRITO COMERCIAL, S.A. *v.* SEA-LAND SERVICE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 1118.

No. 85-678. UNITED PACIFIC INSURANCE CO. ET AL. *v.* ANIERO CONCRETE CO., INC. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85-692. SHUBA *v.* AUSTINTOWN BOARD OF EDUCATION. Ct. App. Ohio, Mahoning County. Certiorari denied.

No. 85-711. PASCO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 913.

No. 85-721. STETZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF ATTWOOD *v.* GRANT. C. A. 4th Cir. Certiorari denied.

No. 85-723. MOTTA *v.* SAMUEL WEISER, INC. C. A. 1st Cir. Certiorari denied. Reported below: 768 F. 2d 481.

No. 85-730. FARKAS *v.* NEW YORK STATE DEPARTMENT OF HEALTH. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 907.

No. 85-737. PINNEY DOCK & TRANSPORT CO. ET AL. *v.* PENN CENTRAL CORP. C. A. 3d Cir. Certiorari denied. Reported below: 771 F. 2d 762.

No. 85-745. HAZELWOOD ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1162.

No. 85-760. HAFNER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 474 So. 2d 202.

No. 85-783. MARTIN-TRIGONA *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 293, 764 F. 2d 926.

No. 85-790. CUDDY *v.* CARMEN, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 25, 762 F. 2d 119.

No. 85-830. ELLINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1164.

No. 85-845. DEMJANJUK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 922.

No. 85-846. DEMJANJUK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 922.

No. 85-848. DRAGATSIS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1168.

No. 85-865. LAMBERT *v.* UNITED STATES; and
No. 85-5900. BLOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 771 F. 2d 83.

No. 85-869. LIGHT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 158.

No. 85-5278. BROWN *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 470 So. 2d 56.

No. 85-5322. VAN HOFF *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 371 N. W. 2d 180.

No. 85-5347. NICHOLS *v.* TEXAS. Ct. App. Tex., 3d Sup. Jud. Dist. Certiorari denied.

No. 85-5356. HERNANDEZ *v.* UNITED STATES BUREAU OF PRISONS. C. A. 10th Cir. Certiorari denied.

No. 85-5370. HARRELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 1153.

No. 85-5372. LEVITT *v.* MONROE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 2d 1224.

No. 85-5445. IN RE MARTIN-TRIGONA. C. A. 1st Cir. Certiorari denied.

No. 85-5337. SCHEPPF *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 468 So. 2d 39.

No. 85-5657. RODRIGUEZ *v.* HOLLAHAN, WARDEN. Sup. Ct. Ariz. Certiorari denied.

No. 85-5659. MALLY *v.* NEW YORK UNIVERSITY. C. A. 2d Cir. Certiorari denied.

No. 85-5660. DAY *v.* WETTMAN, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-5662. GROSHON *v.* DOUGLAS. C. A. 10th Cir. Certiorari denied.

No. 85-5664. WARDEN *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 2d 112.

No. 85-5666. BURTON *v.* EVAN ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-5667. BURTON *v.* DIAMOND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 905.

No. 85-5668. MALLY *v.* NEW YORK UNIVERSITY ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-5673. STAMPS *v.* PIMA COUNTY SUPERIOR COURT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 913.

No. 85-5682. GREGORY *v.* AUGER, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 768 F. 2d 287.

No. 85-5684. BOWEN *v.* FOLTZ, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 85-5691. ROMER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85-5695. FRAZIER *v.* PLACER SAVINGS & LOAN ASSN. ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 85-5719. SCANLAND *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 473 So. 2d 1182.

No. 85-5721. COWELL *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 85–5754. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 1156.

No. 85–5758. OKELLO *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1486.

No. 85–5770. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 768.

No. 85–5772. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 1339.

No. 85–5773. DERKSEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied.

No. 85–5795. YELLEN *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 704 P. 2d 306.

No. 84–750. EASTERN AIR LINES, INC. *v.* WINBOURNE. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 758 F. 2d 1016.

No. 85–237. HENRY ET AL. *v.* CITY OF DETROIT MANPOWER DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 763 F. 2d 757.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The issue presented in this case is whether an order denying a civil rights plaintiff's motion for appointment of counsel is a final decision appealable as a matter of right under 28 U. S. C. § 1291. Three among petitioners are Title VII plaintiffs who moved for and were denied appointment of counsel pursuant to 42 U. S. C. § 2000e–5(f)(1)(B); a fourth petitioner, a plaintiff in an action under 42 U. S. C. § 1983, moved for and was denied appointment of counsel pursuant to 28 U. S. C. § 1915(d). Petitioners appealed to the United States Court of Appeals for the Sixth Circuit, which dismissed the appeals on the grounds that the orders denying appointment of counsel are not final for purposes of 28 U. S. C. § 1291. 763 F. 2d 757 (1985). This decision, while not without support among the Courts of Appeals, conflicts with the decisions in *Caston* v. *Sears, Roebuck, & Co., Hattiesburg, Miss.*, 556 F. 2d 1305 (CA5 1977) (order denying appointment of counsel pursuant

to § 2000e–5(f)(1)(B) is final for purposes of § 1291), and *Slaughter* v. *City of Maplewood*, 731 F. 2d 587 (CA8 1984) (to the same effect). I would grant certiorari to resolve this conflict among the Courts of Appeals on this plainly recurring question.

No. 85–307. ESTATE OF ROCKEFELLER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 762 F. 2d 264.

No. 85–461. CONTROL DATA CORP. *v.* C. E. SERVICES, INC. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 759 F. 2d 1241.

No. 85–5658. MALLY *v.* INTERNATIONAL BUSINESS MACHINES CORP. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 85–484. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 763 F. 2d 133.

No. 85–570. HOLLOWAY *v.* WALKER, JUDGE, 162ND JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 765 F. 2d 517.

No. 85–586. CAYLOR *v.* CITY OF RED BLUFF ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982), this Court held that exhaustion of state administrative remedies is not a prerequisite to bringing an action in federal court under 42 U. S. C. § 1983. In the present case, the California Court of Appeal held that *Patsy* applies only in the context of a § 1983 suit brought in *federal* court. Because petitioner was suing in a California court for employment discrimination without having exhausted the possibility of remedies through a complaint to the California Fair Employment Practices Commission, his § 1983 suit was held properly dismissed. This holding postponing the federal

§ 1983 remedy pending pursuit of state remedies is questionable under *Patsy*, and conflicts with the decision of the Connecticut Supreme Court in *Fetterman* v. *University of Connecticut*, 192 Conn. 539, 473 A. 2d 1176 (1984), where *Patsy* was held to prevent state as well as federal courts from imposing a requirement of exhaustion of state administrative remedies on § 1983 plaintiffs. I would grant certiorari to resolve this conflict.

No. 85–659. HOPFMANN *v.* UNITED STATES FEDERAL ELECTION COMMISSION ET AL. C. A. D. C. Cir. Motion of The Free Congress Research and Education Foundation for leave to file a brief as *amicus curiae* granted. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 246 U. S. App. D. C. 44, 762 F. 2d 138.

No. 85–5642. HANCE *v.* GEORGIA. Sup. Ct. Ga.;
No. 85–5663. CONKLIN *v.* GEORGIA. Sup. Ct. Ga.;
No. 85–5665. BELL *v.* ALABAMA. Sup. Ct. Ala.;
No. 85–5694. MCKAGUE *v.* NEVADA. Sup. Ct. Nev.; and
No. 85–5701. BROWN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 85–5642, 254 Ga. 575, 332 S. E. 2d 287; No. 85–5663, 254 Ga. 558, 331 S. E. 2d 532; No. 85–5665, 475 So. 2d 609; No. 85–5694, 101 Nev. 327, 705 P. 2d 127; No. 85–5701, 473 So. 2d 1260.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85–5693. OWENS, BY HIS GUARDIAN AD LITEM, OWENS *v.* BOURNS, INC., ET AL. C. A. 4th Cir. Motion of National Federation of the Blind for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 766 F. 2d 145.

Rehearing Denied

No. 85–368. SEIBOLD *v.* UNR-ROHN CO., *ante*, p. 920;
No. 85–5180. MADEJ *v.* ILLINOIS, *ante*, p. 935; and
No. 85–5395. FOWLER *v.* SOUTHEAST TOYOTA DISTRIBUTORS, INC., ET AL., *ante*, p. 951. Petitions for rehearing denied.

DECEMBER 19, 1985

Dismissal Under Rule 53

No. 85–733. FARM STORES, INC. *v.* TEXACO INC. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 763 F. 2d 1335.

DECEMBER 20, 1985

Dismissal Under Rule 53

No. 85–173. KEY INTERNATIONAL MANUFACTURING, INC. *v.* MORSE/DIESEL, INC., ET AL. C. A. 2d Cir. Certiorari dismissed as to respondents Den-Al Realty Corp. and Carden Construction Corp. under this Court's Rule 53. Reported below: 762 F. 2d 990.

JANUARY 9, 1986

Certiorari Denied

No. 85–6155 (A–531). ROACH *v.* AIKEN, WARDEN, ET AL. C. A. 4th Cir. Application for stay of execution of sentence of death scheduled for Friday, January 10, 1986, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 781 F. 2d 379.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting). Accordingly, I would vacate the death sentence and remand the case so that the state court can determine what sentence—other than death—may be appropriate.

In addition, this case affords us an opportunity to address the important question whether an accused may, consistent with the Eighth and Fourteenth Amendments, be sentenced to death for a capital offense he committed while a juvenile. Although "[c]rimes committed by youths may be just as harmful to victims as those committed by older persons, . . . they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults." Twentieth

Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978). As we stated in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982):

> "[Youth] is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979)." *Id.*, at 115–116 (footnotes omitted).

The need for solicitude for the particular susceptibility of juveniles is well reflected by the facts of this case. The trial judge found that petitioner acted under duress or under the domination of an older person, and that he was suffering from mental retardation and a personality disorder. See *Roach* v. *Martin*, 757 F. 2d 1463, 1468–1469 (CA4 1985). In addition, petitioner now presents evidence suggesting that he suffers from the debilitating effects of Huntington's disease. Under these circumstances, even accepting the Court's current interpretation of the Eighth Amendment, sentencing petitioner to death may be inconsistent with the "'evolving standards of decency that mark the progress of a maturing society,'" *Gregg* v. *Georgia*, *supra*, at 173 (quoting *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion of Warren, C. J.)), and may provide no more than "marginal contributions to any discernible social or public purposes." *Furman* v. *Georgia*, 408 U. S. 238, 312 (1972) (WHITE, J., concurring). "Even if some percentage of adults are deterred by the death penalty, the deterrent effect tends to lose much of its power when imposed upon an adolescent." Streib, Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen, 36 Okla. L. Rev., 613, 639 (1983). I would grant the petition for certiorari to resolve this important issue, and would stay petitioner's execution until we decide the matter. At the very least, in light of the evidence suggesting that petitioner suffers from Huntington's disease, I agree with JUSTICE MARSHALL that the stay should be granted and the case held pending our decision in *Ford* v. *Wainwright*, No. 85–5542, cert. granted, *ante*, p. 1019.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The State of South Carolina intends to execute petitioner James Terry Roach tomorrow, January 10, 1986, at 5 a. m. At approximately noon today, four hours after he presented his federal habeas claims to the Court of Appeals and was denied all relief, petitioner came to this Court, seeking a stay of execution and a writ of certiorari. Among other claims, Roach's counsel contends that Roach has been rendered so mentally incompetent by Huntington's disease that his execution would offend the contemporary standards of decency embodied in the Eighth Amendment. One month ago, this Court granted certiorari to resolve the issues of whether the execution of the presently mentally incompetent offends the Eighth Amendment and, if it does, what process is due a condemned prisoner who might lack any understanding of the penalty he faces. *Ford* v. *Wainwright*, No. 85–5542, cert. granted, *ante*, p. 1019. Because in the 17 hours allowed it by the regime of *Barefoot* v. *Estelle*, 463 U. S. 880 (1983),* this Court has decided to allow Roach to go to his death while the question of his execution's constitutionality is yet to be resolved, I must dissent from the denial of petitioner's application for a stay of execution.

In 1977, several months before his 18th birthday, petitioner pleaded guilty to two counts of murder and charges of criminal sexual assault, kidnaping, and armed robbery. At the capital sentencing hearing, a psychiatrist appearing on Roach's behalf testified that while Roach was mentally retarded, he could not, at that time, be diagnosed as suffering from Huntington's disease. Huntington's disease is an inherited disorder of movement, personality, and thought that often does not manifest itself until an individual has reached adulthood. *Roach* v. *Martin*, 757 F. 2d 1463, 1473 (CA4 1985). After considering this and other mitigating factors, however, the trial judge sentenced Roach to death on both murder counts. The conviction and sentence were upheld on direct review, *State* v. *Shaw (Roach)*, 273 S. C. 194, 255 S. E. 2d 799 (1979), and this Court denied certiorari, 444 U. S. 1026 (1980).

In his first federal habeas petition, Roach urged that he had indeed inherited Huntington's disease from his mother, who had

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*See Note, Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts, 95 Yale L. J. 349 (1985).

already been diagnosed as having that disorder in an early stage. Roach further alleged that, were he given the opportunity to prove this fact, he could raise doubts as to both his competency to stand trial and the appropriateness of his death sentence. It appears that Roach did not press any claim of his present incompetence to be executed, for, in affirming the District Court's denial of his habeas petition, the Court of Appeals concluded:

> "[E]ven assuming arguendo that Roach does in fact have the Huntington's gene, in which case HD [Huntington's disease] will inevitably manifest its symptoms, we can see no way that this fact alone would alter Roach's conviction and sentence. In other words, a determination today that Roach has the HD gene would not affect the findings that Roach was sane at the time of the offenses and that he was competent to stand trial, and is now competent." 757 F. 2d, at 1474.

The petition now before this Court, however, goes beyond mere allegations that Roach suffers from an as-yet-unmanifested genetic disorder. Accompanying his petition is an affidavit by Dr. William H. Olsen, a distinguished neurologist who, less than two weeks ago, was the first neurologist to have examined Roach in the last five years. Dr. Olsen not only found that there is a "reasonable degree of certainty" that Roach suffers from Huntington's disease, but also made a preliminary finding that Roach suffers from the mental deterioration that is a characteristic symptom of the disorder. Dr. Olsen's conclusion, though admittedly preliminary, raises substantial doubts as to whether Roach has any understanding that he is scheduled to die tomorrow morning. Certainly, nothing in the State's papers assuages these doubts.

Neither this Court nor the State of South Carolina is now in a position to ascertain whether Roach is indeed sufficiently competent to face his execution with the dignity that is the final right we allow even the most heinous criminals. What we can do is allow Roach's counsel and experts the time and opportunity to make such a showing. The Court's refusal to do so even while it prepares to hear a case in which another condemned man raises a similar claim, provides yet another stark example of the arbitrariness with which the death penalty is administered in the United States today. I would grant the stay and defer consideration of Roach's petition for certiorari pending this Court's decision in *Ford* v. *Wainwright*, *supra*.

JANUARY 13, 1986

Appeals Dismissed

No. 85-749. MICHELLE MARIE W., A MINOR BY AND THROUGH HER GUARDIAN AD LITEM, WILLIAMS, ET AL. *v.* RILEY ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. JUSTICE WHITE and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 39 Cal. 3d 354, 703 P. 2d 88.

No. 85-773. ATLANTIC RICHFIELD CO. ET AL. *v.* ALASKA ET AL. Appeal from Sup. Ct. Alaska dismissed for want of substantial federal question. THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 705 P. 2d 418.

No. 85-787. DAVES *v.* STATE BAR OF TEXAS. Appeal from Ct. App. Tex., 7th Sup. Jud. Dist. dismissed for want of substantial federal question. Reported below: 691 S. W. 2d 784.

No. 85-5455. GARCIA, AKA TRAVALINO *v.* DIXON ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 760 F. 2d 275.

No. 85-5853. ROYSE *v.* UNITED STATES ET AL. Appeal from D. C. W. D. Wash. dismissed for want of jurisdiction.

Miscellaneous Orders

No. ——. RAMIREZ *v.* CALIFORNIA. Motion to permit petitioner to proceed *in forma pauperis* without submitting an affidavit of indigency denied.

No. A-436. DIAZ *v.* UNITED STATES. Application for release on bail pending trial, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-453 (85-5989). HORAN *v.* UNITED STATES. C. A. 3d Cir. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D-525. IN RE DISBARMENT OF PHELPS. Robert Edward Phelps, Jr., of Houston, Tex., having requested to resign as a

member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on October 21, 1985 [*ante*, p. 917], is hereby discharged.

No. D–528. IN RE DISBARMENT OF LARKIN. Disbarment entered. [For earlier order herein, see *ante*, p. 941.]

No. D–530. IN RE DISBARMENT OF SIEGFRIED. Scott Thomas Siegfried, of Wadsworth, Ohio, having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on November 4, 1985 [*ante*, p. 941], is hereby discharged.

No. D–538. IN RE DISBARMENT OF VETTER. It is ordered that William V. Vetter, of Tacoma, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–539. IN RE DISBARMENT OF MUELLER. It is ordered that Donald H. Mueller, of Milwaukee, Wis., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–540. IN RE DISBARMENT OF CHOSID. It is ordered that Richard G. Chosid, of Bloomfield Hills, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–541. IN RE DISBARMENT OF BOULDING. It is ordered that Calvin Roosevelt Boulding, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84, Orig. UNITED STATES *v.* ALASKA. Application of the Special Master for award of interim compensation granted, and the Special Master is awarded interim compensation in the amount of $75,000 to be paid by the State of Alaska and the United States in equal portions. [For earlier order herein, see, *e. g.*, 465 U. S. 1018.]

No. 104, Orig. NEW JERSEY *v.* NEVADA ET AL. It is ordered that the Honorable Wade H. McCree, Jr., of Ann Arbor, Mich., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and the authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court.

Motion of City of Las Vegas to be dismissed as a party defendant is referred to the Special Master. [For earlier order herein, see *ante*, p. 917.]

No. 84–1076. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* STATE OIL AND GAS BOARD OF MISSISSIPPI ET AL. Sup. Ct. Miss. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of appellant for leave to file a supplemental brief after argument granted.

No. 84–1545. MILLER-WOHL CO., INC. *v.* COMMISSIONER OF LABOR AND INDUSTRY OF MONTANA ET AL. Appeal from Sup. Ct. Mont. Motions of Chamber of Commerce of the United States, Equal Employment Advisory Council, and American Civil Liberties Union et al. for leave to file briefs as *amici curiae* granted.

No. 84–1656. LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSN. ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Solicitor General for divided argument and for additional time for oral argument denied. Motion of North Carolina Association of Black Lawyers for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument, or in the alternative, for

appointment of counsel to brief and argue in support of judgment below as *amicus curiae* denied.

No. 84-1667. BETHEL SCHOOL DISTRICT NO. 403 ET AL. *v.* FRASER, A MINOR, ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 84-1726. EAST RIVER STEAMSHIP CORP. ET AL. *v.* TRANSAMERICA DELAVAL INC. C. A. 3d Cir. [Certiorari granted, *ante*, p. 814.] Motions of Pott Industries Inc. and Product Liability Advisory Council, Inc., et al. for leave to file briefs as *amici curiae* granted. Motion of Ingram River Equipment, Inc., for leave to file a brief as *amicus curiae* denied.

No. 84-1903. POSADAS DE PUERTO RICO ASSOCIATES, DBA CONDADO HOLIDAY INN *v.* TOURISM COMPANY OF PUERTO RICO ET AL. Sup. Ct. P. R. Motions for leave to file briefs as *amici curiae* filed by the following are granted: American Association of Advertising Agencies, Inc., Atlantic City Casino Association, American Federation of Labor and Congress of Industrial Organizations, American Newspaper Publishers Association, National Broadcasting Co., Inc., and American Broadcasting Cos., Inc., et al.

No. 84-1905. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* OWENS ET AL. D. C. C. D. Cal. [Probable jurisdiction noted *sub nom. Heckler* v. *Owens*, *ante*, p. 899.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 85-385. BROCK, SECRETARY OF LABOR *v.* PIERCE COUNTY. C. A. 9th Cir. [Certiorari granted, *ante*, p. 944.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 85-434. UNITED STATES *v.* JAMES ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 978.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 84-1973. THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION *v.* WOLD ENGINEERING, P. C., ET AL. Sup. Ct. N. D. [Certiorari granted, *ante*, p. 900.] Motions of

Standing Rock Sioux Tribe et al. and Turtle Mountain Band of Chippewa Indians for leave to file briefs as *amici curiae* granted.

No. 84–1974. ROSE, WARDEN *v.* CLARK. C. A. 6th Cir. [Certiorari granted, *ante*, p. 816.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–1979. MERITOR SAVINGS BANK, FSB *v.* VINSON ET AL. C. A. D. C. Cir. [Certiorari granted *sub nom. PSFS Savings Bank* v. *Vinson*, *ante*, p. 815.] Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted.

No. 84–1999. LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL–CIO, C. L. C. *v.* CITY OF CLEVELAND ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 816.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of respondent Vanguards of Cleveland for divided argument granted. Motion of respondents City of Cleveland et al. for divided argument granted.

No. 85–5. PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Solicitor General for divided argument granted.

No. 85–62. MAINE *v.* TAYLOR ET AL. C. A. 1st Cir. [Probable jurisdiction postponed, *ante*, p. 943.] Motion of the Solicitor General for divided argument granted.

No. 85–88. PAULUSSEN *v.* HERION. Super. Ct. Pa. [Probable jurisdiction noted, *ante*, p. 899.] Motion of Children's Defense Fund et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 85–198. CELOTEX CORP. *v.* CATRETT, ADMINISTRATRIX OF THE ESTATE OF CATRETT. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 944.] Motion of Motor Vehicle Manufacturers Association of the United States, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 85–227. SMALIS ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. [Certiorari granted, *ante*, p. 944.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 85–390. CITY OF LOS ANGELES ET AL. *v.* PREFERRED COMMUNICATIONS, INC. C. A. 9th Cir. [Certiorari granted, *ante*, p. 979.] Motion of Nicholas W. Carlin for leave to file a brief as *amicus curiae* granted.

No. 85–530. O'CONNOR ET AL. *v.* ORTEGA. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1018.] Motion of respondent for leave to proceed further herein *in forma pauperis* denied. Motion of respondent for appointment of counsel denied.

No. 85–581. BULLOCH ET AL. *v.* PEARSON ET AL. C. A. 10th Cir. Motion of Scott M. Matheson for leave to file a brief as *amicus curiae* granted. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 85–641. HATCH ET AL. *v.* RELIANCE INSURANCE CO., *ante*, p. 1021. Motion of respondent for award of damages granted, and damages in the amount of $500 are awarded pursuant to this Court's Rule 49.2. JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS dissent.

No. 85–736. KEMP, WARDEN *v.* THOMAS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 85–5821. WADE *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 3, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85–5845. IN RE TRIPATI. Petition for writ of habeas corpus denied.

No. 85–5670. IN RE COLES; and

No. 85–5755. IN RE JOHNSON. Petitions for writs of mandamus denied.

No. 85-5799. IN RE RODMAN; and

No. 85-5800. IN RE RODMAN. Petitions for writs of prohibition denied.

Probable Jurisdiction Noted

No. 85-637. HODEL, SECRETARY OF THE INTERIOR *v.* IRVING ET AL. Appeal from C. A. 8th Cir. Probable jurisdiction noted. Reported below: 758 F. 2d 1260.

No. 85-656. MUNRO, SECRETARY OF STATE OF WASHINGTON *v.* SOCIALIST WORKERS PARTY ET AL. Appeal from C. A. 9th Cir. Probable jurisdiction noted. Reported below: 765 F. 2d 1417.

No. 85-701. FEDERAL ELECTION COMMISSION *v.* MASSACHUSETTS CITIZENS FOR LIFE, INC. Appeal from C. A. 1st Cir. Probable jurisdiction noted. Reported below: 769 F. 2d 13.

No. 85-766. TASHJIAN, SECRETARY OF STATE OF CONNECTICUT *v.* REPUBLICAN PARTY OF CONNECTICUT ET AL. Appeal from C. A. 2d Cir. Probable jurisdiction noted. Reported below: 770 F. 2d 265.

Certiorari Granted

No. 85-494. CALIFORNIA FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* GUERRA, DIRECTOR, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 758 F. 2d 390.

No. 85-767. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION ET AL. *v.* CREST STREET COMMUNITY COUNCIL, INC., ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 769 F. 2d 1025.

No. 85-236. EICHENLAUB *v.* YURKY ET AL. C. A. 3d Cir. Motion of respondent Yurky for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 770 F. 2d 1078.

No. 85-303. MISSOURI *v.* BLAIR. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 691 S. W. 2d 259.

No. 85-473. CARGILL, INC., ET AL. *v.* MONFORT OF COLORADO, INC. C. A. 10th Cir. Certiorari granted. JUSTICE

BLACKMUN took no part in the consideration or decision of this petition. Reported below: 761 F. 2d 570.

No. 85-558. O'CONNOR ET UX. *v.* UNITED STATES;
No. 85-559. COPLIN ET UX. *v.* UNITED STATES; and
No. 85-560. MATTOX ET UX. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 761 F. 2d 688.

No. 85-660. COLORADO *v.* CONNELLY. Sup. Ct. Colo. Motion of Duane Woodard, Attorney General of Colorado, et al. for leave to file a brief as *amici curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. In addition to the question presented by the petition for writ of certiorari, the parties are requested to brief and argue the following question: "Did respondent's mental condition render his waiver of *Miranda* rights ineffective?" Application for stay, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the issuance of the mandate of this Court. Reported below: 702 P. 2d 722.

Memorandum of JUSTICE BRENNAN, with whom JUSTICE STEVENS joins.

This grant of certiorari is yet another instance supporting the concern that the Court shows an unseemly eagerness to act as "the adjunct of the State and its prosecutors in facilitating efficient and expedient conviction . . . ." *Wainwright* v. *Witt*, 469 U. S. 412, 463 (1985) (BRENNAN, J., dissenting). Most often, this concern has been evoked by the Court's overly narrow interpretations of the Constitution's fundamental guarantees and the laws established to secure relief from violations of those guarantees. See *ibid.; United States* v. *Leon*, 468 U. S. 897, 928-929 (1984) (BRENNAN, J., dissenting). However, the Court's willingness to take special judicial action to assist the prosecutor has not been limited to its interpretations of substantive law. For example, in *New Jersey* v. *T. L. O.*, 469 U. S. 325 (1985), reargument was directed on a constitutional question not raised by either party because it provided a broader basis for upholding the State's action. Similarly, two Terms ago, JUSTICE STEVENS noted the "quite striking" fact that during the preceding two-and-a-half years the Court had summarily reversed, without briefing or oral argument, 19 criminal cases—every one on the petition of the warden or the prosecutor and every one in his favor. *Florida* v.

Meyers, 466 U. S. 380, 385–387, and n. 3 (1984) (STEVENS, J., dissenting). Nothing has changed in the year and a half since that decision, for, although in the immediate wake of JUSTICE STEVENS' dissent the Court did summarily reverse a few convictions on the petition of a criminal defendant, the trend to grant summary dispositions only in favor of the prosecutor has resumed and the record now stands at 26–4.[1] No particularly informed understanding of statistics is required to appreciate that the likelihood of courts so consistently erring in favor of defendants is truly remote and that only a one-sided exercise of discretion can explain these results.

The Court's treatment of this case provides another clear example of why there is concern that the Court engages in injudicious efforts to assist prosecutors. Today, the Court takes the unprecedented step of rewriting a prosecutor's certiorari petition for him, enabling him to seek reversal on a ground he did not present himself.[2]

Respondent approached a uniformed police officer and stated that "he had killed someone" and wanted to tell the officer about it. Before questioning respondent about the killing, the officer informed respondent of his *Miranda* rights. Respondent waived

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[1] The four cases since *Florida* v. *Meyers* decided in favor of a criminal defendant are: *Payne* v. *Virginia*, 468 U. S. 1062 (1984) *(per curiam); Thompson* v. *Louisiana*, 469 U. S. 17 (1984) *(per curiam); Smith* v. *Illinois*, 469 U. S. 91 (1984) *(per curiam);* and *Lanier* v. *South Carolina, ante*, p. 25 *(per curiam)*. The seven cases decided in favor of the warden or prosecutor during that same period are: *Massachusetts* v. *Upton*, 466 U. S. 727 (1984) *(per curiam); Florida* v. *Rodriguez*, 469 U. S. 1 (1984) *(per curiam); United States* v. *Woodward*, 469 U. S. 105 (1984) *(per curiam); United States* v. *Gagnon*, 470 U. S. 522 (1985) *(per curiam); United States* v. *Benchimol*, 471 U. S. 453 (1985) *(per curiam); Delaware* v. *Fensterer, ante*, p. 15 *(per curiam);* and *Pennsylvania* v. *Goldhammer, ante*, p. 28 *(per curiam)*. *Payne, Thompson*, and *Smith* followed closely after JUSTICE STEVENS' dissent in *Florida* v. *Meyers*. Since *Smith* was decided on December 10, 1984, however, five of the last six summary dispositions have been in favor of the prosecution.

I am not suggesting that all the summary judgments awarded to the prosecution were incorrect or improper, although I did not agree with the result in many of the cases. It is the Court's selective employment of its summary disposition power only in favor of the prosecution that is most disturbing.

[2] This action is even less justifiable than the improper decision to order reargument in *New Jersey* v. *T. L. O.*, 469 U. S. 325 (1985), since here the Court cannot even point to having heard oral argument as justification for revising the issues presented to suit its own desires.

his rights and proceeded to confess to the murder of a young girl. After being charged with murder, respondent moved to suppress his statements as made involuntarily. A psychiatrist testified that respondent believed that the voice of God had commanded him to confess or commit suicide. The psychiatrist testified that respondent was suffering from "chronic paranoid schizophrenia" and "command auditory hallucinations" when he confessed and that respondent's actions were not the product of a free will. The trial court suppressed statements made both before and after the *Miranda* warnings were given on the ground that respondent's mental state rendered these confessions involuntary and tainted his waiver of the *Miranda* rights. The Colorado Supreme Court affirmed, and this petition followed. The prosecutor carefully limited his petition to this Court to challenge only the suppression of respondent's initial, unsolicited statements. The petition expressly states that "[respondent's] later confession, which involves a *Miranda* issue, is not an issue in this petition." Pet. for Cert. 15. Despite this, the Court directs the parties to brief and argue that issue.

We do not know why the prosecutor chose not to seek review of the *Miranda* issue. But, whatever the reason, review was *not* sought, and it is hardly for this Court to "second chair" the prosecutor to alter his strategy or guard him from mistakes. Under this Court's Rule 21.1(a), "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." Given petitioner's express disclaimer that the *Miranda* issue is presented, that question obviously is not "fairly included" in the question submitted. The Court's direction that the parties address it anyway makes meaningless in this case the provisions of this Rule and is plainly cause for concern, particularly since it is clear that a similar dispensation would not be granted a criminal defendant, however strong his claim. In asking the parties to address issues that the State chose not to present in the petition for certiorari, the Court goes beyond a mere philosophic inclination to facilitate criminal prosecution: the Court gives the appearance of being not merely the champion, but actually an arm of the prosecution.[3]

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[3] I express no views about the merits of the issues on which certiorari is now granted. See *Ohio ex rel. Eaton* v. *Price*, 360 U. S. 246 (1959) (statement of BRENNAN, J.).

I realize that, in itself, this order is not a matter of great significance. But even matters of small effect can cloak issues of great moment. In making the specific guarantees of the Bill of Rights a part of our fundamental law, the Framers recognized that limitless state power afflicts the innocent as well as the guilty, that even a crime-free world is not worth the fear and oppression that inevitably follow unrestricted police power, and that a truly free society is one in which every citizen—guilty or innocent—is treated fairly and accorded dignity and respect by the State. Of course, the Framers could not foresee the shape our society would take as the Nation developed. Nor could they foresee how the police function would evolve to keep pace. Rather, it has fallen to this Court—the "ultimate interpreter of the Constitution," *Baker* v. *Carr*, 369 U. S. 186, 211 (1962)—to enforce the rights enshrined in the Bill of Rights and preserve the principles established in 1789. Ours is the duty to prevent encroachment on these principles by overzealous police in the discharge of their great responsibility to prevent crime. Every law-abiding citizen shares with the Court the belief that the prevention of crime is an essential governmental function. However, the Members of this Court have the special responsibility to recognize that, as essential as is the goal of preventing crime, "the Court must be ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor." *Florida* v. *Meyers*, 466 U. S., at 387 (STEVENS, J., dissenting). This Court has, sadly, lost sight of this role, to the detriment of the rights of each of us. I can only repeat: "One can only hope that this day too will soon pass." *Wainwright* v. *Witt*, 469 U. S., at 463 (BRENNAN, J., dissenting).

No. 85-954. JAPAN WHALING ASSN. ET AL. *v.* AMERICAN CETACEAN SOCIETY ET AL.; and

No. 85-955. BALDRIGE, SECRETARY OF COMMERCE, ET AL. *v.* AMERICAN CETACEAN SOCIETY ET AL. C. A. D. C. Cir. Motion of respondents to expedite consideration of the petitions for writs of certiorari granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Cases are scheduled for oral argument this Term. Reported below: 247 U. S. App. D. C. 309, 768 F. 2d 426.

Certiorari Denied. (See also No. 85-5455, *supra*.)

No. 84-951. GULF COAST CABLE TELEVISION CO. *v.* AFFILIATED CAPITAL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 1555 and 741 F. 2d 766.

No. 84-1604. GUZMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 754 F. 2d 482.

No. 84-1800. WALTERS ET AL. *v.* SPRUYTTE. C. A. 6th Cir. Certiorari denied. Reported below: 753 F. 2d 498.

No. 84-6826. WILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 654.

No. 84-6848. ARAGON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84-6913. SIMONS *v.* MONTGOMERY COUNTY DEPARTMENT OF POLICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 30.

No. 84-6981. PAYNE *v.* COUGHLIN ET AL. C. A. 2d Cir. Certiorari denied.

No. 84-6993. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 1517.

No. 85-137. LAVADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 750 F. 2d 1527.

No. 85-259. MISLEH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-294. HUDSPETH *v.* NORTH MISSISSIPPI SAVINGS & LOAN ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 2d 1096.

No. 85-329. BRYANT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 370.

No. 85-346. SCHWENDER *v.* DEPARTMENT OF LABOR. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 178.

No. 85-386. PAPPY, KAPLON, VOGEL & PHILLIPS ET AL. *v.* ARAGON. C. A. 9th Cir. Certiorari denied. Reported below: 750 F. 2d 1447.

No. 85-392. SECURITIES INDUSTRY ASSN. *v.* COMPTROLLER OF THE CURRENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 244 U. S. App. D. C. 419, 758 F. 2d 739.

No. 85-405. UVIEDO *v.* STEVES SASH & DOOR CO. C. A. 5th Cir. Certiorari denied. Reported below: 738 F. 2d 1425, 753 F. 2d 369, and 760 F. 2d 87.

No. 85-408. QUIVIRA MINING CO. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 10th Cir. Certiorari denied. Reported below: 765 F. 2d 126.

No. 85-411. VIVITAR CORP. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 761 F. 2d 1552.

No. 85-431. HUMANA INC. ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 244 U. S. App. D. C. 376, 758 F. 2d 696.

No. 85-438. SIMMONS *v.* INTERSTATE COMMERCE COMMISSION ET AL. (two cases). C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 126 (first case); 766 F. 2d 1177 (second case).

No. 85-445. DEFAZIO ET AL. *v.* CITY OF SPRINGFIELD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 752 F. 2d 1423.

No. 85-456. AMERICAN POSTAL WORKERS UNION, AFL-CIO *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 225, 764 F. 2d 858.

No. 85-469. TOWN OF BELMONT, NEW HAMPSHIRE *v.* DOLE, SECRETARY OF TRANSPORTATION. C. A. 1st Cir. Certiorari denied. Reported below: 766 F. 2d 28.

No. 85-504. LUNDAY-THAGARD CO. *v.* UNITED STATES DEPARTMENT OF THE INTERIOR. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 773 F. 2d 322.

No. 85-508. AVERY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 760 F. 2d 1219 and 767 F. 2d 1494.

No. 85-512. FOSTER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 1430.

No. 85-515. GRONOWICZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 764 F. 2d 983.

No. 85-529. HOU HAWAIIANS *v.* HAWAII ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 764 F. 2d 623.

No. 85-562. SPIKA ET AL. *v.* VILLAGE OF LOMBARD, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 763 F. 2d 282.

No. 85-574. THOELE ET AL. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 766 F. 2d 1053.

No. 85-592. NATURAL GAS PIPELINE COMPANY OF AMERICA *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 247 U. S. App. D. C. 1, 765 F. 2d 1155.

No. 85-601. CURREY *v.* WAFFENSCHMIDT ET UX.; and
No. 85-764. WAFFENSCHMIDT ET AL. *v.* FIRST NATIONAL BANK OF MOUNT VERNON, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 763 F. 2d 711.

No. 85-602. BANKERS & SHIPPERS INSURANCE COMPANY OF NEW YORK *v.* MARSHALL ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 85-603. ESTATE OF SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 1119.

No. 85-604. SCARNATI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 896.

No. 85-613. COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC. *v.* TRAVELERS INSURANCE COS. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 893.

No. 85-653. CITY OF CLEVELAND HEIGHTS, OHIO, ET AL. *v.* SMITH. C. A. 6th Cir. Certiorari denied. Reported below: 760 F. 2d 720.

No. 85-675. FOUR MILLION, TWO HUNDRED FIFTY-FIVE THOUSAND, SIX HUNDRED TWENTY-FIVE DOLLARS AND THIRTY-NINE CENTS ($4,255,625.39), ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 895.

No. 85-681. WESTERN RESERVE OIL & GAS CO., LTD., ET AL. *v.* NEW ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 1428.

No. 85-683. KWANG-WEI HAN *v.* PILATO ET UX. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-704. CALL ET AL. *v.* CITY OF ALBANY, CALIFORNIA, ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 38 Cal. 3d 633, 699 P. 2d 316.

No. 85-712. JOHN E. KOERNER & CO. ET AL. *v.* PLAINTIFF CLASS REPRESENTATIVES, CORN DERIVATIVES ANTITRUST LITIGATION, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 894.

No. 85-725. MAUGET *v.* KAISER ENGINEERS, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 907.

No. 85-731. SINCLAIR INTERNATIONAL ET AL. *v.* MAXFIELD. C. A. 3d Cir. Certiorari denied. Reported below: 766 F. 2d 788.

No. 85-740. STATE SAVINGS & LOAN ASSN. *v.* FEDERAL HOME LOAN BANK BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 246 U. S. App. D. C. 293, 764 F. 2d 926.

No. 85-743. STEWART *v.* SEARS ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 85-752. MICHAELS ET AL. *v.* MICHAELS. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 1185.

No. 85-753. PENNINGTON, ADMINISTRATOR FOR THE ESTATE OF TORRES *v.* FLOTA MERCANTE GRANCOLOMBIANA, S.A., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1074.

No. 85-754. GREATER BATON ROUGE PORT COMMISSION *v.* JACINTOPORT CORP. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 2d 435.

No. 85-762. METGE, EXECUTRIX OF THE ESTATE OF METGE, ET AL. *v.* BANKERS TRUST CO. C. A. 8th Cir. Certiorari denied. Reported below: 762 F. 2d 621.

No. 85-763. WHITE *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 369 N. W. 2d 301.

No. 85-768. LEONE ET AL. *v.* PIERCE COUNTY MEDICAL BUREAU ET AL. C. A. 9th Cir. Certiorari denied. Reported below; 767 F. 2d 932.

No. 85-771. BARON *v.* MELONI, INDIVIDUALLY AND AS SHERIFF OF MONROE COUNTY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 36.

No. 85-772. BROWN *v.* WASHINGTON. Super. Ct. Wash., King County. Certiorari denied.

No. 85-774. PALAZZO *v.* GULF OIL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 1381.

No. 85-776. VARNES *v.* FORBES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85-778. WORRE *v.* DEPARTMENT OF REVENUE OF OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 299 Ore. 444, 703 P. 2d 230.

No. 85-779. KAHN *v.* ALEXANDER GRANT & CO.; and
No. 85-780. TIFFANY INDUSTRIES, INC. *v.* ALEXANDER GRANT & CO. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 2d 717.

No. 85-788. BOGARAT *v.* EMERSON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 174.

No. 85-789. HIEGEL *v.* HILL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 771 F. 2d 358.

No. 85-795. BENNETT ET AL. *v.* UNITED STATES TRUST COMPANY OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 308.

No. 85-803. TURNER ET AL. *v.* C F & I STEEL CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 43.

No. 85-806. ELLIOTT *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 85-807. OHIO *v.* AKRON AIRPORT POST NO. 8975, VETERANS OF FOREIGN WARS OF THE UNITED STATES. Sup. Ct. Ohio. Certiorari denied. Reported below: 19 Ohio St. 3d 49, 482 N. E. 2d 606.

No. 85-808. GLEASON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 1239.

No. 85-809. PLUMMER *v.* AMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 896.

No. 85-810. MICHIGAN UNITED FOOD & COMMERCIAL WORKERS UNIONS ET AL. *v.* BAERWALDT, COMMISSIONER OF INSURANCE OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 308.

No. 85-811. WILSON ET UX. *v.* SEARS, ROEBUCK & CO. C. A. 8th Cir. Certiorari denied. Reported below: 757 F. 2d 948.

No. 85-812. VANTERPOOL ET UX. *v.* HESS OIL VIRGIN ISLANDS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 766 F. 2d 117.

No. 85-813. MINNESOTA TIMBER PRODUCTS ASSN., INC. *v.* AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 1261.

No. 85-814. KAPLUS *v.* PHILLIPS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 807.

No. 85-817. AJAC TRANSMISSION PARTS CORP. ET AL. *v.* TRANSGO, INC. C. A. 9th Cir. Certiorari denied. Reported below: 768 F. 2d 1001.

No. 85-818. BLACK ET AL. *v.* WYCHE. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 472 So. 2d 1195.

No. 85-819. AIR LINE STEWARDS & STEWARDESSES ASSN., LOCAL 550, TWU, AFL-CIO, ET AL. *v.* AMERICAN AIRLINES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 763 F. 2d 875.

No. 85-820. NORWOOD *v.* INA LIFE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 758 F. 2d 656.

No. 85-823. GEORGIA DEPARTMENT OF MEDICAL ASSISTANCE *v.* BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1293.

No. 85-826. GOLIN *v.* BROOKHAVEN NATIONAL LABORATORY. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 135.

No. 85-827. STEVENS ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of San Francisco. Certiorari denied.

No. 85-828. LOCAL UNION 542, INTERNATIONAL UNION OF OPERATING ENGINEERS *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1068.

No. 85-829. GEORGE A. CREED & SON, INC. *v.* TRIDENT TECHNICAL COLLEGE ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 286 S. C. 98, 333 S. E. 2d 781.

No. 85-831. HOTEL & RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 28 *v.* SERITIS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85-832. WHITTAKER CORP. *v.* OLYMPIC SPORTS PRODUCTS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 910.

No. 85-835. MORTON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-836. GEL SPICE CO., INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 773 F. 2d 427.

No. 85-837. KARAPINKA *v.* UNION CARBIDE CORP. C. A. 2d Cir. Certiorari denied.

No. 85-838. KARAM, SPECIAL ADMINISTRATRIX OF THE ESTATE OF KARAM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85-839. LACHICA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1174.

No. 85-841. CURRIE ET AL. *v.* BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 85-842. CITY OF DES MOINES, IOWA, ET AL. *v.* MOORE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 343.

No. 85-852. PRESTON CARROLL CO., INC., ET AL. *v.* MORRISON ASSURANCE CO. Sup. Ct. Ga. Certiorari denied. Reported below: 254 Ga. 608, 331 S. E. 2d 520.

No. 85-864. DA-CHUAN ZHENG ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 768 F. 2d 518.

No. 85-853. McLAIN, SHERIFF, LINCOLN COUNTY, OKLAHOMA *v.* WALKER. C. A. 10th Cir. Certiorari denied. Reported below: 768 F. 2d 1181.

No. 85-866. HOLMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 763.

No. 85-880. DIRECTORY SERVICE COMPANY OF COLORADO, INC., ET AL. *v.* ROCKFORD MAP PUBLISHERS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 145.

No. 85-893. HUNT ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 161.

No. 85-903. CERTAIN UNNAMED PROSPECTIVE DEFENDANTS *v.* NEWSPAPERS, INC., ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 124 Wis. 2d 499, 370 N. W. 2d 209.

No. 85-905. SALISBURY *v.* JAMES RIVER CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85-906. IN RE MARTIN-TRIGONA. C. A. 2d Cir. Certiorari denied. Reported below: 763 F. 2d 140.

No. 85-909. NAMENWIRTH *v.* BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 2d 1235.

No. 85-911. MARTY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1351.

No. 85-915. LAW FIRM OF DANIEL P. FOSTER, P. C. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 35.

No. 85-916. LAW FIRM OF DANIEL P. FOSTER, P. C. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 35.

No. 85-923. MILLS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 764 F. 2d 373.

No. 85-931. KIRKLEY *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 470 So. 2d 1001.

No. 85-932. MARIN ET AL. *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 769 F. 2d 590.

No. 85-933. CARROLLO ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 2d 744.

No. 85-939. RAMIE *v.* CITY OF HEDWIG VILLAGE, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 490.

No. 85-943. MALLET *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 44.

No. 85-947. SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA *v.* MANECKE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 912.

No. 85-957. VIGNES *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 85-962. HERSHEY *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 20 M. J. 433.

No. 85-963. HOLMAN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 149.

No. 85-981. CONTACT LENS MANUFACTURERS ASSN. *v.* FOOD AND DRUG ADMINISTRATION OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 247 U. S. App. D. C. 102, 766 F. 2d 592.

No. 85-996. HILBMANN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 44.

No. 85-5011. BARRIENTOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 758 F. 2d 1152.

No. 85-5013. DARWIN *v.* RISON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 285.

No. 85-5100. ALDRIDGE *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 63.

No. 85-5205. COCHRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 1118.

No. 85-5227. GARMANY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 929.

No. 85-5234. BEZOLD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 999.

No. 85-5240. PRICE *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85-5248. SCOTT *v.* ROCKVIEW STATE CORRECTIONAL INSTITUTION ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-5293. PERPIGNAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 438.

No. 85-5302. SAWYER *v.* FULCOMER, SUPERINTENDENT, STATE INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 85-5307. KABONGO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1012.

No. 85-5350. STAUFFER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 763 F. 2d 202.

No. 85-5362. DUNLAP *v.* MASSEY, SUPERINTENDENT, UNION CORRECTIONAL INSTITUTION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85-5371. CORBETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85-5380. JACKSON *v.* GENERAL DYNAMICS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 2d 693.

No. 85-5439. JOHNSON *v.* MANSON, COMMISSIONER OF CORRECTIONS OF CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 196 Conn. 309, 493 A. 2d 846.

No. 85-5449. DUNBAR *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 85-5467. LOPES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 150.

No. 85-5481. BARKER *v.* MORRIS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 2d 1396.

No. 85-5502. DOE ET AL. *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 103 N. M. 177, 704 P. 2d 431.

No. 85–5512. GRAVES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 490 A. 2d 1086.

No. 85–5520. TREADWELL, AKA BARRY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 245 U. S. App. D. C. 257, 760 F. 2d 327.

No. 85–5522. REEVES *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 2d 283.

No. 85–5532. CAMPMAN *v.* UNITED STATES; and
No. 85–5543. STREETER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 171.

No. 85–5546. MCKNIGHT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 152.

No. 85–5565. LUNDIEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 769 F. 2d 981.

No. 85–5572. ROYSTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 1491.

No. 85–5594. PETTY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 111 App. Div. 2d 96, 489 N. Y. S. 2d 811.

No. 85–5615. BROWN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 770 F. 2d 241.

No. 85–5617. AMADI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 908.

No. 85–5653. OWENS *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS. C. A. 3d Cir. Certiorari denied. Reported below: 774 F. 2d 1152.

No. 85–5656. MCQUEEN *v.* U. S. DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION. C. A. 11th Cir. Certiorari denied.

No. 85–5679. PASKULY *v.* MARSHALL FIELD & CO. C. A. 7th Cir. Certiorari denied.

No. 85-5700. CODY *v.* DE IORIO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1067.

No. 85-5703. KEARSON *v.* SOUTHERN BELL TELEPHONE & TELEGRAPH CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 405.

No. 85-5707. GERINGER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-5712. BALTEZORE *v.* CONCORDIA PARISH SHERIFF'S DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 202.

No. 85-5715. TINKER-BEY *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 85-5717. WALKER *v.* PRISONER REVIEW BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 2d 396.

No. 85-5718. ST. AMAND *v.* JONES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 934.

No. 85-5720. WILSON *v.* MCMACKIN. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 53.

No. 85-5723. FULLER *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 1154.

No. 85-5724. DAY *v.* AMOCO CHEMICALS CORP. C. A. 5th Cir. Certiorari denied.

No. 85-5725. GENTSCH *v.* ROBERSON ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-5726. BERNARD *v.* NICKELS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 159.

No. 85-5730. SHAFFER-CORONA *v.* DISTRICT OF COLUMBIA TEACHERS FEDERAL CREDIT UNION. Ct. App. D. C. Certiorari denied.

No. 85-5735. WESTFALL *v.* SUPREME COURT OF APPEALS OF WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 85-5738. COSSETT ET AL. *v.* LEDFORD, TRUSTEE. C. A. 6th Cir. Certiorari before judgment denied.

No. 85–5746. MITCHELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 769 F. 2d 1544.

No. 85–5748. WEST *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 771 F. 2d 910.

No. 85–5752. RICHARDS *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 908.

No. 85–5753. LIPSMAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 616, 485 N. E. 2d 243.

No. 85–5756. GEISON *v.* FIRESTONE, SECRETARY OF STATE OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 174.

No. 85–5757. CARROLL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 101 Ill. 2d 590.

No. 85–5763. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 2d 903.

No. 85–5764. SELLNER *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 303 Md. 42, 491 A. 2d 1197.

No. 85–5765. HARRISON *v.* MCDADE. Sup. Ct. Ga. Certiorari denied. Reported below: 254 Ga. XXIII, 332 S. E. 2d 659.

No. 85–5766. GREEN *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 296 Md. 172.

No. 85–5767. HOLSEY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 303 Md. 683, 496 A. 2d 682.

No. 85–5769. EVANS *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–5775. FELDER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 85–5777. PARKER *v.* FAIRMAN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1168.

No. 85–5778. ROSS *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 693 S. W. 2d 191.

No. 85-5779. POOLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1237.

No. 85-5782. LOJUK *v.* JOHNSON. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 2d 619.

No. 85-5783. KNIGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 768.

No. 85-5785. REDDICK *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 197 Conn. 115, 496 A. 2d 466.

No. 85-5788. DANIEL *v.* UNITED STATES PARCEL SERVICE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 85-5789. CANNIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1351.

No. 85-5791. MYRICK *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 3d Cir. Certiorari denied.

No. 85-5796. IVY *v.* REED, FORMER WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85-5797. AHMED *v.* HUGHES AIRCRAFT CO. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 169.

No. 85-5798. HENNESSY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 85-5801. BUNCH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1076.

No. 85-5804. HUNTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 2d 1000.

No. 85-5806. CHANEY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 304 Md. 21, 497 A. 2d 152.

No. 85-5807. LUCIEN *v.* CHRANS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 85-5808. STANFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 772 F. 2d 901.

No. 85-5809. BUCKLEY *v.* COMMERCIAL FEDERAL SAVINGS & LOAN ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-5810. HOOKS *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85-5811. ANDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 53.

No. 85-5813. SHABAZZ *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 85-5814. OLIVA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 136.

No. 85-5816. GRAEWE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 763 F. 2d 1504 and 774 F. 2d 106.

No. 85-5817. ALLEN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 85-5820. JONES *v.* BROWN, FORMER GOVERNOR OF KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 51.

No. 85-5826. BUSBY *v.* HOLT, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 771 F. 2d 1461.

No. 85-5827. KNIGHT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-5828. GONZALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 1393.

No. 85-5832. MCCALLISTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 915.

No. 85-5834. SMITH *v.* CITY OF OMAHA, NEBRASKA, ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 220 Neb. 217, 369 N. W. 2d 67.

No. 85-5836. DEVAN *v.* CITY OF DES MOINES, IOWA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 423.

No. 85-5837. CAMERON *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 74 Ore. App. 367, 704 P. 2d 553.

No. 85-5839. GRAY *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1059.

No. 85-5841. TOOMEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 764 F. 2d 678.

No. 85-5842. VARGAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85-5848. GRAEWE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 763 F. 2d 1504 and 774 F. 2d 106.

No. 85-5849. LOVETT *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 85-5851. KENDRICKS *v.* BROWN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1071.

No. 85-5860. HOLLEMAN *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 2d 690.

No. 85-5889. RISPOLI *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 35.

No. 85-5924. MULLINS *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 917.

No. 85-5968. COOPER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 931.

No. 84-1287. LIPHETE ET AL. *v.* STIERHEIM ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. JUSTICE MARSHALL and JUSTICE BLACKMUN would grant certiorari. Reported below: 455 So. 2d 1348.

No. 84-1745. SCHILLING, COMMISSIONER OF SAVINGS AND LOAN ASSOCIATIONS FOR ILLINOIS *v.* TELEGRAPH SAVINGS &

LOAN ASSOCIATION OF CHICAGO ET AL. Sup. Ct. Ill. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 105 Ill. 2d 166, 473 N. E. 2d 921.

No. 85-332. PARISH OF ST. BERNARD ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE O'CONNOR would grant certiorari. Reported below: 756 F. 2d 1116.

No. 85-334. FIRESTONE TIRE & RUBBER CO. ET AL. *v.* UNITED STATES; and

No. 85-376. ETHYL CORP. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 761 F. 2d 1153.

No. 85-391. YOUNG *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 286 Ark. 413, 692 S. W. 2d 752.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

Arkansas Stat. Ann. § 41-1812 (1977) provides, in pertinent part, that "[a] person commits indecent exposure if, with purpose to arouse or gratify the sexual desire of himself or of any other person, he exposes his sex organs . . . in a public place or public view. . . ."* Petitioner was a nude dancer at D.L.'s Darkroom, a tavern in Little Rock, Arkansas. Along with nearly every other nude dancer in the metropolitan area, petitioner was arrested in one of two "sweep" operations conducted in February 1984. At a bench trial, an undercover police officer testified that once during her dance, petitioner touched her breasts, and then touched the inside of her thighs. At no time did petitioner expose her vaginal area or touch her genitals. The Municipal Court convicted petitioner for indecent exposure under § 41-1812, fined her $700, and gave her a 30-day suspended sentence.

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*Arkansas Stat. Ann. § 41-1812 (1977) provides in full as follows:

"Indecent exposure. (1) A person commits indecent exposure if, with purpose to arouse or gratify the sexual desire of himself or of any other person, he exposes his sex organs:

"(a) in a public place or public view; or

"(b) under circumstances in which he knows his conduct is likely to cause affront or alarm.

"(2) Indecent exposure is a class A misdemeanor."

The Pulaski County Circuit Court conducted a trial *de novo* on appeal. The court held that mere nude dancing violated the statute, and rejected petitioner's First Amendment defense on the grounds that her nude dancing had no articulated message. Pet. for Cert. 13–14. The court affirmed petitioner's conviction, and imposed a 1-year suspended sentence on the condition that she not "display herself in a public place. . . ." App. to Pet. for Cert. 8–a.

The Arkansas Supreme Court affirmed, both on the ground that petitioner's conduct violated the statute and because such behavior was not protected by the First Amendment. 286 Ark. 413, 692 S. W. 2d 752 (1985). With respect to the statutory argument, the court noted that § 41–1812 was intended to cover both nude dancing and "'flashers.'" *Id.*, at 415, 692 S. W. 2d, at 753. Turning to petitioner's constitutional argument, the court "d[id] not take issue" with petitioner's contention that "'mere nude dancing'" is entitled to First Amendment protection, but found under the facts of this case that petitioner's conduct "was not simply nudity. . . ." *Id.*, at 417, 692 S. W. 2d, at 754. Instead, "while dancing [petitioner] ran her hand over her breast, down over her stomach and rubbed herself on the inner thigh below the vaginal area." *Ibid.* Because petitioner did not argue that such conduct is constitutionally protected, the court did not address the remaining aspects of her constitutional argument. *Ibid.*

Petitioner maintains that, as applied to mere nude dancing, § 41–1812 is overbroad and substantially abridges First Amendment rights. Regardless of whether and how petitioner might have touched herself during her performance, she has standing to raise this overbreadth challenge. See *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 958–959 (1984); *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 633–635 (1980); *Broadrick* v. *Oklahoma*, 413 U. S. 601, 611–612 (1973).

In *New York State Liquor Authority* v. *Bellanca*, 452 U. S. 714 (1981) and *California* v. *LaRue*, 409 U. S. 109 (1972), the Court held that States may regulate nude dancing in establishments licensed to serve liquor by virtue of the power conferred under the Twenty-first Amendment. In both cases, however, the Court intimated that statutes which seek to regulate nude dancing in public places other than bars and taverns might contravene the dictates of the First Amendment, as this form of entertainment

might be entitled to constitutional protection. *New York State Liquor Authority* v. *Bellanca*, *supra*, at 718; *California* v. *LaRue*, *supra*, at 118. Indeed, in *Schad* v. *Mount Ephraim*, 452 U. S. 61, 66 (1981), the Court expressly stated that "nude dancing is not without its First Amendment protections from official regulation." See also *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 933–934 (1975); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 557–558 (1975).

Given these repeated indications that barroom-type nude dancing is a type of expression that is protected under the First Amendment under some circumstances, the Court should grant the petition for certiorari in this case in order to explore the propriety of Arkansas' regulation. Section 41–1812 does not prohibit nudity only in establishments possessing liquor licenses. Instead, it criminalizes nonobscene nudity in any public place so long as its purpose is to gratify the sexual desires of another person. Arkansas thus cannot rely on the Twenty-first Amendment as a sufficient basis to justify its statute, and instead, must demonstrate a compelling state interest sufficient to prohibit the exercise of a protected form of expression. See *Doran* v. *Salem Inn, Inc.*, *supra*, at 933–934; *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968).

In his dissent in *New York State Liquor Authority* v. *Bellanca*, *supra*, JUSTICE STEVENS noted that "[a]lthough the Court has written several opinions implying that nude or partially nude dancing is a form of expressive activity protected by the First Amendment, the Court has never directly confronted the question." *Id.*, at 718–719. I believe it is time to do so. The state courts are in disagreement over the reach of the First Amendment in this area. See generally Barbre, Topless or Bottomless Dancing or Similar Conduct as Offense, 49 A.L.R. 3d 1084, §§ 3, 5 (1973 and Supp. 1985) (collecting cases). In addition, this case does not present the complications of local police power over zoning, as found in *Schad* v. *Mount Ephraim*, *supra*, or the question of States' rights under the Twenty-first Amendment present in *California* v. *LaRue*, *supra*, *Doran* v. *Salem Inn, Inc.*, *supra*, and *New York State Liquor Authority* v. *Bellanca*, *supra*.

For these reasons, I would grant the petition for certiorari.

No. 85–555. BANKERS TRUST CO. *v.* METGE, EXECUTRIX OF THE ESTATE OF METGE, ET AL. C. A. 8th Cir. Motion of Amer-

ican Bankers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 762 F. 2d 621.

No. 85-702. MADRID ET AL. *v.* MONTELONGO ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 765 F. 2d 1353.

No. 85-816. CONNECTICUT *v.* SUTTON. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 197 Conn. 485, 498 A. 2d 65.

No. 85-894. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* LYONS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 770 F. 2d 529.

No. 85-881. AUSTIN *v.* TENNESSEE. Ct. Crim. App. Tenn.;
No. 85-5058. PENRY *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85-5126. HATCH *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 85-5705. HOOPER *v.* ARIZONA. Sup. Ct. Ariz.;
No. 85-5844. SMITH *v.* MONTANA. Sup. Ct. Mont.;
No. 85-5846. CARTWRIGHT *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 85-5867. MARTIN *v.* OHIO. Sup. Ct. Ohio; and
No. 85-5880. JONES *v.* SMITH, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: No. 85-5058, 691 S. W. 2d 636; No. 85-5126, 701 P. 2d 1039; No. 85-5705, 145 Ariz. 538, 703 P. 2d 482; No. 85-5844, —— Mont. —— and ——, 705 P. 2d 1087 and 1110; No. 85-5846, 708 P. 2d 592; No. 85-5867, 19 Ohio St. 3d 122, 483 N. E. 2d 1157; No. 85-5880, 772 F. 2d 668.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85-5815. ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 1356.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Because the Court's refusal to grant certiorari in this case allows the State of Florida to proceed with the execution of a defendant whose conviction may well rest upon a ground that the Florida Supreme Court has held invalid, I must dissent from the denial here.

Since *Stromberg* v. *California*, 283 U. S. 359 (1931), this Court has recognized that "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." *Zant* v. *Stephens*, 462 U. S. 862, 881 (1983). See *Chiarella* v. *United States*, 445 U. S. 222, 237, n. 21 (1980); *Leary* v. *United States*, 395 U. S. 6, 31–32 (1969). Although in *Stromberg*, the Court was concerned that the jury might have held the defendant criminally liable for conduct protected by the First Amendment, the rationale of that decision should not be limited to cases in which a general verdict may be based upon a ground repugnant to the Federal Constitution. Where a jury has been instructed that it may convict a defendant upon an invalid ground, the reason for that invalidity is not important. See *Chiarella* v. *United States*, *supra*, at 237, n. 21 ("We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct"). What offends the Due Process Clause is the possibility that the jury may have condemned the defendant for reasons that as a matter of law—be it statutory or constitutional—cannot support the verdict. The existence of such a possibility is all too real in this case and demands that petitioner's conviction be set aside.

Petitioner was arrested and charged with the murder of an 8-year-old girl. In statements to the police, he admitted removing the victim's clothes, using rope to tie her hands, and placing plastic bags over her body. He said he thought he had tried to have sexual relations with the victim but either could not do it or could

not bring himself to do it. 764 F. 2d 1356, 1358 (CA11 1985). The indictment brought against petitioner alleged that he had "murdered the victim, unlawfully, from a premeditated design by strangling." *Adams* v. *State*, 412 So. 2d 850, 852 (Fla. 1982). The circumstances of the crime might easily have led jurors to believe that even if petitioner had not premeditated the homicide, he nevertheless had killed the girl in the course of an attempted rape. Under state law, such a felony-murder theory was not foreclosed by the indictment, *ibid.*, and it does not appear that the prosecution ever indicated its intention to rely solely upon a theory of premeditated murder.

The trial court's instruction made clear the availability of either felony murder or premeditated murder as a basis for a first-degree murder conviction. At the close of trial, the court instructed the jury that it would not have to find that petitioner had a "premeditated design to kill" in order to convict him of first-degree murder. The court explained:

> "The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree, even though there is no premeditated design or intent to kill.
>
> "If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime the killing is in the perpetration of or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree." *Ibid.*

The jury proceeded to convict petitioner of first-degree murder. Long before petitioner's trial, however, the Florida Supreme Court had held the statutory term "crime against nature" too vague to sustain a conviction. *Franklin* v. *State*, 257 So. 2d 21 (Fla. 1971). Indeed, in affirming petitioner's conviction, the Florida Supreme Court admitted that the instruction here "included references to two crimes which do not exist, to wit: rape and an abominable and detestable crime against nature." 412 So. 2d, at 852. Were it possible, therefore, that in reaching their general verdict the jury relied on a felony-murder theory based upon the

sexual aspects of the killing, the conviction unquestionably would have to be overturned under *Stromberg*.

Finding no such possibility, the Court of Appeals affirmed the District Court's refusal to grant petitioner's habeas petition. The Court of Appeals concluded:

> "The trial court's reference to the capital felony of killing during the commisssion of or an attempt to commit rape, a crime against nature, or kidnapping as murder in the first degree appears early in the instructions as part of what were, in essence, statutory definitions. The actual and controlling charge came later in the instructions, when the trial court told the jurors that, if the elements of homicide were found, their next task would be to determine its degree. At this point, premeditated murder was the only killing stated to constitute murder in the first degree. Therefore, the jurors were actually instructed to consider only premeditated murder as murder in the first degree." 764 F. 2d, at 1362–1363.

I cannot accept the Court of Appeals' distinction between the "statutory" section of the trial court's instructions and the later, "controlling" part. Although the trial court's focus on premeditated murder came in the context of its "summary" of the entire charge, the jury can hardly be presumed to have forgotton the lengthy explanation of first-degree murder that had come before. The sexual overtones of the crime make it impossible to eliminate the possibility that the jury seized upon the references to rape and "crime against nature" and made them dispositive here. So long as such a possibility exists, *Stromberg* requires that petitioner's conviction be set aside.

This Court's refusal to grant certiorari in *Dobbert* v. *Wainwright*, 468 U. S. 1231 (1984), a case raising a *Stromberg* claim very similar to the one here, might have been attributed to the majority's belief that the constitutional claim there had not been properly preserved. *Id.*, at 1244–1246 (MARSHALL, J., dissenting from denial of stay of execution and of certiorari). No such procedural bar exists here, and the Court's refusal to consider petitioner's claims is even less excusable. I dissent.

No. 85–5843. ROVETUSO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 768 F. 2d 809.

Rehearing Denied

No. 84-6717. HOLSEY *v.* MARYLAND, *ante*, p. 1004;

No. 85-56. CONNOR *v.* UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *ante*, p. 998;

No. 85-130. CALIFORNIA STATE BOARD OF EQUALIZATION ET AL. *v.* CHEMEHUEVI INDIAN TRIBE, *ante*, p. 9;

No. 85-191. ZERMAN ET AL. *v.* AVANT GARDE CONDOMINIUM ASSN., INC., ET AL.; and ZERMAN *v.* WHITE, CLERK OF THE FLORIDA SUPREME COURT, ET AL., *ante*, p. 895;

No. 85-222. BAKER, INDIVIDUALLY AND DBA BAKER COAL CO. *v.* UNITED STATES, *ante*, p. 945;

No. 85-263. MAGGETTE *v.* COOK COUNTY POLICE AND CORRECTIONS MERIT BOARD ET AL., *ante*, p. 945;

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No. 85-439. CALIFORNIA EX REL. COOPER, CITY ATTORNEY OF SANTA ANA, CALIFORNIA *v.* MITCHELL BROTHERS' SANTA ANA THEATER ET AL., *ante*, p. 948;

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No. 85-5508. HADDIX *v.* OHIO LIQUOR CONTROL COMMISSION, *ante*, p. 997;

No. 85-5510. BURTON *v.* WILSON ET AL., *ante*, p. 997; and

No. 85-5511. BURTON *v.* SMITH, *ante*, p. 997. Petitions for rehearing denied.

No. 84–6742. BAILEY ET AL. *v.* BUCKEYE CELLULOSE CORP., *ante*, p. 863. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 85–17. VERNON *v.* MAGGIO, WARDEN, *ante*, p. 945. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 85–5041. CHANDLER *v.* LORD, *ante*, p. 853. Motion for leave to file petition for rehearing denied.

No. 85–5316. WILSON *v.* UNITED STATES ET AL., *ante*, p. 921. Motion of petitioner for leave to file petition for rehearing out of time denied.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1078 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

REPUBLICAN PARTY OF HAWAII ET AL. *v.* MINK ET AL.

ON APPLICATION FOR STAY

No. A-428. Decided November 29, 1985

An application by the Republican Party of Hawaii and two Honolulu City Councilmen—who had been recalled from their offices in an October 5, 1985, election, and who sought to run in a special election scheduled for November 30 to fill the vacancies caused by the recall—to stay the Hawaii Supreme Court's judgment (or to enjoin the City Clerk's conduct) is denied. The Hawaii Supreme Court's judgment construed a provision of the Honolulu City Charter as preventing the recalled Councilmen from appearing on the ballot and ordered the City Clerk to enforce the Charter provision in the November 30 election. It was almost impossible in the length of time available to ascertain whether four Justices of this Court would vote to note probable jurisdiction of an appeal from the Hawaii Supreme Court's decision, or whether a majority of this Court would be likely to reverse that decision. The "stay equities" of the case and the usual presumption of constitutionality accorded to state and local laws require denial of the application.

JUSTICE REHNQUIST, Circuit Justice.

Applicants, two recalled City Councilmen of the city of Honolulu and the Republican Party of Hawaii, ask me to stay an order of the Supreme Court of Hawaii, or to affirmatively enjoin the conduct of respondent Pua, the City Clerk of the city of Honolulu. They claim that the following provision of the Honolulu City Charter violates the United States Constitution as interpreted by this Court in *Anderson* v. *Celebrezze*, 460 U. S. 780 (1983):

> "No person, who has been removed from his elected office or who has resigned from such an office after a recall

> petition directed to him has been filed, shall be eligible for election or appointment to any office of the city within two years after his removal or resignation."

Applicants Matsumoto and Paccaro were recalled in an election held October 5. They seek to run in a special election called to fill the vacancies caused by the recall which is scheduled for tomorrow, Saturday, November 30. The stay application was presented to me about 1 p. m., eastern standard time, today, Friday, November 29. The Court of Appeals for the Ninth Circuit concluded that the City Charter provision as it construed it was unconstitutional, but the Supreme Court of Hawaii has now adopted a narrowing construction, which nonetheless prevents Matsumoto and Paccaro from appearing on the ballot, and ordered the City Clerk to enforce the provision in tomorrow's election.

It is almost impossible in the length of time available to me to ascertain whether four Justices of this Court would vote to note probable jurisdiction of an appeal from the decision of the Supreme Court of Hawaii, or whether a majority of this Court would be likely to reverse the decision of that court. The City Charter provision as interpreted by the Supreme Court of Hawaii is not, in my judgment, clearly unconstitutional under our decision in *Anderson* v. *Celebrezze*, *supra*. Under these circumstances, the "stay equities" of the case and the usual presumption of constitutionality accorded to state and local laws lead me to deny the application.

474/pt. 2

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OF

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SUPREME COURT

DURING THE TIME OF THESE REPORTS

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BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1985

UNITED STATES *v.* VON NEUMANN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1144. Argued November 4, 1985—Decided January 14, 1986

Respondent purchased a car in Switzerland and had it shipped to Vancouver, Canada. After he had picked up the car in Vancouver, he drove to the United States border but failed to declare the car when asked by a United States customs officer whether he had anything to declare. Customs then seized the car pursuant to 19 U. S. C. § 1497, which provides that any article not declared upon entry into the United States that by law must be declared is subject to forfeiture or to a penalty equaling the value of the article. Respondent, rather than waiting to challenge the seizure in a judicial forfeiture action that might be initiated by the Government, immediately chose the other statutory option of filing a petition for administrative remission of the forfeiture. Two weeks later he posted a bond for $24,500, the car's value, and Customs released the car. The Customs Service did not respond to the remission petition until 36 days after it was filed, at which time the penalty for failure to declare the car was reduced to $3,600, and this penalty was upheld on administrative review. Respondent then filed a complaint in Federal District Court, seeking cancellation of the penalty on the ground that he had not violated § 1497, and a declaration that the seizure and penalty were unlawful. The District Court disagreed and entered judgment for the Government. The Court of Appeals held that the 36-day delay in acting on respondent's remission petition denied him due process of law in violation of the Fifth Amendment. Subsequently on remand from this Court for reconsideration in light of *United States* v. *$8,850*, 461 U. S. 555, the Court of Appeals held that the four-factor balancing test of *Barker* v. *Wingo*, 407 U. S. 514—the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice suffered by the defendant—applied in *$8,850* in determining whether a delay in bringing a forfeiture proceeding violated due process should also be applied to determine whether the 36-day delay in this case violated due process, and accordingly remanded to the District Court to determine that question under the above test.

Held: On the record, the 36-day delay did not deprive respondent of property without due process of law. Pp. 249–251.

(a) Respondent's right to a forfeiture proceeding meeting the *Barker* test provides the postseizure hearing required by due process to protect respondent's property interest in the car. The remission statute simply

grants the Secretary of the Treasury the discretion not to pursue a complete forfeiture despite the Government's entitlement to one. Remission proceedings are not *necessary* to a forfeiture determination, and therefore are not constitutionally required. Thus, there is no constitutional basis for a claim that respondent's interest in the car, or in the money put up to secure the bond, entitled him to a speedy answer to his remission petition. Pp. 249–250.

(b) Even if respondent had a property right under the remission statute that cannot be taken away without due process that includes a speedy answer to the remission petition, any due process requirement of timely disposition was more than adequately provided for here. It is not shown that he suffered any prejudice from the 36-day delay. Pp. 250–251.

729 F. 2d 657, reversed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Parts I and II of which BURGER, C. J., joined. BURGER, C. J., filed an opinion concurring in part, *post*, p. 251. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 252.

Alan I. Horowitz argued the cause for the United States. With him on the brief were *Acting Solicitor General Fried*, *Assistant Attorney General Trott*, and *Deputy Solicitor General Frey*.

Charles L. Birke argued the cause and filed a brief for respondent.

JUSTICE BRENNAN delivered the opinion of the Court.

We must decide in this case whether a 36-day delay by the United States Customs Service in responding to a remission petition filed by respondent in response to the seizure of his car by customs agents deprived respondent of property without due process of law.

I

Title 19 U. S. C. § 1497[1] provides that any article not declared upon entry into the United States which by law

[1] Section 497, 46 Stat. 728, 19 U. S. C. § 1497, provides:

"Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written

must be declared is subject to forfeiture or to a penalty equaling the value of the article. After seizure of an article by the United States Customs Service, a claimant to it has essentially two options. He may pursue an administrative remedy under 19 U. S. C. § 1618 (1982 ed., Supp. III),[2] which vests in the Secretary of the Treasury the discretionary authority to mitigate or remit the penalty or forfeiture, or he may challenge the seizure in a judicial forfeiture action initiated by the Government.[3] 19 U. S. C. §§ 1602–1604.[4]

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declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article."

[2] Section 618, 46 Stat. 757, as amended and set forth in 19 U. S. C. § 1618 (1982 ed., Supp. III), provides in pertinent part:

"Whenever any person interested in any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws . . . before the sale of such vessel, vehicle, aircraft, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury . . . if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto."

[3] The claimant may trigger the Government's initiation of forfeiture proceedings. In *United States* v. *$8,850*, 461 U. S. 555, 569 (1983), we noted:

"A claimant is able to trigger rapid filing of a forfeiture action if he desires it. First, the claimant can file an equitable action seeking an order compelling the filing of the forfeiture action or return of the seized property. See *Slocum* v. *Mayberry*, 2 Wheat. 1, 10 (1817) (Marshall, C. J.). Less formally, the claimant could simply request that the Customs Service refer the matter to the United States Attorney. If the claimant believes the initial seizure was improper, he could file a motion under Federal Rule of Criminal Procedure 41(e) for a return of the seized property."

[4] When the Jaguar was seized in this case, a customs officer could have instituted nonjudicial, summary forfeiture proceedings if the value of the car had been not more than $10,000. See 19 U. S. C. §§ 1607–1609. Congress has since raised this limit to $100,000. 19 U. S. C. § 1607 (1982 ed.,

In 1974, respondent John Von Neumann shipped to Vancouver, Canada, a 1974 Jaguar Panther automobile he purchased in Switzerland. On January 20, 1975, he and a friend picked up the car in Vancouver, obtained a release from Canadian Customs to take possession of the vehicle and also obtained a form that Von Neumann was to deliver to the Canadian Customs station at the border. Von Neumann failed to deliver the form to Canadian Customs officials. He claimed that he inadvertently drove past the Canadian Customs station because of poor visibility and inadequate directions. Instead, Von Neumann and his friend arrived at the United States border checkpoint at Blaine, Washington, where they were questioned by United States Immigration Officer Harry Perkins, a designated customs officer. Canadian Customs officials had earlier alerted United States Customs that Von Neumann's car would be crossing the border, and Perkins specifically asked Von Neumann whether he had anything to declare. When Von Neumann failed to declare the automobile, Perkins asked him into the checkpoint station and referred the matter to Customs Inspector Donald E. Morrison. Upon being asked why he had not declared the car, Von Neumann explained that he did not think a declaration was required. Morrison then seized the car pursuant to 19 U. S. C. § 1497.

That same day, January 20, Von Neumann prepared a "Petition for Remission or Mitigation of Forfeitures and Penalties Incurred," pursuant to 19 U. S. C. § 1618, explaining that he had not intended to violate United States Customs laws when he failed to declare the car. Two weeks later, on February 3, Von Neumann posted a bond for $24,500, the

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Supp. III). Even for a seizure of property appraised at less than $100,000, the claimant has a right to a judicial determination upon posting a bond to cover costs in the sum of $2,500 or 10% of the value of the claimed property, whichever is smaller, but not less than $250. 19 U. S. C. § 1608 (1982 ed., Supp. III).

value of his car, and Customs released the vehicle pursuant to its authority under 19 U. S. C. § 1614. On February 12, counsel for Von Neumann filed a supplement to the original remission petition. On February 25—36 days after the petition was filed—the Seattle District Director of the Customs Service, pursuant to delegation of authority from the Secretary of the Treasury,[5] acted on Von Neumann's remission petition, and informed Von Neumann that the penalty for failure to declare the car was being reduced to $3,600. On administrative review of this determination, the Regional Commissioner of Customs in San Francisco, on April 14, 1975, upheld the $3,600 penalty.

Having exhausted his administrative remedies, Von Neumann filed a complaint in the United States District Court for the Central District of California. He sought cancellation of the $3,600 penalty on the ground that he had not violated § 1497. He also requested an injunction prohibiting Customs from placing his name on a computer list of violators, and a declaration that this seizure and penalty were unlawful. The District Court found that Von Neumann had violated 19 U. S. C. § 1497, and that seizure of the car therefore was proper. The court also upheld the validity of the remission and mitigation procedures. Accordingly, it entered judgment for the Government.[6] Von Neumann appealed this de-

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[5] The Secretary of the Treasury is authorized by statute to act on petitions for remission. 19 U. S. C. § 1618. This authority has been delegated to District Directors of the Customs Service in some cases where the total value of the merchandise forfeited does not exceed $100,000, 19 CFR § 171.21 (1985). At the time of this seizure, the limit was $25,000. See 19 CFR § 171.21 (1974).

[6] The Government filed a contingent counterclaim seeking recovery of the full $24,500 in accordance with 19 U. S. C. § 1497, in the event the District Court found the mitigation invalid. Because the District Court entered judgment in favor of the Government on the merits of Von Neumann's complaint, it denied the contingent counterclaim. In its answer in the District Court the Government had also contended that the remission and mitigation sought and received by respondent was a settle-

cision, challenging both the procedures followed by Customs in imposing the penalty and also the penalty itself.

The Court of Appeals for the Ninth Circuit agreed with the District Court that Von Neumann had violated § 1497. 660 F. 2d 1319, 1323 (1981). The court, however, also considered and sustained Von Neumann's claim that the 36-day delay in acting on his remission petition denied Von Neumann due process of law in violation of the Fifth Amendment. The court reasoned that speed in the handling of the remission petition, particularly where the seizure is of an automobile, is constitutionally required—that strict guidelines in responding to remission petitions are necessary "to ensure the due process rights of administrative claimants," *id.*, at 1326–1327, and concluded that Customs must "act on a petition for remission or mitigation within 24 hours of receipt," *id.*, at 1327. In addition, the court ruled, a claimant has a right to a personal appearance to present his or her claim. *Ibid.*

The Government petitioned for certiorari. We granted the petition, vacated, and remanded for reconsideration in light of *United States* v. *$8,850*, 461 U. S. 555 (1983). 462 U. S. 1101 (1983). In *$8,850*, however, the issue presented did not involve the remission procedure; rather the question was whether the Government's 18-month delay in bringing a *forfeiture* proceeding violated the claimant's right to due process of law. The Court held that due process requires a postseizure determination within a reasonable time of the seizure. We concluded that the four-factor balancing test of *Barker* v. *Wingo*, 407 U. S. 514 (1972), provides the relevant framework for determining whether a delay was reasonable. The *Barker* test involves a weighing of four factors: the length of any delay, the reason for the delay, the defendant's assertion of his right, and prejudice suffered by the defendant. Applying this test to the 18-month delay before it, the

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ment, accord, and satisfaction binding on Von Neumann. The District Court did not reach this issue; nor do we.

Court in *$8,850* found no unreasonable delay, in part because a substantial portion of the delay in question was attributable to pending administrative and criminal proceedings.

On remand in this case, the Court of Appeals recognized that *$8,850* "presented a somewhat different issue from that arising in the instant case," 729 F. 2d 657, 659 (1984), because *$8,850* dealt with forfeiture rather than the remission procedure. Nevertheless, it concluded that this Court's holding in *$8,850* "reinforces our earlier view that due process rights attach to the processing of the petition for remission," 729 F. 2d, at 660, and therefore reaffirmed its holding that "due process requires Customs to act promptly in ruling on petitions for remission or mitigation under 19 U. S. C. § 1618." *Ibid.* The court recognized that its earlier attempt to set specific time limits for the processing of remission petitions was "ill-advised," *ibid.*, and held instead that the *Barker* factors should also be applied to determine whether Customs has violated due process in delaying a response to a remission petition. The court accordingly remanded the case to the District Court to consider whether the 36-day delay violated due process. In addition, however, the court made clear its view that the circumstances of this case support a finding of a due process violation. Thus, the court noted that the propriety of the length of the delay may turn on the nature of the item that has been seized, and reemphasized the point made in its earlier opinion that "special hardships [are] imposed on persons deprived of the use of their automobiles . . . ." 729 F. 2d, at 661. With respect to the reason for the delay, the Court of Appeals observed that the "record here provides no obvious reason for the Government's one-month delay in processing von Neumann's petition, although we note that Customs processes a great number of petitions each year." *Ibid.* In addition, the court pointed to the filing of the remission petition itself as the necessary assertion of the right to a speedy determination under *Barker*. Finally, the court

noted that prejudice could be established by the inconvenience of being without a vehicle for any length of time.

Arguing that due process considerations do not govern the Secretary's disposition of remission petitions, the Government petitioned for certiorari. We granted the Government's petition. 471 U. S. 1064 (1984). We now reverse.

II

We understand respondent to argue that his property interest in his car gives him a constitutional right to a speedy disposition of his remission petition without awaiting a forfeiture proceeding. We disagree. Implicit in this Court's discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest in the car.[7] Respondent argues, however, that "[t]he petition for remission procedure is just one step in which it is determined whether that property interest will be extinguished via a judicial foreclosure proceeding." Brief for Respondent 8–9. We think respondent misunderstands the remission procedure's role. It is true that, as a practical matter, most forfeitures are disposed of through the administrative remission procedures,[8] but that is constitutionally

[7] In *$8,850* the claimant conceded that no preseizure hearing is required when Customs makes a seizure at the border. Respondent does not dispute that here, and we doubt that he could. In *$8,850* we noted that while the general rule is that "absent an 'extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a *prior* judicial determination that the seizure is justified. . . . due process does not require federal customs officials to conduct a hearing before seizing items subject to forfeiture." *$8,850*, 461 U. S., at 562, n. 12. We reasoned that such a requirement would make customs processing entirely unworkable and also found that because "the seizure serves important governmental purposes[,] a preseizure notice might frustrate the statutory purpose . . . ." *Ibid.*

[8] We noted in *$8,850* that Customs processes over 50,000 noncontraband forfeitures per year, and that in 90% of all seizures, the claimant files a petition for remission or mitigation. We further noted that the Secretary

irrelevant. We noted in *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 234 (1972), that in the event an item is not declared at the border under § 1497 "[t]he Government need only prove that the property was brought into the United States without the required declaration; the Government bears no burden with respect to intent." The remission statute simply grants the Secretary the discretion not to pursue a complete forfeiture despite the Government's entitlement to one. Remission proceedings supply both the Government and the claimant a way to resolve a dispute informally rather than in judicial forfeiture proceedings. But remission proceedings are not *necessary* to a forfeiture determination, and therefore are not constitutionally required. Thus there is no constitutional basis for a claim that respondent's interest in the car, or in the money put up to secure the bond, entitles him to a speedy answer to his remission petition.

III

While his interest in the car is the only basis on which respondent relies in his support of the Court of Appeals' decision, the Government asks that the Court adjudge the case of a claimant who relies on the argument that § 1618 itself creates a property right which cannot be taken away without due process that includes a speedy answer to a remission petition. The Government argues that the statute creates no such right. We need not address the hypothetical, however. It is abundantly clear on the record in this case that, even if respondent had such a property right, any due process requirement of timely disposition was more than adequately provided here. It is difficult, indeed impossible, to see what prejudice respondent suffered from the 36-day delay in the response. True, he was without his car for 14 days, and then, for another 22 days, without the money he

in turn grants at least partial relief for an estimated 75% of the petitions. Typically, this mitigation process terminates the dispute without the necessity of filing a forfeiture action.

had to put up to secure a bond, and Von Neumann urges the importance of automobiles to citizens in this society. But we have already noted that his right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car and the money. In fact, it is not altogether certain that the delay dated from the filing on January 20 of the original remission petition. Respondent supplemented his remission petition and was given a final decision just 13 days later. Moreover, respondent gives no hint as to how or why even a 36-day delay in the disposition of his remission petition deprived him of the process he claims was his due in connection with that petition. He does not argue that the delay prejudiced his defense against the forfeiture, see *$8,850*, 461 U. S., at 569, and with respect to preparing his "case" for remission, that case was made at the time of filing and could not have been affected by the subsequent delay. On the record before us, the 36-day delay cannot be said to deprive respondent of due process of law.

Reversed.

CHIEF JUSTICE BURGER, concurring in part.

I join Parts I and II of the majority opinion, but do not agree with the Court's failure, in Part III of the opinion, to resolve an important question that is properly before the Court.

Part III declines to address the question whether a claimant may assert a due process "property" interest in the result of a discretionary petition for reduction of a statutory penalty. This question was expressly presented by our grant of the Government's petition for certiorari. The two opinions of the Court of Appeals are sufficiently ambiguous as to leave unclear whether or not that court was relying on Von Neumann's interest in the car itself, or on some interest in having his penalty reduced. In its initial opinion the Court of Appeals held that "[t]he delay in processing [respondent's] petition for remission or mitigation . . . violated his *due proc-*

ess right to prompt consideration of his claim." 660 F. 2d 1319, 1327 (CA9 1981) (emphasis added).

Whether respondent has any due process right in his claim for mitigation of the statutory penalty is a question properly before the Court, and we have an obligation to address it. Resolution of this issue is not difficult. We held in *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458 (1981), that a prisoner has no liberty interest cognizable under due process in a claim for a discretionary grant of parole, even though under the state parole procedure inmates were regularly and routinely granted release. It follows directly that there can be no possible due process property interest in a discretionary grant of a reduction in a statutory penalty unless we are prepared to modify *Dumschat*.

I would confront and resolve this issue rather than relying on the Court's alternative holding that the 36-day period satisfies due process regardless of what due process "interests" were actually involved.

JUSTICE STEVENS, concurring in the judgment.

The fact that remission procedures are not constitutionally required, *ante*, at 249–250, does not shed any light on the question whether the Government has an obligation to process remission petitions with reasonable diligence. For even though it was not obligated to do so, Congress has enacted legislation authorizing the Secretary of the Treasury to create such a procedure. The importance of this statutory procedure is underlined by the fact that it is used to resolve almost 50,000 claims every year. Its practical significance is also suggested by the fact that the number of at least partially successful claimants in remission proceedings is triple the number that come away empty-handed. This record indicates that the remission petition is a principal mechanism for resolving the dispute between the Government and the individual that frequently results from the seizure of property at our borders.

When Congress authorizes a member of the Cabinet to establish a procedure of this importance to thousands of individuals, it surely intends that the procedure will be administered in a regular and fundamentally fair way. One element of fair procedure is a requirement of reasonable diligence in processing claims. Absent clear evidence to the contrary, I would therefore construe the statute as implicitly commanding the Secretary to act diligently, and would not speculate about the possibility that a wholly arbitrary remission procedure would comply with the Due Process Clause of the Fifth Amendment.*

Nevertheless, I agree with the Court's ultimate conclusion that on this record respondent has not demonstrated that the 36-day delay in responding to his petition was unlawful. I therefore concur in the judgment.

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*The Government concedes that, at least before the Customs Service acts on a remission petition, Congress has intended that the timeliness of the Government's response be fully reviewable. See Brief for United States 25, n. 20 ("A claimant is not powerless . . . to obtain a speedy resolution of the question of his interest in the property. If delay in processing the administrative petition for remission or mitigation is unreasonable under the Administrative Procedure Act, the claimant may file suit to attempt to compel the agency to act. 5 U. S. C. 706(1)").

VASQUEZ, WARDEN *v.* HILLERY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-836. Argued October 15, 1985—Decided January 14, 1986

In 1962, a California grand jury indicted respondent for murder. Before trial in California Superior Court, the judge refused to quash the indictment on the alleged ground that it had been issued by a grand jury from which blacks had been systematically excluded. Respondent was subsequently convicted of first-degree murder. After unsuccessfully pursuing appeals and collateral relief in the state courts for the next 16 years, respondent filed a habeas corpus petition in Federal District Court, again raising his equal protection challenge to the grand jury that indicted him. The District Court upheld the challenge, and the Court of Appeals affirmed.

Held:

1. Respondent's obligation to exhaust state remedies before seeking collateral relief in federal court was not circumvented by the fact that the District Court, pursuant to a valid exercise of its power to expand the record, directed the parties to present supplemental evidence (consisting of affidavits and a computer analysis assessing the mathematical possibility that chance or accident could have accounted for the exclusion of blacks from the grand jury), where such evidence did not fundamentally alter the claim already considered by the state courts. Pp. 257-260.

2. The longstanding rule requiring reversal of the conviction of a defendant indicted by a grand jury from which members of his own race were systematically excluded will not be abandoned in this case on the theory that discrimination in the grand jury amounted to harmless error and that respondent's conviction after a fair trial purged any taint attributable to the grand jury process. Intentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the State's power to prevent. Even if the grand jury's determination of probable cause to believe that a defendant has committed a crime is confirmed in hindsight by a conviction on the indicted offense, that confirmation does not suggest that discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or existence of the proceedings to come. And just as a conviction is void under the Equal Protection Clause if the prosecutor deliberately charged the defendant on account of

his race, a conviction cannot be understood to cure the taint attributable to a grand jury selected on the basis of race. Pp. 260–264.

3. Sound jurisprudence counsels against adoption of a rule whereby the grant of federal habeas corpus relief to a state prisoner would be conditioned upon the passage of time between his conviction and the filing of the federal habeas corpus petition, depending upon the State's ability to obtain a second conviction. Pp. 264–265.

4. The decision in this case is supported, but not compelled, by the *stare decisis* doctrine, the means by which this Court ensures that the law will not merely change erratically but will develop in a principled and intelligible fashion. Pp. 265–266.

733 F. 2d 644, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, and in all but the sixth paragraph of Part III of which WHITE, J., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 266. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 267.

William George Prahl, Supervising Deputy Attorney General of California, argued the cause for petitioner. With him on the brief was *John K. Van de Kamp*, Attorney General.

Clifford Earl Tedmon, by appointment of the Court, 471 U. S. 1002, argued the cause and filed a brief for respondent.*

JUSTICE MARSHALL delivered the opinion of the Court.

The Warden of San Quentin State Prison asks this Court to retire a doctrine of equal protection jurisprudence first announced in 1880. The time has come, he urges, for us to abandon the rule requiring reversal of the conviction of any defendant indicted by a grand jury from which members of his own race were systematically excluded.

I

In 1962, the grand jury of Kings County, California, indicted respondent, Booker T. Hillery, for a brutal murder.

**Julius LeVonne Chambers, Steven L. Winter,* and *Anthony G. Amsterdam* filed a brief for the NAACP Legal Defense & Educational Fund, Inc., as *amicus curiae* urging affirmance.

Before trial in Superior Court, respondent moved to quash the indictment on the ground that it had been issued by a grand jury from which blacks had been systematically excluded. A hearing on respondent's motion was held by Judge Meredith Wingrove, who was the sole Superior Court Judge in the county and had personally selected all grand juries, including the one that indicted respondent, for the previous seven years. Absolving himself of any discriminatory intent, Judge Wingrove refused to quash the indictment.[1] Respondent was subsequently convicted of first-degree murder.

For the next 16 years, respondent pursued appeals and collateral relief in the state courts, raising at every opportunity his equal protection challenge to the grand jury that indicted him.[2] Less than one month after the California Supreme Court foreclosed his final avenue of state relief in 1978, respondent filed a petition for a writ of habeas corpus in federal court, raising that same challenge. The District Court concluded that respondent had established discrimination in the grand jury, and granted the writ. See *Hillery* v. *Pulley*, 563 F. Supp. 1228 (ED Cal. 1983). The Court of Appeals

[1] Three thorough and well-reasoned opinions of the District Court discuss in detail the evidence adduced at the hearing, as well as other aspects of the case. See *Hillery* v. *Pulley*, 563 F. Supp. 1228 (ED Cal. 1983); *Hillery* v. *Pulley*, 533 F. Supp. 1189 (ED Cal. 1982); *Hillery* v. *Sumner*, 496 F. Supp. 632 (ED Cal. 1980). We repeat here only those portions relevant to the issues before the Court.

[2] See *People* v. *Hillery*, 34 Cal. Rptr. 853, 386 P. 2d 477 (1963) (affirming conviction; rejecting discrimination claim); *People* v. *Hillery*, 62 Cal. 2d 692, 401 P. 2d 382 (1965) (on rehearing, rejecting discrimination claim; reversing sentence), cert. denied, 386 U. S. 938 (1967); *People* v. *Hillery*, 65 Cal. 2d 795, 423 P. 2d 208 (1967) (after remand, affirming sentence), cert. denied, 389 U. S. 986 (1968); *In re Hillery*, 71 Cal. 2d 857, 457 P. 2d 565 (1969) (on original petition for habeas corpus, reversing sentence); *People* v. *Hillery*, 10 Cal. 3d 897, 519 P. 2d 572 (1974) (after remand, reducing sentence); *In re Hillery*, Crim. No. 20424 (Cal. 1978) (affirming denial of state habeas corpus).

affirmed, 733 F. 2d 644 (CA9 1984), and we granted certiorari, 470 U. S. 1026 (1985).

II

As a threshold matter, we turn to petitioner's contention that respondent has circumvented his obligation to exhaust state remedies before seeking collateral relief in federal court. 28 U. S. C. § 2254(b). The exhaustion issue had its genesis in this case when the Federal District Judge saw a need to "supplement and clarify" the state-court record presented for review. Record, Doc. No. 8, p. 2. Upon authority of 28 U. S. C. § 2254 Rule 7, the judge directed the State to provide more figures "demonstrating what portion of the Black population in Kings County was eligible for grand jury service." Record, Doc. No. 8, p. 3. He also directed the parties to present their views regarding the application of statistical probability analysis to the facts of this case, to assist him in "focus[ing] on the likelihood that chance or accident alone could account for the exclusion of a group from grand jury service." *Ibid.* Petitioner objects that the submissions made in response to the judge's order "drastically" altered respondent's claim and rendered it unsuitable for federal habeas review without prior consideration by the state courts. Brief for Petitioner 81.

The exhaustion doctrine seeks to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary. *Rose* v. *Lundy*, 455 U. S. 509, 515 (1982). Under standards established by this Court, a state prisoner may initiate a federal habeas petition "[o]nly if the state courts have had the first opportunity to hear the claim sought to be vindicated . . . ." *Picard* v. *Connor*, 404 U. S. 270, 276 (1971). "It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Id.*, at 275; see also *Humphrey* v. *Cady*, 405 U. S. 504, 516–517, n. 18 (1972). We have never held that presentation

of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts. See *Picard*, *supra*, at 278.

Rule 7(b) permits a federal district court in a habeas proceeding to expand the existing record to "include, without limitation, . . . documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record." In this case, the District Court sought to clarify the relevant facts, an endeavor wholly consistent with Rule 7 and the purpose of the writ. See *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963). The sole question here is whether this valid exercise of the court's power to expand the record had the effect of undermining the policies of the exhaustion requirement.

Several affidavits challenged here as "new" evidence supported respondent's allegations that no black had ever served on the grand jury in Kings County and that qualified blacks in the county were available to serve, which he had pressed in his pretrial motion to quash in Superior Court, App. 28–30, and throughout the state proceedings. The California Supreme Court found that the total absence of blacks from the grand jury in the history of Kings County was an undisputed fact. *People* v. *Hillery*, 62 Cal. 2d 692, 709, 401 P. 2d 382, 392 (1965), cert. denied, 386 U. S. 938 (1967). That fact was entitled, therefore, to a presumption of correctness on federal review. *Sumner* v. *Mata*, 449 U. S. 539, 545–546 (1981); see *Hillery* v. *Pulley*, 533 F. Supp. 1189, 1201, n. 25 (ED Cal. 1982). The California Supreme Court also discussed Judge Wingrove's consideration of blacks' qualifications, and found that blacks had served as petit jurors, 62 Cal. 2d, at 710, 401 P. 2d, at 392–393, minimum eligibility requirements for which were substantially the same as for grand jurors, see 563 F. Supp., at 1245; Mar, The California Grand Jury: Vestige of Aristocracy, 1 Pac. L. J. 36, 40

(1970). Consequently, the additional affidavits introduced no claim upon which the state courts had not passed.

The remaining "new" evidence under attack, a computer analysis submitted in response to the District Court's request, assessed the mathematical probability that chance or accident could have accounted for the exclusion of blacks from the Kings County grand jury over the years at issue.[3] Petitioner would have us conclude that the "sophisticated computer techniques" rendered respondent's claim a "wholly different animal." Brief for Petitioner 80–81. These statistical estimates, however, added nothing to the case that this Court has not considered intrinsic to the consideration of any grand jury discrimination claim. As early as 1942, this Court rejected a contention that absence of blacks on the grand jury was insufficient to support an inference of discrimination, summarily asserting that "chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period as sixteen years or more." *Hill* v. *Texas*, 316 U. S. 400, 404 (1942). This proposition, which the Court derived solely on the basis of judicial intuition, is precisely what respondent sought to establish by methods now considered somewhat more reliable.

More recently, in reviewing a habeas corpus proceeding, this Court independently applied general statistical principles to the evidence on the record in order to assess the role of chance in the exclusion of Mexican-Americans from a grand jury in Texas. *Castaneda* v. *Partida*, 430 U. S. 482,

[3] The statistical expert concluded that if the grand juries selected in Kings County between 1900 and 1962 had been chosen by chance, the probability that no black would have been selected was 57 in 100,000 million. Although the State made no attempt to rebut this testimony, the District Court questioned the reliability of the expert's analysis, performed its own analysis of the data, and ultimately accepted the expert's conclusions only for the 7-year period of Judge Wingrove's tenure, which yielded a probability of 2 in 1,000 that the phenomenon was attributable to chance. 563 F. Supp., at 1241–1244.

496–497, n. 17 (1977). Form would indeed triumph over substance were we to allow the question of exhaustion to turn on whether a federal judge has relied on educated conjecture or has sought out a more sophisticated interpretative aid to accomplish the same objective.

We emphasize that the District Court's request for further information was evidently motivated by a responsible concern that it provide the meaningful federal review of constitutional claims that the writ of habeas corpus has contemplated throughout its history. 533 F. Supp., at 1202–1203; see *Townsend* v. *Sain*, *supra*, at 311–312. Respondent had initially submitted only the evidence that had been considered in state court, and subsequently complied with the court's request by furnishing materials no broader than necessary to meet the needs of the court. Accordingly, the circumstances present no occasion for the Court to consider a case in which the prisoner has attempted to expedite federal review by deliberately withholding essential facts from the state courts. We hold merely that the supplemental evidence presented by respondent did not fundamentally alter the legal claim already considered by the state courts, and, therefore, did not require that respondent be remitted to state court for consideration of that evidence.

III

On the merits, petitioner urges this Court to find that discrimination in the grand jury amounted to harmless error in this case, claiming that the evidence against respondent was overwhelming and that discrimination no longer infects the selection of grand juries in Kings County. Respondent's conviction after a fair trial, we are told, purged any taint attributable to the indictment process. Our acceptance of this theory would require abandonment of more than a century of consistent precedent.

In 1880, this Court reversed a state conviction on the ground that the indictment charging the offense had been

issued by a grand jury from which blacks had been excluded. We reasoned that deliberate exclusion of blacks "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880).

Thereafter, the Court has repeatedly rejected all arguments that a conviction may stand despite racial discrimination in the selection of the grand jury. See, *e. g.*, *Neal* v. *Delaware*, 103 U. S. 370, 396 (1881); *Bush* v. *Kentucky*, 107 U. S. 110 (1883); *Gibson* v. *Mississippi*, 162 U. S. 565 (1896); *Carter* v. *Texas*, 177 U. S. 442 (1900); *Rogers* v. *Alabama*, 192 U. S. 226 (1904); *Pierre* v. *Louisiana*, 306 U. S. 354 (1939); *Smith* v. *Texas*, 311 U. S. 128 (1940); *Hill* v. *Texas*, *supra*; *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Reece* v. *Georgia*, 350 U. S. 85 (1955); *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958); *Arnold* v. *North Carolina*, 376 U. S. 773 (1964); *Alexander* v. *Louisiana*, 405 U. S. 625 (1972). Only six years ago, the Court explicitly addressed the question whether this unbroken line of case law should be reconsidered in favor of a harmless-error standard, and determined that it should not. *Rose* v. *Mitchell*, 443 U. S. 545 (1979).[4]

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[4] The dissent attempts to lessen the precedential weight of *Mitchell* by characterizing it as an advisory opinion. *Post*, at 270, n. 4. In Part II of *Mitchell*, three Justices reaffirmed the principle that grand jury discrimination requires reversal of the conviction in all cases; in Parts III and IV, they concluded that the prisoner had failed to make out a prima facie case of discrimination. 443 U. S., at 574. Two additional Justices explicitly joined Part II, but dissented from the judgment because they believed that discrimination had been established, and that the conviction must, therefore, be reversed. *Id.*, at 588 (WHITE, J., joined by STEVENS, J., dissenting). The dissent here offers a citation to *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.), in support of its unprecedented argument that a statement of legal opinion joined by five Justices of this Court does not carry the force of law. The cited passage, however, refers only to the manner in which one may discern a single holding of the Court in cases in which no opinion on the

We reaffirmed our conviction that discrimination on the basis of race in the selection of grand jurors "strikes at the fundamental values of our judicial system and our society as a whole," and that the criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded. *Id.*, at 556.

Petitioner argues here that requiring a State to retry a defendant, sometimes years later, imposes on it an unduly harsh penalty for a constitutional defect bearing no relation to the fundamental fairness of the trial. Yet intentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent. Thus, the remedy we have embraced for over a century—the only effective remedy for this violation[5]—is not disproportionate to the evil that it seeks to deter. If grand jury discrimination becomes a thing of the past, no conviction will ever again be lost on account of it.

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issue in question has garnered the support of a majority. That discussion is inapplicable to Part II of *Mitchell*, to which five Justices expressly subscribed.

[5] As we pointed out in *Rose* v. *Mitchell*, alternative remedies are ineffectual. Federal law provides a criminal prohibition against discrimination in the selection of grand jurors, 18 U. S. C. § 243, but according to statistics compiled by the Administrative Office of the United States Courts, that section has not been the basis for a single prosecution in the past nine years. With respect to prior years, for which precise information is not available, we have been unable to find evidence of any prosecution or conviction under the statute in the last century. The other putative remedy for grand jury discrimination is 42 U. S. C. § 1983, which, in theory, allows redress for blacks who have been excluded from grand jury service. See *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320 (1970). These suits are also extremely rare, undoubtedly because the potential plaintiffs, eligible blacks not called for grand jury service, are often without knowledge of the discriminatory practices and without incentive to launch costly legal battles to stop them.

Nor are we persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions. The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts. Moreover, "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." *United States* v. *Ciambrone*, 601 F. 2d 616, 629 (CA2 1979) (Friendly, J., dissenting). Thus, even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come.

When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired. See *Tumey* v. *Ohio*, 273 U. S. 510, 535 (1927) (reversal required when judge has financial interest in conviction, despite lack of indication that bias influenced decisions). Similarly, when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained. See *Davis* v. *Georgia*, 429 U. S. 122 (1976) *(per curiam)*; *Sheppard* v. *Maxwell*, 384 U. S. 333, 351–352 (1966). Like these fundamental flaws, which never have been thought harmless, discrimination in the grand jury undermines the structural integrity of the

criminal tribunal itself, and is not amenable to harmless-error review.[6]

Just as a conviction is void under the Equal Protection Clause if the prosecutor deliberately charged the defendant on account of his race, see *United States* v. *Batchelder*, 442 U. S. 114, 125, and n. 9 (1979), a conviction cannot be understood to cure the taint attributable to a charging body selected on the basis of race. Once having found discrimination in the selection of a grand jury, we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted. The overriding imperative to eliminate this systemic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal.

The opinion of the Court in *Mitchell* ably presented other justifications, based on the necessity for vindicating Fourteenth Amendment rights, supporting a policy of automatic reversal in cases of grand jury discrimination. That analysis persuasively demonstrated that the justifications retain their validity in modern times, for "114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole." 443 U. S., at 558–559. The six years since *Mitchell* have given us no reason to doubt the continuing truth of that observation.

IV

The dissent propounds a theory, not advanced by any party, which would condition the grant of relief upon the passage of time between a conviction and the filing of a petition for federal habeas corpus, depending upon the ability of a State to obtain a second conviction. Sound jurisprudence

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[6] JUSTICE WHITE does not join in the foregoing paragraph.

counsels against our adoption of that approach to habeas corpus claims.

The Habeas Corpus Rules permit a State to move for dismissal of a habeas petition when it "has been prejudiced in its ability to respond to the petition by delay in its filing." 28 U. S. C. § 2254 Rule 9(a). Indeed, petitioner filed such a motion in this case, and it was denied because the District Court found that no prejudicial delay had been caused by respondent. *Hillery* v. *Sumner*, 496 F. Supp. 632, 637 (ED Cal. 1980). Congress has not seen fit, however, to provide the State with an additional defense to habeas corpus petitions based on the difficulties that it will face if forced to retry the defendant. The Judicial Conference Advisory Committee on Criminal Rules has drafted a proposed amendment to Rule 9(a), which would permit dismissal of a habeas corpus petition upon a demonstration that the State has been prejudiced, either in defending against the prisoner's federal claim or in bringing the prisoner to trial again should the federal claim prove meritorious. 52 U. S. L. W. 2145 (1983). That proposal has not been adopted. And, despite many attempts in recent years, Congress has yet to create a statute of limitations for federal habeas corpus actions. See L. Yackle, Postconviction Remedies § 19 (Supp. 1985) (describing relevant bills introduced in past several Congresses). We should not lightly create a new judicial rule, in the guise of constitutional interpretation, to achieve the same end.

V

Today's decision is supported, though not compelled, by the important doctrine of *stare decisis*, the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in

fact. While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged "to bring its opinions into agreement with experience and with facts newly ascertained." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 412 (1932) (Brandeis, J., dissenting).

Our history does not impose any rigid formula to constrain the Court in the disposition of cases. Rather, its lesson is that every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective. In the case of grand jury discrimination, we have been offered no reason to believe that any such metamorphosis has rendered the Court's long commitment to a rule of reversal outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration. On the contrary, the need for such a rule is as compelling today as it was at its inception.

The judgment of the Court of Appeals, accordingly, is affirmed.

It is so ordered.

JUSTICE O'CONNOR, concurring in the judgment.

This Court has long held that upon proof of systematic exclusion of blacks from a grand jury issuing an indictment, the admittedly costly remedy of reversal of a conviction thereafter obtained through a fair trial is necessary in order to eradicate and deter such discrimination. Not until *Rose* v. *Mitchell*, 443 U. S. 545 (1979), however, did the Court squarely address the question whether, given the availability of this remedy on direct review, it is also necessary to make the same remedy available when the petitioner seeks to renew his claim of discriminatory exclusion on federal habeas corpus review. See *id.*, at 582 (POWELL, J., concurring in judgment).

I share the view expressed by JUSTICE POWELL in *Rose:* a petitioner who has been afforded by the state courts a full

and fair opportunity to litigate the claim that blacks were discriminatorily excluded from the grand jury which issued the indictment should be foreclosed from relitigating that claim on federal habeas. The incremental value that continued challenges may have in rooting out and deterring such discrimination is outweighed by the unique considerations that apply when the habeas writ is invoked. The history and purposes of the writ, as well as weighty finality interests and considerations of federalism, counsel against permitting a petitioner to renew on habeas a challenge which does not undermine the justness of his trial, conviction, or incarceration. See *id.*, at 579–588.

In this case, the District Court held that respondent was not given a full and fair hearing on his discriminatory exclusion claim in state court. See *Hillery* v. *Pulley*, 563 F. Supp. 1228 (ED Cal. 1983). That holding was not altered on appeal, 733 F. 2d 644 (CA9 1984), nor is it challenged by the petitioner in this Court. Respondent's claim was therefore cognizable in federal habeas proceedings. Because I am not convinced that a sufficiently compelling case has been made for reversing this Court's precedents with respect to the remedy applicable to properly cognizable claims of discriminatory exclusion of grand jurors, I concur in the judgment of the Court.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

Respondent, a black man, was indicted by a grand jury having no black members for the stabbing murder of a 15-year-old girl. A petit jury found respondent guilty of that charge beyond a reasonable doubt, in a trial the fairness of which is unchallenged here.[1] Twenty-three years later, we are asked to grant respondent's petition for a writ of habeas

[1] Respondent was thrice sentenced to death for this murder. See *People* v. *Hillery*, 10 Cal. 3d 897, 519 P. 2d 572 (1974); *ante*, at 256, n. 2. That sentence was ultimately reduced to life imprisonment because the California Supreme Court found that imposition of the death penalty was in all cases inconsistent with the California Constitution. *Ibid.*

corpus—and thereby require a new trial if that is still feasible—on the ground that blacks were purposefully excluded from the grand jury that indicted him. It is undisputed that race discrimination has long since disappeared from the grand jury selection process in Kings County, California. It is undisputed that a grand jury that perfectly represented Kings County's population at the time of respondent's indictment would have contained only one black member.[2] Yet the Court holds that respondent's petition must be granted, and that respondent must be freed unless the State is able to reconvict, more than two decades after the murder that led to his incarceration.

It is difficult to reconcile this result with a rational system of justice. The Court nevertheless finds its decision compelled by a century of precedent and by the interests of respondent and of society in ending race discrimination in the selection of grand juries. I dissent for two reasons. First, in my view, any error in the selection of the grand jury that indicted respondent is constitutionally harmless. Second, even assuming that the harmless-error rule does not apply, reversal of respondent's conviction is an inappropriate remedy for the wrong that prompts this case.

I

The Court concludes that the harmless-error rule does not apply to claims of grand jury discrimination. *Ante*, at 261. This conclusion is said to follow from a line of cases going back over 100 years. *Ante*, at 260–261. In my view, it follows from a misapplication of the doctrine of *stare decisis*.

Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet* v.

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[2] According to 1960 census figures, 4.7% of Kings County's population over age 21 was black. *Hillery* v. *Pulley*, 563 F. Supp. 1228, 1232 (ED Cal. 1983). Respondent's grand jury consisted of 19 individuals, all of whom were white. *Id.*, at 1231.

Coronado Oil & Gas Co., 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting). Accordingly, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 559 (1985) (POWELL, J., dissenting). Nevertheless, when governing decisions are badly reasoned, or conflict with other, more recent authority, the Court "has never felt constrained to follow precedent." *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944). Instead, particularly where constitutional issues are involved, "[t]his Court has shown a readiness to correct its errors even though of long standing." *United States* v. *Barnett*, 376 U. S. 681, 699 (1964). In this case, the Court misapplies *stare decisis* because it relies only on decisions concerning grand jury discrimination. There is other precedent, including important cases of more recent vintage than those cited by the Court, that should control this case. Those cases hold, or clearly imply, that a conviction should not be reversed for constitutional error where the error did not affect the outcome of the prosecution.

In *Chapman* v. *California*, 386 U. S. 18 (1967), the Court held that a trial judge's improper comment on the defendant's failure to testify—a clear violation of the Fifth and Fourteenth Amendments—was not a proper basis for reversal if harmless. *Id.*, at 21–24. Since *Chapman*, "the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *United States* v. *Hasting*, 461 U. S. 499, 509 (1983). This rule has been applied to a variety of constitutional violations. See *Harrington* v. *California*, 395 U. S. 250 (1969) (use of co-conspirator confession in violation of Confrontation Clause); *Coleman* v. *Alabama*, 399 U. S. 1 (1970) (denial of counsel at preliminary hearing); *Milton* v. *Wainwright*, 407 U. S. 371 (1972) (use of confession obtained in violation of

right to counsel); *Gerstein* v. *Pugh*, 420 U. S. 103 (1975) (illegal arrest).

Other doctrines reflect the same principle. A defendant claiming ineffective assistance of counsel must show that counsel's incompetence caused him actual prejudice. *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). This is so even though counsel "made errors so serious that [he] was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Ibid.*[3] Similarly, a defendant who is barred by a procedural default from asserting a constitutional claim on direct appeal cannot raise the claim on habeas corpus without showing that the error actually prejudiced him. *United States* v. *Frady*, 456 U. S. 152, 170 (1982); see also *Wainwright* v. *Sykes*, 433 U. S. 72 (1977).

In *Rose* v. *Mitchell*, 443 U. S. 545 (1979), the Court contended that the principle of these cases is inapplicable to grand jury discrimination claims, because grand jury discrimination "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process."[4] *Id.*, at 555–556. But *every* constitutional error may be said to raise questions as to the "appearance of justice" and the "integrity

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[3] As the Court stated in *Strickland*, "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U. S., at 695.

[4] Although all parts of JUSTICE BLACKMUN's opinion in *Rose* v. *Mitchell* were joined by four other Justices, its precedential weight is subject to some question. In particular, Part II of the opinion—the part that discusses the legal principles applicable to grand jury discrimination claims generally—was not joined by five Justices who also joined in the judgment. Cf. *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976) (Court's holding is "that position taken by those Members who concurred in the judgments on the narrowest grounds"). Moreover, the opinion's discussion of general principles was irrelevant to the result, which turned on the insufficiency of the evidence of discrimination. In my view, therefore, *Rose* is little more than an advisory opinion. See *Flast* v. *Cohen*, 392 U. S. 83, 94–95 (1968); Frankfurter, Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1005–1007 (1924).

of the judicial process." Nevertheless, as the cases cited above show, the Court has required some showing of actual prejudice to the defendant as a prerequisite to reversal, even when the constitutional error directly affects the fairness of the defendant's trial. Compare *Strickland* v. *Washington*, *supra*, at 687 (requiring prejudice in ineffective assistance of counsel claims), with *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963) (emphasizing importance of right to counsel to ensure fair trial). Grand jury discrimination is a serious violation of our constitutional order, but so also are the deprivations of rights guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments to which we have applied harmless-error analysis or an analogous prejudice requirement. Moreover, grand jury discrimination occurs *prior* to trial, while the asserted constitutional violations in most of the above-cited cases occurred *during* trial. The Court does not adequately explain why grand jury discrimination affects the "integrity of the judicial process" to a greater extent than the deprivation of equally vital constitutional rights, nor why it is exempt from a prejudice requirement while other constitutional errors are not.

Thirty-one years ago, in a typically prescient opinion, Justice Jackson called for such an explanation. *Cassell* v. *Texas*, 339 U. S. 282, 299 (1950) (Jackson, J., dissenting). None has been forthcoming. *Rose* v. *Mitchell*, *supra*, at 575 (Stewart, J., concurring in judgment). Since then, as the cases cited above show, the Court has firmly established the principle that error that does not affect the outcome of a prosecution cannot justify reversing an otherwise valid conviction. That proposition—and the decisions of the last two decades that have reinforced it—is flatly inconsistent with the result reached today. The Court's failure to reconcile this conflict itself violates the doctrine of *stare decisis*.

I would dissent from the Court's decision for this reason alone. The reasoning of *Chapman* and its progeny accords with a rational system of justice—one that fully preserves

constitutional rights but recognizes that not every violation undermines the fairness of a given conviction. In this case, the grand jury error did not affect the fairness of respondent's trial or otherwise injure respondent in any cognizable way. *Infra*, at 274–277. I therefore would reverse the Court of Appeals.

II

Even assuming that now-established harmless-error principles are inapplicable, this case unjustifiably extends the "century of precedent" on which the Court relies. Those decisions do not require reversal of a decades-old conviction on the ground that it was preceded by an indictment issued by a discriminatorily selected grand jury. The purposes of the "automatic reversal" rule require otherwise.

A

No one questions that race discrimination in grand jury selection violates the Equal Protection Clause of the Fourteenth Amendment. *E. g.*, *Rose* v. *Mitchell*, 443 U. S., at 551; *id.*, at 577–578 (Stewart, J., concurring in judgment); *id.*, at 590–591 (WHITE, J., dissenting). The issue in this case is not whether the State erred, but what should be done about it. The question is whether reversal of respondent's conviction either is compelled by the Constitution or is an appropriate, but not constitutionally required, remedy for racial discrimination in the selection of grand jurors. See *Bush* v. *Lucas*, 462 U. S. 367, 378 (1983); *Davis* v. *Passman*, 442 U. S. 228, 245 (1979); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 403, 407 (1971) (Harlan, J., concurring in judgment).

The Constitution does not compel the rule of automatic reversal that the Court applies today. In *Hobby* v. *United States*, 468 U. S. 339 (1984), we acknowledged that discriminatory selection of grand jury foremen violated the Constitution, but we concluded that reversing the petitioner's conviction was an inappropriate remedy for the violation since

grand jury foremen play a minor part in federal prosecutions. *Id.*, at 345–346; see also *Oregon* v. *Elstad*, 470 U. S. 298, 305–307 (1985) (suppression of evidence obtained in violation of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), is not constitutionally compelled); *United States* v. *Leon*, 468 U. S. 897, 905–906 (1984) (suppression of evidence obtained in violation of the Fourth Amendment is not constitutionally compelled); *Stone* v. *Powell*, 428 U. S. 465, 489 (1976); see generally Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975). The rationale of *Hobby* cannot be squared with the claim that discriminatory selection of the body that charged the defendant *compels* reversal of the defendant's conviction. Rather, it is necessary to determine whether reversal of respondent's conviction is an "appropriate remedy" for the exclusion of blacks from grand juries in Kings County, California, in 1962.[5] *Hobby*, *supra*, at 342; see *Rose* v. *Mitchell*, *supra*, at 558–559 (weighing costs and benefits of awarding relief to petitioners claiming grand jury discrimination). Cf. Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 53 (1985) (arguing that judicially created remedies are appropriate only when "necessary in order to preserve a specifically intended federal right"). That determination depends on (i) the utility of the remedy in either correcting any injustice to respondent or deterring unconstitutional conduct by state officials, and (ii) the remedy's costs to society. *United States* v. *Leon*, *supra*, at 906–907; *Stone* v. *Powell*, *supra*, at 489.

B

The scope of the remedy depends in part on the nature and degree of the harm caused by the wrong. The Court perceives two kinds of harm flowing from grand jury discrimination: harm to the respondent's interest in not being charged

[5] Respondent does not allege that discriminatory selection of grand jurors continued after 1962. Nor is there anything in the record to support such an allegation.

and convicted because of his race, and harm to society's interest in deterring racial discrimination. I consider in turn these asserted interests and the degree to which they are served in this case by the Court's automatic reversal rule.

(1)

The Court does not contend that the discriminatory selection of the grand jury that indicted respondent calls into question the correctness of the decision to indict. Such a contention could not withstand analysis. Following his indictment for murder, respondent was convicted of that charge in a trial and by a jury whose fairness is not now challenged. The conviction, affirmed on direct appeal in 1965,[6] establishes that the grand jury's decision to indict was indisputably correct. *Rose* v. *Mitchell*, *supra*, at 575–576 (Stewart, J., concurring in judgment); *Cassell* v. *Texas*, 339 U. S., at 301–302 (Jackson, J., dissenting). Justice Jackson expressed the point best:

> "It hardly lies in the mouth of a defendant whom a fairly chosen trial jury has found guilty beyond reasonable doubt, to say that his indictment is attributable to prejudice. In this case a trial judge heard the prosecution's evidence, ruled it sufficient to warrant a conviction, appellate courts have held the same, and no further question about it is before us. Moreover, a jury admittedly chosen without racial discrimination has heard the prosecution's and defendant's evidence and has held that guilt beyond a reasonable doubt has been proved. That finding, too, has been affirmed on appeal and is not here. Under such circumstances, it is frivolous to contend that any grand jury, however constituted, could have done its

[6] The California Supreme Court affirmed respondent's conviction in 1963; on rehearing in 1965, the court reversed respondent's death sentence but again affirmed his conviction. *Ante*, at 256, n. 2. Respondent is presently serving a sentence of life imprisonment.

duty in any way other than to indict." *Cassell* v. *Texas*, *supra*, at 302 (dissenting).

The Court nevertheless decides that discrimination in the selection of the grand jury potentially harmed respondent, because the grand jury is vested with broad discretion in deciding whether to indict and in framing the charges, and because it is impossible to know whether this discretion would have been exercised differently by a properly selected grand jury. *Ante*, at 263. The point appears to be that an all-white grand jury from which blacks are systematically excluded might be influenced by race in determining whether to indict and for what charge. Since the State may not imprison respondent for a crime if one of its elements is his race, the argument goes, his conviction must be set aside.

This reasoning ignores established principles of equal protection jurisprudence. We have consistently declined to find a violation of the Equal Protection Clause absent a finding of intentional discrimination. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 265 (1977); *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). There has been no showing in this case—indeed, respondent does not even allege—that the Kings County grand jury indicted respondent because of his race, or that the grand jury declined to indict white suspects in the face of similarly strong evidence.[7] Nor is it sensible to assume that impermissible dis-

[7] Most criminal cases in Kings County were initiated by information rather than indictment. In the decade ending in 1962, Kings County grand juries indicted a total of only four persons, only one of whom was black. *People* v. *Hillery*, 62 Cal. 2d 692, 710, 401 P. 2d 382, 393 (1965), cert. denied, 386 U. S. 938 (1967). In light of these facts, any claim that discriminatory selection of grand jurors was a mechanism for applying different standards to black offenders than to their white counterparts seems altogether fanciful.

Nor is there any *direct* evidence that the grand jury discriminated against respondent because of his race. The only discrimination in this case was directed not at respondent but at the black residents of Kings County, who were barred from serving on grand juries because of their

crimination might have occurred simply because the grand jury had no black members. This Court has never suggested that the racial composition of a grand jury gives rise to the inference that indictments are racially motivated, any more than it has suggested that a suspect arrested by a policeman of a different race may challenge his subsequent conviction on that basis.[8] But the Court now holds that relief is justified in part because of the bare potential, unsupported by any evidence, that an all-white grand jury charged respondent because of his race.

This justification does not square with the Court's previous decisions in this area; at the same time, it fails to explain the outcome of this case. In *Castaneda* v. *Partida*, 430 U. S. 482 (1977), for example, the Court ordered a new trial for a Hispanic petitioner who was indicted by a grand jury half of whose members were Hispanic. Whatever value such a result might have, it cannot be justified on the ground that the grand jury indicted the petitioner because of his race. In this case, due to the small number of blacks in Kings County, a random selection system could well have resulted in a grand jury identical to the one that indicted respondent. A perfectly representative grand jury—one whose composition reflected the county's racial mix—would have contained only one black member. Neither outcome would have justified an inference that respondent had been charged because of his race. See *Akins* v. *Texas*, 325 U. S. 398, 403 (1945).

Once the inference of racial bias in the decision to indict is placed to one side, as it must be under our precedents, it is

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race. There is nothing in the record to support a finding that the grand jurors themselves discriminated against anyone on the basis of race, or that they otherwise failed to discharge their duties properly.

[8] Instead, as the Court apparently acknowledges, a validly convicted criminal defendant must show that he was "deliberately charged . . . on account of his race" in order to obtain reversal of the conviction. *Ante*, at 264 (citing *United States* v. *Batchelder*, 442 U. S. 114, 125, and n. 9 (1979)). Respondent has not even alleged, much less shown, any discrimination directed at him. See n. 7, *supra*.

impossible to conclude that the discriminatory selection of Kings County's grand jurors caused respondent to suffer any cognizable injury. There may be a theoretical possibility that a different grand jury might have decided not to indict or to indict for a less serious charge. The fact remains, however, that the grand jury's decision to indict was *correct as a matter of law*, given respondent's subsequent, unchallenged conviction. A defendant has no right to a grand jury that errs in his favor. At most, he has an interest in not being bound over for trial in the absence of any evidence of his guilt, see *Costello* v. *United States*, 350 U. S. 359, 364 (1956) (Burton, J., concurring),[9] or based on impermissible factors such as his race, see *Oyler* v. *Boles*, 368 U. S. 448, 456 (1962). There is no allegation that those rights were violated in this case. The Court's decision cannot, therefore, be justified as a means of redressing any wrong to respondent.

(2)

As respondent suffered no prejudice from the grand jury discrimination that prompted his claim, the Court's remedy must stand or fall on its utility as a deterrent to government officials who seek to exclude particular groups from grand juries, weighed against the cost that the remedy imposes on society. See *United States* v. *Leon*, 468 U. S., at 906–907. The Court properly emphasizes that grand jury discrimination is "a grave constitutional trespass," *ante*, at 262, but it leaps from that observation to the conclusion that *no matter when the claim is raised* the appropriate response is to reverse the conviction of one indicted by a discriminatorily se-

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[9] I do not intend to suggest that respondent could have obtained judicial review of the sufficiency of the evidence on which his indictment was based. See *United States* v. *Calandra*, 414 U. S. 338, 345 (1974) ("an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence"). I suggest only that, assuming such an attack were permitted, respondent could show no violation of any personal right in this case.

lected body. That conclusion is not, as the Court erroneously suggests, compelled by precedent; equally important, it seriously disserves the public interest.

The cases on which the Court relies involved relatively brief lapses of time between the defendant's trial and the granting of relief. This fact is unsurprising, since the Court only recently determined that claims of grand jury discrimination may be raised in federal habeas corpus proceedings. See *Rose* v. *Mitchell*, 443 U. S. 545 (1979).[10] Prior to 1970, the Court's grand jury discrimination cases arose on direct appeal from conviction. In all of those cases, the time between the defendant's indictment and this Court's decision was six years or less.[11] Before today, the Court has twice

[10] In my separate opinion in *Rose* v. *Mitchell*, I took the position that, where a habeas petitioner is given a full opportunity to litigate his grand jury discrimination claim in state court, he should not be permitted to litigate the claim again on federal habeas corpus. 443 U. S., at 579 (POWELL, J., concurring in judgment). I remain convinced that my conclusion was correct. Nor do I believe that in this case *stare decisis* weighs persuasively against reexamining the question whether a defendant should be permitted to relitigate a claim that has no bearing on either his guilt or on the fairness of the trial that convicted him. *Rose* v. *Mitchell*, decided in 1979, is the only case in which this Court has examined the issue, and *Rose*'s authority is questionable. See n. 4, *supra*.

JUSTICE O'CONNOR has some doubt as to whether respondent had a full and fair opportunity to litigate his grand jury discrimination claim in a state court. *Ante*, at 267 (O'CONNOR, J., concurring in judgment). Respondent concedes that he did in fact relitigate that claim in state habeas corpus proceedings, Brief for Respondent 3, and appealed the denial of relief to the California Supreme Court. *Ibid.* In my view, this afforded respondent an entirely adequate opportunity to litigate in state courts both the underlying discrimination claim and the subsidiary claim that Judge Wingrove was a biased adjudicator.

It is unnecessary actually to decide the issue in this case, for I conclude that the judgment should be reversed on two other grounds: the harmlessness of the error, and the inappropriateness of the Court's remedy in cases in which the discrimination claim is raised so long after the claimant's conviction that retrial is difficult if not impossible.

[11] The longest time lapse occurred in *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). In *Strauder*, the defendant was indicted in October 1874; this Court's decision was rendered in March 1880.

granted relief to habeas corpus petitioners alleging grand jury discrimination. Both cases involved delays comparable to the delay reflected in the cases that arose on direct appeal. See *Castaneda* v. *Partida*, 430 U. S. 482 (1977) (decision announced five years after indictment); *Peters* v. *Kiff*, 407 U. S. 493 (1972) (decision announced six years after indictment).

This case raises the open question whether relief should be denied where the discrimination claim is pressed many years after conviction, and where the State can show that the delay prejudiced its ability to retry the defendant.[12] Respondent first raised his grand jury discrimination claim before a federal court 16 years after his conviction.[13] It is now almost a quarter-century since respondent was tried for murder and since the discrimination occurred. The Court finds this time lapse irrelevant. In my view, it is critically important, because it both increases the societal cost of the Court's chosen

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[12] The Court has decided only two cases in which the State might have argued that a long delay in raising a grand jury discrimination claim prejudiced the State's ability to retry the defendant. In both instances, the Court denied relief on other grounds. *Francis* v. *Henderson*, 425 U. S. 536 (1976) (petitioner raised grand jury discrimination claim seven years after conviction; Court denied relief on exhaustion grounds); *Tollett* v. *Henderson*, 411 U. S. 258 (1973) (petitioner raised grand jury claim 21 years after conviction; Court held that claim was foreclosed because petitioner had pleaded guilty pursuant to competent legal advice).

[13] The reason for this delay is irrelevant, unless bad faith on the State's part can be shown. Because respondent suffered no injury from Kings County's discriminatory selection of grand juries, he cannot fairly complain if he is required to raise his claim promptly in order to secure a windfall.

Moreover, respondent does not appear to have been blameless for the long delay. The California Supreme Court finally rejected respondent's grand jury discrimination claim in 1965. Respondent next raised the claim in 1974, when he sought postconviction relief in state court. During the intervening nine years, respondent raised repeated challenges—ultimately successfully—to his death sentence. There is no apparent reason why respondent could not simultaneously have sought postconviction relief on the grand jury discrimination claim, which if successful would require a new trial on guilt.

remedy and lessens any deterrent force the remedy may otherwise have.

In *Rose* v. *Mitchell*, *supra*, the Court reasoned that the rule of automatic reversal imposes limited costs on society, since the State is able to retry successful petitioners, and since "the State remains free to use all the proof it introduced to obtain the conviction in the first trial." *Id.*, at 558. This is not the case when relief is granted many years after the original conviction. In those circumstances, the State may find itself severely handicapped in its ability to carry its heavy burden of proving guilt beyond a reasonable doubt. Where the original verdict turned on the jury's credibility judgments, long delays effectively eliminate the State's ability to reconstruct its case. Even where credibility is not central, the passage of time may make the right to retry the defendant "a matter of theory only." Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 147 (1970). Witnesses die or move away; physical evidence is lost; memories fade. For these reasons, the Court has noted that "'[t]he greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary.'" *Peyton* v. *Rowe*, 391 U. S. 54, 62 (1968) (citation omitted).[14]

Long delays also dilute the effectiveness of the reversal rule as a deterrent. This case is illustrative. The architect of the discriminatory selection system that led to respondent's claim, Judge Wingrove, died 19 years ago. Respond-

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[14] Under the Court's approach, one in respondent's position may be wise to wait to raise his discrimination claim until the State could no longer reconvict him due to the death or disappearance of witnesses or the loss of physical evidence. In effect, this strategy could permit a prisoner to commute a legally imposed sentence of life or long duration. This is a risk society should tolerate where the claim goes to the petitioner's guilt or innocence, or even where the claim seeks otherwise to redress a wrong done to the petitioner. But there is no reason to tolerate this risk where, as here, the claimant was fairly convicted and has suffered no prejudice from the asserted constitutional error.

ent does not allege that the discriminatory practices survived Judge Wingrove, nor is there any evidence in the record to support such an allegation. It is hard to believe that Judge Wingrove might have behaved differently had he known that a convicted defendant might be freed 19 years after his death. Yet that is exactly the proposition that must justify the remedy imposed in this case: that people in positions similar to Judge Wingrove's will change their behavior out of the fear of successful habeas petitions long after they have left office or otherwise passed from the scene. The proposition, to say the least, is highly questionable.

These concerns require that a different balance be struck in a case such as this one than in cases in which the grand jury discrimination claim is adjudicated only a short time after the petitioner's conviction. At the very least, the Court should focus directly on the aspect of delay that increases the costliness of its remedy by allowing the State to show that it would be substantially prejudiced in its ability to retry respondent.[15] If this showing were made, respondent's

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[15] The Court suggests that Rule 9(a) of the Habeas Corpus Rules, together with congressional inaction, "counsels against" considering prejudice to the State's ability to retry respondent in this case. *Ante*, at 265. This suggestion is erroneous. Rule 9 permits the State to defend against both repetitious habeas petitions, see *Woodard* v. *Hutchins*, 464 U. S. 377, 379 (1984) (POWELL, J., joined by BURGER, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., concurring), and petitions to which the State cannot adequately respond due to the petitioner's delay in filing, *e. g.*, *Mayola* v. *Alabama*, 623 F. 2d 992, 999–1000 (CA5 1980), cert. denied, 451 U. S. 913 (1981). The Rule does not by its terms foreclose other consideration of the lapse of time between the petitioner's conviction and the filing of the habeas petition. *Honeycutt* v. *Ward*, 612 F. 2d 36, 43 (CA2 1979) (Friendly, J., concurring in judgment), cert. denied, 446 U. S. 985 (1980). More important, it is a rule of habeas corpus procedure applicable to habeas petitions generally, and does not purport to be a rule of substantive law that defines particular substantive claims for relief. Congress' decision not to amend it therefore says nothing about Congress' intent with regard to the remedy applied here. In sum, the question whether the relief respondent seeks is "appropriate" in this case, *Hobby* v. *United States*, 468

petition for relief should be denied. Such an approach would also identify those cases in which granting habeas relief could be expected to have the least deterrent value: the State will likely suffer the greatest prejudice in cases of long delay, and those are the cases in which the automatic reversal rule is least likely to alter the behavior of discriminatory officials. This approach would leave the rule that the Court defends intact in precisely those cases where it does the most good and the least harm: cases in which the responsible officials are likely to be accountable for forcing the State to again prove its case, and in which retrial and reconviction are plausible possibilities.

III

Twenty-three years ago, respondent was fairly convicted of the most serious of crimes. Respondent's grand jury discrimination claim casts no doubt on the adequacy of the procedures used to convict him or on the sufficiency of the evidence of his guilt. For that reason alone, the Court should reverse the Court of Appeals' decision.[16] Even assuming the

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U. S. 339, 342 (1984), is governed neither by Rule 9 nor by Congress' decisions not to amend that Rule. See *Stone* v. *Powell*, 428 U. S. 465, 474–482 (1976) (discussing relationship between habeas corpus statute and the rule that evidence seized in violation of the Fourth Amendment is inadmissible). As the Court stated in *Fay* v. *Noia*, 372 U. S. 391, 438 (1963):

"[W]e recognize a limited discretion in the federal judge to deny [habeas corpus] relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, 'dispose of the matter as law and justice require,' 28 U. S. C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles."

See also *Stone* v. *Powell*, *supra*, at 478, n. 11. Those "equitable principles" cannot, in my view, require that the Court apply a remedy that is not constitutionally compelled beyond the bounds of justice and good sense.

[16] Confidence in our system of justice is eroded when one found guilty of murder, in a trial conceded to be fair, is set free. It is important to remember that the criminal law's aim is twofold: "that guilt shall not escape

harmlessness of the error is irrelevant, however, reversal is still required. The Court inappropriately applies a deterrence rule in a context where it is unlikely to deter, and where its costs to society are likely to be especially high. These considerations should at least lead the Court to remand for a determination of whether the long lapse of time since respondent's conviction would prejudice the State's ability to retry respondent.

The Court follows neither of these paths, but instead affirms a decision that will likely mean that respondent must be freed for no good purpose. This result is not compelled by precedent. But if it were, its consequences would justify reconsidering those decisions thought to require it. I therefore dissent.

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or innocence suffer." *Berger* v. *United States*, 295 U. S. 78, 88 (1935); see also *United States* v. *Agurs*, 427 U. S. 97, 112 (1976). The Court's decision in this case plainly undermines the State's interest in punishing the guilty, without either protecting the innocent or ensuring the fundamental fairness of the procedures pursuant to which one such as respondent is tried and convicted.

WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* GREENFIELD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84-1480. Argued November 13, 1985—Decided January 14, 1986

On three occasions shortly after his arrest in Florida for sexual battery, respondent was given *Miranda* warnings, and in each instance he exercised his right to remain silent and stated that he wished to speak with an attorney before answering any questions. Respondent later pleaded not guilty by reason of insanity, and in the closing arguments in the Florida trial court, the prosecutor, over defense counsel's objection, reviewed police officer testimony as to the occasions on which respondent had exercised his right to remain silent, and suggested that respondent's repeated refusals to answer questions without first consulting an attorney demonstrated a degree of comprehension that was inconsistent with his claim of insanity. Respondent's subsequent conviction was affirmed by the Florida Court of Appeal, which held that the general rule precluding prosecutorial comment as to a defendant's exercise of his right to remain silent did not apply to a case in which an insanity plea was filed. Respondent then unsuccessfully sought habeas corpus relief in Federal District Court, but the Court of Appeals reversed, holding that under the reasoning of *Doyle* v. *Ohio*, 426 U. S. 610, respondent was entitled to a new trial.

Held: The prosecutor's use of respondent's postarrest, post-*Miranda* warnings silence as evidence of sanity violated the Due Process Clause of the Fourteenth Amendment. Pp. 289-295.

(a) In *Doyle*, *supra*, it was held that the prosecutor's impeachment of the defendants' exculpatory testimony by asking them on cross-examination why they had not explained their conduct at the time of their arrest was fundamentally unfair and therefore violated the Due Process Clause. The source of the unfairness was the implicit assurance contained in *Miranda* warnings that silence will carry no penalty. Pp. 289-291.

(b) There is no merit to the argument that *Doyle* does not control this case because proof of sanity is significantly different from proof of the commission of the underlying offense. The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair

to breach that promise by using silence to overcome a defendant's plea of insanity. *South Dakota* v. *Neville*, 459 U. S. 553, distinguished. Pp. 292–293.

(c) The argument that *Doyle* should not control this case because a suspect's comprehension of *Miranda* warnings, as evidenced by his silence, is far more probative of sanity than of commission of the underlying offense, is also unpersuasive. Such argument fails to meet the problem of fundamental unfairness that flows from the State's breach of its implied assurances. Pp. 293–294.

(d) A State's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest can be served by carefully framed questions that avoid any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel. Pp. 294–295.

741 F. 2d 329, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. REHNQUIST, J., filed an opinion concurring in the result, in which BURGER, C. J., joined, *post*, p. 296.

Ann Garrison Paschall, Assistant Attorney General of Florida, argued the cause for petitioner. With her on the briefs was *Jim Smith*, Attorney General.

James D. Whittemore, by appointment of the Court, 472 U. S. 1006, argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

Respondent entered a plea of not guilty by reason of insanity to a charge of sexual battery. At his trial in the Circuit Court for Sarasota County, Florida, the prosecutor argued that respondent's silence after receiving *Miranda* warnings was evidence of his sanity. The question presented is whether such use of a defendant's silence violates the Due Process Clause of the Fourteenth Amendment as construed in *Doyle* v. *Ohio*, 426 U. S. 610 (1976).

*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union by *Charles S. Sims* and *Jack D. Novik*; and for the Illinois Psychological Association by *Donald Paull* and *Marilyn Martin*.

I

The battery occurred in woods near a beach in the vicinity of Sarasota, Florida. After respondent released his victim, she drove directly to the police station to report the incident. Based on her description, Officer Pilifant identified respondent on the beach and placed him under arrest about two hours after the assault occurred. After handcuffing him, the officer gave respondent the warnings required by our decision in *Miranda* v. *Arizona*, 384 U. S. 436, 467–473 (1966). Specifically, Officer Pilifant stated:

> "You have a right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights I have explained to you? Having these rights in mind do you wish to talk to us now?" App. 73.

Respondent replied by stating that he understood his rights and that he wanted to talk to an attorney before making any statement. The *Miranda* warnings were repeated by Officer Pilifant while driving to the police station and reiterated by Detective Jolley after they arrived at the station. Each time that respondent was asked "if he wished to give up the right to remain silent," he declined, stating that he wanted to talk to an attorney. App. 77.

Under Florida law, when a defendant pleads not guilty by reason of insanity and when his evidence is sufficient to raise a reasonable doubt about his sanity, the State has the burden of proving sanity beyond a reasonable doubt.[1] In his case in

[1] See *Farrell* v. *State*, 101 So. 2d 130, 133 (Fla. 1958) ("when there is testimony of insanity sufficient to present a reasonable doubt of sanity the presumption [of sanity] vanishes. The defendant is then entitled to an

chief, the prosecutor introduced the testimony of Officer Pilifant and Detective Jolley. They described the occasions on which respondent had exercised his right to remain silent and had expressed a desire to consult counsel before answering any questions. Both officers repeated the several colloquies with respondent. In his defense, respondent did not testify, but two psychiatrists expressed the opinion that he was a paranoid schizophrenic who had been unable to distinguish right from wrong at the time of the alleged offense. In rebuttal, the prosecutor relied on a third psychiatrist who expressed a contrary opinion.

In his closing argument, over defense counsel's objection, the prosecutor reviewed the testimony of Officer Pilifant and Detective Jolley and suggested that respondent's repeated refusals to answer questions without first consulting an attorney demonstrated a degree of comprehension that was inconsistent with his claim of insanity.[2] The jury found respondent guilty and the judge sentenced him to life imprisonment.

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acquittal if the state does not overcome the reasonable doubt"), cited in *Greenfield* v. *State*, 337 So. 2d 1021, 1023, n. 2 (Fla. App. 1976).

[2] He argued, in part:

"He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say 'what's going on?' No. He says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down—as going down [to] the car as you recollect Officer Pil[i]fant said he explained what Miranda rights meant and the guy said—and Mr. Greenfield said 'I appreciate that, thanks a lot for telling me that.' And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley—He's down there. He says, 'Have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk?' 'No.' 'Do you want to talk to an attorney?' 'Yes.' And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant . . . .

[Footnote 2 is continued on p. 288]

By a two-to-one vote, the Florida Court of Appeal for the Second District affirmed the conviction. *Greenfield* v. *State*, 337 So. 2d 1021 (1976). After noting that "prosecutorial comment relating to a defendant's insistence on his right to remain silent generally constitutes reversible error," *id.*, at 1022, the majority held that the general rule did not apply to a case in which an insanity plea had been filed. The dissenting judge suggested that the application of the general rule would not have prejudiced the prosecution because the "questions and answers could have been couched in such a manner as to permit the officer to convey to the jury the fact that the appellant carried on a perfectly rational conversation without specifically stating that he chose to avail himself of his right to remain silent." *Id.*, at 1023.

The Florida Supreme Court granted respondent's petition for certiorari and summarily remanded the case to the Court of Appeal for reconsideration in light of *Clark* v. *State*, 363 So. 2d 331 (1978), a case in which it had held that improper comment on a defendant's silence was constitutional error reviewable on appeal if an adequate contemporaneous objection was made either at the time the evidence was introduced or at the time of the prosecutor's comment. *Greenfield* v. *State*, 364 So. 2d 885 (1978). On reconsideration, the Court of Appeal adhered to its earlier decision.

Having exhausted his state remedies, respondent filed a petition for a writ of habeas corpus in the Federal District Court. The petition was referred to a Magistrate. The State argued that the silence issue was barred because respondent's counsel had failed to make an adequate objection. The Magistrate concluded that federal review of the claim was not foreclosed because counsel had objected to the prosecutor's closing argument and because the Florida Court of Appeal had rejected the claim on its merits. The

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"So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity." App. 96–98.

Magistrate, however, agreed with the Florida courts' disposition of the merits and recommended that the habeas corpus petition be denied. The District Court accepted that recommendation.[3]

The United States Court of Appeals for the Eleventh Circuit reversed. 741 F. 2d 329 (1984). Disagreeing with two other Federal Courts of Appeals[4]—but not with the position taken by the Florida Supreme Court in a case decided after this respondent had exhausted his state remedies, see *State* v. *Burwick*, 442 So. 2d 944 (1983), cert. denied, 466 U. S. 931 (1984)—the Court of Appeals held that under the reasoning of *Doyle* v. *Ohio*, 426 U. S. 610 (1976), respondent was entitled to a new trial. We agree.

II

In *Doyle*, the defendants had taken the witness stand and offered an exculpatory explanation for their participation in what the State's evidence had portrayed as a routine marihuana transaction. On cross-examination the prosecutor impeached their testimony by asking them why they had not explained their conduct at the time of their arrest. The Court held that such cross-examination was fundamentally unfair

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[3] The Florida Attorney General did not object to the Magistrate's conclusion that the Florida Court of Appeal had rejected respondent's claim on its merits. In his petition for rehearing in the United States Court of Appeals for the Eleventh Circuit, the Attorney General renewed the argument that the postarrest, post-*Miranda* warnings silence issue was barred by *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). He advances the same argument in this Court. However, as the Magistrate concluded, the Florida appellate court clearly addressed the issue on the merits. Thus, we must reject the Attorney General's argument. See *Ulster County Court* v. *Allen*, 442 U. S. 140, 149 (1979); *Mullaney* v. *Wilbur*, 421 U. S. 684, 704, n. (1975) (REHNQUIST, J., concurring). Cf. *Franks* v. *Delaware*, 438 U. S. 154, 161–162 (1978); *Raley* v. *Ohio*, 360 U. S. 423, 436–437 (1959); *Manhattan Life Insurance Co.* v. *Cohen*, 234 U. S. 123, 134 (1914).

[4] See *Sulie* v. *Duckworth*, 689 F. 2d 128 (CA7 1982), cert. denied, 460 U. S. 1043 (1983); *United States* v. *Trujillo*, 578 F. 2d 285 (CA10), cert. denied, 439 U. S. 858 (1978).

and therefore violated the Due Process Clause of the Fourteenth Amendment.

The source of the unfairness was the implicit assurance contained in the *Miranda* warnings "that silence will carry no penalty."[5] The critical importance of the implied promise that is conveyed to an arrested person by the *Miranda* warnings has been repeatedly confirmed in subsequent decisions. Thus, in *Fletcher* v. *Weir*, 455 U. S. 603, 606 (1982), we explained:

> "In *Jenkins* [v. *Anderson*, 447 U. S. 231 (1980)], as in other post-*Doyle* cases, we have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him. In *Roberts* v. *United States*, 445 U. S. 552, 561 (1980), we observed that the

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[5] "Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. MR. JUSTICE WHITE, concurring in the judgment in *United States* v. *Hale*, [422 U. S.], at 182–183, put it very well:

"'[W]hen a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . . . Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from *Miranda* warnings that this would not be the case.'" *Doyle* v. *Ohio*, 426 U. S., at 618–619 (footnotes omitted).

In *United States* v. *Hale*, 422 U. S. 171 (1975), the Court had held that the use of postarrest, post-*Miranda* warnings silence was impermissible in federal prosecutions. The Court based its holding on its supervisory power in federal proceedings and left open the constitutional question. JUSTICE WHITE's concurrence argued that the use violated due process, and it was that view the Court adopted in *Doyle*.

postconviction, presentencing silence of the defendant did not resemble 'postarrest silence that may be induced by the assurances contained in *Miranda* warnings.' In *Jenkins*, we noted that the failure to speak involved in that case occurred before the defendant was taken into custody and was given his *Miranda* warnings, commenting that no governmental action induced the defendant to remain silent before his arrest. 447 U. S., at 239–240. Finally, in *Anderson* v. *Charles*, 447 U. S. 404, 407–408 (1980), we explained that use of silence for impeachment was fundamentally unfair in *Doyle* because '*Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. . . . *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances.'"

Since *Fletcher*, moreover, we have continued to reiterate our view that *Doyle* rests on "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *South Dakota* v. *Neville*, 459 U. S. 553, 565 (1983).[6] *Doyle* and subsequent cases have thus made clear that breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires.[7]

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[6] That this "fundamental unfairness" derives from the implicit assurances of the *Miranda* warnings is supported by our holdings that due process is not violated by the impeachment use of pre-*Miranda* warnings silence, either before arrest, *Jenkins* v. *Anderson*, 447 U. S. 231 (1980), or after arrest, *Fletcher* v. *Weir*, 455 U. S. 603 (1982), or of post-*Miranda* warnings statements, *Anderson* v. *Charles*, 447 U. S. 404 (1980); nor is it violated by the use of a refusal to take a state test that does not involve *Miranda*-like warnings, *Neville*.

[7] Notably, the Court in *Doyle* did not rely on the contention that Ohio had violated the defendants' Fifth Amendment privilege against self-incrimination by asking the jury to draw an inference of guilt from the exercise of their constitutional right to remain silent. Cf. *Griffin* v. *Cali-*

The Florida Attorney General argues that *Doyle* does not control this case because proof of sanity is significantly different from proof of the commission of the underlying offense, and that the *Doyle* due process rationale thus does not apply. At the outset, we note that, in this case, unlike *Doyle* and its progeny, the silence was used as affirmative proof in the case in chief, not as impeachment.[8] The Florida Attorney General argues that an insanity defense should be viewed as an "affirmative defense," and that the use of silence to overcome an insanity defense should thus be viewed as impeachment. Without accepting that argument, or its characterization of the insanity defense,[9] we address the claim that the *Doyle* due process analysis should not prevent the use of post-*Miranda* warnings silence to overcome an insanity defense.

We find no warrant for the claimed distinction in the reasoning of *Doyle* and of subsequent cases. The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

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fornia, 380 U. S. 609 (1965) (Fifth Amendment prohibits prosecutorial comment on defendant's refusal to testify).

[8] The constitutional violation might thus be especially egregious because, unlike *Doyle*, there was no risk "that exclusion of the evidence [would] merely provide a shield for perjury." 426 U. S., at 626 (STEVENS, J., dissenting).

[9] Cf. n. 1, *supra*.

The Florida Attorney General argues, however, that introduction of the evidence of respondent's post-*Miranda* warnings silence no more violates the Constitution than did the reference to a defendant's refusal to take a blood-alcohol test in *South Dakota* v. *Neville*, *supra*. In *Neville*, we rejected the due process challenge—and the attempt to rely on *Doyle*—because of the important differences between the refusal to take a blood-alcohol test and the post-*Miranda* warnings silence. We noted that, unlike the refusal to take an optional blood-alcohol test, the right of silence after *Miranda* warnings is of constitutional dimension. 459 U. S., at 565. We also noted that, unlike the state warning about the refusal to take the blood-alcohol test (which expressly advised Neville that his refusal could be used to deprive him of his driving privileges), *Miranda* warnings contain implied assurances that silence will *not* be used against the suspect. 459 U. S., at 565–566. Both *Doyle* elements—the constitutional dimension and the implied assurance—are equally present when post-*Miranda* warnings silence is used to prove sanity. Unlike Neville, therefore, and like Doyle, Greenfield received "the sort of implicit promise to forgo use of evidence that would unfairly 'trick' [him] if the evidence were later offered against him at trial." 459 U. S., at 566.[10]

The Florida Attorney General further contends that a suspect's comprehension of *Miranda* warnings, as evidenced by his silence, is far more probative of sanity than of commission of the underlying offense. He therefore argues that the reliance on the "insolubly ambiguous" character of the post-*Miranda* warnings silence in the *Doyle* opinion, 426 U. S., at 617, is inappropriate in the context of an insanity defense. We need not evaluate the probative value of respondent's si-

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[10] To the extent that the Attorney General seeks to rely on *Neville*'s Fifth Amendment holding, his argument is inapposite because the *Doyle* analysis rests on the Due Process Clause, not the Fifth Amendment.

lence to reject this argument.[11] For the ambiguity of the defendants' silence in *Doyle* merely added weight to the Court's principal rationale, which rested on the implied assurance contained in the *Miranda* warning. See *South Dakota* v. *Neville*, 459 U. S., at 564–565; *Jenkins* v. *Anderson*, 447 U. S. 231, 239–240 (1980).[12] The Attorney General's argument about the probative value of silence therefore fails entirely to meet the problem of fundamental unfairness that flows from the State's breach of its implied assurances.

Finally, the Florida Attorney General argues that it is vitally important to be able to present evidence of a defendant's sanity at the time of the offense and shortly thereafter.

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[11] We note, however, that the Florida Supreme Court does not share the Florida Attorney General's view about the probative value of silence in an insanity context. As the Florida court wrote in *State* v. *Burwick*, 442 So. 2d 944, 948 (1983):

"Post-arrest, post-*Miranda* silence is deemed to have dubious probative value by reason of the many and ambiguous explanations for such silence. 422 U. S. at 180, 95 S. Ct., at 2138. Contrary to what *Greenfield* intimates, these ambiguities attendant to post-*Miranda* silence do not suddenly disappear when an arrestee's mental condition is brought into issue. The same evidentiary problems addressed by the Supreme Court in *Hale* are present in the case before us. For example, one could reasonably conclude that custodial interrogation might intimidate a mentally unstable person to silence. Likewise, an emotionally disturbed person could be reasonably thought to rely on the assurances given during a *Miranda* warning and thereafter choose to remain silent. In sum, just what induces post-arrest, post-*Miranda* silence remains as much a mystery today as it did at the time of the *Hale* decision. Silence in the face of accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt. Accordingly, the state should not be permitted to confirm Burwick's mental state with evidence of his post-*Miranda* silence."

[12] Several commentators have also emphasized that, particularly in light of later cases, *Doyle*'s probativeness rationale is secondary to its implied assurance rationale. See, *e. g.*, Note, Protecting *Doyle* Rights After *Anderson* v. *Charles*: The Problem of Partial Silence, 69 Va. L. Rev. 155, 165, n. 56 (1983); Clark, Impeachment With Post-Arrest Silence: The Emergence of a "New Federalism" Approach, 19 Am. Crim. L. Rev. 751, 759 (1982); The Supreme Court, 1979 Term, 94 Harv. L. Rev. 77, 84–85 (1980).

However, as the dissenting judge in the Florida Court of Appeal recognized in this very case, the State's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest could have been served by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel.[13] What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized.

In *Doyle*, we held that *Miranda* warnings contain an implied promise, rooted in the Constitution, that "silence will carry no penalty." 426 U. S., at 618. Our conclusion that it was fundamentally unfair for the Ohio prosecutor to breach that promise by using the defendants' postarrest, post-*Miranda* warnings silence to impeach their trial testimony requires us also to conclude that it was fundamentally unfair for the Florida prosecutor to breach the officers' promise to respondent by using his postarrest, post-*Miranda* warnings silence as evidence of his sanity.[14]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[13] In his petition and brief, the Attorney General has not contested the Eleventh Circuit's view that the prosecutorial comment was directed at the "defendant's post-*Miranda* warning silence," 741 F. 2d 329, 333 (1984), or its conclusion that this comment, if erroneous, was not harmless, *id.*, at 336. Nor has respondent contested the point that a prosecutor may legitimately inquire into and comment upon "purely 'demeanor' or 'behavior' evidence." Brief for Respondent 14. With respect to post-*Miranda* warnings "silence," we point out that silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted.

[14] This conclusion is supported by a number of state decisions, in addition to that of Florida. See *Commonwealth* v. *Mahdi*, 388 Mass. 679, 448 N. E. 2d 704 (1983); *People* v. *Vanda*, 111 Ill. App. 3d 551, 444 N. E. 2d 609 (1982), cert. denied, 464 U. S. 841 (1983); *People* v. *Schindler*, 114 Cal. App. 3d 178, 170 Cal. Rptr. 461 (1980).

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, concurring in the result.

I agree with the Court that our opinion in *Doyle* v. *Ohio*, 426 U. S. 610 (1976), shields from comment by a prosecutor a defendant's silence after receiving *Miranda* warnings, even though the comment be addressed to the defendant's claim of insanity. I write separately, however, to point out that it does not follow from this that the Court of Appeals, which took the same position, reached the correct result. That court expanded *Doyle* to cover not merely silence, but requests for counsel, and ignored the fact that the evidence upon which the prosecutor commented had been admitted without objection. Analyzed in these terms, the Court of Appeals' conclusion that the "error" was not harmless is suspect: The portion of the prosecutor's closing statement that the Court of Appeals held amounted to constitutional error was in large part unobjectionable from a constitutional point of view, and the officer's testimony relating to silence was already before the jury, without objection. I concur in the result reached today because one of the prosecutor's comments, however brief, was an improper comment on respondent's silence, and the State does not argue here that any error was harmless beyond a reasonable doubt.

In *Doyle*, the Court said:

> "The warnings mandated by *[Miranda]* . . . require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. . . . Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assur-

ance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." 426 U. S., at 617–618 (footnotes omitted).

Doyle addressed the propriety of cross-examining defendants about their silence following *Miranda* warnings. Here the Court of Appeals assumed, without analysis, that respondent's conduct and statements following the warnings, such as his requests for a lawyer, should be treated the same as *silence*. I disagree. *Doyle* deemed silence "insolubly ambiguous"—the defendant may be indicating he has nothing to say in his defense, or he may be relying on the assurance that he has a right to remain silent. Similarly, a request for a lawyer has essentially no probative value where the question is one of guilt or innocence: No sensible person would draw an inference of guilt from a defendant's request for a lawyer after he had been told he had a right to consult one; it is simply not true that only a guilty person would want to have a lawyer present when being questioned by the police.

But a request for a lawyer may be highly relevant where the plea is based on insanity. There is no "insoluble ambiguity" in the request; it is a perfectly straightforward statement tending to show that an individual is able to understand his rights and is not incoherent or obviously confused or unbalanced. While plainly not conclusive proof of sanity, the request for a lawyer, like other coherent and responsive statements made near the time of the crime, is certainly relevant.*

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*It may be, as the Court suggests, that the prosecution could have served its legitimate purposes "by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional righ[t] . . . to consult counsel," *ante*, at 295. That the prosecutor might have done things differently, however, does not render unconstitutional his express reference to respondent's invocation of his right to counsel. Indeed, I

Nor does the "unfairness" prong of *Doyle*, based on the implicit assurance in the *Miranda* warnings that "silence will carry no penalty," bar prosecutorial comment on respondent's requests for a lawyer. Officer Pilifant told respondent: "You have a right to remain silent. Anything you say can and will be used against you in a court of law." App. 73. The logical corollary of this warning—that what respondent *does* say *can* be used against him—is that what he does *not* say *cannot*.

Officer Pilifant's description of respondent's right to counsel was framed differently:

> "You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish." *Ibid.*

I do not read the foregoing statement as containing any promise, express or implied, that the words used in responding to notice of the right to a lawyer will not be used by the State to rebut a claim of insanity. In the absence of such a promise, respondent surely was not "tricked" into asking for a lawyer, and the prosecutor's reference to respondent's request was in no way "fundamentally unfair."

Nor do I believe that relevant comment about the invocation of the right to an attorney, made in an effort to defeat a claim of insanity, works the sort of "penalty" condemned in *Doyle*. Inviting the jury to draw an inference of guilt, which separates a defendant from the mass of society, is one thing; inviting it to draw an inference of sanity or rationality, which merely places a defendant together with the mass of society, is quite another. A suspect's right to an attorney during

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would think that quotation of a defendant's precise words is a far more effective means of disproving insanity than are general references to his "rationality" or "responsiveness."

questioning, which is derivative of his right to remain silent, see *Miranda* v. *Arizona*, 384 U. S. 436, 469–470 (1966), is not unconstitutionally burdened by use of his request as evidence of his ability to distinguish right from wrong.

Turning to the prosecutor's closing argument in this case, I believe that far less of what the Court of Appeals described as the "challenged portion" violated *Doyle* than did the Court of Appeals. That "challenged portion" consists of the following statement:

> "Let's go on to Officer Pilifant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow [respondent] on the beach and that he went up to him, talked to him, and then arrested him for the offense. The fellow voluntarily put his arms behind his back and said he would go to the car. This is supposedly an insane person under the throws *[sic]* of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say 'What's going on?' No. He says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down—as going down [to] the car as you recollect Officer Pil[i]fant said he explained what Miranda rights meant and the guy said—and Mr. Greenfield said 'I appreciate that, thanks a lot for telling me that.' And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley—He's down there. He says, 'Have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk?' 'No.' 'Do you want to talk to an attorney?' 'Yes.' And after he talked to the

> attorney again he will not speak. Again another physical overt indication by the defendant . . . .
>
> . . . . .
>
> "So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity." App. 96–98.

The first part of the statement describes, in the words of the arresting officer, prearrest conduct of the defendant. *Doyle* does not bar this sort of testimony. *Fletcher* v. *Weir*, 455 U. S. 603 (1982). When the defendant was read his *Miranda* rights, he did *not* remain silent; he said:

> "I understand my rights. I do not want to speak to you. I want to speak to an attorney. . . . [And then] I appreciate that, thanks a lot for telling me that."

Thus *Doyle* does not cover this portion of the closing argument either. While a defendant's invocation of his right to an attorney, or his statement that he understands (and appreciates being informed about) his rights, would be largely irrelevant in the case of most defenses, it is surely relevant in the context of a claim of insanity.

The only portion of the summation that can, in my opinion, be said to violate *Doyle* is the following:

> "[E]ven down at the station, according to Detective Jolley—He's down there. He says, 'Have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk?' 'No.' 'Do you want to talk to an attorney?' 'Yes.' And after he talked to the attorney again he will not speak."

This is a comment on respondent's silence, and as such it constitutes a breach of the *Miranda* warning's "implied assurance" that his silence would not be used against him.

The Court of Appeals' determination that the prosecutor's error was not harmless was based on its apparent conclusion that all of the "challenged portion" of the prosecutor's state-

ment violated the constitutional rights of the defendant. The court stated:

> "The prosecutor relied strongly on [respondent's] *conduct* as evidence of sanity; his closing argument was not lengthy and the *portion challenged here* was not minor. We cannot say that the error was harmless beyond a reasonable doubt." 741 F. 2d 329, 336 (1984) (emphasis added).

But as noted above, actually a much smaller portion of this statement was constitutionally objectionable. And in evaluating whether or not this minute extract from the prosecutor's closing argument can be deemed harmless, I think an important factor apparently not considered by the Court of Appeals was that the testimony on which the summation was based had already come in without objection. It was there for the jury to consider on its own regardless of whether the prosecutor ever mentioned it. This fact, together with the brevity of the prosecutor's improper comment, at least suggests that the error was harmless beyond a reasonable doubt. See *Cupp* v. *Naughten*, 414 U. S. 141 (1973); *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974). As the Court points out, however, *ante*, at 295, n. 13, the Attorney General has not contested the Court of Appeals' conclusion that any error was not harmless. Accordingly, I concur in the result.

UNITED STATES *v.* LOUD HAWK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1361. Argued November 12, 1985—Decided January 21, 1986

Respondents were arrested and indicted in November 1975 on counts of possessing firearms and dynamite. In March 1976, the Federal District Court granted respondents' motion to suppress evidence relating to the dynamite counts, and the Government promptly filed a notice of appeal and requested a continuance. The District Court denied this request and, when the Government answered "not ready" after the case was called for trial, dismissed the indictment. The Government appealed this dismissal, and the two appeals were consolidated. In August 1979, the Court of Appeals reversed the suppression order, ordered that the dynamite counts be reinstated, and held that the District Court erred in dismissing the firearms counts. In November 1979, respondents filed a petition for certiorari, which this Court denied. The Court of Appeals' mandate issued in March 1980, 46 months after the Government filed its notice of appeal from the dismissal of the indictment, during which time respondents were unconditionally released. On remand, the District Court ordered the Government to reindict on the firearms charges. In August 1980, the District Court granted a motion to dismiss on the ground of vindictive prosecution as to one respondent but denied it as to the other respondents, and both the Government and these respondents appealed. During these appeals, respondents remained free on their own recognizance. In July 1982, the Court of Appeals reversed the dismissal as to the one respondent and dismissed the appeals of the other respondents, and in October 1982 denied respondents' petitions for a rehearing. Respondents then filed a petition for certiorari, which this Court denied. The Court of Appeals' mandate issued in January 1983. In May 1983, the District Court again dismissed the indictment, ruling that respondents' Sixth Amendment right to a speedy trial had been violated. The Court of Appeals affirmed.

Held:

1. The time during which the indictment was dismissed and respondents were free of all restrictions on their liberty should be excluded from the length of delay considered under the Speedy Trial Clause of the Sixth Amendment. *United States* v. *MacDonald*, 456 U. S. 1. Pp. 310-312.

(a) Where no indictment is outstanding, it is only the actual restraints imposed by arrest and holding to answer a criminal charge that engages the protection of the Speedy Trial Clause. Here, respondents

were not incarcerated and were not subject to bail, and further judicial proceedings would have been necessary to subject them to any actual restraints. Pp. 310–311.

(b) The fact that the Government's desire to prosecute respondents was a matter of public record was insufficient to count the time in question toward a speedy trial claim. Nor does the fact that respondents were ordered to appear at the evidentiary hearing held on remand in the District Court during the first appeal constitute the sort of "actual restraint" required for application of the Speedy Trial Clause. And respondents' necessity to obtain counsel while their case was technically dismissed was not sufficient to trigger that Clause. Pp. 311–312.

2. The delay attributable to the interlocutory appeals does not weigh effectively towards the respondents' claim under the Speedy Trial Clause. Under the balancing test of *Barker* v. *Wingo*, 407 U. S. 514, courts must accommodate the competing concerns of orderly appellate review and a speedy trial. Pp. 312–317.

(a) Three of the factors under *Barker*—the length of delay, the extent to which respondents have asserted their speedy trial rights, and the prejudice to respondents—fail to support a finding of a violation of the Speedy Trial Clause. Pp. 314–315.

(b) The remaining *Barker* factor, the reason for the delay, also fails to carry respondents' claims. The Government's first interlocutory appeal was justified where the Government could not have otherwise presented the issue relating to exclusion of the evidence on the dynamite counts, and the Government's appeal on this issue was strong. Similarly, the Government's second interlocutory appeal was justified because the Government could not have otherwise proceeded against the one respondent against whom the indictment was dismissed, and here too the Government's position was strong. Pp. 315–316.

(c) The delay from respondents' interlocutory appeals does not count toward their speedy trial claims. A defendant bears the heavy burden of showing an unreasonable delay caused by the prosecution in that appeal or a wholly unjustified delay by the appellate court. Pp. 316–317.

3. On the facts, the delays in question were not sufficiently long to justify dismissal of the case against respondents because of an alleged violation of the Speedy Trial Clause. P. 317.

741 F. 2d 1184, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 317.

Bruce N. Kuhlik argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Kathleen A. Felton*.

Kenneth Saul Stern, by appointment of the Court, 471 U. S. 1123, argued the cause for respondents. With him on the brief were *Tom Steenson*, *Ronald P. Schiffman*, and *Michael Timothy Bailey*.*

JUSTICE POWELL delivered the opinion of the Court.

In this case we must decide, first, whether the Speedy Trial Clause of the Sixth Amendment[1] applies to time during which respondents were neither under indictment nor subjected to any official restraint, and, second, whether certain delays occasioned by interlocutory appeals were properly weighed in assessing respondents' right to a speedy trial. A divided panel of the Court of Appeals for the Ninth Circuit weighed most of the 90 months from the time of respondents' arrests and initial indictment in November 1975 until the District Court's dismissal of the indictment in May 1983 towards respondents' claims under the Speedy Trial Clause. We conclude that the time that no indictment was outstanding against respondents should not weigh towards respondents' speedy trial claims. We also find that in this case the delay attributable to interlocutory appeals by the Government and respondents do not establish a violation of the Speedy Trial

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**James W. Klein* filed a brief for the Public Defender Service for the District of Columbia as *amicus curiae* urging affirmance.

[1] The Speedy Trial Clause of the Sixth Amendment reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

The more stringent provisions of the Speedy Trial Act, 18 U. S. C. § 3161 *et seq.*, have mooted much litigation about the requirements of the Speedy Trial Clause as applied to federal prosecutions. The time devoted to pretrial appeals, however, is automatically excluded under the Act, §§ 3161(d)(2) and (h)(1)(E). These respondents must therefore seek any relief under the Speedy Trial Clause.

Clause. Accordingly, we reverse the holding of the Court of Appeals that respondents were denied their right to a speedy trial.

I

In view of the nature of respondents' claim, we state the factual and procedural history of this case in some detail. On November 14, 1975, pursuant to a tip from the Federal Bureau of Investigation, Oregon state troopers stopped two vehicles in search of several federal fugitives.[2] After an exchange of gunfire and a motor chase, state troopers captured all but one of the respondents, Dennis Banks.[3] Both vehicles were locked and impounded while federal and state authorities obtained search warrants.

Searches of the vehicles over the next two days disclosed 350 pounds of dynamite,[4] 6 partially assembled time bombs,

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[2] Dennis James Banks, one of the respondents in this action, was active in the American Indian Movement, and was a fugitive when these events occurred. The siege and occupation of Wounded Knee had taken place 60 months before, and the Federal Bureau of Investigation was tracking Banks and his party as fugitives from that affair. *United States* v. *Loud Hawk*, 628 F. 2d 1139, 1141 (CA9 1979). For a description of the battle of Wounded Knee and the resultant violence and death, see *United States* v. *Banks*, 383 F. Supp. 389 (SD 1974), appeal dism'd, 513 F. 2d 1329 (CA8 1975); *United States* v. *Banks*, 374 F. Supp. 321 (SD 1974); *United States* v. *Banks*, 368 F. Supp. 1245 (SD 1973).

[3] The Government represents that it would introduce evidence at trial showing that respondent Dennis Banks was the driver of one of the vehicles. Banks was not apprehended until January 26, 1976.

[4] Respondents still dispute any characterization of the destroyed evidence as dynamite. Brief in Opposition 4, and n. 4; Brief for Respondents 4, n. 5. The Court of Appeals wrote:

"Each of the seven boxes was marked 'High Explosives Dangerous' and on the side had the following markings:

"'50 lbs
Gelex 2 1 × 8
70% Strength
D73MAO 7B'"

[Footnote 4 is continued on p. 306]

2,600 rounds of ammunition, 150 blasting caps, 9 empty hand grenades, and miscellaneous firearms.[5] Oregon law enforcement officers, apparently unaware of the evidentiary consequences, adhered to their usual policy and destroyed the dynamite. A federal agent present at the destruction photographed the explosions. *United States* v. *Loud Hawk*, 628 F. 2d 1139, 1142 (CA9 1979). State officials also preserved wrappers from the dynamite casings.

A federal grand jury indicted respondents on November 25, 1975, on charges of possessing firearms and explosives. Trial in the United States District Court for the District of Oregon was set for the week of February 9, 1976. On December 22, 1975, a grand jury returned a five-count superseding indictment. This indictment charged all respondents with three counts relating to possession and transportation in commerce of an unregistered destructive device (the dynamite counts) and two counts relating to unlawful possession of firearms (the firearms counts).

Two days later, respondents filed a motion to suppress all evidence concerning the dynamite, arguing that federal and state officials had intentionally and negligently destroyed the dynamite before the defense had the opportunity to examine it. After initially denying respondents' motion,[6] and after

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"together with the logo of the DuPont company prominently displayed. Inside were red cylindrical sticks with heavy wrapping paper covering the contents and marked:

"'Explosives Dangerous
Gelex 2
70% Strength
E I Dupont De Nemours & Co. (Inc.).'"

United States v. *Loud Hawk*, *supra*, at 1144–1145.

We follow the practice of the opinions discussing the issue and refer to the destroyed evidence as dynamite. 741 F. 2d 1184, 1187 (CA9 1984); *United States* v. *Loud Hawk*, *supra*, at 1143. Cf. *United States* v. *Banks*, 682 F. 2d 841, 843 (CA9 1982) ("explosive material").

[5] App. 40a–42a, and n. 4, 90a.

[6] The District Court denied the motion on January 21, 1976.

two continuances at respondents' behest,[7] the District Court granted respondents' motion to suppress on March 31, 1976. App. to Pet. for Cert. 157a. Three weeks later, the Government appealed the suppression order,[8] and moved that trial on all counts be continued pending the outcome of the appeal. The District Court denied the Government's request for a continuance, and when the case was called for trial, the Government answered not ready. Pursuant to Federal Rule of Criminal Procedure 48(b), the District Judge dismissed the indictment with prejudice. Six months had passed since the original indictment.

The Government immediately appealed the dismissal, and the two appeals were consolidated. The Court of Appeals

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[7] On January 21, 1976, the District Court postponed trial until March 8, 1976, on respondents' motion. On respondents' motion and over the objection of the Government, on February 18, 1976, the District Court again continued trial until May 12, 1976. Record, Doc. Nos. 62, 64.

[8] The Government is permitted to pursue some interlocutory appeals under 18 U. S. C. § 3731. That section as then in effect read:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

"An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts *[sic]* suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

"The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

"The provisions of this section shall be liberally construed to effectuate its purposes."

heard argument on October 15, 1976, and a divided panel affirmed in an unreported opinion on July 26, 1977. App. to Pet. for Cert. 88a–118a. On the Government's motion, the court voted on October 17, 1977, to hear the case en banc. On March 6, 1978, the Court of Appeals en banc remanded for findings of fact on whether federal officials participated in the destruction of the dynamite and whether respondents were prejudiced by its destruction. The court retained jurisdiction over the appeal pending the District Court's findings. The District Court issued its findings on August 23, 1978, and the case returned to the Court of Appeals.

On August 7, 1979, the Court of Appeals reversed the suppression order and directed that the dynamite counts be reinstated. *United States* v. *Loud Hawk*, 628 F. 2d, at 1150. The court also held that although the Government could have gone to trial on the firearms counts pending the appeal, the District Court erred in dismissing those counts with prejudice. *Id.*, at 1151. The Court of Appeals denied respondents' petition for rehearing on October 1, 1979. Respondents petitioned for certiorari; we denied the petition on March 3, 1980. 445 U. S. 917. The mandate of the Court of Appeals issued on March 12, 1980, 46 months after the Government filed its notice of appeal from the dismissal of the indictment. Respondents were unconditionally released during that time.

Following remand, the District Court ordered the Government to reindict on the firearms charges.[9] Respondents filed a number of motions during June and July of 1980 in re-

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[9] App. 57. The Government obtained a new indictment from the grand jury that recharged with the original firearms count (although it substituted "receiving" for "transporting") and two of the original three dynamite device counts. The new indictment also charged the defendants with two new destructive device counts relating to a slightly different type of destructive device. It also charged respondent KaMook Banks with a new count of receiving firearms while under indictment for a felony.

sponse to the superseding indictment,[10] including a motion to dismiss for vindictive prosecution. On August 8, 1980, the District Court granted the vindictive prosecution motion as to KaMook Banks and denied it as to respondents Dennis Banks, Render, and Loud Hawk. Both sides appealed. Respondents remained free on their own recognizance during this appeal.

The appeals were consolidated, and the Court of Appeals ordered expedited consideration. The court heard argument on January 7, 1981, but did not issue its decision until July 29, 1982. The court sustained the Government's position on all issues. *United States* v. *Banks*, 682 F. 2d 841. Respondents' petitions for rehearing were denied on October 5, 1982. Respondents again petitioned for certiorari, and we denied the petition on January 10, 1983. 459 U. S. 1117. The Court of Appeals' mandate issued on January 31, 1983, almost 29 months after the appeals were filed.

The District Court scheduled trial to begin on April 11, 1983. The Government sought and received a continuance until May 3, 1983, because of alleged difficulties in locating witnesses more than seven years after the arrests. Subsequently, the court on its own motion continued the trial date until May 23, 1983, and then again rescheduled the trial for June 13. The record in this Court does not reveal the rea-

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[10] A listing of the relevant docket entries, *id.*, at 38–145, shows that the motions filed during this 4-week period included: motion for a transcript of a recently held hearing (June 24, 1980), *id.*, at 61; motion to dismiss counts three and four for insufficient allegations (July 7, 1980), *id.*, at 63; motion to supress evidence of pretrial photographic identification and "Tainted Potential Courtroom Identification," *ibid.*; motion for change in jury selection procedure, *ibid.*; motion to dismiss because of the grand jury composition, *ibid.*; motion to dismiss for vindictive prosecution, *ibid.*; motion to dismiss for preindictment delay, *ibid.*; motion for disclosure and production (July 21, 1980), *id.*, at 64; motion for appointment of investigator at Government expense, *ibid.*; and third motion to dismiss for gross governmental misconduct, *ibid.* All motions except for KaMook Banks' vindictive prosecution motion were denied (Aug. 5, 1980). *Id.*, at 65–66.

sons for these latter two continuances. Defendants objected to each continuance.

On May 20, 1983, the District Court again dismissed the indictment, this time on the ground that respondents' Sixth Amendment right to a speedy trial had been violated. 564 F. Supp. 691. The Government appealed, and unsuccessfully urged the District Court to request that the Court of Appeals expedite the appeal. On its own motion the court treated the appeal as expedited, and heard argument on January 4, 1984. A divided panel affirmed on August 30, 1984. 741 F. 2d 1184.[11] We granted certiorari, 471 U. S. 1014 (1985), and now reverse.

II

The Government argues that under *United States* v. *MacDonald*, 456 U. S. 1 (1982), the time during which defendants are neither under indictment nor subject to any restraint on their liberty should be excluded—weighed not at all—when considering a speedy trial claim.[12] Respondents contend that even during the time the charges against them were dismissed, the Government was actively pursuing its case and they continued to be subjected to the possibility that bail might be imposed. This possibility, according to respondents, is sufficient to warrant counting the time towards a speedy trial claim.

The Court has found that when no indictment is outstanding, only the "*actual* restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections of the speedy trial provision of the Sixth Amendment." *United States* v. *Marion*, 404 U. S. 307, 320 (1971)

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[11] The Ninth Circuit's holding conflicts with three other Circuits. See *United States* v. *Herman*, 576 F. 2d 1139, 1146 (CA5 1978); *United States* v. *Jackson*, 508 F. 2d 1001, 1004 (CA7 1975); *United States* v. *Bishton*, 150 U. S. App. D. C. 51, 54, 463 F. 2d 887, 890 (1972).

[12] In *MacDonald*, we held that where the Government has dismissed an indictment and the defendant is not subject to actual restraints on his liberty, the Speedy Trial Clause does not apply.

(emphasis added); see *MacDonald*, *supra*, at 9. As we stated in *MacDonald*: "The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." 456 U. S., at 8.

During much of the litigation, respondents were neither under indictment nor subject to bail.[12] Further judicial proceedings would have been necessary to subject the respondents to any actual restraints. Cf. *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967). As we stated in *MacDonald*: "[W]ith no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. After the charges against him have been dismissed, 'a citizen suffers no restraints on his liberty and is [no longer] the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer.'" 456 U. S., at 9.

Respondents argue that the speedy trial guarantee should apply to this period because the Government's desire to prosecute them was a matter of public record. Public suspicion, however, is not sufficient to justify the delay in favor of a defendant's speedy trial claim. We find that after the District Court dismissed the indictment against respondents and after respondents were freed without restraint, they were "in the same position as any other subject of a criminal investigation." *MacDonald*, *supra*, at 8–9. See *Marion*, *supra*, at 309. The Speedy Trial Clause does not purport to protect a defendant from all effects flowing from a delay before trial.

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[12] In those instances where the defendant is subject to incarceration or bail, the courts would have to engage in a balancing of the restrictions imposed and their effect on the defendant, the necessity for delay, and the length of delay, using the approach we have outlined below. *Infra*, at 315–316.

The Clause does not, for example, limit the length of a pre-indictment criminal investigation even though "the [suspect's] knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life." 456 U. S., at 9.

Nor does the fact that respondents were ordered to appear at the evidentiary hearing held on remand in the District Court during the first appeal—an appearance they waived—constitute the sort of "actual restraint" required under our precedents as a basis for application of the Speedy Trial Clause. Finally, we are not persuaded that respondents' need for counsel while their case was technically dismissed supports their speedy trial claim. Although the retention of counsel is frequently an inconvenience and an expense, the Speedy Trial Clause's core concern is impairment of liberty; it does not shield a suspect or a defendant from every expense or inconvenience associated with criminal defense.

We therefore find that under the rule of *MacDonald*, when defendants are not incarcerated or subjected to other substantial restrictions on their liberty, a court should not weigh that time towards a claim under the Speedy Trial Clause.

III

The remaining issue is how to weigh the delay occasioned by an interlocutory appeal when the defendant is subject to indictment or restraint. As we have recognized, the Sixth Amendment's guarantee of a speedy trial "is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States* v. *Ewell*, 383 U. S. 116, 120 (1966). These safeguards may be as important to the accused when the delay is occasioned by an unduly long appellate process as when the delay is caused by a lapse between the initial arrest and the drawing of a proper indictment, *Ewell*, *supra*, at

118–119, or by continuances in the date of trial, *Barker* v. *Wingo*, 407 U. S. 514, 517–518 (1972).

At the same time, there are important public interests in the process of appellate review. The assurance that motions to suppress evidence or to dismiss an indictment are correctly decided through orderly appellate review safeguards both the rights of defendants and the "rights of public justice." *Beavers* v. *Haubert*, 198 U. S. 77, 87 (1905). The legislative history of 18 U. S. C. § 3731 "makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States* v. *Wilson*, 420 U. S. 332, 337 (1975).

It is, of course, true that the interests served by appellate review may sometimes stand in opposition to the right to a speedy trial. But, as the Court observed in *United States* v. *Ewell*, *supra*, at 121:

> "It has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events. . . . [This rule] has been thought wise because it protects the societal interest in trying people accused of crime, rather than granting them immunization because of legal error at a previous trial, and because it enhances the probability that appellate courts will be vigilant to strike down previous convictions that are tainted with reversible error. . . . These policies, so carefully preserved in this Court's interpretation given the Double Jeopardy Clause, would be seriously undercut by [an] interpretation given the Speedy Trial Clause [that raised a Sixth Amendment obstacle to retrial following successful attack on conviction]."

In *Barker*, we adopted a four-part balancing test to determine whether a series of continuances infringed upon the defendant's right to a speedy trial. 407 U. S., at 530. That test assessed the "[l]ength of delay, the reason for the

delay, the defendant's assertion of his right, and prejudice to the defendant." *Ibid* (footnote omitted). The *Barker* test furnishes the flexibility to take account of the competing concerns of orderly appellate review on the one hand, and a speedy trial on the other. We therefore adopt this functional test to determine the extent to which appellate time consumed in the review of pretrial motions should weigh towards a defendant's speedy trial claim. Under this test, we conclude that in this case the delays do not justify the "unsatisfactorily severe remedy of dismissal." *Id.*, at 522.

A

Barker's first, third, and fourth factors present no great difficulty in application. The first factor, the length of delay, defines a threshold in the inquiry: there must be a delay long enough to be "presumptively prejudicial." *Id.*, at 530. Here, a 90-month delay in the trial of these serious charges is presumptively prejudicial and serves to trigger application of *Barker*'s other factors. *Ibid.*

The third factor—the extent to which respondents have asserted their speedy trial rights—does not support their position. Although the Court of Appeals found that respondents have repeatedly moved for dismissal on speedy trial grounds, 741 F. 2d, at 1192, that finding alone does not establish that respondents have appropriately asserted their rights. We held in *Barker* that such assertions from defendants are "entitled to strong evidentiary weight" in determining whether their rights to a speedy trial have been denied. 407 U. S., at 531–532. These assertions, however, must be viewed in the light of respondents' other conduct.

Here, respondents' speedy trial claims are reminiscent of Penelope's tapestry.[14] At the same time respondents were making a record of claims in the District Court for speedy trial, they consumed six months by filing indisputably frivolous petitions for rehearing and for certiorari after this

[14] Homer, The Odyssey, Book II, lines 91–105 (R. Lattimore trans. 1965).

Court's decision in *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263 (1982) (federal courts without jurisdiction to hear defendant's interlocutory appeal from denial of motion to dismiss indictment). They also filled the District Court's docket with repetitive and unsuccessful motions. See, *e. g.*, n. 10, *supra*.

The Court of Appeals gave "little weight" to the fourth factor, prejudice to respondents. At most, the court recognized the possibility of "impairment of a fair trial that may well result from the absence or loss of memory of witnesses in this case." 741 F. 2d, at 1193. See *Barker*, 407 U. S., at 532. That possibility of prejudice is not sufficient to support respondents' position that their speedy trial rights were violated. In this case, moreover, delay is a two-edged sword. It is the Government that bears the burden of proving its case beyond a reasonable doubt. The passage of time may make it difficult or impossible for the Government to carry this burden.

B

The flag all litigants seek to capture is the second factor, the reason for delay. In *Barker*, we held that "different weights should be assigned to different reasons." *Id.*, at 531. While a "deliberate attempt to delay the trial in order to hamper the defense," would be weighed heavily against the Government, a delay from "overcrowded courts"—as was the situation here—would be weighed "less heavily." *Ibid.* Given the important public interests in appellate review, *supra*, at 313, it hardly need be said that an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay. In assessing the purpose and reasonableness of such an appeal, courts may consider several factors. These include the strength of the Government's position on the appealed issue, the importance of the issue in the posture of the case, and—in some cases—the seriousness of the crime. *United States* v. *Herman*, 576 F. 2d 1139, 1146 (CA5 1978) (Wisdom, J.). For example, a delay resulting from an ap-

peal would weigh heavily against the Government if the issue were clearly tangential or frivolous. *Ibid.* Moreover, the charged offense usually must be sufficiently serious to justify restraints that may be imposed on the defendant pending the outcome of the appeal. *Ibid.*

Under *Barker*, delays in bringing the case to trial caused by the Government's interlocutory appeal may be weighed in determining whether a defendant has suffered a violation of his rights to a speedy trial. It is clear in this case, however, that respondents have failed to show a reason for according these delays any effective weight towards their speedy trial claims. There is no showing of bad faith or dilatory purpose on the Government's part. The Government's position in each of the appeals was strong, and the reversals by the Court of Appeals are prima facie evidence of the reasonableness of the Government's action. Moreover, despite the seriousness of the charged offenses, the District Court chose not to subject respondents to any actual restraints pending the outcome of the appeals.

The only remaining question is the weight to be attributed to delays caused by respondents' interlocutory appeals. In that limited class of cases where a pretrial appeal by the defendant is appropriate, see, *e. g.*, *Hollywood Motor Car Co.*, *supra*, at 265–266, delays from such an appeal ordinarily will not weigh in favor of a defendant's speedy trial claims. A defendant with a meritorious appeal would bear the heavy burden of showing an unreasonable delay caused by the prosecution in that appeal, or a wholly unjustifiable delay by the appellate court. A defendant who resorts to an interlocutory appeal normally should not be able upon return to the district court to reap the reward of dismissal for failure to receive a speedy trial. As one Court of Appeals has noted in the context of a District Court's consideration of pretrial motions:

> "Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a

decision, the defendants are not now able to criticize the very process which they so frequently called upon." *United States* v. *Auerbach*, 420 F. 2d 921, 924 (CA5 1969), rehearing denied, 423 F. 2d 676, cert. denied, 399 U. S. 905 (1970).

In the present case, respondents' appeal was allowable under the law of the Ninth Circuit before our decision in *Hollywood Motor Car, supra*. But we find that their position was so lacking in merit that the time consumed by this appeal should not weigh in support of respondents' speedy trial claim. Nor do we weigh the additional delay of six months resulting from respondents' frivolous action in seeking rehearing and certiorari toward respondents' speedy trial claim. See *ibid.*, decided prior to these latter actions.

IV

We cannot hold, on the facts before us, that the delays asserted by respondents weigh sufficiently in support of their speedy trial claim to violate the Speedy Trial Clause. They do not justify the severe remedy of dismissing the indictment. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

The Court holds today that the Speedy Trial Clause of the Sixth Amendment does not apply to a Government appeal from a district court's dismissal of an indictment, unless the defendant is incarcerated or otherwise under restraint during that appeal. The majority supports this result by equating the present case to *United States* v. *MacDonald*, 456 U. S. 1 (1982). That analysis, however, both ignores the considerable differences between this case and *MacDonald* and gives short shrift to the interests protected by the Speedy Trial Clause. I further disagree with the majority's application

of *Barker* v. *Wingo*, 407 U. S. 514 (1972), to the remaining appellate delays in this case.

I

The majority concludes that when an appeal arises out of the district court's dismissal of an indictment, the lack of an outstanding indictment absolves the Government of its responsibility to provide a speedy trial. However, we have never conditioned Sixth Amendment rights solely on the presence of an outstanding indictment. Those rights attach to anyone who is "accused,"[1] and we have until now recognized that one may stand publicly accused without being under indictment. The majority offers two reasons for concluding that respondents did not enjoy the right to a speedy trial during the Government's appeals. First, respondents were suffering only "[p]ublic suspicion," *ante*, at 311, and not a formal accusation. Second, they were not subject to "actual restraints" on their liberty. Both of these rationales are seriously flawed.

A

In *United States* v. *Marion*, 404 U. S. 307 (1971), we held that the Speedy Trial Clause does not apply until the Government, either through arrest or indictment, asserts probable cause to believe that a suspect has committed a crime. Before that time the individual, while possibly aware of the Government's suspicion, is not "the subject of public accusation," *id.*, at 321, and his only protection against delay comes from the Due Process Clause and the applicable statute of limitations. The Court applied the same rationale in *MacDonald, supra*. In that case, military charges of murder against MacDonald, an Army officer, were dropped after an investigation. MacDonald was then given an honorable discharge, only to be indicted by a civilian grand jury nearly

[1] The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

four years later for the same murders. The Court held that this delay did not implicate the speedy trial right because "the Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges." *Id.*, at 7. The Court reasoned that after the termination of the first formal prosecution, MacDonald was "in the same position as any other subject of a criminal investigation," *id.*, at 8–9, and thus was no more an "accused" than was the defendant in *Marion* before his arrest.

The same cannot be said of respondents in the present case.[2] Unlike one who has not been arrested, or one who has had the charges against him dropped, respondents did not enjoy the protection of the statute of limitations while the Government prosecuted its appeals. That protection was an important aspect of our holding in *Marion* that prearrest delay is not cognizable under the Speedy Trial Clause. See 404 U. S., at 322–323. More importantly, in contrast to *MacDonald*, the Government has not "dropped" anything in

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[2] It is also instructive to compare the present case and *MacDonald* with respect to another Sixth Amendment right—the right to counsel. Surely a Government appeal under 18 U. S. C. § 3731 is a "critical stage" of the prosecution, implicating the Sixth Amendment right to counsel. Cf. *Evitts* v. *Lucey*, 469 U. S. 387 (1985) (defendant in state prosecution has due process right to effective assistance of counsel on appeal, whether counsel is retained or appointed). As during other critical stages, the defendant needs an attorney during a government appeal "as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence." *Ross* v. *Moffitt*, 417 U. S. 600, 610–611 (1974). Again, the contrast to *MacDonald* is striking. The defendant in that case would have had no Sixth Amendment right to counsel during the time between the dropping of the Army charges and the filing of the grand jury charges; that period was not a "critical stage" of a prosecution.

In *United States* v. *Gouveia*, 467 U. S. 180 (1984), we held that the Sixth Amendment right to counsel is satisfied in a narrower class of cases than the speedy trial right. It therefore defies logic to conclude that respondents could be protected by the former, but not the latter, during the Government's appeal.

this case.[3] There has been at all relevant times a case on a court docket captioned *United States* v. *Loud Hawk*—I can think of no more formal indication that respondents stand accused by the Government.

The majority argues that while "the Government's desire to prosecute [respondents] was a matter of public record," that desire constituted only "[p]ublic suspicion" that is insufficient to call Sixth Amendment rights into play, citing *Marion* and *MacDonald*. *Ante*, at 311. The reason that the Government's desire to prosecute in both of those cases did not constitute an "accusation," however, is that the Government had not yet formalized its commitment. Indeed, in *MacDonald*, the Government dismissed the murder charges because it "concluded that they were untrue," 456 U. S., at 10, n. 12, thus acknowledging that the first formal accusation had been a mistake and extinguishing the prior probable-cause determination. In the present case, the Government has made no such confession of error and continues to align its full resources against respondents in judicial proceedings.

The most telling difference between this case and *MacDonald*, however, is the fact that respondents' liberty could have been taken from them at any time during the Government's

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[3] That neither Congress nor this Court has had any difficulty recognizing the fundamental difference between the Government's dismissal of an indictment and the court's dismissal, subject to appellate review, is clear from Federal Rule of Criminal Procedure 48. Subdivision (a) of that Rule permits the Government, with leave of court, to dismiss an indictment, and provides that when the indictment is dismissed, "the prosecution shall thereupon terminate." Subdivision (b) permits the district court to dismiss an indictment, but contains no language suggesting that such action brings the prosecution to an end—nor could it, because the court's dismissal is subject to the Government's statutory right to appeal.

Asking whether the indictment "exists" during the appeal, while interesting from the standpoint of ontology, is of limited practical help. Yet it is significant that in the *MacDonald* situation the Government must go back to the grand jury and seek reindictment. When the district court dismisses an indictment, on the other hand, the court of appeals can reinstate the indictment with the stroke of a pen.

appeal. One of the primary purposes of the speedy trial right, of course, is to prevent prolonged restraints on liberty, *id.*, at 8; *Barker* v. *Wingo*, 407 U. S., at 532, and the absence of any possibility of such restraints was a vital part of our *MacDonald* holding. See 456 U. S., at 9. In contrast, Congress has declared explicitly, in 18 U. S. C. § 3731, that a person in respondents' position shall be subject to the same restraints as an arrested defendant awaiting trial.[4] Thus the District Court had the undoubted authority to condition respondents' release on the posting of bail, or indeed to keep them in jail throughout the appeal, see 18 U. S. C. § 3142(e) (1982 ed., Supp. III). Respondents' release could have been accompanied by restrictions on travel, association, employment, abode, and firearms possession, or conditioned on their reporting regularly to law enforcement officers and/or keeping a curfew. See § 3142(c). Considering all the circumstances, therefore, I believe that respondents' position is most closely analogous to that of a defendant who has been arrested but not yet indicted.

B

As if acknowledging that the delay in this case is more analogous to postarrest, preindictment delay than to prearrest delay, the majority concedes that had respondents been incarcerated or forced to post bond during the Government's appeals, the automatic exclusion rule of *MacDonald* would not apply. *Ante*, at 311, n. 13. Yet, inexplicably, the majority then suggests that the Speedy Trial Clause applies to postarrest, preindictment delay only when the defendant has been subjected to "'*actual* restraints,'" *ante*, at 310,

[4] Title 18 U. S. C. § 3731 provides in pertinent part: "Pending the prosecution and determination of the appeal . . . the defendant shall be released in accordance with chapter 207 of this title." Chapter 207, 18 U. S. C. §§ 3141–3156, contains the procedures for pretrial release, and permits the district courts to impose various restraints pending trial. The Government concedes that respondents could have been incarcerated or put under other restraints during the Government's appeals. Tr. of Oral Arg. 6, 18.

quoting *Marion*, 404 U. S., at 320 (emphasis added by majority opinion). The majority completely misreads *Marion* while creating a rule that is flatly inconsistent with our prior holdings.

We held in *Marion* that prearrest delay is not cognizable under the Speedy Trial Clause, but we certainly did not disturb the settled rule that the Government's formal institution of criminal charges, whether through arrest or indictment, always calls the speedy trial right into play. See *id.*, at 316–319; see also *United States* v. *Gouveia*, 467 U. S. 180, 185–186 (1984). Although it specified detention and bail as possible deleterious effects of a formal criminal charge, *Marion* nowhere suggested that it is the restraints themselves, rather than the assertion of probable cause, that constitute an accusation. Nor did we hold that a criminal charge has less constitutional significance when a defendant is released on recognizance rather than on bail. See 404 U. S., at 321, n. 12. The majority identifies no logic or precedent supporting its novel conclusion that a defendant who is arrested and released on bail is "accused," while a defendant who is arrested and released without bail, on the same evidence, is not "accused."[5]

Indeed, we have rejected precisely the interpretation of *Marion* that the majority now adopts. In *Dillingham* v. *United States*, 423 U. S. 64 (1975) *(per curiam)*, we held that

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[5] It is worth noting that the Speedy Trial Act puts time limits on the Government beginning with "the date on which [the defendant] was arrested or served with a summons," 18 U. S. C. § 3161, without regard to the terms of the defendant's release.

Moreover, Federal Rule of Criminal Procedure 48(b), which "provides for enforcement of the [speedy trial] right," *Pollard* v. *United States*, 352 U. S. 354, 361, n. 7 (1957); see *Marion*, 404 U. S., at 319, states: "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, . . . the court may dismiss the indictment, information or complaint." That language clearly confers the same rights on a defendant who is arrested and unconditionally released as one who is released on conditions.

Marion does not require "actual prejudice" to invoke the speedy trial right for postarrest, preindictment delay. Such "actual prejudice" included the "actual restraints" that the majority now requires. The Court of Appeals in that case noted that the defendant was released on bond, but without any other restrictions, pending trial. After citing *Marion*, it held that "any increased strain on this man's life which followed his arrest . . . does not rise to the level of substantial actual prejudice." *United States* v. *Palmer*, 502 F. 2d 1233, 1237 (CA5 1974), rev'd *sub nom. Dillingham* v. *United States*, *supra*. We summarily rejected the "actual prejudice" rationale, and the majority gives no reason whatsoever for resurrecting it today.[6]

There can be no question that one who had been arrested and released under 18 U. S. C. § 3141(a) (1982 ed., Supp. III) would be entitled, under *Marion*, to the protections of the Speedy Trial Clause. Because respondents were by statute subject to the same restraints as that hypothetical defendant, I am at a loss to understand why they should enjoy less protection.

II

The majority also declines to hold the Government accountable for delay attributable to appeals during which respond-

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[6] Apparently relying on the fact that the defendant in *Dillingham* had to post a $1,500 bond, see 502 F. 2d, at 1234, the Government reads *Dillingham* to stand for the proposition that any restriction, no matter how insignificant, invokes the Speedy Trial Clause when no indictment is outstanding. See Tr. of Oral Arg. 19. Once again, neither the plain language of the Sixth Amendment nor any decision of this Court suggests this peculiar constitutional standard. Moreover, while an indictment and an arrest are comparable in that each one constitutes a formal assertion of probable cause, there is no such symmetry between an indictment and incarceration or posting of bond. Simply put, the position advanced by the Government and the majority lacks even internal consistency.

The only sensible reading of *Dillingham* is that actual restraints, like other types of prejudice to a defendant, are relevant to the speedy trial

ents were under indictment. In doing so the majority emphasizes the second *Barker* factor—the reason for the delay, see 407 U. S., at 530. Because it concludes that "[t]here is no showing of bad faith or dilatory purpose on the Government's part," the majority declines to accord any "effective weight" to this factor in the speedy trial balance. *Ante*, at 316. In reaching this conclusion, it virtually ignores the most obvious "reason for the delay" in this case—the fact that the Court of Appeals was unable to decide these appeals in a reasonably prompt manner.

In *Barker*, we explained the application of the "reason for the delay" factor as follows:

> "[D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 U. S., at 531 (footnote omitted).

The majority's application of this factor to the appellate delays in this case makes government misconduct or bad faith a virtual prerequisite to a finding of a speedy trial violation. Seizing upon the approach of some of the Courts of Appeals,[7] the majority analyzes the reason behind the appellate delay solely in terms of the reasonableness of the government's behavior in taking and prosecuting the appeal. This approach is inconsistent with the policies behind the speedy trial right. We recognized in *Barker* that the right protects both the defendant's interest in fairness and society's interest in provid-

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balance, but are not prerequisites to application of the Speedy Trial Clause. See *Barker* v. *Wingo*, 407 U. S. 514, 533 (1972).

[7] See, e. g., *United States* v. *Saintil*, 705 F. 2d 415 (CA11 1983); *United States* v. *Herman*, 576 F. 2d 1139 (CA5 1978).

ing swift justice. *Id.*, at 519. Courts as well as prosecutors must necessarily work to promote those interests if they are to have any vitality. Because it is the government as a whole—including the courts—that bears the responsibility to provide a speedy trial, the prosecutor's good faith cannot suffice to discharge that responsibility.[8]

The Court of Appeals frankly admitted that "most of the delay must be attributed to the processes of this court," 741 F. 2d 1184, 1191 (CA9 1984), a conclusion that is difficult to escape. This case involves appeals from pretrial rulings. The Court of Appeals had every reason to know that these appeals should have been ruled upon as expeditiously as possible. See that court's Rule 20. Yet it took over five years for the Court of Appeals to decide two appeals, one of them "expedited." No complicated analysis is needed to identify the reason for the delay in this case.

I would hold, simply, that a nonfrivolous appeal by any party permits a *reasonable* delay in the proceedings. The number and complexity of the issues on appeal, or the number of parties, might permit a greater or lesser delay in a given case. The government, not the defendant, must suffer the ultimate consequences of delays attributable to "overcrowded courts," *ibid.*, even at the appellate level.[9] In the

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[8] This assumes, of course, that the defendant wants a speedy trial and is not intentionally hindering the government's attempt to provide one. That assumption may be open to question in this case. The majority points out that respondents' strategically timed demands for a speedy trial ring somewhat hollow in light of respondents' overall behavior during the litigation. Were that the basis for the Court's opinion, I might be able to accept a remand to the Court of Appeals for further consideration of that factor. I am unable, however, to agree with the majority's analysis of the second *Barker* v. *Wingo* factor.

[9] The majority's focus on the prosecution's, rather than the court's, contribution to the delay undoubtedly comes in part from a reluctance to permit district courts to tell a court of appeals, or possibly this Court, that it has taken too long to decide a case. However, appellate courts have no privilege to decline constitutional obligations. The appellate courts would be better advised to adopt procedures for the speedy resolution of interloc-

present case, the amount of time that the appeals consumed is patently unreasonable. I would therefore weigh the second *Barker* factor against the Government in this case.

III

The majority has seriously misapplied our precedents in concluding that delay resulting when the government appeals the dismissal of an indictment is excludable for speedy trial purposes unless the defendant is subjected to actual restraints during that appeal. Its application of *Barker v. Wingo* to this case also undercuts the very purpose of the speedy trial right. I respectfully dissent.

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utory criminal appeals than to force district courts into the uncomfortable position of dismissing indictments because of appellate delay.

DANIELS v. WILLIAMS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-5872. Argued November 6, 1985—Decided January 21, 1986

Petitioner brought an action in Federal District Court under 42 U. S. C. §1983, seeking to recover damages for injuries allegedly sustained when, while an inmate in a Richmond, Virginia, jail, he slipped on a pillow negligently left on a stairway by respondent sheriff's deputy. Petitioner contends that such negligence deprived him of his "liberty" interest in freedom from bodily injury "without due process of law" within the meaning of the Due Process Clause of the Fourteenth Amendment. The District Court granted respondent's motion for summary judgment, and the Court of Appeals affirmed.

Held: The Due Process Clause is not implicated by a state official's *negligent* act causing unintended loss of or injury to life, liberty, or property. Pp. 329-336.

(a) The Due Process Clause was intended to secure an individual from an abuse of power by government officials. Far from an abuse of power, lack of due care, such as respondent's alleged negligence here, suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Due Process Clause would trivialize the centuries-old principle of due process of law. *Parratt* v. *Taylor*, 451 U. S. 527, overruled to the extent that it states otherwise. Pp. 329-332.

(b) The Constitution does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. While the Due Process Clause speaks to some facets of the relationship between jailers and inmates, its protections are not triggered by lack of due care by the jailers. Jailers may owe a special duty of care under state tort law to those in their custody, but the Due Process Clause does not embrace such a tort law concept. Pp. 332-336.

748 F. 2d 229, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, POWELL, and O'CONNOR, JJ., joined. MARSHALL, J., concurred in the result. BLACKMUN, J., *post*, p. 336, and STEVENS, J., *post*, p. 336, filed opinions concurring in the judgment.

Stephen Allan Saltzburg argued the cause and filed briefs for petitioner.

James Walter Hopper argued the cause and filed a brief for respondent.

JUSTICE REHNQUIST delivered the opinion of the Court.

In *Parratt* v. *Taylor*, 451 U. S. 527 (1981), a state prisoner sued under 42 U. S. C. § 1983, claiming that prison officials had negligently deprived him of his property without due process of law. After deciding that § 1983 contains no independent state-of-mind requirement, we concluded that although petitioner had been "deprived" of property within the meaning of the Due Process Clause of the Fourteenth Amendment, the State's postdeprivation tort remedy provided the process that was due. Petitioner's claim in this case, which also rests on an alleged Fourteenth Amendment "deprivation" caused by the negligent conduct of a prison official, leads us to reconsider our statement in *Parratt* that "the alleged loss, even though negligently caused, amounted to a deprivation." *Id.*, at 536–537. We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.

In this § 1983 action, petitioner seeks to recover damages for back and ankle injuries allegedly sustained when he fell on a prison stairway. He claims that, while an inmate at the city jail in Richmond, Virginia, he slipped on a pillow negligently left on the stairs by respondent, a correctional deputy stationed at the jail. Respondent's negligence, the argument runs, "deprived" petitioner of his "liberty" interest in freedom from bodily injury, see *Ingraham* v. *Wright*, 430 U. S. 651, 673 (1977); because respondent maintains that he is entitled to the defense of sovereign immunity in a state tort suit, petitioner is without an "adequate" state remedy, cf. *Hudson* v. *Palmer*, 468 U. S. 517, 534–536 (1984). Accordingly, the deprivation of liberty was without "due process of law."

The District Court granted respondent's motion for summary judgment. A panel of the Court of Appeals for the Fourth Circuit affirmed, concluding that even if respondent could make out an immunity defense in state court, petitioner would not be deprived of a meaningful opportunity to present his case. 720 F. 2d 792 (1983). On rehearing, the en banc Court of Appeals affirmed the judgment of the District Court, but under reasoning different from that of the panel. 748 F. 2d 229 (1984). First, a 5–4 majority ruled that negligent infliction of bodily injury, unlike the negligent loss of property in *Parratt*, does not constitute a deprivation of any interest protected by the Due Process Clause. The majority therefore believed that the postdeprivation process mandated by *Parratt* for property losses was not required. Second, the en banc court unanimously decided that even if a prisoner is entitled to some remedy for personal injuries attributable to the negligence of state officials, *Parratt* would bar petitioner's claim if the State provided an adequate postdeprivation remedy. Finally, a 6–3 majority concluded that petitioner had an adequate remedy in state court, even though respondent asserted that he would rely on sovereign immunity as a defense in a state suit. The majority apparently believed that respondent's sovereign immunity defense would fail under Virginia law.

Because of the inconsistent approaches taken by lower courts in determining when tortious conduct by state officials rises to the level of a constitutional tort, see *Jackson* v. *Joliet*, 465 U. S. 1049, 1050 (1984) (WHITE, J., dissenting from denial of certiorari) (collecting cases), and the apparent lack of adequate guidance from this Court, we granted certiorari. 469 U. S. 1207 (1985). We now affirm.

In *Parratt* v. *Taylor*, we granted certiorari, as we had twice before, "to decide whether mere negligence will support a claim for relief under § 1983." 451 U. S., at 532. After examining the language, legislative history, and prior interpretations of the statute, we concluded that § 1983, un-

like its criminal counterpart, 18 U. S. C. § 242, contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right. *Id.*, at 534–535. We adhere to that conclusion. But in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim. See, *e. g.*, *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977) (invidious discriminatory purpose required for claim of racial discrimination under the Equal Protection Clause); *Estelle* v. *Gamble*, 429 U. S. 97, 105 (1976) ("deliberate indifference" to prisoner's serious illness or injury sufficient to constitute cruel and unusual punishment under the Eighth Amendment).

In *Parratt*, before concluding that Nebraska's tort remedy provided all the process that was due, we said that the loss of the prisoner's hobby kit, "even though negligently caused, amounted to a deprivation [under the Due Process Clause]." 451 U. S., at 536–537. JUSTICE POWELL, concurring in the result, criticized the majority for "pass[ing] over" this important question of the state of mind required to constitute a "deprivation" of property. *Id.*, at 547. He argued that negligent acts by state officials, though causing loss of property, are not actionable under the Due Process Clause. To JUSTICE POWELL, mere negligence could not "wor[k] a deprivation in the *constitutional sense*." *Id.*, at 548 (emphasis in original). Not only does the word "deprive" in the Due Process Clause connote more than a negligent act, but we should not "open the federal courts to lawsuits where there has been no affirmative abuse of power." *Id.*, at 548–549; see also *id.*, at 545 (Stewart, J., concurring) ("To hold that this kind of loss is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution"). Upon reflection, we agree and overrule *Parratt* to the extent that it states that mere lack of due care by a state

official may "deprive" an individual of life, liberty, or property under the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property. *E. g.*, *Davidson* v. *New Orleans*, 96 U. S. 97 (1878) (assessment of real estate); *Rochin* v. *California*, 342 U. S. 165 (1952) (stomach pumping); *Bell* v. *Burson*, 402 U. S. 535 (1971) (suspension of driver's license); *Ingraham* v. *Wright*, 430 U. S. 651 (1977) (paddling student); *Hudson* v. *Palmer*, *supra* (intentional destruction of inmate's property). No decision of this Court before *Parratt* supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, see Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368 (1911), was "'intended to secure the individual from the arbitrary exercise of the powers of government,'" *Hurtado* v. *California*, 110 U. S. 516, 527 (1884) (quoting *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244 (1819)). See also *Wolff* v. *McDonnell*, 418 U. S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government, *Dent* v. *West Virginia*, 129 U. S. 114, 123 (1889)"); *Parratt*, *supra*, at 549 (POWELL, J., concurring in result). By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, *e. g.*, *Rochin*, *supra*, it serves to prevent governmental power from being "used for purposes of oppression," *Murray's Les-*

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see v. *Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856) (discussing Due Process Clause of Fifth Amendment).

We think that the actions of prison custodians in leaving a pillow on the prison stairs, or mislaying an inmate's property, are quite remote from the concerns just discussed. Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.

The Fourteenth Amendment is a part of a Constitution generally designed to allocate governing authority among the branches of the Federal Government and between that Government and the States, and to secure certain individual rights against both State and Federal Government. When dealing with a claim that such a document creates a right in prisoners to sue a government official because he negligently created an unsafe condition in the prison, we bear in mind Chief Justice Marshall's admonition that "we must never forget, that it is *a constitution* we are expounding," *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819) (emphasis in original). Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," *Paul* v. *Davis*, 424 U. S. 693, 701 (1976), quoted in *Parratt* v. *Taylor*, 451 U. S., at 544.

The only tie between the facts of this case and anything governmental in nature is the fact that respondent was a sheriff's deputy at the Richmond city jail and petitioner was an inmate confined in that jail. But while the Due Process Clause of the Fourteenth Amendment obviously speaks to some facets of this relationship, see, *e. g.*, *Wolff* v. *McDon-*

nell, 418 U. S. 539 (1974), we do not believe its protections are triggered by lack of due care by prison officials. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle* v. *Gamble*, 429 U. S. 97, 106 (1976), and "false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." *Baker* v. *McCollan*, 443 U. S. 137, 146 (1979). Where a government official's act causing injury to life, liberty, or property is merely negligent, "no procedure for compensation is *constitutionally* required." *Parratt*, *supra*, at 548 (POWELL, J., concurring in result) (emphasis added.)[1]

That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectible legal interests. The enactment of tort claim statutes, for example, reflects the view that injuries caused by such negligence should generally be redressed.[2] It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns.

In support of his claim that negligent conduct can give rise to a due process "deprivation," petitioner makes several arguments, none of which we find persuasive. He states, for example, that "it is almost certain that *some* negligence claims are within § 1983," and cites as an example the failure of a State to comply with the procedural requirements of *Wolff* v. *McDonnell*, *supra*, before depriving an inmate of good-time credit. We think the relevant action of the prison

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[1] Accordingly, we need not decide whether, as petitioner contends, the possibility of a sovereign immunity defense in a Virginia tort suit would render that remedy "inadequate" under *Parratt* and *Hudson* v. *Palmer*, 468 U. S. 517 (1984).

[2] See, *e. g.*, the Virginia Tort Claims Act, Va. Code § 8.01-195.1 *et seq.* (1984), which applies only to actions accruing on or after July 1, 1982, and hence is inapplicable to this case.

officials in that situation is their deliberate decision to deprive the inmate of good-time credit, not their hypothetically negligent failure to accord him the procedural protections of the Due Process Clause. But we need not rule out the possibility that there are other constitutional provisions that would be violated by mere lack of care in order to hold, as we do, that such conduct does not implicate the Due Process Clause of the Fourteenth Amendment.

Petitioner also suggests that artful litigants, undeterred by a requirement that they plead more than mere negligence, will often be able to allege sufficient facts to support a claim of intentional deprivation. In the instant case, for example, petitioner notes that he could have alleged that the pillow was left on the stairs with the intention of harming him. This invitation to "artful" pleading, petitioner contends, would engender sticky (and needless) disputes over what is fairly pleaded. What's more, requiring complainants to allege something more than negligence would raise serious questions about what "more" than negligence—intent, recklessness, or "gross negligence"—is required,[3] and indeed about what these elusive terms mean. See Reply Brief for Petitioner 9 ("what terms like willful, wanton, reckless or gross negligence mean" has "left the finest scholars puzzled"). But even if accurate, petitioner's observations do not carry the day. In the first place, many branches of the law abound in nice distinctions that may be troublesome but have been thought nonetheless necessary:

> "I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized."

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[3] Despite his claim about what he might have pleaded, petitioner concedes that respondent was at most negligent. Accordingly, this case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or "gross negligence," is enough to trigger the protections of the Due Process Clause.

LeRoy Fibre Co. v. *Chicago, M. & St. P. R. Co.*, 232 U. S. 340, 354 (1914) (Holmes, J., partially concurring).

More important, the difference between one end of the spectrum—negligence—and the other—intent—is abundantly clear. See O. Holmes, The Common Law 3 (1923). In any event, we decline to trivialize the Due Process Clause in an effort to simplify constitutional litigation.

Finally, citing *South* v. *Maryland*, 18 How. 396 (1856), petitioner argues that respondent's conduct, even if merely negligent, breached a sheriff's "special duty of care" for those in his custody. Reply Brief for Petitioner 14. The Due Process Clause, petitioner notes, "was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the crown." *Ingraham* v. *Wright*, 430 U. S., at 672–673. And *South* v. *Maryland* suggests that one such protection was the right to recover against a sheriff for breach of his ministerial duty to provide for the safety of prisoners in his custody. 18 How., at 402–403. Due process demands that the State protect those whom it incarcerates by exercising reasonable care to assure their safety and by compensating them for negligently inflicted injury.

We disagree. We read *South* v. *Maryland*, *supra*, an action brought under federal diversity jurisdiction on a Maryland sheriff's bond, as stating no more than what this Court thought to be the principles of common law and Maryland law applicable to that case; it is not cast at all in terms of constitutional law, and indeed could not have been, since at the time it was rendered there was no due process clause applicable to the States. Petitioner's citation to *Ingraham* v. *Wright* does not support the notion that all common-law duties owed by government actors were somehow constitutionalized by the Fourteenth Amendment. Jailers may owe a special duty of care to those in their custody under state tort law, see Restatement (Second) of Torts § 314A(4) (1965), but for the reasons previously stated we reject the contention that the

Due Process Clause of the Fourteenth Amendment embraces such a tort law concept. Petitioner alleges that he was injured by the negligence of respondent, a custodial official at the city jail. Whatever other provisions of state law or general jurisprudence he may rightly invoke, the Fourteenth Amendment to the United States Constitution does not afford him a remedy.

Affirmed.

JUSTICE MARSHALL concurs in the result.

JUSTICE BLACKMUN, concurring in the judgment.

I concur in the result. See my opinion in dissent in *Davidson* v. *Cannon*, *post*, p. 349.

JUSTICE STEVENS, concurring in the judgments.*

Two prisoners raise similar claims in these two cases. Both seek to recover for personal injuries suffered, in part, from what they allege was negligence by state officials. Both characterize their injuries as "deprivations of liberty" and both invoke 42 U. S. C. § 1983 as a basis for their claims.

Prisoner Roy Daniels was injured when he slipped on a newspaper and pillows left on a stairway in the Virginia jail where he is incarcerated; he alleges state negligence in the presence of the objects on the stairs. Prisoner Robert Davidson suffered injury when he was attacked by another inmate in the New Jersey prison where he is incarcerated; he alleges (and proved at trial) state negligence in the failure of prison authorities to prevent the assault after he had written a note expressing apprehension about the inmate who ultimately assaulted him. I agree with the majority that petitioners cannot prevail under § 1983. I do not agree, however, that it is necessary either to redefine the meaning of "deprive" in the Fourteenth Amendment,[1] or to repudiate

*[This opinion applies also to No. 84-6470, *Davidson* v. *Cannon et al.*, *post*, p. 344.]

[1] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U. S. Const., Amdt. 14.

the reasoning of *Parratt* v. *Taylor*, 451 U. S. 527 (1981), to support this conclusion.

We should begin by identifying the precise constitutional claims that petitioners have advanced. It is not enough to note that they rely on the Due Process Clause of the Fourteenth Amendment, for that Clause is the source of three different kinds of constitutional protection. First, it incorporates specific protections defined in the Bill of Rights. Thus, the State, as well as the Federal Government, must comply with the commands in the First[2] and Eighth[3] Amendments; so too, the State must respect the guarantees in the Fourth,[4] Fifth,[5] and Sixth[6] Amendments. Second, it contains a substantive component, sometimes referred to as "substantive due process," which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them." *Ante*, at 331.[7] Third, it is a guarantee of fair procedure, sometimes referred to as "procedural due process": the State may not execute, imprison, or fine a defendant without giving him a fair trial,[8] nor may it take property without providing appropriate procedural safeguards.[9]

The type of Fourteenth Amendment interest that is implicated has important effects on the nature of the constitutional claim and the availability of § 1983 relief. If the claim is in

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[2] See, *e. g.*, *Douglas* v. *Jeannette*, 319 U. S. 157 (1943).

[3] See, *e. g*, *Robinson* v. *California*, 370 U. S. 660 (1962).

[4] See, *e. g.*, *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

[5] See, *e. g.*, *Malloy* v. *Hogan*, 378 U. S. 1 (1964) (right to protection from compelled self-incrimination applies to States); *Benton* v. *Maryland*, 395 U. S. 784 (1969) (right to protection from double jeopardy applies to States).

[6] See, *e. g.*, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968) (right to jury trial applies to States).

[7] See also *Moore* v. *East Cleveland*, 431 U. S. 494 (1977); *Youngberg* v. *Romeo*, 457 U. S. 307 (1982).

[8] See, *e. g.*, *Groppi* v. *Leslie*, 404 U. S. 496 (1972); *In re Oliver*, 333 U. S. 257 (1948).

[9] See, *e. g.*, *Fuentes* v. *Shevin*, 407 U. S. 67 (1972).

the first category (a violation of one of the specific constitutional guarantees of the Bill of Rights), a plaintiff may invoke § 1983 regardless of the availability of a state remedy.[10] As explained in *Monroe* v. *Pape*, 365 U. S. 167 (1961), this conclusion derives from the fact that the statute—the Ku Klux Act of 1871—was intended to provide a federal remedy for the violation of a federal constitutional right. Thus, when the Fourth Amendment is violated, as in *Pape*, the provision of an independent federal remedy under § 1983 is necessary to satisfy the purpose of the statute.

Similarly, if the claim is in the second category (a violation of the substantive component of the Due Process Clause), a plaintiff may also invoke § 1983 regardless of the availability of a state remedy.[11] For, in that category, no less than with the provisions of the Bill of Rights, if the Federal Constitution prohibits a State from taking certain actions "regardless of the fairness of the procedures used to implement them," the constitutional violation is complete as soon as the prohibited action is taken; the independent federal remedy is then authorized by the language and legislative history of § 1983.

A claim in the third category—a procedural due process claim—is fundamentally different. In such a case, the deprivation may be entirely legitimate—a State may have every right to discharge a teacher or punish a student—but the State may nevertheless violate the Constitution by failing to provide appropriate procedural safeguards. The constitutional duty to provide fair procedures gives the citizen the opportunity to try to prevent the deprivation from happening, but the deprivation itself does not necessarily reflect any

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[10] See, *e. g.*, *Monroe* v. *Pape*, 365 U. S. 167 (1961) (§ 1983 action for Fourth Amendment violation); *Smith* v. *Wade*, 461 U. S. 30 (1983) (§ 1983 action for Eighth Amendment violation). See generally *McNeese* v. *Board of Education*, 373 U. S. 668, 672 (1963) (§ 1983 is "supplementary to any remedy any State might have").

[11] Cf. *Parratt* v. *Taylor*, 451 U. S. 527, 545 (1981) (BLACKMUN, J., concurring); *Roe* v. *Wade*, 410 U. S. 113 (1973).

"abuse" of state power. Similarly, a deprivation may be the consequence of a mistake or a negligent act, and the State may violate the Constitution by failing to provide an appropriate procedural response. In a procedural due process claim, it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation of property or liberty *without due process of law*—without adequate procedures.

Thus, even though the State may have every right to deprive a person of his property or his liberty, the individual may nevertheless be able to allege a valid § 1983 due process claim, perhaps because a predeprivation hearing must be held,[12] or because the state procedure itself is fundamentally flawed.[13] So too, even though a deprivation may be unauthorized, a procedural due process claim may be raised if it challenges the State's procedures for preventing or redressing the deprivation. However, a complaint does not state a valid procedural due process objection—and a valid § 1983 claim—if it does not include a challenge to the fundamental fairness of the State's procedures. In consequence, when a predeprivation hearing is clearly not feasible,[14] when the regime of state tort law provides a constitutionally unobjectionable system of recovery for the deprivation of property or liberty, and when there is no other challenge to the State's procedures, a valid § 1983 claim is not stated. For, unlike cases in the other two categories—those in which the alleged

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[12] See, *e. g.*, *Loudermill* v. *Cleveland Board of Education*, 470 U. S. 532 (1985); *Carey* v. *Piphus*, 435 U. S. 247 (1978); *Goss* v. *Lopez*, 419 U. S. 565 (1975). Cf. *Groppi*, *supra*.

[13] Cf. *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 436 (1982) (postdeprivation state remedy is inadequate when challenge is to "the state system itself"); *Baker* v. *McCollan*, 443 U. S. 137, 156 (1979) (STEVENS, J., dissenting).

[14] See *Hudson* v. *Palmer*, 468 U. S. 517, 533 (1984) ("when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur"); *Parratt* v. *Taylor*, *supra*.

deprivation violates a substantive federal right—if a procedural due process claim lacks a colorable objection to the validity of the State's procedures, no constitutional violation has been alleged.[15]

Petitioners' claims are not of the first kind. Neither Daniels nor Davidson argues in this Court that the prison authorities' actions violated specific constitutional guarantees incorporated by the Fourteenth Amendment. Neither now claims, for instance, that his rights under the Eighth Amendment were violated. Similarly, I do not believe petitioners have raised a colorable violation of "substantive due process."[16] Rather, their claims are of the third kind: Daniels and Davidson attack the validity of the procedures that Virginia and New Jersey, respectively, provide for prisoners who seek redress for physical injury caused by the negligence of corrections officers.

I would not reject these claims, as the Court does, by attempting to fashion a new definition of the term "depriva-

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[15] See *id.*, at 543–544.

[16] Davidson explicitly disavows a substantive due process claim. See Brief for Petitioner in No. 84–6470, p. 7 ("petitioner frames his claim here purely in terms of procedural due process"). At oral argument, counsel for Daniels did suggest that he was pursuing a substantive due process claim. Tr. of Oral Arg. in No. 84–5872, p. 22. However, the Court of Appeals viewed Daniels' claim as a procedural due process argument, see 748 F. 2d 229, 230, n. 1 (CA4 1984) ("There is no claim of any substantive due process violation"), and Daniels did not dispute this characterization in his petition for certiorari or in his brief on the merits.

In any event, to the extent that petitioners' arguments about the special obligations of prison officials may be read as a substantive due process claim, I agree with the Court, *ante*, at 335–336, that the sheriff's "special duty of care" recognized in *South* v. *Maryland*, 18 How. 396 (1856) does not have its source in the Federal Constitution. In these circumstances, it seems to me, the substantive constitutional duties of prison officials to prisoners are defined by the Eighth Amendment, not by substantive due process. Cf. *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701, 719–721 (CA7 1973) (analyzing prison officials' responsibilities to prevent inmate assaults under the Eighth Amendment), cert. denied *sub nom. Gutierrez* v. *Department of Public Safety of Illinois*, 414 U. S. 1146 (1974).

tion" and excluding negligence from its scope. No serious question has been raised about the presence of "state action" in the allegations of negligence,[17] and the interest in freedom from bodily harm surely qualifies as an interest in "liberty." Thus, the only question is whether negligence by state actors can result in a deprivation. "Deprivation," it seems to me, identifies, not the actor's state of mind, but the victim's infringement or loss. The harm to a prisoner is the same whether a pillow is left on a stair negligently, recklessly, or intentionally; so too, the harm resulting to a prisoner from an attack is the same whether his request for protection is ignored negligently, recklessly, or deliberately. In each instance, the prisoner is losing—being "deprived" of—an aspect of liberty as the result, in part, of a form of state action.

Thus, I would characterize each loss as a "deprivation" of liberty. Because the cases raise only procedural due process claims, however, it is also necessary to examine the nature of petitioners' challenges to the state procedures. To prevail, petitioners must demonstrate that the state procedures for redressing injuries of this kind are constitutionally inadequate. Petitioners must show that they contain a defect so serious that we can characterize the procedures as fundamentally unfair, a defect so basic that we are forced to conclude that the deprivation occurred without due process.

Daniels' claim is essentially the same as the claim we rejected in *Parratt*. The Court of Appeals for the Fourth Circuit determined that Daniels had a remedy for the claimed negligence under Virginia law. Although Daniels vigorously argues that sovereign immunity would have defeated his claim, the Fourth Circuit found to the contrary, and it is our settled practice to defer to the Courts of Appeals on ques-

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[17] Respondents in *Davidson* do raise a state-action objection in one sentence, Brief for Respondents in No. 84-6470, p. 13, n., but that bare reference is inadequate to mount a challenge to the undisturbed District Court finding of state action.

tions of state law.[18] It is true that *Parratt* involved an injury to "property" and that Daniels' case involves an injury to "liberty," but, in both cases, the plaintiff claimed nothing more than a "procedural due process" violation. In both cases, a predeprivation hearing was definitionally impossible.[19] And, in both cases, the plaintiff had state remedies that permitted recovery if state negligence was established. Thus, a straightforward application of *Parratt* defeats Daniels' claim.

Davidson's claim raises a question not specifically addressed in *Parratt*. According to the Third Circuit, no state remedy was available because a New Jersey statute prohibits prisoner recovery from state employees for injuries inflicted by other prisoners. Thus, *Davidson* puts the question whether a state policy of noncompensability for certain types of harm, in which state action may play a role, renders a state procedure constitutionally defective. In my judgment, a state policy that defeats recovery does not, in itself, carry that consequence. Those aspects of a State's tort regime that defeat recovery are not constitutionally invalid, so long as there is no fundamental unfairness in their operation. Thus, defenses such as contributory negligence or statutes of limitations may defeat recovery in particular cases without raising any question about the constitutionality of a State's procedures for disposing of tort litigation. Similarly, in my judgment, the mere fact that a State elects to provide some of its agents with a sovereign immunity defense in certain cases does not justify the conclusion that its remedial system is constitutionally inadequate. There is no reason to believe that the Due Process Clause of the Fourteenth Amendment

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[18] See *Haring* v. *Prosise*, 462 U. S. 306, 314, n. 8 (1983); *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 181, n. 11 (1979); *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976); *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949).

[19] It borders on the absurd to suggest that a State must provide a hearing to determine whether or not a corrections officer should engage in negligent conduct.

and the legislation enacted pursuant to § 5 of that Amendment should be construed to suggest that the doctrine of sovereign immunity renders a state procedure fundamentally unfair.[20] Davidson's challenge has been only to the fact of sovereign immunity; he has not challenged the difference in treatment of a prisoner assaulted by a prisoner and a nonprisoner assaulted by a prisoner, and I express no comment on the fairness of that differentiation

Thus, although I believe that the harms alleged by Daniels and proved by Davidson qualify as deprivations of liberty, I am not persuaded that either has raised a violation of the Due Process Clause of the Fourteenth Amendment. I therefore concur in the judgments.

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[20] In *Martinez* v. *California*, 444 U. S. 277 (1980), we held that California's immunity statute did not violate the Due Process Clause simply because it operated to defeat a tort claim arising under state law. The fact that an immunity statute does not give rise to a procedural due process claim does not, of course, mean that a State's doctrine of sovereign immunity can protect conduct that violates a federal constitutional guarantee; obviously it cannot, see *Martinez*, *supra*, at 284, n. 8, quoting *Hampton* v. *Chicago*, 484 F. 2d 602, 607 (CA7 1973), cert. denied, 415 U. S. 917 (1974).

DAVIDSON *v.* CANNON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-6470. Argued November 6, 1985—Decided January 21, 1986

When threatened by a fellow inmate in the New Jersey State Prison, petitioner sent a note reporting the incident to respondent Assistant Superintendent of the prison, who read the note and sent it to respondent Corrections Sergeant, who, while informed of its contents, did not read it or notify other officers of the threat and forgot about it by the time he went off duty. Two days later the inmate attacked petitioner and inflicted serious injuries. Petitioner then brought a damages action against respondents in Federal District Court under 42 U. S. C. § 1983, claiming that they had violated his rights under, *inter alia*, the Fourteenth Amendment by negligently failing to protect him from the other inmate. After a bench trial, the District Court awarded damages, holding that petitioner was deprived of his liberty interest in personal security as a result of respondents' negligence and that such deprivation was without due process because of a New Jersey statute that protects prison officials from liability for injuries caused by one prisoner to another. The Court of Appeals reversed.

Held: The protections of the Due Process Clause of the Fourteenth Amendment, whether procedural or substantive, are not triggered by lack of due care by prison officials. *Daniels* v. *Williams*, *ante*, p. 327. Respondents' lack of due care, while leading to serious injuries, simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent. Pp. 347-348.

752 F. 2d 817, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *ante*, p. 336. BRENNAN, J., filed a dissenting opinion, *post*, p. 349. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 349.

James Douglas Crawford argued the cause and filed a brief for petitioner.

Madeleine Waters Mansier, Deputy Attorney General of New Jersey, argued the cause for respondents. With her on

the brief were *Irwin I. Kimmelman*, Attorney General, and *James J. Ciancia*, Assistant Attorney General.

Acting Solicitor General Fried argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, *Barbara L. Herwig*, and *Douglas N. Letter*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner sued prison officials seeking damages under 42 U. S. C. § 1983 for injuries he suffered when they negligently failed to protect him from another inmate. On December 19, 1980, petitioner was threatened by one McMillian, a fellow inmate at the New Jersey State Prison at Leesburg. Petitioner sent a note reporting the incident that found its way to respondent Cannon, the Assistant Superintendent of the prison, who read the note and sent it on to respondent James, a Corrections Sergeant.† Cannon subsequently testified that he did not view the situation as urgent because on previous occasions when petitioner had a serious problem he had contacted Cannon directly.

James received the note at about 2 p. m. on December 19, and was informed of its contents. James then attended to other matters, which he described as emergencies, and left the note on his desk unread. By the time he left the prison that evening James had forgotten about the note, and since

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**Fred E. Inbau*, *James P. Manak*, *Wayne W. Schmidt*, *Daniel B. Hales*, and *Courtney E. Evans* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging affirmance.

†The note, addressed to a civilian hearing officer, said:

"When I went back to the unit after seeing you McMillian was on the steps outside the unit. When I was going past him he told me 'I'll fuck you up you old mother-fucking fag.' Go up to your cell, I be right there.

"I ignored this and went to another person's cell and thought about it. Then I figured I should tell you so 'if' anything develops you would be aware.

"I'm quite content to let this matter drop but evidently McMillian isn't.

"Thank you, R. Davidson." 752 F. 2d 817, 819 (CA3 1984).

neither he nor Cannon worked on December 20 or 21, the officers on duty at that time had not been informed of the threat. Petitioner took no steps other than writing the note to alert the authorities that he feared an attack, nor did he request protective custody. He testified that he did not foresee an attack, and that he wrote the note to exonerate himself in the event that McMillian started another fight. He also testified that he wanted officials to reprimand McMillian in order to forestall any future incident. On Sunday, December 21, McMillian attacked petitioner with a fork, breaking his nose and inflicting other wounds to his face, neck, head, and body.

Petitioner brought this § 1983 suit in the United States District Court for the District of New Jersey, claiming that respondents (and two others) had violated his constitutional rights under the Eighth and Fourteenth Amendments. After a bench trial, the District Court held that petitioner had not established an Eighth Amendment violation "because [respondents] did not act with deliberate or callous indifference to [petitioner's] needs and because the incident complained of was a single attack." App. 89. The court also found, however, that respondents "negligently failed to take reasonable steps to protect [petitioner], and that he was injured as a result." *Ibid.* Petitioner was thereby deprived, see *Parratt* v. *Taylor*, 451 U. S. 527, 536–537 (1981), of his liberty interest in personal security, see *Ingraham* v. *Wright*, 430 U. S. 651, 673 (1977); and because New Jersey law provides that "[n]either a public entity nor a public employee is liable for . . . any injury caused by . . . a prisoner to any other prisoner," N. J. Stat. Ann. § 59:5–2(b)(4) (1982), the court concluded that the deprivation was without due process. Petitioner was awarded compensatory damages of $2,000.

The Court of Appeals for the Third Circuit, hearing the case en banc, reversed. 752 F. 2d 817 (1984). While accepting the District Court's conclusion that respondents had been negligent, and agreeing that the attack on petitioner impli-

cated a recognized liberty interest, the majority held that respondents' negligence did not work a "deprivation" of that interest within the meaning of the Due Process Clause. The court conceded that language in *Parratt* supported the District Court's position that merely negligent conduct causing injury could constitute a Fourteenth Amendment "deprivation," but concluded that "*Parratt* does not so hold." 752 F. 2d, at 826. Accordingly, the court ruled that petitioner had failed to make out a violation of his procedural or substantive due process rights, stating that § 1983 provides no remedy "for the type of negligence found in this case." *Id.*, at 829.

Two judges who joined the majority opinion also wrote separately to suggest that even if respondents' negligence had "deprived" petitioner of liberty, the State's decision not to provide a remedy, in view of its strong interest in protecting its prison officials from liability, did not violate due process. Three judges dissented, essentially embracing the position of the District Court.

We granted certiorari, 471 U. S. 1134 (1985), and set this case for oral argument with *Daniels* v. *Williams*, *ante*, p. 327. Finding the principles enunciated in *Daniels* controlling here, we affirm.

In *Daniels*, we held that the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty, or property. In other words, where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required. In this case, petitioner does not challenge the District Court's finding that respondents "'did not act with deliberate or callous indifference to [petitioner's] needs,'" 752 F. 2d, at 820. Instead, he claims only that respondents "negligently failed to protect him from another inmate." Brief for Petitioner 2. *Daniels* therefore controls.

Respondents' lack of due care in this case led to serious injury, but that lack of care simply does not approach the sort

of abusive governn nt conduct that the Due Process Clause was designed to prevent. *Daniels*, *ante*, at 331–333. Far from abusing governmental power, or employing it as an instrument of oppression, respondent Cannon mistakenly believed that the situation was not particularly serious, and respondent James simply forgot about the note. The guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials.

In an effort to limit the potentially broad sweep of his claim, petitioner emphasizes that he "does not ask this Court to read the Constitution as an absolute guarantor of his liberty from assault by a fellow prisoner, even if that assault is caused by the negligence of his jailers." Brief for Petitioner 17. Describing his claim as one of "procedural due process, pure and simple," *id.*, at 14, all he asks is that New Jersey provide him a remedy. But the Fourteenth Amendment does not require a remedy when there has been no "deprivation" of a protected interest. Petitioner's claim, based on respondents' negligence, is quite different from one involving injuries caused by an unjustified attack by prison guards themselves, see *Johnson* v. *Glick*, 481 F. 2d 1028 (CA2), (Friendly, J.), cert. denied *sub nom. John* v. *Johnson*, 414 U. S. 1033 (1973), or by another prisoner where officials simply stood by and permitted the attack to proceed, see *Curtis* v. *Everette*, 489 F. 2d 516 (CA3 1973), cert. denied *sub nom. Smith* v. *Curtis*, 416 U. S. 995 (1974). As we held in *Daniels*, the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials.

Accordingly, the judgment of the Court of Appeals for the Third Circuit is affirmed.

It is so ordered.

[For opinion of JUSTICE STEVENS concurring in the judgment, see *ante*, p. 336].

JUSTICE BRENNAN, dissenting.

I agree with the Court that merely negligent conduct by a state official, even though causing personal injury, does not constitute a deprivation of liberty under the Due Process Clause. I do believe, however, that official conduct which causes personal injury due to recklessness or deliberate indifference, does deprive the victim of liberty within the meaning of the Fourteenth Amendment.

As JUSTICE BLACKMUN persuasively demonstrates in his dissent, the record in this case strongly suggests that the prison officials' failure to protect the petitioner from attack was reckless and not merely negligent. Accordingly, like JUSTICE BLACKMUN, I would vacate the judgment and remand this case so that the Court of Appeals may review the District Court's holding that respondents' conduct was not reckless.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, dissenting.

When the State of New Jersey put Robert Davidson in its prison, it stripped him of all means of self-protection. It forbade his access to a weapon. N. J. Dept. of Corrections Standards 251.4.a.201 and .202. It forbade his fighting back. Standards 251.4.a.002, .003, and .004. It blocked all avenues of escape. The State forced Davidson to rely solely on its own agents for protection. When threatened with violence by a fellow inmate, Davidson turned to the prison officials for protection, but they ignored his plea for help. As a result, Davidson was assaulted by another inmate. He suffered stab wounds on his face and body as well as a broken nose that required surgery.

The Court nevertheless excuses the prison officials from liability under 42 U. S. C. § 1983, holding that because the officials were "merely negligent in causing the injury" there was no "deprivation" of liberty without due process of law.

Ante, at 347. It relies for this proposition and result on the easier companion case, *Daniels* v. *Williams*, *ante*, p. 327, which overrules in part *Parratt* v. *Taylor*, 451 U. S. 527 (1981). In *Daniels*, also a § 1983 suit, the Court holds that a pretrial detainee, allegedly injured when he slipped on a pillow negligently left on the jail stairs by a deputy, as a matter of law suffered no deprivation under the Fourteenth Amendment.

While I concur in the judgment in *Daniels*, I do not join the Court in extending that result to this case. It is one thing to hold that a commonplace slip and fall, or the loss of a $23.50 hobby kit, see *Parratt* v. *Taylor*, *supra*, does not rise to the dignified level of a constitutional violation. It is a somewhat different thing to say that negligence that permits anticipated inmate violence resulting in injury, or perhaps leads to the execution of the wrong prisoner, does not implicate the Constitution's guarantee of due process. When the State incarcerated Daniels, it left intact his own faculties for avoiding a slip and a fall. But the State prevented Davidson from defending himself, and therefore assumed some responsibility to protect him from the dangers to which he was exposed. In these circumstances, I feel that Davidson was deprived of liberty by the negligence of the prison officials. Moreover, the acts of the state officials in this case may well have risen to the level of recklessness. I therefore dissent.

I

Davidson broke up a fight between two other inmates. Two days later, on Friday, December 19, 1980, the three were brought before a prison disciplinary officer. Only one of the three, Gibbs, was found guilty of fighting. When Davidson and the other inmate, McMillian, returned to their unit, McMillian threatened Davidson. Davidson decided to report the threat, in part to exonerate himself in advance but primarily to get the prison officials to take precautions. App. 85 (District Court's findings of fact). See also *id.*, at

75. Accordingly, Davidson reported the threat to Officer Garcia. Because McMillian had a history of prison assaults and fighting, *id.*, at 33–34, 62, Garcia recognized the seriousness of McMillian's threats. Garcia had Davidson relate the incident in writing. He then took Davidson's note, and told Davidson to return to his unit.

Garcia delivered the note to respondent Cannon, Assistant Superintendent of the prison, and described its contents. Cannon did not think the threat serious because Davidson had not personally come to him to report it and because of the nature of the earlier fight. *Id.*, at 44, 46. Cannon nonetheless asked to speak to Davidson, but changed his mind when he learned that Davidson had already returned to his unit. *Id.*, at 42. Rather than take one of the usual preventive measures, such as separating the two inmates, placing Davidson in protective custody, or attempting to ascertain the gravity of the threat by talking to the two, *id.*, at 44, Cannon simply told Garcia to pass the note along to respondent James, a Corrections Sergeant in the Internal Affairs Unit. *Id.*, at 43.

Garcia followed Cannon's order, giving the note to James at approximately 2:15 p. m., and informing James that it concerned a threat to Davidson by McMillian. *Id.*, at 38–39. Because James was not ordered to act immediately, he decided there was no urgency. James also decided not to follow the normal procedure of interviewing the complainant. *Id.*, at 50. James had two other tasks that he considered to be of higher priority, *id.*, at 61—paperwork and a report of a knife in a cell. James described the latter as an emergency situation; he conceded, however, that that cell had been double locked so that it was secure. *Id.*, at 51. James' regular shift ended at 4 p. m., but he worked a second shift that night as Assistant Center Keeper until 10:30 p. m. The Center Keeper ordinarily investigates threats to inmates, but again James took no action on the threat to Davidson. *Id.*, at 54–55. The second shift was "normal and routine." *Id.*, at

59. James made at least two conscious decisions not to act on the note; by the time he left the prison, he had forgotten about it. *Ibid.* Had he remembered, he would have notified the weekend shift. *Id.*, at 59–60. A reported threat would not normally be ignored over the weekend. *Id.*, at 50.

Meanwhile, the prison authorities had been alerted to the potential violence through another channel. On Wednesday, December 17, Officer Gibson wrote a "Special Report" stating that an inmate source had told him the fight involving Davidson and McMillian was "not over yet." Gibson recommended keeping Davidson and Gibbs in the detention area for their own protection. *Id.*, at 80. This recommendation was apparently ignored, as both Davidson and McMillian remained in their regular unit.

Neither Cannon nor James worked during the weekend. *Id.*, at 48. On Sunday, December 21, McMillian attacked Davidson, *id.*, at 28, inflicting the injuries that gave rise to this suit.

II

The Court appears to recognize that the injuries to Davidson (as well as that to Daniels in the companion case, *ante*, p. 327) implicates the "liberty" protected by the Fourteenth Amendment. It is well established that this liberty includes freedom from unjustified intrusions on personal security. *Ingraham* v. *Wright*, 430 U. S. 651, 673–674 (1977). In particular, it includes a prisoner's right to safe conditions and to security from attack by other inmates. See *Youngberg* v. *Romeo*, 457 U. S. 307, 315–316 (1982).[1] Before a State can

[1] The Court in *Youngberg* v. *Romeo* held that an infringement of an institutionalized mental patient's liberty interest in safe conditions would not violate due process if it resulted from a professionally acceptable judgment concerning the conditions of confinement. The essence of Davidson's complaint, of course, is that the judgments made by respondents were not acceptable. *Youngberg*, in any event, is factually inapposite here, because Davidson—like Daniels—does not challenge the general conditions of his confinement.

deprive a prisoner of the liberty he retains after imprisonment, it must afford him constitutionally adequate procedures. *Vitek* v. *Jones*, 445 U. S. 480, 493–494 (1980).

Although Daniels' and Davidson's liberty interests were infringed, the Court holds that they were not "deprived" of liberty in the constitutional sense. In the past, we have held that the Fourteenth Amendment requires a "familiar *two-stage analysis:* We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property.'" *Ingraham* v. *Wright*, 430 U. S., at 672 (emphasis added). If so, "we then must decide what procedures constitute 'due process of law.'" *Ibid.* But I agree with the Court that a deprivation of liberty under the Fourteenth Amendment generally requires more than a mere infringement of a liberty interest. I also agree that the purpose of the Fourteenth Amendment's Due Process Clause should guide our determination of what actions constitute a deprivation of liberty under the Clause. A deprivation must contain some element of abuse of governmental power, for the "touchstone of due process is protection of the individual against arbitrary action of government." *Wolff* v. *McDonnell*, 418 U. S. 539, 558 (1974). Finally, I agree that mere negligent activity *ordinarily* will not amount to an abuse of state power. Where the Court today errs, in my view, is in elevating this sensible rule of thumb to the status of inflexible constitutional dogma. The Court declares that negligent activity can *never* implicate the concerns of the Due Process Clause. I see no justification for this rigid view. In some cases, by any reasonable standard, governmental negligence is an abuse of power.[2] This is one of those cases.

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[2] It is important not to confuse negligence with the absence of deliberate action. Negligent acts are often deliberate. W. Prosser, D. Dobbs, W. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 31, p. 171 (5th. ed. 1984) (Prosser); see, *e. g.*, *The Germanic*, 196 U. S. 589 (1905). Respondents Cannon and James did not act inadvertently. They deliber-

It seems to me that when a State assumes sole responsibility for one's physical security and then ignores his call for help, the State cannot claim that it did not know a subsequent injury was likely to occur. Under such circumstances, the State should not automatically be excused from responsibility. In the context of prisons, this means that once the State has taken away an inmate's means of protecting himself from attack by other inmates, a prison official's negligence in providing protection can amount to a deprivation of the inmate's liberty, at least absent extenuating circumstances.[3] Such conduct by state officials seems to me to be the "arbitrary action" against which the Due Process Clause protects. The

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ately decided that the threat to Davidson was not serious. Whether conduct is denominated negligent or intentional can be a function of the likelihood that harm will occur. Where occurrence of the harm is substantially certain, the law imputes to the actor an intent to cause it. Restatement (Second) of Torts § 8A, Comment *b* (1965). Where harm is less certain, we may call the actor negligent. Prosser, *supra*, at 170. In some circumstances, the risk of injury is so high that the government's failure to make efforts to avoid the injury is unacceptable, even if its omission still might be categorized as negligence.

[3] *Estelle* v. *Gamble*, 429 U. S. 97, 106 (1976), is not to the contrary. In *Estelle*, the Court held that a valid Eighth Amendment claim based on a prison physician's diagnosis or treatment required an allegation of deliberate indifference rather than one of mere negligence. The requirement that deliberate indifference or wantonness be shown flows directly from the requirement of cruel and unusual conduct. The type of conduct about which the drafters of the Eighth Amendment were primarily concerned included " 'torture[s]' and other 'barbar[ous]' methods of punishment" (quotations and citation omitted). *Id.*, at 102. As is shown in the text, *infra*, the concerns underlying the Due Process Clause are broader than those underlying the Eighth Amendment.

A prison is not the only setting in which governmental negligence may amount to an abuse of power. If police officers arrest a motorist on the freeway and leave his young children alone in the car by the side of the road on a cold night, any resulting injury to the children might well constitute a "deprivation" within the meaning of the Fourteenth Amendment. Cf. *White* v. *Rochford*, 592 F. 2d 381 (CA7 1979).

officials' actions in such cases thus are not remote from the purpose of the Due Process Clause and § 1983.[4]

Moreover, this case does not raise the concern noted in *Daniels*, *ante*, at 332, that "[t]he only tie between the facts . . . and anything governmental in nature" is the identity of the parties. In *Daniels*, the negligence was only coincidentally connected to an inmate-guard relationship; the same incident could have occurred on any staircase. Daniels in jail was as able as he would have been anywhere else to protect himself against a pillow on the stairs. The State did not prohibit him from looking where he was going or from taking care to avoid the pillow.[5]

In contrast, where the State renders a person vulnerable and strips him of his ability to defend himself, an injury that results from a state official's negligence in performing his duty is peculiarly related to the governmental function. Negligence in such a case implicates the "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Monroe* v. *Pape*, 365 U. S. 167, 184 (1961), quoting *United States* v. *Classic*, 313 U. S. 299, 326 (1941). The deliberate decision not to protect Davidson from a known threat

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[4] In adopting the predecessor of § 1983, Congress sought a remedy "against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Monroe* v. *Pape*, 365 U. S. 167, 176 (1961) (emphasis in original).

[5] While negligence of prison officials can constitute a due process violation, general conditions of confinement do not ordinarily give rise to the increased standard of care discussed above. Prison conditions are typically part of the State's legitimate restraint of liberty as a function of punishing convicted persons. See *Rhodes* v. *Chapman*, 452 U. S. 337 (1981). "Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial." *Bell* v. *Wolfish*, 441 U. S. 520, 537 (1979). See also *Block* v. *Rutherford*, 468 U. S. 576 (1984).

was directly related to the often violent life of prisoners. And protecting inmates from attack is central to one of the State's primary missions in running a prison—the maintenance of internal security. See *Hudson* v. *Palmer*, 468 U. S. 517, 524 (1984).

The Fourteenth Amendment is not "trivialized," see *Daniels*, *ante*, at 332, by recognizing that in some situations negligence can lead to a deprivation of liberty. On the contrary, excusing the State's failure to provide reasonable protection to inmates against prison violence demeans both the Fourteenth Amendment and individual dignity.[6]

III

Even were I to accept the Court's rigid view of what constitutes a deprivation, I would not vote to affirm the judgment of the Court of Appeals. Although the District Court ruled that the prison officials' conduct here was not reckless, there is substantial reason to doubt that conclusion. Since the Court of Appeals did not review the recklessness holding, I would remand the case for that review.

The Court has previously indicated that prison officials act recklessly when they disregard the potential for violence between a known violent inmate and a known likely victim. In *Smith* v. *Wade*, 461 U. S. 30 (1983), the Court recognized that a prison guard had acted recklessly in placing a known violent inmate in a cell shared by the previously victimized plaintiff and another inmate, without attempting to locate an empty cell nearby. The plaintiff, who had recently been removed from protective custody, was assaulted by his cellmates. It is far from clear that the officials in the present case were any less reckless.

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[6] The Court's notion of trivialization is especially difficult to understand given its recognition that negligent behavior may violate other constitutional provisions. See *United States* v. *Leon*, 468 U. S. 897, 919–923, and n. 23 (1984) (Fourth Amendment).

Even if the respondents' conduct ordinarily would be considered only negligent, the forewarning here changes the constitutional complexion of the case. When officials have actual notice of a prisoner's need for physical protection, "'administrative negligence can rise to the level of deliberate indifference to or reckless disregard for that prisoner's safety.'" *Layne* v. *Vinzant*, 657 F. 2d 468, 471 (CA1 1981), quoting *West* v. *Rowe*, 448 F. Supp. 58, 60 (ND Ill. 1978). See also *Matzker* v. *Herr*, 748 F. 2d 1142, 1149 (CA7 1984); *Miller* v. *Solem*, 728 F. 2d 1020, 1024–1025 (CA8), cert. denied, 469 U. S. 841 (1984). Cf. *Baker* v. *McCollan*, 443 U. S. 137, 148 (1979) (concurring opinion) (sheriff who failed to adopt procedures for identifying arrestees was negligent rather than reckless when he had not previously been notified of the legitimate need for or duty to adopt such procedures).

The respondents "had the responsibility to care for plaintiff's safety, actual notice of the threat by an inmate with a known history of violence, and an opportunity to prevent harm to plaintiff." App. 89 (District Court's conclusions of law). Both respondents knew that McMillian had threatened Davidson after the fight and that Davidson had reported the threat immediately. Although Cannon knew that McMillian was a troublemaker, *id.*, at 41, he nonetheless chose to think that the situation was not serious. *Id.*, at 42. Likewise, James decided to attend to other matters during the entire eight hours he worked after receiving the note. *Id.*, at 86–87. Cannon and James intentionally delayed protecting Davidson's personal security in the face of a real and known possibility of violence. See *Porm* v. *White*, 762 F. 2d 635, 636–638 (CA8 1985). Cf. *Estelle* v. *Gamble*, 429 U. S. 97, 104–105 (1976) (intentional delay in providing necessary medical care to seriously ill inmate can constitute deliberate indifference and thus violate the Eighth Amendment). Cannon did not check on what James had found; James turned his back on the violence brewing for the weekend. Yet the risk

that harm would occur was substantial and obvious. Respondents' behavior very well may have been sufficiently irresponsible to constitute reckless disregard of Davidson's safety.

Even if negligence is deemed categorically insufficient to cause a deprivation under the Fourteenth Amendment, recklessness must be sufficient. Recklessness or deliberate indifference is all that a prisoner need prove to show that denial of essential medical care violated the Eighth Amendment's ban on cruel and unusual punishments. See *Estelle* v. *Gamble*, 429 U. S., at 104. The Due Process Clause provides broader protection than does the Eighth Amendment, see, *e. g.*, *Bell* v. *Wolfish*, 441 U. S. 520 (1979); *Ingraham* v. *Wright*, 430 U. S. 651 (1977); *Wolff* v. *McDonnell*, 418 U. S., at 557–558; *Revere* v. *Massachusetts General Hospital*, 463 U. S. 239, 244 (1983), so a violation of the Due Process Clause certainly should not require a more culpable mental state.

IV

The deprivation of Davidson's liberty interest violated the Fourteenth Amendment if it occurred "without due process of law." That condition is clearly satisfied. In both *Parratt* and *Hudson*, the Court held that where a deprivation of property was caused by a random and unauthorized act of a state official, it was impracticable for the State to provide process in advance and the State could satisfy procedural due process by a meaningful postdeprivation remedy, such as a tort suit. *Parratt* v. *Taylor*, 451 U. S., at 541; *Hudson* v. *Palmer*, 468 U. S., at 520–521. Even assuming the same is true for deprivations of liberty, New Jersey has failed to provide a meaningful postdeprivation remedy. By statute, the State has ruled: "Neither a public entity nor a public employee is liable for . . . any injury caused by . . . a prisoner to any other prisoner." N. J. Stat. Ann. § 59:5–2(b)(4) (West 1982). The State acknowledges that it would have asserted the immunity statute as a defense to a state-court action and

that Davidson's complaint would have been dismissed before being heard on the merits. Brief for Respondents 34.

Conduct that is wrongful under § 1983 surely cannot be immunized by state law. A State can define defenses, including immunities, to state-law causes of action, as long as the state rule does not conflict with federal law. *Ferri* v. *Ackerman*, 444 U. S. 193, 198 (1979). But permitting a state immunity defense to control in a § 1983 action "'would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.'" *Martinez* v. *California*, 444 U. S. 277, 284, n. 8 (1980), quoting *Hampton* v. *Chicago*, 484 F. 2d 602, 607 (CA7 1973), cert. denied, 415 U. S. 917 (1974). It is irrelevant that state immunity as applied to defeat a state-law tort claim is constitutional, and may be construed as one aspect of the State's definition of a tort claim. See 444 U. S., at 281–282, and n. 5. Since § 1983 was designed to attack the misuse of state power, "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms." *Scheuer* v. *Rhodes*, 416 U. S. 232, 243 (1974).

Strong federal interests argue for allowing Davidson to bring his suit in the face of the New Jersey statute. See *Ferri* v. *Ackerman*, 444 U. S., at 198, n. 13. First, "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Monroe* v. *Pape*, 365 U. S., at 196 (concurring opinion). Second, the legislative history of § 1983's predecessor makes clear that Congress intended to alter the federal-state relationship with respect to the protection of federal rights. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972). In particular, Congress in-

tended "to provide a federal remedy where the state remedy . . . was not available in practice." *Monroe* v. *Pape*, 365 U. S., at 174.

Davidson has been denied "'an *opportunity* . . . granted at a meaningful time and in a meaningful manner' . . . 'for [a] hearing appropriate to the nature of the case.'" *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 437 (1982) (citations omitted) (emphasis in original). Lacking a meaningful post-deprivation remedy in state court, Davidson was deprived of his liberty without due process of law.

I therefore would reverse the judgment of the Court of Appeals and order that the District Court award of $2,000 be reinstated. If I agreed with the rigid rule announced in *Daniels*—which I do not—I would vacate the judgment and remand the case for review of the District Court's finding that the respondents' conduct was not reckless.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM v. DIMENSION FINANCIAL CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 84-1274. Argued November 4, 1985—Decided January 22, 1986

Section 2(c) of the Bank Holding Company Act of 1956 defines "bank" as any institution "which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." In response to the increase in the number of arguably uncovered "nonbank banks"—such as institutions offering customers "NOW" (negotiable order of withdrawal) accounts, which function like traditional checking accounts but are subject to a seldom exercised right of the bank to require prior notice of withdrawal, and institutions offering "commercial loans substitutes" such as certificates of deposit and commercial paper—the Federal Reserve Board amended its "Regulation Y" to redefine a "bank" as any institution that (1) accepts deposits that "as a matter of practice" are payable on demand and (2) engages in the business of making "any loan other than a loan to an individual for personal, family, household, or charitable purposes," including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments." In consolidated cases challenging the amended Regulation Y, the Court of Appeals set aside the regulation.

Held: The Board did not act within its statutory authority in defining "banks" as it did. Pp. 366–375.

(a) The Board's definition of "demand deposit" is not an accurate or reasonable interpretation of § 2(c) of the Act. An institution that offers NOW accounts—even if it engages in commercial lending—is not a "bank" for the purposes of the Act because the requirement of prior notice of withdrawal withholds from the depositor any "legal right" to withdraw on demand. No amount of agency expertise can make the words "legal right" contained in § 2(c) mean a right to do something "as a matter of practice." Pp. 367–368.

(b) Nor is the Board's definition of "commercial loan" a reasonable interpretation of § 2(c), under which an institution, even if it accepts deposits that the depositor has a legal right to withdraw on demand, is not a bank unless it "engages in the business of making commercial loans." The term "commercial loan" is used in the financial community

to describe the direct loan from a bank to a business customer for the purpose of providing funds needed by the customer in its business. Money market transactions, which the Board characterizes as "commercial loan substitutes," do not fall within the commonly accepted definition of "commercial loans." Nothing in the statutory language or the legislative history indicates that the term "commercial loan" meant anything different from its accepted ordinary commercial usage. Pp. 368–373.

(c) The Board's new definition cannot be supported on the asserted basis that it falls within the Act's "plain purpose" of regulating institutions "functionally equivalent" to banks. The "plain purpose" of legislation is determined in the first instance with reference to the plain language of the statute itself. Here, rather than defining "bank" as an institution that offers the functional equivalent of banking services, Congress defined with specificity certain transactions that constitute banking subject to regulation. The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect Congress' will as expressed in the statute. Pp. 373–375.

744 F. 2d 1402, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except WHITE, J., who took no part in the consideration or decision of the case.

Michael Bradfield argued the cause for petitioner. With him on the briefs was *James V. Mattingly, Jr.*

Jeffrey S. Davidson argued the cause for respondents Dimension Financial Corp. et al. With him on the brief were *David G. Norrell, Glenn Summers,* and *William L. Mitchell. John D. Hawke, Jr.,* argued the cause for respondents American Financial Services Association et al. With him on the brief were *Leonard H. Becker, Douglas L. Wald,* and *Louis A. Hellerstein.**

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*Briefs of *amici curiae* urging reversal were filed for the Conference of State Bank Supervisors et al. by *Erwin N. Griswold, J. Thomas Cardwell, Laura N. Pringle,* and *James F. Bell;* and for the Independent Bankers Association of America by *Leonard J. Rubin.*

Briefs of *amici curiae* urging affirmance were filed for the United States by *Acting Solicitor General Fried, Acting Assistant Attorney General Willard, Deputy Solicitor General Claiborne, John F. Cordes, Freddi*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Federal Reserve Board acted within its statutory authority in defining "banks" under § 2(c) of the Bank Holding Company Act of 1956, 12 U. S. C. § 1841 *et seq.*, as any institution that (1) accepts deposits that "as a matter of practice" are payable on demand and (2) engages in the business of making "any loan other than a loan to an individual for personal, family, household, or charitable purposes" including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments." 12 CFR § 225.2(a)(1) (1985).

I

A

Section 2(c) of the Bank Holding Company Act defines "bank" as any institution "which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 70 Stat. 133, as amended, 12 U. S. C. § 1841(c).

This case is about so-called "nonbank banks"—institutions that offer services similar to those of banks but which until recently were not under Board regulation because they conducted their business so as to place themselves arguably outside the narrow definition of "bank" found in § 2(c) of the Act. Many nonbank banks, for example, offer customers NOW (negotiable order of withdrawal) accounts which function like conventional checking accounts but because of prior notice provisions do not technically give the depositor a "legal right to withdraw on demand." 12 U. S. C. § 1841(c)(1). Others offer conventional checking accounts, but avoid classification as "banks" by limiting their extension of commercial credit to

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Lipstein, and *Mary Ann Gadziala;* and for Sears, Roebuck and Co. et al. by *Theodore B. Olson, Philip M. Knox, Jr., David Shute*, and *Peter J. Wallison.*

the purchase of money market instruments such as certificates of deposit and commercial paper.

In 1984, the Board promulgated rules providing that nonbank banks offering the functional equivalent of traditional banking services would thereafter be regulated as banks. 49 Fed. Reg. 794. The Board accomplished this by amending its definition of a bank, found in "Regulation Y," in two significant respects. First, the Board defined "demand deposit" to include deposits, like NOW accounts, which are "as a matter of practice" payable on demand. 12 CFR § 225.2 (a)(1)(A) (1985). Second, the Board defined the "making of a commercial loan" as "any loan other than a loan to an individual for personal, family, household, or charitable purposes," including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments." 12 CFR § 225.2(a)(1)(B) (1985).

B

Cases challenging the amended Regulation Y were commenced in three Circuits and were consolidated in the United States Court of Appeals for the Tenth Circuit.[1] The Court of Appeals set aside both the demand deposit and commercial loan aspects of the Board's regulation. 744 F. 2d 1402 (1984). The court did not discuss the demand deposit regulation in detail, relying instead on the holding of an earlier Tenth Circuit case, *First Bancorporation* v. *Board of Governors*, 728 F. 2d 434 (1984). In *First Bancorporation*, the court noted that the statutory definition of demand deposit is a deposit giving the depositor "a *legal right* to withdraw on demand." The court recognized that "withdrawals from NOW accounts are in actual practice permitted on demand." *Id.*, at 436. But, since the depositary institution retains a technical prior notice requirement it does not, for the pur-

[1] Cases filed in the United States Courts of Appeal for the Fourth and Sixth Circuits were transferred to the Tenth Circuit pursuant to 28 U. S. C. § 2112(a).

poses of Congress' definition of "bank," accept "deposits that the depositor has a legal right to withdraw on demand."

The Court of Appeals also concluded that the Board's new definition of "commercial loan" was at odds with the Act. The legislative history revealed that in passing § 2(c) Congress intended to exempt from Board regulation institutions whose only commercial credit activity was the purchase of money market instruments. Although agencies must be "able to change to meet new conditions arising within their sphere of authority," any expansion of agency jurisdiction must come from Congress and not the agency itself. 744 F. 2d, at 1409. Accordingly, the Court of Appeals invalidated the amended regulations.

We granted certiorari. 471 U. S. 1064 (1985). We affirm.

II

The Bank Holding Company Act of 1956, 12 U. S. C. § 1841 *et seq.*, vests broad regulatory authority in the Board over bank holding companies "to restrain the undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit." S. Rep. No. 91-1084, p. 24 (1970). The Act authorizes the Board to regulate "any company which has control over any bank." 12 U. S. C. § 1841(a)(1).

The breadth of that regulatory power rests on the Act's definition of the word "bank." The 1956 Act gave a simple and broad definition of bank: "any national banking association or any State bank, savings bank, or trust company." 12 U. S. C. § 1841(c) (1964 ed.). Experience soon proved that literal application of the statute had the unintended consequence of including within regulation industrial banks offering limited checking account services to their customers. These institutions accepted "'funds from the public that are, in actual practice, repaid on demand.'" Amend the Bank Holding Company Act of 1956: Hearings on S. 2253, S. 2418,

and H. R. 7371 before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess., 447 (1966) (letter to the Committee from J. L. Robertson, Member, Federal Reserve Board). Although including these institutions within the bank definition was the "correct legal interpretation" of the 1956 statute, the Board saw "no reason in policy to cover such institutions under this act." *Ibid.* Congress agreed, and accordingly amended the statutory definition of a bank in 1966, limiting its application to institutions that accept "deposits that the depositor has a legal right to withdraw on demand."[2]

The 1966 definition proved unsatisfactory because it too included within the definition of "bank" institutions that did not pose significant dangers to the banking system. Because one of the primary purposes of the Act was to "restrain undue concentration of . . . commercial credit," it made little sense to regulate institutions that did not, in fact, engage in the business of making commercial loans. S. Rep. No. 91–1084, p. 24 (1970). Congress accordingly amended the definition, excluding all institutions that did not "engag[e] in the business of making commercial loans." Since 1970 the statute has provided that a bank is any institution that

> "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U. S. C. § 1841(c).

III

In 1984, the Board initiated rulemaking to respond to the increase in the number of nonbank banks.[3] After hearing

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[2] The Senate Report explained, "the bill redefines 'bank' as an institution that accepts deposits payable on demand (checking accounts), the commonly accepted test of whether an institution is a commercial bank so as to exclude institutions like industrial banks and nondeposit trust companies." S. Rep. No. 1179, 89th Cong., 2d Sess., 7 (1966).

[3] The Board explained that since 1980 a large number of insurance, securities, industrial, and commercial organizations have acquired Federal Deposit Insurance Corporation insured financial institutions that are the

views of interested parties, the Board found that nonbank banks pose three dangers to the national banking system. *First*, by remaining outside the reach of banking regulations, nonbank banks have a significant competitive advantage over regulated banks despite the functional equivalence of the services offered. *Second*, the proliferation of nonbank banks threatens the structure established by Congress for limiting the association of banking and commercial enterprises. See 12 U. S. C. § 1843(c)(8) (bank holding company can purchase nonbanking affiliate only if entity "closely related to banking"). *Third*, the interstate acquisition of nonbank banks undermines the statutory proscription on interstate banking without prior state approval. 49 Fed. Reg. 794, 835–836 (1984). Since the narrowed statutory definition required that both the demand deposit and the commercial loan elements be present to constitute the institution as a bank, the Board proceeded to amend Regulation Y redefining both elements of the test. We turn now to the two elements of this definition.

A

The Board amended its definition of "demand deposit" primarily to include within its regulatory authority institutions offering NOW accounts. A NOW account functions like a traditional checking account—the depositor can write checks that are payable on demand at the depository institution. The depository institution, however, retains a seldom exercised but nevertheless absolute right to require prior notice of withdrawal. Under a literal reading of the statute, the institution—even if it engages in full-scale commercial lending—is not a "bank" for the purposes of the Holding Company Act because the prior notice provision withholds from the depositor any "legal right" to withdraw on demand. The

functional equivalent of banks. The Board also noted that the powers of previously unregulated industrial banks "have substantially expanded . . . making them for all intents and purposes banks" for the purposes of the Bank Holding Company Act. 49 Fed. Reg., at 834.

Board in its amended definition closes this loophole by defining demand deposits as a deposit, not that the depositor has a "legal right to withdraw on demand," but a deposit that "as a matter of practice is payable on demand."

In determining whether the Board was empowered to make such a change, we begin, of course, with the language of the statute. If the statute is clear and unambiguous "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.

Application of this standard to the Board's interpretation of the "demand deposit" element of § 2(c) does not require extended analysis. By the 1966 amendments to § 2(c), Congress expressly limited the Act to regulation of institutions that accept deposits that "the depositor has a legal right to withdraw on demand." 12 U. S. C. § 1841(c). The Board would now define "legal right" as meaning the same as "a matter of practice." But no amount of agency expertise—however sound may be the result—can make the words "legal right" mean a right to do something "as a matter of practice." A *legal* right to withdraw on demand means just that: a right to withdraw deposits without prior notice or limitation. Institutions offering NOW accounts do not give the depositor a legal right to withdraw on demand; rather, the institution itself retains the ultimate legal right to require advance notice of withdrawal. The Board's definition of "demand deposit," therefore, is not an accurate or reasonable interpretation of § 2(c).

B

Section 2(c) of the Act provides that, even if an institution accepts deposits that the depositor has a legal right to withdraw on demand, the institution is not a bank unless it "en-

gages in the business of making commercial loans." Under Regulation Y, "commercial loan" means "any loan other than a loan to an individual for personal, family, household, or charitable purposes," including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments."

The purpose of the amended regulation is to regulate as banks institutions offering "commercial loan substitutes," that is, extensions of credit to commercial enterprises through transactions other than the conventional commercial loan. In its implementing order, the Board explained that "it is proper to include these instruments within the scope of the term commercial loan as used in the Act in order to carry out the Act's basic purposes: to maintain the impartiality of banks in providing credit to business, to prevent conflicts of interest, and to avoid concentration of control of credit." 49 Fed. Reg., at 841.

As the Board's characterization of these transactions as "commercial loan substitutes" suggests,[4] however, money market transactions do not fall within the commonly accepted definition of "commercial loans." The term "commercial loan" is used in the financial community to describe the direct loan from a bank to a business customer for the purpose of providing funds needed by the customer in its business. The term does not apply to, indeed is used to distinguish, extensions of credit in the open market that do not involve close borrower-lender relationships. Cf. G. Munn & F. Garcia, Encyclopedia of Banking and Finance 607 (1983). These latter money market transactions undoubtedly involve the indi-

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[4]The Board stated in its implementing order that "commercial paper is an important substitute for commercial loans." 49 Fed. Reg., at 840, n. 34. See also *Citicorp*, 69 Fed. Res. Bull. 921, 922 (1983) ("commercial loans include such commercial loan substitutes as the purchase of commercial paper, bankers acceptances and certificates of deposit, and the sale of federal funds"); Hurley, The Commercial Paper Market, 63 Fed. Res. Bull. 525 (1977) ("commercial paper is an important substitute for bank credit").

rect extension of credit to commercial entities but, because they do not entail the face-to-face negotiation of credit between borrower and lender, are not "commercial loans."

This common understanding of the term "commercial loan" is reflected in the Board's own decisions. Throughout the 1970's the Board applied the term "commercial loan" to exclude from regulation institutions engaging in money market transactions. For example, in *D. H. Baldwin Co.*, 63 Fed. Res. Bull. 280 (1977), the Board noted that although savings and loans participated in the federal funds market and issued certificates of deposit, they were not "technically 'banks' for the purposes of the Act" because they did not make commercial loans. *Id.*, at 286. The Board recognized that savings and loans resembled banks but concluded that "the decision should be left to Congress whether, in light of the policies underlying the Bank Holding Company Act, such 'near-banks' should be treated as 'banks' or 'nonbanks.'" *Id.*, at 287. See also *American Fletcher Corp.*, 60 Fed. Res. Bull. 868, 869, and n. 8 (1974) (savings and loans participate in the federal funds market and offer certificates of deposit but may not be deemed "banks" within the meaning of the Act). In 1976, the Board's Legal Division found that broker call loans "do not appear to have the close lender-borrower relationship that is one of the characteristics of commercial loans." Letter to Michael A. Greenspan from Baldwin P. Tuttle, Deputy General Counsel, pp. 2–3 (Jan. 26, 1976) (App. 100A–101A). A 1981 internal memorandum summarized the Board's longstanding interpretation of the commercial loan definition:

> "The Board also has concluded that, although commercial in nature, the purchase of federal funds, money market instruments (certificates of deposit, commercial paper, and bankers acceptances) are not considered commercial loans *for the purposes of section 2(c) of the Act*, despite the fact that for other statutory and regulatory purposes these instruments may be considered commer-

cial loans." Federal Reserve System, Office Correspondence (Feb. 10, 1981) (App. 97A) (emphasis in original).[5]

The Board now contends that the new definition conforms with the original intent of Congress in enacting the "commercial loan" provision. The provision, the Board argues, was a "technical amendment to the Act designed to create a narrowly circumscribed exclusion from the Act's coverage." Brief for Petitioner 41. The Board supports this revisionist view of the purpose of the "commercial loan" provision by citing a comment in the "legislative history" indicating that at the time the provision was enacted, it operated to exclude only one institution, the Boston Safe Deposit & Trust Co. The Board does not go so far as to claim that the commercial loan amendment was a private bill, designed only to exempt Boston Safe. It suggests, however, that because the amendment was prompted by the circumstances of one particular institution, the language "commercial loan" should be given something other than its commonly accepted meaning.

The statute by its terms, however, exempts from regulation *all* institutions that do not engage in the business of making commercial loans. The choice of this general language demonstrates that, although the legislation may have been prompted by the needs of one institution, Congress intended to exempt the class of institutions not making commercial loans. Furthermore, the legislative history supports this plain reading of the statute. The Senate Report explained:

> "The definition of 'bank' adopted by Congress in 1966 was designed to include commercial banks and exclude those institutions not engaged in commercial banking,

[5] The Board contends that these decisions "represented a willingness by the Board to refrain from applying the full scope of the Act in conditions that did not appear to generate the potential for its evasion." 49 Fed. Reg., at 842. But the decisions themselves make no mention of such self-imposed restraint. Rather, the decisions represented the Board's interpretation of the meaning of the statute based on the language of the Act and the legislative history of its passage.

> since the purpose of the act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit. However, the Federal Reserve Board has noted that this definition may be too broad and may include institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans. The committee, accordingly, adopted a provision which would exclude institutions that are not engaged in the business of making commercial loans from the definition of 'bank.'" S. Rep. No. 91–1084, p. 24 (1970).

The only reference to Boston Safe is in a lengthy banking journal article that Representative Gonzalez entered into the Congressional Record. See 116 Cong. Rec. 25846, 25848 (1970) (indicating that Boston Safe was "[v]irtually the only bank that does no commercial lending"). Such a passage is not "legislative history" in any meaningful sense of the term and cannot defeat the plain application of the words actually chosen by Congress to effectuate its will. Finally, even if the legislative history evidenced a congressional intent to exclude only Boston Safe, which it does not, the Board's expansive definition of "commercial loan" would be an unreasonable interpretation of the statute. At the time the commercial loan provision was enacted, Boston Safe did not "make commercial loans," but did purchase money market instruments such as certificates of deposit and commercial paper. Recognizing the common usage of the term "commercial loan" and the purpose of the 1970 amendment, the Board in 1972 advised Boston Safe that it was not, in fact, a bank for the purposes of the Bank Holding Company Act:

> "The Board understands that Boston Safe purchases 'money market instruments,' such as certificates of deposit, commercial paper, and bank acceptances. In the circumstances of this case, such transactions are not regarded as commercial loans for the purposes of the Act." Letter to Lee J. Aubrey, Vice President,

> Federal Reserve Bank of Boston, from Michael A. Greenspan, Assistant Secretary, Board of Governors, p. 2 (May 18, 1972) (App. 94A).

Nothing in the statutory language or the legislative history, therefore, indicates that the term "commercial loan" meant anything different from its accepted ordinary commercial usage. The Board's definition of "commercial loan," therefore, is not a reasonable interpretation of § 2(c).

C

Unable to support its new definitions on the plain language of § 2(c), the Board contends that its new definitions fall within the "plain purpose" of the Bank Holding Company Act. Nonbank banks must be subject to regulation, the Board insists, because "a statute must be read with a view to the 'policy of the legislation as a whole' and cannot be read to negate the plain purpose of the legislation." The plain purpose of the legislation, the Board contends, is to regulate institutions "functionally equivalent" to banks. Since NOW accounts are the functional equivalent of a deposit in which the depositor has a legal right to withdraw on demand and money market transactions involve the extension of credit to commercial entities, institutions offering such services should be regulated as banks.[6]

The "plain purpose" of legislation, however, is determined in the first instance with reference to the plain language of the statute itself. *Richards* v. *United States*, 369 U. S. 1, 9 (1962). Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the

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[6] In a related argument, the Board contends that it has the power to regulate these institutions under § 5(b), which provides that the Board may issue regulations "necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof." 12 U. S. C. § 1844(b). But § 5 only permits the Board to police within the boundaries of the Act; it does not permit the Board to expand its jurisdiction beyond the boundaries established by Congress in § 2(c).

problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Without doubt there is much to be said for regulating financial institutions that are the functional equivalent of banks. NOW accounts have much in common with traditional payment-on-demand checking accounts; indeed we recognize that they generally serve the same purpose. Rather than defining "bank" as an institution that offers the functional equivalent of banking services, however, Congress defined with specificity certain transactions that constitute banking subject to regulation. The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.[7]

If the Bank Holding Company Act falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address. Numerous proposals for legislative reform have been advanced to streamline the tremendously complex area of financial institution regulation. See, *e. g.*,

[7] The process of effectuating congressional intent at times may yield anomalies. In *TVA* v. *Hill*, 437 U. S. 153 (1978), for example, we were confronted with the explicit language of a statute that in application produced a curious result. Noting that nothing prohibited Congress from passing unwise legislation, we upheld the enforcement of the statute as Congress had written it. Congress swiftly granted relief to the petitioner in *Hill;* but it did so in a fashion that could not have been tailored by the courts. See Pub. L. 95–632, § 5, 92 Stat. 3760.

Blueprint for Reform: Report of the Task Group on Regulation of Financial Services (July 1984). Our present inquiry, however, must come to rest with the conclusion that the action of the Board in this case is inconsistent with the language of the statute for here, as in *TVA* v. *Hill*, 437 U. S. 153, 194 (1978), "[o]nce the meaning of an enactment is discerned . . . the judicial process comes to an end."

Affirmed.

JUSTICE WHITE took no part in the consideration or decision of this case.

CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. *v.* BULLOCK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-1236. Argued November 5, 1985—Decided January 22, 1986

After respondent and his friend Tucker accepted Dickson's offer of a ride home, a fight developed between Tucker and Dickson, and Dickson stopped the car. Respondent held Dickson's head as Tucker struck Dickson in the face with a whiskey bottle. Tucker then pummeled Dickson with his fists until Dickson fell to the ground and lay helpless, at which point Tucker killed him by smashing his skull with a concrete block. Respondent and Tucker disposed of the body, and respondent kept Dickson's car for himself. Respondent was arrested the next day and was charged with capital murder under a Mississippi statute. The jury found him guilty and, following a separate sentencing hearing, sentenced him to death. The Mississippi Supreme Court affirmed, finding that the capital murder verdict and death sentence were sustainable under a Mississippi law making an accomplice equally responsible with the principal offender. After exhausting state postconviction remedies, respondent filed a petition for a writ of habeas corpus in Federal District Court, which denied the writ. The Court of Appeals reversed on the ground that respondent's death sentence was invalid under the intervening decision in *Enmund* v. *Florida*, 458 U. S. 782, that the Eighth Amendment forbids the imposition of the death penalty on "one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.*, at 797. The court based its conclusion solely upon its reading of the jury instructions at respondent's state trial, reasoning that under those instructions the jury may well have found respondent guilty and sentenced him to death despite concluding that he had neither killed nor intended to kill or without ever coming to any conclusion on those questions. Accordingly, the court granted a writ of habeas corpus and vacated respondent's death sentence but permitted the State, at its option, to impose a life sentence or conduct a new sentencing hearing at which, with the proper findings, a death sentence could be reimposed.

Held:

1. The Court of Appeals was correct in concluding that neither the jury's verdict of guilt nor its imposition of the death sentence necessarily reflected a finding that respondent killed, attempted to kill, or intended to kill. Pp. 383–384.

2. But the Court of Appeals erred in focusing exclusively on the jury and in ordering a new sentencing hearing without inquiring whether the necessary finding of intent had been made by the state trial court or appellate court. The *Enmund* rule need not be enforced by the jury and does not impose *any* particular form of procedure upon the States. At what point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution. Accordingly, when a federal habeas corpus court reviews an *Enmund* claim, its inquiry cannot be limited to an examination of jury instructions. Rather, the court must examine the entire course of the state proceedings in order to determine whether, at some point, the requisite factual finding as to the defendant's culpability has been made. If it has, the finding must be presumed correct by virtue of 28 U. S. C. § 2254(d), and unless the habeas petitioner can bear the burden of overcoming the presumption, the court must hold that the Eighth Amendment as interpreted in *Enmund* is not offended by the death sentence. Pp. 384–388.

3. The Mississippi Supreme Court's finding was insufficient to satisfy *Enmund*, for *Enmund* holds that the Eighth Amendment does more than require that a death-sentenced defendant be legally responsible for a killing as a matter of state law; it requires that he himself have actually killed, attempted to kill, or intended that a killing take place or that lethal force be used. Pp. 389–390.

4. The proper course for a federal court faced with a habeas corpus petition raising an *Enmund* claim when the state courts have failed to make any finding regarding the *Enmund* criteria is to take steps to require the State's own judicial system to make the factual findings in the first instance. Therefore, it is Mississippi, not the federal habeas corpus court, that should first provide respondent with a reliable determination as to whether he killed, attempted to kill, or intended that a killing take place or that lethal force be used. Pp. 390–391.

5. Here, the District Court should be directed to issue the habeas corpus writ vacating respondent's death sentence but to leave to the State the choice of either imposing a sentence of life imprisonment or reimposing the death sentence after obtaining a determination from its own courts of the factual question whether respondent killed, attempted to

kill, intended to kill, or intended that lethal force would be used. P. 392.

743 F. 2d 244, modified and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 392. BRENNAN, J., filed a dissenting opinion, *post*, p. 393. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 394. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 407.

Marvin L. White, Jr., Special Assistant Attorney General of Mississippi, argued the cause for petitioners. With him on the brief were *Edwin Lloyd Pittman*, Attorney General, *Amy D. Whitten*, Special Assistant Attorney General, and *William S. Boyd III*.

Joseph T. McLaughlin argued the cause for respondent. With him on the briefs were *Henry Weisburg* and *Daniel Levin*.*

JUSTICE WHITE delivered the opinion of the Court.

In *Enmund* v. *Florida*, 458 U. S. 782 (1982), we ruled that the Eighth Amendment forbids the imposition of the death penalty on "one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.*, at 797. This case requires us to determine in whose hands the decision that a defendant possesses the requisite degree of culpability properly lies.

**Michael J. Bowers*, Attorney General of Georgia, *Marion O. Gordon*, First Assistant Attorney General, *William B. Hill, Jr.*, Senior Assistant Attorney General, *Mary Beth Westmoreland*, Assistant Attorney General, *Jim Smith*, Attorney General of Florida, *Linley E. Pearson*, Attorney General of Indiana, and *Archie G. McClintock*, Attorney General of Wyoming, filed a brief for the State of Georgia et al. as *amici curiae* urging reversal.

Robert Glass and *Timothy K. Ford* filed a brief for the National Association of Criminal Lawyers as *amicus curiae*.

I

Early in the morning of September 22, 1978, respondent Crawford Bullock and his friend Ricky Tucker accepted Mark Dickson's offer of a ride home from a bar in Jackson, Mississippi. During the course of the ride, Tucker and Dickson began to argue about some money Dickson supposedly owed Tucker. The argument became a fight: Dickson stopped the car, and Dickson and Tucker exchanged blows. Bullock attempted to grab Dickson, but Dickson eluded his grasp and fled from the car. Tucker gave chase and succeeded in tackling Dickson, while Bullock, who had a cast on his leg, followed more slowly. When Bullock caught up with the struggling men, he held Dickson's head as Tucker struck Dickson in the face with a whiskey bottle. Tucker then pummeled Dickson with his fists until Dickson fell to the ground. As Dickson lay helpless, Tucker killed him by smashing his skull with repeated blows from a concrete block. Bullock and Tucker together disposed of Dickson's body, and Bullock kept Dickson's car for himself. Bullock was arrested the next day when police spotted him driving the car. Under questioning at the police station, he confessed to his participation in the course of events just described.

Bullock was charged with capital murder under a Mississippi statute that provided that "[t]he killing of a human being without the authority of law by any means or in any manner shall be capital murder . . . [w]hen done with or without any design to effect death, by any person engaged in the commission of the crime of . . . robbery . . . or in any attempt to commit such." Miss. Code Ann. § 97-3-19(2)(e) (Supp. 1985). Under Mississippi law, a participant in a robbery could be convicted of capital murder under the statute for a murder committed in the course of the robbery by an accomplice notwithstanding the defendant's own lack of intent that any killing take place, for "[i]t is . . . familiar law that when two or more persons act in concert, with a common design, in committing a crime of violence upon others, and a

homicide committed by one of them is incident to the execution of the common design, both are criminally liable for the homicide." *Price* v. *State*, 362 So. 2d 204, 205 (Miss. 1978). In accordance with this doctrine of accomplice liability, the court instructed the jury at the conclusion of the guilt phase of Bullock's trial as follows:

> "The Court instructs the Jury that if you believe from the evidence in this case, beyond a reasonable doubt that on September 21, 1978, in the First Judicial District of Hinds County, Mississippi, Crawford Bullock, Jr., was present, consented to, and encouraged the commission of a crime and thereby *aided* another individual, and that he, the said Crawford Bullock, Jr., or the other, then and there did wilfully, unlawfully and feloniously take and carry away the personal property of another from the presence of Mark Dickson, and from his person, against his will, by violence to his person, to-wit *[sic]*; his billfold or one 1978 Thunderbird automobile then in his possession, then and in that event, the Defendant, Crawford Bullock, Jr. is guilty of robbery as if he had with his own hands committed the whole offense; and, if the Jury further finds from the evidence in this case, beyond a reasonable doubt, that on said date aforesaid, while engaged in the commission of the aforesaid robbery, if any, that the said Crawford Bullock, Jr., did alone, or while acting in consert *[sic]* with another, while present at said time and place by consenting to the killing of the said, Mark Dickson, and that the said Crawford Bullock, Jr., did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self defense, by any means, in any manner, whether done with or without any design to effect the death of the said Mark Dickson, that the[n], and in that event, the said Crawford Bullock, Jr., is guilty of capital murder." App. 87–89.

The jury found Bullock guilty of capital murder. Following a separate sentencing hearing, the jury found that two statutory aggravating circumstances were present and that they were not outweighed by any mitigating circumstances. Accordingly, the jury sentenced Bullock to death.

On appeal to the Mississippi Supreme Court, Bullock argued, *inter alia*, that the evidence was insufficient as a matter of law to allow submission of the capital murder charge to the jury and that the imposition of the death penalty on him would be so disproportionate to his level of involvement in the crime as to violate the Eighth Amendment. The court rejected both contentions. *Bullock* v. *State*, 391 So. 2d 601 (1980), cert. denied, 452 U. S. 931 (1981). The court ruled that the verdict of capital murder was sustainable in view of the "overwhelming" evidence "that [Bullock] was present, aiding and assisting in the assault upon, and slaying of, Dickson . . . and in the taking of the T-bird automobile, which was in the lawful possession and use of Dickson." 391 So. 2d, at 606. With respect to Bullock's claim that the punishment of death was disproportionate to his degree of culpability, the court noted that "[t]he law is well settled in this state that any person who is present, aiding and abetting another in the commission of a crime, is equally guilty with the principal offender." Because Bullock was "an active participant in the assault and homicide committed upon Mark Dickson," the court concluded that the punishment was not disproportionate to his guilt. *Id.*, at 614.

After exhausting state postconviction remedies, Bullock filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Mississippi. The District Court denied the writ, but the Court of Appeals for the Fifth Circuit reversed on the ground that Bullock's death sentence was invalid under our decision in *Enmund*, which was handed down during the pendency of the District Court proceedings. *Bullock* v. *Lucas*, 743 F. 2d 244 (1984). The

court based this conclusion solely upon its reading of the jury instructions given at Bullock's trial. The court reasoned that under the instructions offered at the guilt phase and quoted in pertinent part above, the jury could have found Bullock guilty of capital murder solely on the basis of his participation in a robbery in which he had aided and abetted someone else who had killed: the instructions did not require a finding of any intent to kill on Bullock's part, nor did they require the jury to find that Bullock had actually killed. In addition, the court noted that the instructions offered the jury at the sentencing phase nowhere required the jury to make any further findings regarding Bullock's personal involvement in the killing. Thus, it was quite possible that the jury had sentenced Bullock to death without ever finding that he had killed, attempted to kill, or intended to kill. In the court's view, *Enmund* prohibited execution of a defendant absent such findings by the trier of fact; accordingly, the court granted a writ of habeas corpus vacating Bullock's death sentence, but permitting the State, "at its option, to either impose a sentence of life imprisonment or, within a reasonable period of time, conduct a new sentencing hearing" at which with the proper findings a death sentence could be reimposed. 743 F. 2d, at 248.

Because the Fifth Circuit's holding that *Enmund* can be satisfied only by findings made at the guilt-innocence or sentencing phase of a trial (see also *Reddix* v. *Thigpen*, 728 F. 2d 705 (CA5 1984)) conflicts with the interpretation of *Enmund* adopted by the Eleventh Circuit, see *Ross* v. *Kemp*, 756 F. 2d 1483 (1985),[1] we granted certiorari, 471 U. S. 1052 (1985).

[1] Under the interpretation of *Enmund* adopted by the Eleventh Circuit in *Ross*, a jury finding that the defendant possesses the requisite culpability is not required by the Eighth Amendment. 756 F. 2d, at 1488. In the absence of such a finding, *Ross* holds, the Eighth Amendment requires no more than that a federal habeas corpus court conduct an independent review of the record to determine whether the defendant's "level of individual participation . . . justifies the application of the death penalty." *Id.*, at 1489. We agree that if the federal court made the *Enmund* finding, the

II

The Court of Appeals was correct in concluding that neither the jury's verdict of guilt nor its imposition of the death sentence necessarily reflects a finding that Bullock killed, attempted to kill, or intended to kill. The jury instructions at the guilt phase were, to say the least, confusing, and they do not lend themselves easily to any particular interpretation. A fair-minded juror, however, could have understood them to mean that the jury could find Bullock guilty of capital murder without regard to his intent and solely by virtue of his having aided his accomplice at some point in the assault that led to the killing.[2] This interpretation of the instructions is but-

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Eighth Amendment would be satisfied, but as will appear, we hold that the state courts should be given the opportunity to address the matter in the first instance.

[2] An instruction offered after the one quoted *supra*, at 380, informed the jury that to find Bullock guilty of capital murder, it must find that he "did in fact kill Mark Dickson without malice, without authority of law, and not in necessary self defense." App. 90–91. This instruction does not change our view that the jury's verdict does not necessarily reflect a finding that Bullock killed. The preceding instruction had explicitly informed the jury that it could find Bullock guilty if his accomplice had done the actual killing. The jury could well have concluded, reading the instructions together, that the instruction that Bullock must have "in fact killed" referred only to a requirement that Bullock have committed acts that rendered him legally accountable for the killing under the previous instruction. Under this reading of the instructions, the earlier, more specific instruction would be read as defining the legal meaning of the requirement that Bullock must have "in fact killed."

Even if the second instruction is read as simply irreconcilable with the first, however, we cannot conclude that the jury followed the second instruction. As was the case last Term in *Francis* v. *Franklin*, 471 U. S. 307, 322 (1985), "[n]othing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." Moreover, to the extent that one can speculate as to which of the

tressed, as Judge Garwood pointed out in his concurring opinion below, by the fact that "the entire case was essentially tried on the theory, in full accordance with the then law of Mississippi, that it was not necessary, either for the felony murder conviction or for the sentence to death, to find that Bullock had either the intent to kill or any personal participation in the killing." 743 F. 2d, at 248. Thus, the jury may well have sentenced Bullock to death despite concluding that he had neither killed nor intended to kill; or it may have reached its decision without ever coming to any conclusion whatever on those questions.

III

But the conclusion that the jury may not have found that the defendant killed, attempted to kill, or intended that a killing take place or that lethal force be employed does not end the inquiry into whether *Enmund* bars the death sentence; rather, it is only the first step. In focusing only on the jury instructions—and in requiring a new sentencing hearing before a jury before the death penalty might be reimposed—the Fifth Circuit apparently proceeded upon the premise that *Enmund* can be satisfied only at a sentencing hearing and by a jury's decision (presumably based upon proof beyond reasonable doubt) that the defendant possessed the requisite culpability. Examination of the nature of our ruling in *Enmund* reveals that this premise is erroneous.

A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). Findings

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instructions the jurors followed in this case, it seems more likely that they would have chosen the earlier instruction, which, though somewhat harder to follow, appears to be more comprehensive and more specifically tied to the facts presented to the jury.

made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. See *Connecticut* v. *Johnson*, 460 U. S. 73, 95, and n. 3 (1983) (POWELL, J., dissenting); cf. *Beck* v. *Alabama*, 447 U. S. 625, 645 (1980); *Presnell* v. *Georgia*, 439 U. S. 14 (1978); *id.*, at 22 (POWELL, J., dissenting). But our ruling in *Enmund* does not concern the guilt or innocence of the defendant—it establishes no new elements of the crime of murder that must be found by the jury. Rather, as the Fifth Circuit itself has recognized, *Enmund* "does not affect the state's definition of any substantive offense, even a capital offense." *Reddix* v. *Thigpen*, 728 F. 2d, at 709; see also *Enmund*, 458 U. S., at 810, n. 19 (O'CONNOR, J., dissenting). *Enmund* holds only that the principles of proportionality embodied in the Eighth Amendment bar imposition of the death penalty upon a class of persons who may nonetheless be guilty of the crime of capital murder as defined by state law: that is, the class of murderers who did not themselves kill, attempt to kill, or intend to kill.[3]

The decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury. Indeed, in *Spaziano* v. *Florida*, 468 U. S. 447 (1984), we specifically rejected the argument that the Sixth Amendment or any other constitutional provision provides a defendant with the right

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[3] We are unable to understand JUSTICE BLACKMUN's statement that we have failed to grasp "the distinction . . . between defining an offense and being entitled to execute a defendant." *Post*, at 403. As stated in the text, we recognize that there is a class of persons whom the State may define as having committed capital murder but whom the State may not permissibly execute. The point we are making, however, is that while the Eighth Amendment prohibits the execution of such defendants, it does not supply a new element of the crime of capital murder that must be found by the jury; hence, such cases as *Cole* v. *Arkansas*, 333 U. S. 196 (1948), which hold that the inadequacy of a jury's findings on the issue of guilt or innocence may not be corrected by an appellate court, are inapposite.

right to have a jury consider the appropriateness of a capital sentence. Moreover, the decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case, like other questions bearing on whether a criminal defendant's constitutional rights have been violated, has long been viewed as one that a trial judge or an appellate court is fully competent to make. See, *e. g.*, *Solem* v. *Helm*, 463 U. S. 277 (1983); *Weems* v. *United States*, 217 U. S. 349 (1910).

The determination whether the death sentence is permissible under *Enmund* is different in a significant respect both from the general exercise of sentencing discretion and from the type of Eighth Amendment proportionality inquiry undertaken in *Solem* v. *Helm*. The latter two determinations typically involve case-by-case, totality-of-the-circumstances decisionmaking. *Enmund*, by contrast, imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death. Nonetheless, the rule remains a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury.

Indeed, *Enmund* does not impose *any* particular form of procedure upon the States. The Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under *Enmund* for such punishment. If a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment itself is not violated by his or her execution regardless of who makes the determination of the requisite culpability; by the same token, if a person sentenced to death lacks the requisite culpability, the Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence. At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution. The State has considerable freedom to structure its capital sentencing

system as it sees fit, for "[a]s the Court has several times made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme." *Spaziano, supra*, at 464; see also *Pulley* v. *Harris*, 465 U. S. 37 (1984); *Zant* v. *Stephens*, 462 U. S. 862 (1983); *Gregg* v. *Georgia*, 428 U. S. 153, 195 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).

Accordingly, when a federal habeas court reviews a claim that the death penalty has been imposed on one who has neither killed, attempted to kill, nor intended that a killing take place or lethal force be used, the court's inquiry cannot be limited to an examination of jury instructions. Rather, the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made.[4] If

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[4] JUSTICE BLACKMUN's reliance on *Hicks* v. *Oklahoma*, 447 U. S. 343 (1980), and *Presnell* v. *Georgia*, 439 U. S. 14 (1978), for the proposition that state appellate courts may not supply essential findings that the jury has omitted is, as applied in this case, misguided. In *Hicks*, we held only that where state law creates for the defendant a liberty interest in having the jury make particular findings, the Due Process Clause implies that appellate findings do not suffice to protect that entitlement. Unlike the defendant in *Hicks*, Bullock had no state-law entitlement at the time of his trial to have the jury (or, indeed, anyone at all) make the *Enmund* findings. Of course, federal law, as later established by *Enmund*, does entitle Bullock to a determination whether he killed, attempted to kill, intended to kill, or intended that lethal force be used; but, for the reasons explained in the text, the federal-law entitlement, unlike the state-law entitlement involved in *Hicks*, does not specify who must make the findings.

In *Presnell*, the defendant was convicted on charges of murder and kidnaping with bodily injury, and was sentenced to death by the jury. The sole aggravating factor supporting the death penalty for murder was that the defendant was also guilty of kidnaping with bodily injury. The Georgia Supreme Court found that the jury had been wrongly instructed on the elements of kidnaping with bodily injury, but affirmed both the conviction for that crime and the use of the crime as an aggravating factor on the ground that the evidence was sufficient to support the jury's findings under a theory on which the jury had not been instructed. We set aside both the

it has, the finding must be presumed correct by virtue of 28 U. S. C. § 2254(d), see *Sumner* v. *Mata*, 449 U. S. 539 (1981), and unless the habeas petitioner can bear the heavy burden of overcoming the presumption, the court is obliged to hold that the Eighth Amendment as interpreted in *Enmund* is not offended by the death sentence.[5]

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conviction and the death sentence on the authority of *Cole* v. *Arkansas*, *supra*, which held that it was constitutional error for a state court to affirm a conviction for one offense on the basis of evidence in the record indicating that the defendant had committed another offense on which the jury had not been instructed. Insofar as it merely applied *Cole* in setting aside the defendant's conviction for kidnaping with bodily injury, *Presnell* is unremarkable and has little to do with this case. See n. 3, *supra*. But in reversing as well the death sentence on the ground that the Georgia Supreme Court could not find an aggravating factor on a theory on which the jury had not been instructed, the *Presnell* Court appeared to assume that the jury's constitutional role in determining sentence was equivalent to its role in determining guilt or innocence. This assumption, of course, is no longer tenable in light of our holding in *Spaziano* v. *Florida*, 468 U. S. 447 (1984).

[5] *Sumner*, of course, establishes that the presumption applies to facts found by appellate as well as trial courts. 449 U. S., at 545–547. There might be instances, however, in which the presumption would not apply to appellate factfinding regarding the *Enmund* criteria because appellate factfinding procedures were not "adequate," see 28 U. S. C. § 2254(d)(2). For example, the question whether the defendant killed, attempted to kill, or intended to kill might in a given case turn on credibility determinations that could not be accurately made by an appellate court on the basis of a paper record, cf. *Anderson* v. *Bessemer City*, 470 U. S. 564, 575 (1985); *Wainwright* v. *Witt*, 469 U. S. 412, 429 (1985). The possibility that such cases falling within the § 2254(d)(2) exception may exist, however, does not excuse the habeas court of its obligation to examine the entire state process to determine whether the *Enmund* findings have been made, for it is by no means apparent that appellate factfinding will always be inadequate. For example, in some cases it may be possible to determine the *Enmund* issue adversely to the defendant even if credibility issues and other ambiguities in the record are resolved in his or her favor. See, *e. g.*, *Ross* v. *Kemp*, 756 F. 2d 1483, 1488–1490 (CA11 1985). We shall not now attempt to determine what factfinding procedures would be adequate in the particular case before us, for, as we shall see, the state courts have not yet purported

IV

The Court of Appeals thus erred in focusing exclusively on the jury and in ordering a new sentencing hearing without inquiring whether the necessary finding of intent had been made by the trial court or by the state appellate court. The State argues that the Mississippi Supreme Court itself made a finding sufficient to satisfy *Enmund* in the course of its direct review of Bullock's conviction and sentence. It relies on two separate statements in the court's opinion. First, in responding to the claim of insufficient evidence, the court said that "[t]he evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson." 391 So. 2d, at 606. Second, in determining that the death penalty was not disproportionate to the sentences imposed in other cases, the court stated that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson." *Id.*, at 614.

We are very doubtful, however, that these assessments of the record were sufficient in themselves to constitute a finding that Bullock killed, attempted to kill, or intended to kill Dickson. The Mississippi Supreme Court obviously was not addressing the specific requirements set forth in *Enmund*, for that case had not yet been decided. Rather, the court's remarks are better read as stating the court's conclusion that Bullock's participation in the assault and robbery were sufficient to make him liable for the murder and deserving of the death penalty in light of Mississippi law under which one who takes some overt act in aid of an assault that leads to a killing by his accomplice is equally responsible with the accomplice for the killing. Indeed, immediately before its statement with respect to proportionality, the court said that "[t]he law is well settled in this state that any person who is present,

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to engage in the requisite factfinding, and we decline to decide the hypothetical question of the adequacy of that which has not yet occurred.

aiding and abetting another in the commission of a crime, is equally guilty with the principal offender." 391 So. 2d, at 614. In other words, the Mississippi court's statements represent at most a finding that, as the District Court put it, Bullock "*by legal definition* actually killed." App. to Pet. for Cert. A30–A31 (emphasis added). Such a finding does not satisfy *Enmund*, for *Enmund* holds that the Eighth Amendment does more than require that a death-sentenced defendant be legally responsible for a killing as a matter of state law; it requires that he himself have actually killed, attempted to kill, or intended that lethal force be used.

V

There remains the question of the appropriate course of action for a federal court faced with a petition for habeas corpus raising an *Enmund* claim when the state courts have failed to make any finding regarding the *Enmund* criteria. Two possibilities come immediately to mind. The federal court could itself make the factual determination whether the defendant killed, attempted to kill, or intended to kill, and either grant or deny the writ depending on the outcome of that inquiry. Alternatively, the federal court could take steps to require the State's own judicial system to make the factual findings in the first instance. Such findings would, of course, be presumptively correct as a result of 28 U. S. C. § 2254(d) in any subsequent federal habeas proceedings.

Either alternative would, in theory, be adequate to remedy any hypothesized Eighth Amendment violation, for either approach would prevent the execution of any defendant who did not in fact kill, attempt to kill, or intend the use of lethal force. We believe, however, that the second course of action is the sounder one. Two considerations underlie this conclusion. First, to the extent that *Enmund* recognizes that a defendant has a right not to face the death penalty absent a particular factual predicate, it also implies that the State's judicial process leading to the imposition of the death penalty

must at *some* point provide for a finding of that factual predicate. Accordingly, Bullock "is entitled to a determination [of the issue] in the state courts in accordance with valid state procedures." *Jackson* v. *Denno*, 378 U. S. 368, 393 (1964). Second, the State itself has "a weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts." *Rogers* v. *Richmond*, 365 U. S. 534, 548 (1961). Considerations of federalism and comity counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants, see *Younger* v. *Harris*, 401 U. S. 37 (1971); these same considerations indicate the appropriateness of allowing the Mississippi courts an opportunity to carry out in the first instance the factual inquiry called for by *Enmund*. To paraphrase our opinion in *Jackson* v. *Denno*, *supra*, at 393–394, it is Mississippi, therefore, not the federal habeas corpus court, which should first provide Bullock with that which he has not yet had and to which he is constitutionally entitled—a reliable determination as to whether he is subject to the death penalty as one who has killed, attempted to kill, or intended that a killing take place or that lethal force be used.[6]

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[6]There may be some cases in which the jury instructions would theoretically have permitted the jury to find the defendant guilty of a capital offense and sentence him to death without finding the *Enmund* factors, but in which the theory on which the case was tried and the evidence received leave no doubt that the jury's verdict rested on a finding that the defendant killed or intended to kill. For example, where a defendant conceded that he committed the killing and defended against the charge of murder only by claiming self-defense, a jury verdict of guilty would necessarily satisfy *Enmund* even if, for some reason, the trial court's instructions did not explicitly require a finding that the defendant killed, attempted to kill, or intended to kill. In such a case, a federal habeas court would be justified in treating the state courts' failure to make explicit *Enmund* findings as harmless beyond a reasonable doubt; the court would therefore simply deny the writ without requiring further proceedings in the state courts. Cf. *Ross* v. *Kemp*, 756 F. 2d, at 1499–1500 (Clark, J., concurring in part and dissenting in part).

VI

The proceeding that the state courts must provide Bullock need not take the form of a new sentencing hearing before a jury. As indicated above, the Eighth Amendment does not require that a jury make the findings required by *Enmund*. Moreover, the sentence currently in force may stand provided only that the requisite findings are made in an adequate proceeding before some appropriate tribunal—be it an appellate court, a trial judge, or a jury.[7] A new hearing devoted to the identification and weighing of aggravating and mitigating factors is thus, as far as we are concerned, unnecessary.

Accordingly, the District Court should be directed to issue the writ of habeas corpus vacating Bullock's death sentence but leaving to the State of Mississippi the choice of either imposing a sentence of life imprisonment or, within a reasonable time, obtaining a determination from its own courts of the factual question whether Bullock killed, attempted to kill, intended to kill, or intended that lethal force would be used. If it is determined that Bullock possessed the requisite culpability, the death sentence may be reimposed. The judgment of the Court of Appeals is modified to this extent, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE BURGER, concurring.

Although I see no need for remanding for further findings in the State's courts, I join the Court's opinion. It is true that the Mississippi Supreme Court did not have *Enmund*'s

[7] Mississippi has adopted a post-*Enmund* capital sentencing statute, under which the task of determining whether the defendant killed, attempted to kill, intended to kill, or intended that lethal force be used is delegated to the jury, Miss. Code Ann. § 99-19-101(7) (Supp. 1985). Whether this provision has any application where, as in this case, trial occurred prior to the passage of the statute, is a matter of state law that we do not attempt to resolve.

findings explicitly in mind when it reviewed the sentence of death imposed on respondent Bullock, because the Mississippi courts had completed their review before *Enmund* was decided. Nevertheless, the Mississippi Supreme Court's opinion makes it clear that *Enmund*'s concerns have been fully satisfied in this case.

In rejecting respondent's claim that there was insufficient evidence to support his capital murder conviction because he "was an unwilling participant in the robbery-homicide," that court explicitly found "[t]he evidence is overwhelming that appellant was present, *aiding and assisting in the assault upon, and slaying of*, Dickson." *Bullock* v. *State*, 391 So. 2d 601, 606 (1980) (emphasis added), cert. denied, 452 U. S. 931 (1981). That court further rejected a claim that the death penalty was disproportionate to sentences imposed in similar cases, after again finding that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson." *Id.*, at 614.

Surely these statements reflect a conclusion of the state court that respondent actively participated in the actual killing, which is far more than *Enmund* requires. In these circumstances, I see no need to expend finite judicial resources by remanding and calling for the Mississippi Supreme Court to tell us what it has already made clear, *i. e.*, that respondent's culpability more than satisfies any proportionality concerns dictated by *Enmund*.

JUSTICE BRENNAN, dissenting.

Although I join JUSTICE BLACKMUN's and JUSTICE STEVENS' dissents, I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting). Accordingly, I would vacate the death sentence and remand the case so that the state court can determine what sentence—other than death—may be appropriate.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Last Term, in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) (a case not even cited by the Court in its controlling opinion, *ante*, p. 376), we recognized institutional limits on an appellate court's ability to determine whether a defendant should be sentenced to death:

> "Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed '[those] compassionate or mitigating factors stemming from the diverse frailties of humankind.' When we held that a defendant has a constitutional right to the consideration of such factors, we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses." 472 U. S., at 330–331 (citations omitted; interpolation in original).

That statement in *Caldwell* is not an abstract disquisition on appellate courts generally. It concerns, in particular, the institutional limits of the Supreme Court of Mississippi in capital cases. Today, the Court ignores those recently stated limits and holds that the Mississippi Supreme Court may be competent to make, on a paper record, the findings required by *Enmund* v. *Florida*, 458 U. S. 782 (1982)—that Crawford Bullock, Jr., killed, attempted to kill, or intended to kill Mark Dickson, and thus deserves to die. The Court reaches that result by paying lipservice to the constitutional significance of *Enmund* while relegating *Enmund* findings to a position of judicial afterthought. The nature of the *Enmund* findings, however, dictates who must make them and at what point in the sentencing process they must be

made. The Eighth Amendment requires that *Enmund* findings be made at the trial court level before the sentencer condemns a defendant to death. The Court's misreading of *Enmund* threatens a retreat from the constitutional safeguards on the capital sentencing process that the Court has acknowledged in the decade since *Gregg* v. *Georgia*, 428 U. S. 153 (1976).

I

Bullock testified both at his trial and at his sentencing proceeding. He explicitly denied that he killed, attempted to kill, or intended to kill Dickson. See, *e. g.*, Tr. 956, 983, 996, 1190. The jury's verdict and sentence are entirely consistent under Mississippi law with Bullock's testimony. As the Court recognizes, that law and the trial court's instructions permitted the jury to convict him and to sentence him to death without finding any particular degree of personal participation in the killing. *Ante*, at 383–384.

The Court also recognizes that the Mississippi Supreme Court failed to make the required *Enmund* findings. That court affirmed Bullock's conviction and death sentence based on its view of Bullock's culpability under Mississippi's law of aiding and abetting, which establishes a threshold far below *Enmund*'s constitutional minimum. *Ante*, at 389–390. The Mississippi Supreme Court explicitly based its account of the crime on Bullock's written confession, see *Bullock* v. *State*, 391 So. 2d 601, 605, cert. denied, 452 U. S. 931 (1981), in which Bullock stated only that Tucker killed Dickson, and that he, Bullock, had no intention of robbing Dickson. Tr. 387–390. That confession provides no evidence that Bullock killed, attempted to kill, or intended to kill Dickson. Thus, the Court properly concludes that none of the required *Enmund* findings has been made.

II

The central message of *Enmund* is that the death penalty cannot constitutionally be imposed without an intensely indi-

vidual appraisal of the "personal responsibility and moral guilt" of the defendant. 458 U. S., at 801.

> "The focus must be on *his* culpability, . . . for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (footnote omitted), which means that we must focus on 'relevant facets of the character and record of the individual offender.' *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976)." *Id.*, at 798 (emphasis in original).

See also *Eddings* v. *Oklahoma*, 455 U. S. 104, 110–112 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 603–604 (1978) (plurality opinion); *Gregg* v. *Georgia*, 428 U. S., at 199 (joint opinion).

Put simply, *Enmund* establishes a constitutionally required factual predicate for the valid imposition of the death penalty. Cf. *ante*, at 390. Like the statutory aggravating circumstances discussed in *Zant* v. *Stephens*, 462 U. S. 862 (1983), the *Enmund* findings "circumscribe the class of persons eligible for the death penalty." 462 U. S., at 878. Just as, absent the finding of a statutory aggravating circumstance, "'[a] case may not pass . . . into that area in which the death penalty is authorized'" under Georgia law, *id.*, at 872, quoting *Zant* v. *Stephens*, 250 Ga. 97, 100, 297 S. E. 2d 1, 4 (1982), so too, absent a finding of one of the *Enmund* factors, a case may not pass into that area in which the death penalty is authorized by the Eighth Amendment.

The Court agrees that it would be wrong for Mississippi to execute Bullock without first determining that he killed, attempted to kill, or intended to kill Dickson. See, *e. g.*, *ante*, at 378, 385, 386. But if that is so, then it was also wrong for the Mississippi jury to discharge "the truly awesome responsibility of decreeing death for a fellow human," *McGautha* v. *California*, 402 U. S. 183, 208 (1971), without first considering the fundamental issue of his personal culpability. By condemning Bullock to die, the jury announced

that he was not fit to live. This expression of the community's ultimate outrage, unaccompanied as it was by any finding that Bullock possessed the degree of culpability required by *Enmund*, involved the kind of deprivation of human dignity which the Eighth Amendment forbids. Cf., *e. g.*, *Trop* v. *Dulles*, 356 U. S. 86, 100–102 (1958) (plurality opinion); *Weems* v. *United States*, 217 U. S. 349, 366 (1910).

A

The question of how to cure this constitutional violation remains. The Court holds that an adequate remedy for the absence of *Enmund* findings can be supplied by "any court that has the power to find the facts and vacate the sentence." *Ante*, at 386. I believe that, in this case, only a new sentencing proceeding before a jury can guarantee the reliability which the Constitution demands. But the Court's decision today goes beyond a simple determination of how to cure an error that has already occurred. It tells the States, in effect, that it is no error for a jury or a trial judge to say that a defendant should die without first considering his personal responsibility and moral guilt, as *Enmund* requires. By turning the jury or trial court's determination into what can be viewed only as a preliminary stage in the capital-sentencing process, the Court's holding poses the threat of diffusing the sentencer's sense of responsibility in the manner condemned in *Caldwell*. The Court thus ignores both the proper institutional roles of trial and appellate courts and the pragmatic and constitutional concerns with reliability that underlie those roles. In short, the Court's holding rests on an improper equation of the wholly dissimilar functions of finding facts and of vacating a sentence because no facts have been found. *Enmund* established a clear constitutional imperative that a death sentence not be *imposed* by a sentencer who fails to make one of the *Enmund* findings. The Court confuses this imperative with the guarantee it purports to

make today that a death sentence will not be *carried out* before someone makes an *Enmund* finding.

That this ignores a distinction with a constitutional difference is made clear by the Court's decisions in *Cole* v. *Arkansas*, 333 U. S. 196 (1948), and *Presnell* v. *Georgia*, 439 U. S. 14 (1978). In *Cole*, the Court reversed a state appellate decision that had affirmed the defendants' sentences by finding they had violated a different statutory provision from the one with which they had been charged. It recognized that the Due Process Clause requires that defendants "have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." 333 U. S., at 202. In *Presnell*, the Court acknowledged that the "fundamental principles of procedural fairness" announced in *Cole* "apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." 439 U. S., at 16. It thus reversed a death sentence which the Georgia Supreme Court had affirmed on the basis of its own finding that evidence in the record would support a statutory aggravating circumstance that had not been found by the jury. Notably, in neither *Cole* nor *Presnell* did this Court consider whether the State Supreme Courts' evidentiary findings were *correct;* whether their findings were right was entirely irrelevant to the question whether the Due Process Clause gave them the power to make such findings. The Court's decision today gives a state appellate court *carte blanche* to engage in factfinding concerning issues that no one at trial thought to be relevant. Here, as the Court recognizes, "'the entire case was essentially tried on the theory . . . that it was not necessary, either for the felony murder conviction or for the sentence to death, to find that Bullock had either the intent to kill or any personal participation in the killing.'" *Ante*, at 384, quoting *Bullock* v. *Lucas*, 743 F. 2d 244, 248

(CA5 1984) (concurring opinion); see also, *e. g.*, Tr. 1155. The critical issue was never determined in the trial court.[1]

Far more than "[c]onsiderations of federalism and comity," *ante*, at 391, should prevent this Court, and other federal habeas courts, from examining trial transcripts and making *Enmund* findings themselves. Considerations of reliability provide a compelling reason for requiring state trial courts to address this issue in the first instance. And, with respect to the question of reliability, the Mississippi Supreme Court is in no better position than is this Court to determine Bullock's credibility.

The Court's conclusion that we should allow the States to adopt capital punishment schemes that depend on appellate factfinding because "it is by no means apparent that appellate factfinding will *always* be inadequate," *ante*, at 388, n. 5 (emphasis added), turns on its head the heightened concern with reliability that has informed our review of the death penalty over the past decade.[2] See, *e. g.*, *Caldwell* v. *Mississippi*,

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[1] The Court's attempt to distinguish *Presnell* on the ground that *Spaziano* v. *Florida*, 468 U. S. 447 (1984), rejected the assumption that juries have equivalent constitutional roles in determining guilt or innocence and in determining capital sentences, see *ante*, at 387–388, n. 4, is misplaced. *Cole* and *Presnell* hold that the Due Process Clause requires that appellate courts review convictions and sentences "as [they] were determined *in the trial court*." *Cole*, 333 U. S., at 202 (emphasis added). *Spaziano* simply held that the Constitution permits trial judges, rather than trial juries, to make sentencing determinations. See *infra*, at 401, and n. 3.

[2] The Court's reliance on *Sumner* v. *Mata*, 449 U. S. 539 (1981), is misplaced. There, the Court held that the presumption of correctness accorded state-court findings of fact under 28 U. S. C. § 2254(d) extends to appellate findings as well as trial-court findings. 449 U. S., at 545–547. But the presumption of correctness is defeated by a showing that "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing." 28 U. S. C. § 2254(d)(2). The question whether state procedures are "adequate" involves two distinct inquiries. The first is whether the procedure employed in a particular case in fact afforded the defendant a full and fair hearing. The second is whether the procedure itself comports with due process. Bullock raises both those

472 U. S., at 328–329; *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983); *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980); *Lockett* v. *Ohio*, 438 U. S., at 604 (plurality opinion); *Gardner* v. *Florida*, 430 U. S. 349, 358–359 (1977) (opinion announcing judgment); *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion). I believe that the Eighth Amendment not only requires that the sentencer make *Enmund* findings before it decides that a defendant must die, but also requires that the *Enmund* factfinder be present at the trial, to see and hear the witnesses.

The Court long has recognized the special competence of trial courts which formed the basis for *Caldwell*'s discussion of the "institutional limits on what an appellate court can do." 472 U. S., at 330. In a variety of contexts, the Court has relied upon the New York Court of Appeals' explanation

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questions: he claims that in his case the Mississippi Supreme Court failed to use adequate procedures for making *Enmund* findings, and that a procedure which places the responsibility for making *Enmund* findings on the Mississippi Supreme Court is inherently inadequate. *Sumner* v. *Mata* does nothing to answer the latter question, because it assumes that the appellate court is constitutionally a proper factfinder. In *Mata*, this Court explicitly acknowledged that the trial-court record on which the California Court of Appeal based its findings concerning the suggestiveness of a photographic lineup was "completely adequate" for that purpose. 449 U. S., at 543. *Sumner* v. *Mata* therefore says nothing about how state-court findings are to be treated when the record on which they are based, by its very nature, is inadequate to permit factfinding in the first instance.

Moreover, the opinion in *Mata* does not concern itself with explaining when an appellate court is constitutionally incompetent to find facts. That an appellate court is not always a proper factfinder is clear beyond doubt. Surely, the Court would not read *Sumner* v. *Mata* to foreclose habeas relief in cases where an essential element of the offense was not found at trial. Cf. *ante*, at 384. In § 2254(d)(2)'s terms, a "factfinding procedure" that vested in appellate courts the responsibility for determining an element of the offense would not be constitutionally "adequate." Similarly, I believe, the *Enmund* findings concern the kind of facts that can be found only by someone who has actually seen and heard the witnesses when they testified.

in *Boyd* v. *Boyd*, 252 N. Y. 422, 429, 169 N. E. 632, 634 (1930):

> "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal. . . . His was the opportunity, the responsibility and the power to decide."

See, *e. g.*, *Wainwright* v. *Witt*, 469 U. S. 412, 434 (1985) (quoting *Boyd*); *Marshall* v. *Lonberger*, 459 U. S. 422, 434 (1983) (same).

Our precedents are not to the contrary. Although we held in *Spaziano* v. *Florida*, 468 U. S. 447 (1984), that neither the Sixth nor the Eighth Amendment required jury sentencing in capital cases, we made that determination in the face of a Florida statute which "plac[ed] responsibility on the *trial* judge to impose the sentence in a capital case." *Id.*, at 465 (emphasis added). In the relevant respects, a trial judge in a capital case is more like a jury than he is like an appellate court. Like the jury, he has seen the witnesses, and is well positioned to make those "determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Wainwright* v. *Witt*, 469 U. S., at 428.[3]

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[3] Every State with a death penalty statute has implicitly recognized this essential point, even though not all of them have explicitly held that *Enmund* findings must be made by the trial court. The seven States whose schemes involve judge sentencing all vest the power to impose sentence in a judge who actually has seen the presentation of evidence and confronted the defendant. See Ala. Code § 13A-5-46 (1982); Ariz. Rev. Stat. Ann. § 13-703 (Supp. 1985); Fla. Stat. § 921.141 (1985); Idaho Code § 19-2515 (Supp. 1985); Ind. Code § 35-50-2-9 (Supp. 1985); Mont. Code Ann. § 46-18-301 (1985); Neb. Rev. Stat. §§ 29-2520 and 29-2521

B

The Court's discussion of "the nature of our ruling in *Enmund*," *ante*, at 384, reveals a reliance on three premises: first, *Enmund* "does not impose any particular form of procedure upon the States," *ante*, at 386 (emphasis omitted); second, *Enmund* "'does not affect the state's definition of any substantive offense, even a capital offense,'" *ante*, at 385, quoting *Reddix* v. *Thigpen*, 728 F. 2d 705, 709 (CA5), cert. denied, 469 U. S. 990 (1984); and, third, *Enmund* is a "substantive limitation on sentencing" amenable to traditional proportionality review, *ante*, at 386. None of these propositions justifies the Court's holding today.

That we have refused "'to say that there is any one right way for a State to set up its capital sentencing scheme,'" *ante*, at 387, quoting *Spaziano*, 468 U. S., at 464, does not mean that there are no wrong ways. As has been shown, a capital-sentencing scheme that permits an appellate court to

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(1979). No State has placed the sentencing power, as opposed to the power to review sentences, in an appellate court. Every State provides for an evidentiary sentencing hearing, to be conducted in front of the sentencing authority, be it judge or jury.

Enmund identified 17 States in which the then-existing death penalty statutes potentially countenanced the execution of defendants who neither killed, attempted to kill, or intended to kill: Arizona, California, Connecticut, Florida, Georgia, Idaho, Indiana, Mississippi, Montana, Nebraska, Nevada, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Wyoming. See 458 U. S., at 789, n. 5; *id.*, at 792, nn. 12 and 13. Since *Enmund*, seven of those States have addressed the issue and apparently have concluded that the sentencer must make *Enmund* findings before imposing sentence. See *State* v. *McDaniel*, 136 Ariz. 188, 199, 665 P. 2d 70, 81 (1983); *People* v. *Garcia*, 36 Cal. 3d 539, 556–557, 684 P. 2d 826, 835–837 (1984), cert. denied, 469 U. S. 1229 (1985); *Allen* v. *State*, 253 Ga. 390, 395, n. 3, 321 S. E. 2d 710, 715, n. 3 (1984), cert. denied, 470 U. S. 1059 (1985); Miss. Code Ann. § 99–19–101(7) (Supp. 1985); *State* v. *Stokes*, 308 N. C. 634, 651–652, 304 S. E. 2d 184, 195 (1983); *Hatch* v. *Oklahoma*, 662 P. 2d 1377, 1382–1383 (Okla. Crim. App. 1983); *State* v. *Peterson*, —— S. C. ——, ——, 335 S. E. 2d 800, 802 (1985). Five others—Connecticut, Nebraska, Nevada, Montana, and South Dakota—have not yet considered cases raising an *Enmund* claim.

make *Enmund* findings sacrifices reliability needlessly to no discernible end, and cannot satisfy the Eighth Amendment.

That *Enmund* does not restrict the State's power to define offenses is equally beside the point. A State's decision to define a crime as "capital" cannot "automatically . . . dictate what should be the proper penalty," *Lockett* v. *Ohio*, 438 U. S., at 602 (plurality opinion), and does not empower the State to execute a defendant who neither killed, nor attempted to kill, nor intended to kill. In *Coker* v. *Georgia*, 433 U. S. 584 (1977), for example, Georgia's definition of rape as a capital offense did not dispose of the Eighth Amendment issue. Both JUSTICE O'CONNOR's dissent in *Enmund* and the Court of Appeals' opinion in *Reddix*—the authorities upon which the Court relies—recognize the distinction, which seems to elude the Court, between defining an offense and being entitled to execute a defendant. See *Enmund*, 458 U. S., at 810, and n. 19 (O'CONNOR, J., dissenting) (Enmund did not contest his conviction for felony murder; his "sole challenge is to the penalty imposed"); *Reddix*, 728 F. 2d, at 709 (the State may convict a defendant of a capital crime without requiring an instruction on intent; "*Enmund*, however, will 'bar a *death penalty*'" absent such an instruction, quoting *Skillern* v. *Estelle*, 720 F. 2d 839, 847 (CA5 1983) (emphasis in *Skillern*), cert. denied, 469 U. S. 873 (1984)). A State remains free to define felony murder as it wishes; but it can execute a felony murderer who has been sentenced to death only by a sentencer who has determined that he possesses the degree of culpability discussed in *Enmund*.

The Court also would justify its holding by reference to the discussion of Eighth Amendment principles of proportionality in *Solem* v. *Helm*, 463 U. S. 277 (1983). The Court's discussion mistakenly amalgamates review and essentially *de novo* factfinding. Certainly, the Court is correct that "the decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case . . . has long been viewed as one that a trial judge or an appellate

court is fully competent to make." *Ante*, at 386. But the Eighth Amendment demands more than that the reviewing court decide whether the sentencer has properly weighed the seriousness of the offense and the severity of the punishment. The Eighth Amendment binds the sentencer as well. The joint opinions in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), *Proffitt* v. *Florida*, 428 U. S. 242 (1976), and *Jurek* v. *Texas*, 428 U. S. 262 (1976), all explicitly rested their approval of the capital-sentencing schemes before them on the *combination* of channeled factfinding by the sentencer and appellate review. In *Gregg*, an "important additional safeguard" was provided by the Georgia Supreme Court's review of "whether the evidence supports the jury's finding of a statutory aggravating circumstance," as well as by the exercise of comparative proportionality review. 428 U. S., at 198. In *Proffitt*, "meaningful appellate review" was provided because the appellate court had before it written findings justifying the imposition of the death penalty. 428 U. S., at 251. In *Jurek*, the jury had to make specific findings, which were then subject to appellate review. 428 U. S., at 269, 276. To permit States to collapse factfinding and review into one proceeding is to abandon one of the most critical protections afforded by every capital-sentencing scheme to which the Court previously has given its approval.

Enmund "insist[ed] on 'individualized consideration as a constitutional requirement *in imposing the death sentence*,'" 458 U. S., at 798 (emphasis added), quoting *Lockett* v. *Ohio*, 438 U. S., at 605, and not merely in reviewing the sentence imposed. The sentencer is not relieved of the duty to consider whether the severity of the defendant's crime justifies the death penalty by the availability of proportionality review. *Enmund* places a substantive limitation on a process that precedes proportionality review.

C

This case demonstrates graphically why a trial-court sentencer must make the *Enmund* determination. Under

Mississippi law, "the jury is the sole player in the judicial process who may vote to send an accused to die." *Wiley* v. *State*, 449 So. 2d 756, 762 (Miss. 1984); see also *Williams* v. *State*, 445 So. 2d 798, 811 (Miss. 1984), cert. denied, 469 U. S. 1117 (1985). To the extent that *Enmund* places a substantive limitation on sentencing, then, Bullock is entitled to insist that the sentencing jury heed its limits. *Caldwell* suggests that to postpone Bullock's right to an *Enmund* determination is effectively to deprive him of that right because, in Mississippi, capital review is "conducted with a presumption of . . . correctness." *Wiley*, 449 So. 2d, at 762; see *Caldwell*, 472 U. S., at 331; see also Miss. Code Ann. § 99–19–105 (Supp. 1985). The Mississippi Supreme Court examines the record solely to see whether a reasonable jury *could* have concluded that Bullock killed, attempted to kill, or intended to kill, rather than whether Bullock in fact did any of those things. Saying that Bullock might have acted with the requisite culpability does not satisfy the constitutional requirement that Bullock actually have acted with that degree of blameworthiness.

Hicks v. *Oklahoma*, 447 U. S. 343 (1980), makes clear that the former inquiry is simply insufficient to satisfy due process. In *Hicks*, the Court vacated a sentence imposed, as Oklahoma law required, by a jury which had relied upon an invalid statutory provision despite the fact that the Court of Criminal Appeals had affirmed the sentence as within the permissible range. *Hicks* held that when a State vests the sentencing power in the trial jury, a defendant has "a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Id.*, at 346. A state appeals court cannot reform a defendant's sentence, thus denying him the right actually to be sentenced by a jury "simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that [affirmed by the appellate court]. Such an arbitrary disregard of the petitioner's right

to liberty is a denial of due process of law." *Ibid.* (emphasis in original).

As for reliability, the Court buries in a footnote an acknowledgment that "the question whether the defendant killed, attempted to kill, or intended to kill might in a given case turn on credibility determinations that could not be accurately made by an appellate court on the basis of a paper record, cf. *Anderson* v *Bessemer City*, 470 U. S. 564, 575 (1985); *Wainwright* v. *Witt*, 469 U. S. 412, 429 (1985)." *Ante*, at 388, n. 5. The Court fails to notice that this *is* that "given case": Bullock took the stand, at both the guilt and penalty phases of his trial, to deny having killed, having attempted to kill, or having intended to kill Dickson. See Tr. 956, 982, 996, 1190. I have read the trial transcript. Although I think the evidence is consistent with Bullock's claim that the killing of Mark Dickson resulted from a drunken brawl between Tucker and Dickson that tragically got out of hand, cf. *Bullock* v. *Lucas*, 743 F. 2d, at 248 (concurring opinion), I must concede that a jury or judge who saw Bullock testify might well think he lied. I fail, however, to see how an appellate court confidently could conclude, without any indication from anyone who actually saw him testify, that Bullock's account was so unworthy of belief that he was properly condemned to death.

Moreover, nothing in the Court's opinion suggests that this case is at all unusual in this respect.[4] To permit the States

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[4] I assume that many capital defendants who neither killed, attempted to kill, nor intended to kill take the stand, at least at the sentencing hearing, since they know that if they convince the sentencer of their diminished level of personal culpability their lives will be spared. The considerations of federalism and comity identified by the Court are hardly best served by allowing the State to construct capital-sentencing schemes that require federal habeas courts to examine in every case the nature of the evidence presented in order to determine whether the State's regular capital-sentencing procedure is satisfactory. It is far better, it seems to me, to establish a bright-line rule requiring the findings to be made by the trial court, especially since the Court has failed to identify a single reason why a

to construct capital-sentencing schemes that by their very nature will be inadequate in cases such as this strikes me as an abdication of our responsibility under the Eighth Amendment to ensure that the system of capital punishment, as well as the imposition of the penalty on individual defendants, meets the Constitution's requirements.[5]

Here, Bullock had a legitimate expectation that the sentencing jury would consider his personal responsibility and moral guilt before deciding to send him to die. Under *Enmund*, the only way to guarantee that such consideration has been given is to require the sentencer to determine that the defendant either killed, or attempted to kill, or intended to kill. That a jury *might* or *could* have made such a determination hardly provides a guarantee that this jury *did*. Because I believe every defendant is entitled to that guarantee, I would vacate the death sentence and remand the case with instructions to provide Bullock with a sentencing hearing before a jury. Inasmuch as the majority refuses to take this essential step, I dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

The justification for executing the defendant depends on the degree of his culpability—"what [his] intentions, expecta-

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State legitimately could prefer to vest the factfinding function in an appellate court.

[5] The Court's refusal to "determine what factfinding procedures would be adequate in the particular case before us," *ante*, at 388, n. 5, strikes me as somewhat perverse. Although most of the cases we hear concern broad legal questions the resolution of which will affect many persons other than the actual parties, this should not blind us to the fact that our authority to reach those questions rests on the presence of a concrete case. The question as to what procedures would be adequate in this case is not, as the Court suggests, "hypothetical." *Ibid.* The believability of Bullock's testimony is the critical factor, and the credibility judgment can be made, in the first instance, only by someone who has seen him testify. If anything is "hypothetical," it is the Court's assumption that an appellate factfinding procedure that is clearly inadequate for the actual case before it will be adequate in hypothetical cases not before it.

tions, and actions were. American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability,' *Mullaney* v. *Wilbur*, 421 U. S. 684, 698 (1975), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing." *Enmund* v. *Florida*, 458 U. S. 782, 800 (1982). The Eighth Amendment therefore precludes the imposition of a death sentence upon a defendant whose "crime did not reflect 'a consciousness materially more "depraved" than that of any person guilty of murder.'" *Id.*, at 800–801.

Because the finding of moral culpability required by *Enmund* is but one part of a judgment that "is ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live,"* I believe that the decision whether a death sentence is the only adequate response to the defendant's moral culpability must be made by a single decisionmaker, be it the trial court or the jury. The State of Mississippi has wisely decided that the jury is the decisionmaker that is best able to "express the conscience of the community on the ultimate question of life or death." *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 (1968). As the Court points out, *ante*, at 383–384, a Mississippi jury has not found that respondent Bullock killed, attempted to kill, or intended that a killing take place or that lethal force be used. It follows, in my view, that a Mississippi jury has not determined that a death sentence is the only response that will satisfy the outrage of the community, and that a new sentencing hearing must be conducted if respondent is ultimately to be sentenced to die. In accordance with this reasoning, I would affirm the judgment of the Court of Appeals.

**Spaziano* v. *Florida*, 468 U. S. 447, 467 (1984) (STEVENS, J., concurring in part and dissenting in part).

TRANSCONTINENTAL GAS PIPE LINE CORP. v. STATE OIL AND GAS BOARD OF MISSISSIPPI ET AL.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

No. 84-1076. Argued October 8, 1985—Decided January 22, 1986

In 1978, during a period of natural gas shortage, appellant interstate pipeline entered into long-term contracts with appellee Getty Oil Co. and others to purchase natural gas from a common gas pool in Mississippi. The contract with Getty obligated appellant to buy only Getty's shares of the gas produced by the wells Getty operated. Demand was sufficiently high that appellant also purchased, on a noncontract basis, the production shares of smaller owners, such as appellee Coastal Exploration, Inc., in the Getty wells. But in 1982, consumer demand dropped significantly, and appellant began to have difficulty in selling its gas. It therefore announced that it would no longer purchase gas from owners with whom it had not contracted. Getty cut back production so that its wells produced only that amount of gas equal to its ownership interest in the maximum flow. This deprived Coastal of revenue, because none of its share of the common pool gas was being produced. Coastal then filed a petition with appellee Mississippi State Oil and Gas Board (Board), asking it to enforce statewide Rule 48 requiring gas purchasers to purchase gas without discrimination in favor of one producer against another in the same source of supply. The Board found appellant in violation of Rule 48 and ordered it to start taking gas "ratably" (*i.e.*, in proportion to the various owners' shares) from the gas pool, and to purchase the gas under nondiscriminatory price and take-or-pay conditions. On appeal, the Mississippi Circuit Court held that the Board's authority was not pre-empted by the Natural Gas Act of 1938 (NGA) or the Natural Gas Policy Act of 1978 (NGPA), and that the NGPA effectively overruled *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kansas*, 372 U. S. 84, which struck down, on pre-emption grounds, a state regulation virtually identical to the Board's order. The Mississippi Supreme Court affirmed.

Held: The Board's ratable-take order is pre-empted by the NGA and NGPA. Pp. 417–425.

(a) Congress, in enacting the NGPA, did not alter the characteristics of the comprehensive regulatory scheme that provided the basis in *Northern Natural* for the finding of pre-emption. The Board's order directly undermines Congress' determination in enacting the NGPA that the supply, demand, and price of high-cost gas be determined by market

forces. To the extent that Congress in the NGPA denied the Federal Energy Regulatory Commission (FERC) the power to regulate directly the prices at which pipelines purchase high-cost gas, it did so because it wanted to leave determination of supply and first-sale price to the market. In light of Congress' intent to move toward a less regulated national natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations. Pp. 417–423.

(b) The Board's order disturbs the uniformity of the federal scheme, since interstate pipelines will be forced to comply with varied state regulations of their purchasing practices. The order would also have the effect of increasing the ultimate price to consumers, thus frustrating the federal goal of ensuring low prices most effectively. Pp. 423–425.

457 So. 2d 1298, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and MARSHALL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which POWELL, STEVENS, and O'CONNOR, JJ., joined, *post*, p. 425.

John Marshall Grower argued the cause for appellant. With him on the briefs were *Jefferson D. Stewart*, *R. Wilson Montjoy II*, *R. V. Loftin, Jr.*, and *Thomas E. Skains*.

Jerome M. Feit argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *William H. Satterfield*, *Joseph S. Davies*, and *John H. Conway*.

Ed Davis Noble, Jr., Assistant Attorney General of Mississippi, argued the cause for appellee State Oil and Gas Board of Mississippi. With him on the brief were *Edwin Lloyd Pittman*, Attorney General, and *R. Lloyd Arnold*, Assistant Attorney General. *Glenn Gates Taylor* argued the cause for appellee Coastal Exploration, Inc. With him on the brief was *Kenneth I. Franks*. *Walker L. Watters* and *David T. Cobb* filed a brief for appellee Getty Oil Co.*

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*Briefs of *amici curiae* urging reversal were filed for the Interstate Natural Gas Association of America by *Harold L. Talisman* and *John H. Cheatham III*; and for Associated Gas Distributors by *Frederic Moring*.

Briefs of *amici curiae* urging affirmance were filed for the State of Texas by *Jim Mattox*, Attorney General, *David R. Richards*, Executive Assist-

JUSTICE BLACKMUN delivered the opinion of the Court.

We are confronted again with the issue of a state regulation requiring an interstate pipeline to purchase gas from all the parties owning interests in a common gas pool. The purchases would be in proportion to the owners' respective interests in the pool, and would be compelled even though the pipeline has pre-existing contracts with less than all of the pool's owners.

This Court, in *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kansas*, 372 U. S. 84 (1963), struck down, on pre-emption grounds, a virtually identical regulation. In the present case, however, the Supreme Court of Mississippi ruled that the subsequently enacted Natural Gas Policy Act of 1978 (NGPA), 92 Stat. 3351, 15 U. S. C. § 3301 *et seq.*, effectively nullified *Northern Natural* by vesting regulatory power in the States over the wellhead sale of gas. The Mississippi Supreme Court went on to hold that the Mississippi regulation did not impermissibly burden interstate commerce. Because of the importance of the issues in the functioning of the interstate market in natural gas, we noted probable jurisdiction. 470 U. S. 1083 (1985).

I

The Harper Sand gas pool lies in Marion County in southern Mississippi. Harper gas is classified as "high-cost natural gas" under NGPA's § 107(c)(1), 15 U. S. C. § 3317(c)(1), because it is taken from a depth of more than 15,000 feet. At the time of the proceedings before appellee State Oil and Gas Board of Mississippi, six separate wells drew gas from the pool. A recognized property of a common pool is that, as gas is drawn up through one well, the pressure surrounding

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ant Attorney General, and *Larry J. Laurent* and *Manual Rios*, Assistant Attorneys General; and for the National Governors' Association by *Benna Ruth Solomon* and *Joyce Holmes Benjamin*.

David Crump filed a brief for the Legal Foundation of America as *amicus curiae*.

that well is reduced and other gas flows towards the area of the producing well. Thus, one well can drain an entire pool, even if the gas in the pool is owned by several different owners. The interests of these other owners often are referred to as "correlative rights." See, *e. g.*, Miss. Code Ann. § 53-1-1 (1972 and Supp. 1985).

Some owners of interests in the Harper Sand pool, such as appellee Getty Oil Co., actually drill and operate gas wells. Others, such as appellee Coastal Exploration, Inc., own smaller working interests in various wells. Normally, these lesser owners rely on the well operators to arrange the sales of their shares of the production, see App. 26, although some nonoperator owners contract directly either with the pipeline that purchases the operator's gas or with other customers.

Appellant Transcontinental Gas Pipe Line Corporation (Transco) operates a natural gas pipeline that transports gas from fields in Texas, Louisiana, and Mississippi for resale to customers throughout the Northeast. Beginning in 1978, Transco entered into 55 long-term contracts with Getty and two other operators, Florida Exploration Co. and Tomlinson Interests, Inc., to purchase gas produced from the Harper Sand pool. In line with prevailing industry practice, the contracts contained "take-or-pay" provisions. These essentially required Transco either to accept currently a certain percentage of the gas each well was capable of producing, or to pay the contract price for that gas with a right to take delivery at some later time, usually limited in duration. Take-or-pay provisions enable sellers to avoid fluctuations in cash flow and are therefore thought to encourage investments in well development. See Pierce, Natural Gas Regulation, Deregulation, and Contracts, 68 Va. L. Rev. 63, 77-79 (1982).

Transco entered into these contracts during a period of national gas shortage. Transco's contracts with Getty and Tomlinson obligated it to buy only Getty's and Tomlinson's own shares of the gas produced by the wells they operated,

while its contracts with Florida Exploration required it to take virtually all the gas Florida Exploration's wells produced, regardless of its ownership. See App. 107. But demand was sufficiently high that Transco also purchased, on a noncontract basis, the production shares of smaller owners, such as Coastal, in the Getty and Tomlinson wells. *Id.*, at 155. In the spring of 1982, however, consumer demand for gas dropped significantly, and Transco began to have difficulty selling its gas. It therefore announced in May 1982 that it would no longer purchase gas from owners with whom it had not actually contracted. See, *e. g.*, *id.*, at 41–42. Transco refused Coastal's request that it be allowed to ratify Getty's contract, and made a counteroffer, which Coastal refused, either to purchase Coastal's gas at a significantly lower price than it was obligated to pay under its existing contracts or to transport Coastal's gas to other customers if Coastal arranged such sales. See *id.*, at 66–69. Fifty-five other noncontract owners of Harper gas, however, did accept such offers from Transco. See 457 So. 2d 1298, 1309 (Miss. 1984).

Getty and Tomlinson cut back production so that their wells produced only that amount of gas equal to their ownership interests in the maximum flow. The immediate economic effect of the cutback was to deprive Coastal of revenue, because none of its share of the Harper gas was being produced. The ultimate geological effect, however, is that gas will flow *from* the Getty-Tomlinson areas of the field, which are producing at less than capacity, *to* the Florida Exploration areas; gas owned by interests that produce through Getty's and Tomlinson's wells thus may be siphoned away. Moreover, because of the decrease in pressure, gas left in the ground, such as Coastal's gas, may become more costly to recover and therefore its value at the wellhead may decline.

II

On July 29, 1982, Coastal filed a petition with appellee State Oil and Gas Board of Mississippi, asking the Board to enforce its Statewide Rule 48, a "ratable-take" requirement. Rule 48 provides:

> "Each person now or hereafter engaged in the business of purchasing oil or gas from owners, operators, or producers shall purchase without discrimination in favor of one owner, operator, or producer against another in the same common source of supply."

Rule 48 never before had been employed to require a pipeline actually to purchase noncontract gas; rather, its sole purpose appears to have been to prevent drainage, that is, to prevent a buyer from contracting with one seller and then draining a common pool of all its gas. See 457 So. 2d, at 1306. The Gas Board conducted a 3-day evidentiary proceeding. It found Transco in violation of Rule 48, and, by its Order No. 409–82, filed Oct. 13, 1982,[1] ordered Transco to start taking gas "ratably" (*i. e.*, in proportion to the various owners' shares) from the Harper Sand pool, and to purchase the gas under nondiscriminatory price and take-or-pay conditions.

Transco appealed the Gas Board's ruling to the Circuit Court of the First Judicial District of Hinds County, Miss. In the parts of its opinion relevant to this appeal, the Circuit Court held that the Gas Board's authority was not pre-

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[1] Order No. 409–82 directed Transco "forthwith to comply with Statewide Rule 48 of the State Oil and Gas Board of Mississippi in its purchases of gas from the said Harper Sand Gas Pool in Greens Creek and East Morgantown Fields, and . . . ratably take and purchase gas without discrimination in favor of one owner, operator or producer against another in the said common source of *[sic]* pool; and, specifically, in the event it so chooses and elects to take and purchase gas produced from the said common pool, Transco shall ratably take and purchase without discrimination in favor of the operators Getty and Tomlinson against Coastal, the Fairchilds, and Inexco." App. to Pet. for Cert. 112a.

empted by either the Natural Gas Act of 1938 (NGA), ch. 556, 52 Stat. 821, 15 U. S. C. § 717 *et seq.*, or the NGPA; that the NGPA effectively overruled *Northern Natural;* and that the Gas Board's order did not run afoul of the Commerce Clause of the United States Constitution.

The Mississippi Supreme Court affirmed that portion of the Circuit Court's judgment. 457 So. 2d 1298 (1984). With respect to Transco's pre-emption claim, the court recognized that, prior to 1978, the Federal Energy Regulatory Commission (FERC) and its predecessor, the Federal Power Commission, possessed "plenary authority to regulate the sale and transportation of natural gas in interstate commerce." *Id.*, at 1314. Under the interpretation of that authority in *Northern Natural*, where a Kansas ratable-take order was ruled invalid because the order "invade[d] the exclusive jurisdiction which the Natural Gas Act has conferred upon the Federal Power Commission," 372 U. S., at 89, Mississippi's "authority to enforce Rule 48 requiring ratable taking had been effectively suspended—preempted, if you will, and any orders such as Order No. 409–82 would have been wholly unenforceable." 457 So. 2d, at 1314. But the court went on to conclude that the enactment of the NGPA in 1978 removed FERC's jurisdiction over "high-cost" gas (the type produced from the Harper Sand pool). Under § 601(a)(1) of the NGPA, "the Natural Gas Act of 1938 (NGA) and FERC's jurisdiction under the Act *never* apply to deregulated gas" (emphasis added), 457 So. 2d, at 1316, and "[t]hat message is decisive of the preemption issue in this case." *Ibid.*

The court also found no implicit pre-emption of Rule 48. Transco's compliance with the Rule could not bring it into conflict with any of FERC's still-existing powers over the gas industry. The court noted that, under *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U. S. 375, 384 (1983), a federal determination that deregulation was appropriate was entitled to as much weight in determining pre-emption as a federal decision to regulate actively.

Although the NGPA stemmed from Congress' desire to deregulate the gas industry, the court found that "[h]owever consistent a continued proscription on state regulation might have been with the theoretical underpinnings of deregulation, the Congress in NGPA in 1978 did not ban state regulation of deregulated gas." 457 So. 2d, at 1318.

In addressing the Commerce Clause issue, the court relied on the balancing test set out in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970): when a state law "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.*, at 142. In weighing the benefit against the burden, a reviewing court should consider whether the local interest "could be promoted as well with a lesser impact on interstate activities." *Ibid.* The court found that Rule 48 had a legitimate local purpose—the prevention of unfair drainage from commonly owned gas pools. It identified the principal burden on interstate commerce as higher prices for the ultimate consumers of natural gas. But, under *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 186–187 (1950), higher prices do not render a state regulation impermissible *per se* under the Commerce Clause. Also, Congress expressed a clear intent in enacting the NGPA that "all reasonable costs of production of natural gas shall be borne ultimately by the consumer. . . . Congress within the scope of its power under the affirmative Commerce Clause has expressly authorized such increases." 457 So. 2d, at 1321. Transco had identified one other potential burden on interstate commerce: Rule 48 would require it to take more gas from Mississippi's fields than would otherwise be the case, thereby leading Transco to reduce its purchases from Louisiana and Texas. But the Mississippi court rejected this argument, noting both that Texas and Louisiana had their own ratable-take regulations, which presumably would protect

their producers, and that the actual cause of any such effect was Transco's imprudent entry into take-or-pay contracts, rather than the State's ratable-take requirement. Transco knew of Rule 48's existence when it entered into its various contracts and should have foreseen the risk that it would be required to purchase smaller owners' shares. Moreover, since Transco was permitted to pass along its increased costs, the consumer ultimately would bear this burden, which was "simply one inevitable consequence of the free market policies of the era of deregulation with respect to which Transco is vested by the negative Commerce Clause with no right to complain." *Id.*, at 1322.

Finally, the court rejected Transco's argument that the State could have served the same local public interest through a ratable-production order rather than through a ratable-take order. It held that it need not even consider whether less burdensome alternatives to the ratable-take order existed, because Transco had failed to meet the threshold requirement of demonstrating an unreasonable burden on interstate commerce.[2]

III

If the Gas Board's action were analyzed under the standard used in *Northern Natural*, it clearly would be pre-empted. Whether that decision governs this case depends on whether Congress, in enacting the NGPA, altered those characteristics of the federal regulatory scheme which provided the basis in *Northern Natural* for a finding of pre-emption.

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[2] Transco's other claims, a void-for-vagueness challenge, a Takings Clause argument, and various state-law claims, were rejected with one exception. The court found that, although the Gas Board had the power to order Transco to take ratably from the Harper Sand pool, it lacked the power to prohibit Transco from paying different prices for gas owned by nonparties to its original contracts. Therefore, Transco need pay Coastal only the current market price, rather than the higher price it was paying Getty and Tomlinson under its contracts with them.

In that case this Court considered whether the "comprehensive scheme of federal regulation" that Congress enacted in the NGA pre-empted a Kansas ratable-take order. 372 U. S., at 91. Northern Natural Gas Company had a take-or-pay contract with Republic Natural Gas Company to purchase all the gas Republic could produce from its wells in the Hugoton Field. Northern also had contracts with other producers to buy their production, but those contracts required it to purchase their gas only to the extent that its requirements could not be satisfied by Republic. *Id.*, at 87. Northern historically had taken ratably from all Hugoton wells, but, starting in 1958, it no longer needed all the gas the wells in the field were capable of producing. It therefore reduced its purchases from the other wells, causing drainage toward Republic's wells. The Kansas Corporation Commission, which previously had imposed a ratable-production order on the Hugoton producers,[3] then issued a ratable-take order requiring Northern to "take gas from Republic wells in no higher proportion to the allowables than from the wells of the other producers." *Id.*, at 88.

Kansas argued that its order represented a permissible attempt to protect the correlative rights of the other producers. The Court rejected this contention. Section 1(b) of the NGA, 15 U. S. C. § 717(b), provided that the Act's provisions "shall not apply . . . to the production or gathering of natural gas." But the Court, it was said, "has consistently held that 'production' and 'gathering' are terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." 372 U. S., at 90. Since Kansas' order was directed not at "a producer but

[3] A ratable-production order in essence allocates pro rata among interest owners the right to produce the amount of gas demanded. For example, if one interest owner owns 75% of the gas in a common pool with 100 units of gas and demand is 60 units, then the majority owner will be permitted to sell only 45 of his units, even though he owns, and is capable of producing, 75 units.

a purchaser of gas from producers," *ibid.*, Northern, being a purchaser, was not expressly exempted from the Act's coverage.

Although it was "undeniable that a state may adopt reasonable regulations to prevent economic and physical waste of natural gas," *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S., at 185, the Court did not view the ratable-take rule as a permissible conservation measure.[4] Such measures target producers and production, while ratable-take requirements are "aimed directly at interstate purchasers and wholesales for resale." *Northern Natural*, 372 U. S., at 94.

The Court identified the conflict between Kansas' rule and the federal regulatory scheme in these terms: Congress had "enacted a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce.'" *Id.*, at 91, quoting *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 682 (1954). "[U]niformity of regulation" was one of its objectives. 372 U. S., at 91–92. And, it was said:

> "The danger of interference with the federal regulatory scheme arises because these orders are unmistakably and unambiguously directed at *purchasers* who take gas in Kansas for resale after transportation in interstate commerce. In effect, these orders shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output of thousands of natural gas wells within the State . . . . Moreover, any readjustment of purchasing patterns which such orders

[4] The Court noted, 340 U. S., at 185, that it had "upheld numerous kinds of state legislation designed to curb waste of natural resources and to protect the correlative rights of owners through ratable taking, *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U. S. 210 (1932)," but it is clear from the context of that statement that those challenges had involved claims by gas owners under the Due Process and Equal Protection Clauses, rather than claims of federal pre-emption: "These ends have been held to justify control over production even though the uses to which property may profitably be put are restricted." *Id.*, at 185–186.

might require of purchasers who previously took unratably could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States" (emphasis in original). *Id.*, at 92.

Northern Natural's finding of pre-emption thus rests on two considerations. First, Congress had created a comprehensive regulatory scheme, and ratable-take orders fell within the limits of that scheme rather than within the category of regulatory questions reserved for the States. Second, in the absence of ratable-take requirements, purchasers would choose a different, and presumably less costly, purchasing pattern. By requiring pipelines to follow the more costly pattern, Kansas' order conflicted with the federal interest in protecting consumers by ensuring low prices.

Under the NGA, the Federal Power Commission's comprehensive regulatory scheme involved "utility-type ratemaking" control over prices and supplies. See Haase, The Federal Role in Implementing the Natural Gas Policy Act of 1978, 16 Houston L. Rev. 1067, 1079 (1979). The FPC set price ceilings for sales from producers to pipelines and regulated the prices pipelines could charge their downstream customers. But "[i]n the early 1970's, it became apparent that the regulatory structure was not working." *Public Service Comm'n of New York* v. *Mid-Louisiana Gas Co.*, 463 U. S. 319, 330 (1983). The Nation began to experience serious gas shortages. The NGA's "artificial pricing scheme" was said to be a "major cause" of the imbalance between supply and demand. See S. Rep. No. 95–436, p. 50 (1977) (additional views of Senators Hansen, Hatfield, McClure, Bartlett, Weicker, Domenici, and Laxalt).

In response, Congress enacted the NGPA, which "has been justly described as 'a comprehensive statute to govern future natural gas regulation.'" *Mid-Louisiana Gas. Co.*, 463 U. S., at 332, quoting Note, Legislative History of the Natu-

ral Gas Policy Act, 59 Texas L. Rev. 101, 116 (1980). The aim of federal regulation remains to assure adequate supplies of natural gas at fair prices, but the NGPA reflects a congressional belief that a new system of natural gas pricing was needed to balance supply and demand. See S. Rep. No. 95–436, at 10. The new federal role is to "oversee[e] a national market price regulatory scheme." Haase, 16 Houston L. Rev., at 1079; see S. Rep. No. 95–436, at 21 (NGPA implements "a new commodity value pricing approach"). The NGPA therefore does not constitute a federal retreat from a comprehensive gas policy. Indeed, the NGPA in some respects expanded federal control, since it granted FERC jurisdiction over the intrastate market for the first time. See the Act's §§ 311 and 312, 15 U. S. C. §§ 3371 and 3372.

Appellees argue, however, that §§ 601(a)(1)(B)(i) and (ii), 15 U. S. C. §§ 3431(a)(1)(B)(i) and (ii), stripped FERC of jurisdiction over the Harper Sand pool gas which was the subject of the Gas Board's Rule 48 order, thereby leaving the State free to regulate Transco's purchases. Section 601(a)(1)(B) states that "the provisions of [the NGA] and the jurisdiction of the Commission under such Act shall not apply solely by reason of any first sale" of high-cost or new natural gas. Moreover, although FERC retains some control over pipelines' downstream pricing practices, § 601(c)(2) requires FERC to permit Transco to pass along to its customers the cost of the gas it purchases "except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds." According to appellees, FERC's regulation of Transco's involvement with high-cost gas can now concern itself only with Transco's sales to its customers; FERC, it is said, cannot interfere with Transco's purchases of new natural gas from its suppliers. Appellees believe that the Gas Board order concerns only this latter relationship, and therefore is not pre-empted by federal regulation of other aspects of the gas industry.

That FERC can no longer step in to regulate directly the prices at which pipelines purchase high-cost gas, however, has little to do with whether state regulations that affect a pipeline's costs and purchasing patterns impermissibly intrude upon federal concerns. Mississippi's action directly undermines Congress' determination that the supply, the demand, and the price of high-cost gas be determined by market forces. To the extent that Congress denied FERC the power to regulate affirmatively particular aspects of the first sale of gas, it did so because it wanted to leave determination of supply and first-sale price to the market. "[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate" (emphasis in original). *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U. S., at 384. Cf. *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 150–151 (1976).

The proper question in this case is not whether FERC has affirmative regulatory power over wellhead sales of § 107 gas, but whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the States the power it had denied FERC. The answer to the latter question must be in the negative. First, when Congress meant to vest additional regulatory authority in the States it did so explicitly. See §§ 503(c) and 602(a), 15 U. S. C. §§ 3413(c) and 3432(a). Second, although FERC may now possess less regulatory jurisdiction over the "intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States," *Northern Natural*, 372 U. S., at 92, than it did under the old regime, that relationship is still a subject of deep federal concern. FERC still must review Transco's pricing practices, even

though its review of Transco's purchasing behavior has been circumscribed. See App. 148–150, 170. In light of Congress' intent to move toward a less regulated national natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations.

Mississippi's order also runs afoul of other concerns identified in *Northern Natural*. First, it disturbs the uniformity of the federal scheme, since interstate pipelines will be forced to comply with varied state regulations of their purchasing practices. In light of the NGPA's unification of the interstate and intrastate markets, the contention that Congress meant to permit the States to impose inconsistent regulations is especially unavailing. Second, Mississippi's order would have the effect of increasing the ultimate price to consumers. Take-or-pay provisions are standard industrywide. See Pierce, 68 Va. L. Rev., at 77–78; H. R. Rep. No. 98–814, pp. 23–25, 133–134 (1984). Pipelines are already committed to purchase gas in excess of market demand. Mississippi's rule will require Transco to take delivery of noncontract gas; this will lead Transco not to take delivery of contract gas elsewhere, thus triggering take-or-pay provisions. Transco's customers will ultimately bear such increased costs, see App. 161, unless FERC finds that Transco's purchasing practices are abusive. In fact, FERC is challenging, on grounds of abuse, the automatic passthrough of some of the costs Transco has incurred in its purchases of high-cost gas. See App. 177–178.[5] In any event, the federal scheme is dis-

[5] On October 31, 1985, FERC issued an initial decision, *Transcontinental Gas Pipe Line Corp.*, 33 FERC ¶ 63,026, finding that Transco's purchases of Harper Sand gas pursuant to the ratable-take order were not imprudent. But the grounds on which the Administrative Law Judge rested his conclusion demonstrate how Mississippi's action impermissibly interferes with FERC's regulatory jurisdiction.

FERC's staff had requested the judge to order Transco "to pursue a least-cost purchasing strategy *irrespective of Rule 48*." *Id.*, at 65,073 (emphasis in original). The judge refused: "In my view, Transco is entitled,

rupted: if customers are forced to pay higher prices because of Mississippi's ratable-take requirement, then Mississippi's rule frustrates the federal goal of ensuring low prices most effectively; if FERC ultimately finds Transco's practices abusive and refuses to allow a passthrough, then FERC's and Mississippi's orders to Transco will be in direct conflict.

The change in regulatory perspective embodied in the NGPA rested in significant part on the belief that direct federal price control exacerbated supply and demand problems by preventing the market from making long-term adjustments.[6] Mississippi's actions threaten to distort the market once again by artificially increasing supply and price. Although, in the long run, producers and pipelines may be able to adjust their selling and purchasing patterns to take account of ratable-take orders, requiring such future adjustments in an industry where long-term contracts are the norm

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indeed is required, to follow the decisions of the Mississippi authorities until and unless they be overturned by the Supreme Court of the United States." *Id.*, at 65,074.

Had the judge considered FERC's claim on the merits, the conflict between the federal and state schemes would be patent. But his belief that he was constrained to find Transco's practices reasonable because they were undertaken in compliance with Mississippi law is almost as demonstrative of pre-emption. First, Mississippi cannot be permitted to foreclose what would otherwise be more searching federal oversight of purchasing practices. Second, the mere exercise of federal regulatory power, even if it does not result in invalidation of the challenged act, shows continued federal occupation of the field. Since no evidence exists to suggest Congress intended FERC's power to be circumscribed by state action, Rule 48 is pre-empted.

[6] The dissent's complaint that Congress did not intend to decontrol supply and demand, *post*, at 433, n. 5, misses the point. Congress clearly intended to eliminate the distortive effects that NGA price control had had on supply and demand. To suggest that Congress was willing to replace this distortion with a distortion on price caused by a State's decision to require pipelines and, ultimately, interstate consumers, to purchase gas they do not want—the purpose of the order in this case—requires taking an artificially formalistic view of what Congress sought to achieve in the NGPA.

will postpone achievement of Congress' aims in enacting the NGPA. We therefore conclude that Mississippi's ratable-take order is pre-empted.

IV

Because we have concluded that the Gas Board's order is pre-empted by the NGA and NGPA, we need not reach the question whether, absent federal occupation of the field, Mississippi's action would nevertheless run afoul of the Commerce Clause.

The judgment of the Supreme Court of Mississippi is therefore reversed.

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE POWELL, JUSTICE STEVENS, and JUSTICE O'CONNOR join, dissenting.

Section 601(a)(1) of the Natural Gas Policy Act of 1978 (NGPA), 92 Stat. 3409, 15 U. S. C. § 3431(a)(1), removes the wellhead sales of "high-cost natural gas" from the coverage of the Natural Gas Act (NGA), 15 U. S. C. §§ 717–717w. Section 121(b) of the NGPA, 15 U. S. C. § 3331(b), exempts such gas from any lingering price controls under the NGPA. The Court nonetheless holds that Mississippi's application of its ratable-take rule to high-cost gas in order to do equity between and among owners in a common pool of deregulated gas," App. to Juris. Statement 28a, is pre-empted by the NGA and NGPA. The Court's opinion misuses the pre-emption doctrine to extricate appellant Transcontinental Gas Pipe Line Corp. (Transco) from a bed it made for itself. I dissent because I do not believe that Mississippi's ratable-take rule invades the exclusive sphere of the NGA, conflicts with the NGPA's purpose of decontrolling the wellhead price of high-cost gas, or runs afoul of the implicit free market policy of the dormant Commerce Clause.

The imposition of a ratable-take rule is a familiar solution of oil and gas law to the problem of "drainage" in a commonly

owned gas pool.[1] When several individuals own gas in a common pool, each has an incentive to remove and capture as much gas as rapidly as possible in order to prevent others from "draining away" his share of the gas reserves. This practice results in a much faster removal rate than a single owner of the same pool would choose, and makes it more difficult to obtain the last amounts of gas in a pool. A ratable-take rule eliminates the perverse incentives of common ownership that otherwise give rise to such economic waste and sharp practice. See *Champlin Refining Co.* v. *Oklahoma Corporation Comm'n*, 286 U. S. 210, 233 (1932).

The controversy in this case centers around the Harper Sand Gas Pool (Harper Pool), which is a pool of "high-cost natural gas" within the definition of that term in § 107(c)(1) of the NGPA, 15 U. S. C. § 3317(c)(1), because it lies more than 15,000 feet beneath the ground and surface drilling for its gas began in 1978.[2] By 1982, there were six wells drawing gas from the Harper Pool. Three were operated by Getty Oil Co., two by the Florida Exploration Co., and one by Tomlinson Interests, Inc. These operators were only part owners of the gas drawn up through their respective wells.

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[1] The withdrawal of gas from a common pool causes changes in pressure, resulting in the migration and spreading out of the remaining gas over the entire pool. This migration is called "drainage" because, from the viewpoint of each owner, the withdrawal of gas by another causes gas to migrate or "drain" away from his end of the pool.

[2] The NGPA defines "high-cost natural gas" as any gas

"(1) produced from any well the surface drilling of which began on or after February 19, 1977, if such production is from a completion location which is located at a depth of more than 15,000 feet;

"(2) produced from geopressured brine;

"(3) occluded natural gas produced from coal seams;

"(4) produced from Devonian shale; and

"(5) produced under such other conditions as the Commission determines to present extraordinary risks or costs." NGPA § 107(c), 92 Stat. 3366, 15 U. S. C. § 3317(c).

They shared ownership rights with a large number of other parties including appellee Coastal Exploration, Inc.

Appellant Transco is an interstate pipeline company that purchases gas from the various owners of the Harper Pool. As each well was drilled between 1978 and 1982, Transco entered into long-term contracts with the well operators to ensure future gas supplies at a fixed price. In this way, Transco bound itself to purchase, and the well operators bound themselves to supply, the well operators' shares of the gas drawn from the common pool. Transco also agreed to a "take-or-pay" clause in each contract, thereby promising to pay the well operators for their shares of the potential gas streams whether or not it took immediate delivery of the gas.

Until May 1982, Transco also purchased the production shares of all of the nonoperating owners. It did so by spot market purchases at prices roughly equal to those it was paying to the contract owners rather than pursuant to fixed-price long-term supply contracts. But Transco announced in May 1982 that, because of a glut in the natural gas market, it would no longer purchase gas on the spot market from the noncontract owners of the Getty and Tomlinson wells. Coastal, which had an ownership interest in gas from one of the Getty wells, thereupon attempted to sell its share of the gas on the spot market to another pipeline company. Failing in this attempt, it then offered to sign a long-term supply contract with Transco on terms identical to those in Transco's contract with Getty. Transco refused Coastal's offer, and made a counteroffer to Coastal which was in turn refused.

Coastal and various noncontract owners then sought relief from the Mississippi Oil and Gas Board (Board), arguing that Transco's disproportionate purchasing of gas from the Harper Pool violated the Board's ratable-take rule (Rule 48), which provides:

> "Each person now or hereafter engaged in the business of purchasing oil or gas from owners, operators, or producers shall purchase without discrimination in favor

of one owner, operator, or producer against another in the same common source of supply." Statewide Rule 48 of the State Oil and Gas Board of Mississippi as set forth in App. to Juris. Statement 129a.

Transco opposed the relief sought by Coastal because enforcement of the rule would require Transco to purchase the same percentage of each owner's share of the pool's allowable production as it purchased from any other owner's share. Because of the "take-or-pay" obligations in its contracts with the operating owners, this would require it either to take more gas than it could profitably sell to its interstate customers or to pay the operating owners for the percentage of their shares that it did not presently take. Transco therefore urged the Board to reduce the allowable production from the common pool to reflect current market demand or to substitute a "ratable-production" rule for the existing "ratable-take" rule. Had the Board acceded to Transco's proposals, Transco's liability for its realized downside contractual risk resulting from the take-or-pay clauses would have been limited or avoided at the expense of the operating owners with whom it contracted. The Board instead ruled in favor of Coastal and against Transco, finding, *inter alia:*

"Transco's course of conduct has been to discriminate against the owners (like Coastal) of relatively small undivided working interests in the . . . [w]ells and the common pool produced by the wells simply because they are owners of relatively small undivided interests.

. . . . .

"The Board finds that Transco's refusal to ratably take and purchase without discrimination Coastal's share of gas produced from the said common pool from which Transco is purchasing the operators' gas produced from the common pool by [the] very same wells and other wells completed into the common pool (1) is discriminatory in favor of the operators against Coastal and thereby violates Rule 48 . . . ; (2) constitutes 'waste' . . .

because, among other things, it abuses the correlative rights of Coastal in the common pool, results in non-uniform, disproportionate and unratable withdrawals of gas from the common pool causing undue drainage between tracts of land, and will have the effect and result of some owners in the pool producing more than their just and equitable share of gas from the common pool to the detriment of Coastal. . . ." App. to Juris. Statement 110a–111a.

The Board's order was affirmed by the Circuit Court of Hinds County, Mississippi, and affirmed by the Supreme Court of Mississippi insofar as it required ratable taking, despite Transco's claims of federal pre-emption and violation of the Commerce Clause. 457 So. 2d 1298 (1984).

The Court now reverses on pre-emption grounds. It holds that the ratable-take rule as applied to high-cost gas is pre-empted under the reasoning of *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kansas*, 372 U. S. 84 (1963), even though the NGPA removed the wellhead sales of such gas from the coverage of the NGA. I believe that the NGPA's removal of such gas from the NGA takes this case outside the purview of *Northern Natural*, and that a ratable-take rule such as that imposed by Mississippi is consistent with the NGPA's purpose of decontrolling the wellhead price of high-cost gas.

Congress passed the NGA in 1938 in response to this Court's holding that the Commerce Clause prevented States from directly regulating the wholesale prices of natural gas sold in interstate commerce. See *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298 (1924). The purpose of the NGA was "to occupy the field of wholesale sales of natural gas in interstate commerce." *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 184 (1983). Section 1(b) of the NGA, 52 Stat. 821, 15 U. S. C. § 717(b), defined the NGA's scope:

"The provisions of this Act shall apply to the *transportation* of natural gas in interstate commerce, to the *sale* in

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> interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, *but shall not apply* to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the *production* and *gathering* of natural gas." (Emphasis added.)

Initially, the Federal Power Commission (predecessor to the Federal Energy Regulatory Commission (FERC)) interpreted § 1(b) to extend the NGA's coverage to gas sales at the downstream end of interstate pipelines, but not to sales by local producers to interstate pipelines. See, *e. g.*, *Phillips Petroleum Co.*, 10 F. P. C. 246 (1951); *Natural Gas Pipeline Co.*, 2 F. P. C. 218 (1940). In 1954, however, this Court gave § 1(b) a broader reading. See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (1954). It interpreted the NGA as creating exclusive federal jurisdiction over the regulation of natural gas in interstate commerce, and § 1(b) as extending the NGA's coverage to both downstream and local sales, though not to the production and gathering of natural gas. *Id.*, at 677–678; see also *id.*, at 685–686 (Frankfurter, J., concurring).

Northern Natural Gas Co. v. *State Corporation Comm'n of Kansas*, *supra*, was decided against this backdrop. In *Northern Natural*, the Court held that a state ratable-take rule as applied to the purchases of natural gas by interstate pipelines was pre-empted by the NGA because it constituted an "inva[sion into] the exclusive jurisdiction which the Natural Gas Act has conferred upon the Federal Power Commission over the sale and transportation of natural gas in interstate commerce for resale." *Id.*, at 89. The Court rejected the argument that ratable-take rules "constitute only state regulation of the 'production or gathering' of natural gas, which is exempted from the federal regulatory domain by the terms of § 1(b) of the Natural Gas Act." *Id.*, at 89–90. It

explained that because such rules apply to purchasers, they involve the regulation of wellhead sales. *Id.*, at 90. It also rejected the argument that they do not "threate[n] any actual invasion of the regulatory domain of the Federal Power Commission since [they] 'in no way involv[e] the *price* of gas.'" *Ibid.* (emphasis added). The Court reasoned that the NGA "leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, . . . or for state regulations which would indirectly" regulate price. *Id.*, at 91. Because ratable-take rules apply to purchasers, they indirectly regulate price and therefore "invalidly invade the federal agency's exclusive domain" of sales regulation.[3] *Id.*, at 92. Finally, the Court explained that although "States do possess power to allocate and conserve scarce natural resources upon and beneath their lands," *id.*, at 93, they may not use means such as ratable-take rules that "threaten effectuation of the federal regulatory scheme." *Ibid.*

The NGPA was passed in 1978 in response to chronic interstate gas shortages caused by price ceilings imposed pursuant to the NGA. Its purpose was to decontrol the wellhead price of natural gas sold to interstate pipelines, allowing prices to rise according to market conditions and causing shortages to vanish. To accomplish this purpose, it divided

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[3] In *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238 (1984), this Court explained that "state law can be pre-empted in either of two general ways." *Id.*, at 248.

"If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. . . . If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Ibid.*

The reasoning of *Northern Natural* is that a state ratable-take rule is pre-empted if it invades the jurisdictional coverage of a statute that falls within the first category of the *Kerr-McGee* pre-emption test—statutes designed to "occupy a given field" to the exclusion of state regulation.

the supply of gas into three major categories: high-cost gas, new gas, and old gas. See Pierce, Natural Gas Regulation, Deregulation, and Contracts, 68 Va. L. Rev. 63, 87–89 (1982). It removed the wellhead sales of high-cost and new gas from the coverage of the NGA. NGPA § 601(a)(1)(B), 15 U. S. C. § 3431(a)(1)(B). It then established formulas for the gradual decontrol of the wellhead prices of such gas. See NGPA §§ 102(b), 103(b), 107(a), 15 U. S. C. §§ 3312(b), 3313(b), 3317(a). The wellhead price of high-cost gas was totally decontrolled in November 1979. See NGPA § 121(b), 15 U. S. C. § 3331(b); Pierce, *supra*, at 87–88. Ceilings continue to apply to the wellhead prices of old gas. See *id.*, at 88–89. Because gas from the Harper Sand Gas Pool qualifies as high-cost gas, the NGA no longer covers its wellhead price. Moreover, to the extent the NGPA ever controlled the wellhead prices of such gas, cf. *Public Service Comm'n of New York* v. *Mid-Louisiana Gas Co.*, 463 U. S. 319 (1983), those controls have long since been eliminated.[4] Therefore, *Northern Natural* does not govern this case. Rather, the issue is whether Mississippi's ratable-take rule stands as an obstacle to the full accomplishment of the NGPA's purpose. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 248 (1984).

The purpose of the NGPA with respect to high-cost gas is to eliminate governmental controls on the wellhead price

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[4] FERC's remaining jurisdiction to prevent interstate pipelines from fraudulently, abusively, or otherwise illegitimately passing on higher wellhead prices to ultimate consumers, see 15 U. S. C. § 3431(c)(2), does not include jurisdiction over wellhead price levels. Cf. *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 184 (1983) (state statute directly prohibiting interstate pipelines from passing on severance tax to consumers invades FERC's pass-on jurisdiction); *Maryland* v. *Louisiana*, 451 U. S. 725, 746–752 (1981) (state statute indirectly requiring interstate pipelines to pass on severance tax to consumers invades FERC's pass-on jurisdiction); *id.*, at 747, n. 22 (question whether tax conflicted with FERC's authority to control price of gas expressly reserved).

of such gas.[5] State regulation that interferes with this purpose is pre-empted. See *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U. S. 375, 384 (1983). State regulation that merely defines property rights or establishes contractual rules, however, does not interfere with this purpose. Markets depend upon such rules to function efficiently.

Ratable-take rules serve the twin interests of conservation and fair dealing by removing the incentive for "drainage." On its face, the ratable-take rule here is completely consistent with the free market determination of the wellhead price of high-cost gas. Like any compulsory unitization rule, it gives joint owners the incentive to price at the same level as a single owner. But it will not affect the spot market price of gas in any other way. It is similarly price neutral in the context of long-term contracting. The rule is merely one of a number of legal rules that regulates the contractual relations of parties in the State of Mississippi as in other States. The

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[5] The majority also mentions "supply" and "demand" as economic variables that Congress intended to decontrol. There is no support for this in the legislative history, and the use of these variables unnecessarily complicates and distorts the pre-emption analysis. The NGPA was concerned with supply only to the extent that price ceilings create shortages. The Court has always acknowledged that conservation of the supply of natural gas is traditionally a function of state power. See, *e. g.*, *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kansas*, 372 U. S. 84, 93 (1963). Thus, it has upheld the common state practice of placing ceilings, called "allowables," on the amount of gas that a particular well or pool may produce during a given period. See, *e. g.*, *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210 (1932). Such absolute restrictions on output have the potential of raising wellhead prices above competitive equilibrium. Ratable-take rules, by themselves, do not.

There is even less reason to infer a purpose to decontrol demand. To the extent central planners even have the power to control demand, their control is limited to the manipulation of output and price. Planners have no obvious control over individual preferences. It therefore makes little sense to consider "demand" to be an independent object of the NGPA's decontrol purpose.

Court, however, seems to equate Mississippi's rule requiring equitable dealing on the part of pipeline companies purchasing from common owners of gas pools as akin to a tax or a subsidy, both of which do tend to distort free market prices.

Unlike taxes or subsidies, however, rules regulating the conditions of contracts have only an attenuated effect on the operation of the free market. Their effect is often to promote the efficient operation of the market rather than to inhibit or distort it the way a tax or subsidy might. A ratable-take rule applied to a common pool eliminates the inefficiencies associated with the perverse incentives of common ownership of a gas pool. It is different from a rule that would require any out-of-state pipeline that purchases gas from one in-state pool of gas to purchase equal amounts from every other in-state pool. This latter type of rule might well burden interstate commerce or violate the free market purpose of the NGPA. But a ratable-take rule applied to a common pool promotes, rather than inhibits, the efficiency of a competitive market. Moreover, States have historically included ratable-take rules in developing the body of law applicable to natural gas extraction. See, *e. g., Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210, 233 (1932); *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179 (1950). One may agree that Congress wished to return to the free market determination of the price of high-cost gas without concluding that Mississippi's ratable-take rule frustrates that wish.

Rule 48 was promulgated by the Mississippi Board long before the enactment of the NGPA, and the fact that it had not previously been applied to this type of transaction affords no argument against its validity based on federal pre-emption. Indeed, the implication in the Court's opinion that a midstream expansion in the coverage of a state regulation justifies pre-emption if the party to whom the rule is applied claims disappointed expectations is nothing less than Contract Clause jurisprudence masquerading as pre-emption. A

party runs the risk of reasonably foreseeable applications of new principles of state law to its activities, see *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400 (1983), and that is the most that can be said to have happened here. The only reason the ratable-take rule has any adverse effect on Transco is that Transco entered supply contracts with the well operators that included "take-or-pay" obligations. The NGPA gives Transco no basis for insisting that state law be frozen as of the moment it entered the "take-or-pay" agreements, protecting it from the imposition of any additional correlative obligations to noncontracting owners.[6]

Because of my conclusion that Mississippi's ratable-take rule is not pre-empted, I also address appellant's contention that the rule violates the "dormant" Commerce Clause. The analysis is much the same as under the NGPA. Indeed, the implicit "free market" purpose of that Clause would seem to add little to the express congressional purpose to decontrol prices, which is the focus of the pre-emption analysis. Here the statute regulates evenhandedly to effectuate a legitimate local public interest—the interest in both fair dealing on the part of joint owners and conservation—and its effects on interstate commerce are incidental at most. The question of burden, therefore, is "one of degree," *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970).

In *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, *supra*, this Court held that ratable-take rules do not violate the dormant Commerce Clause because they do not place a significant burden on the out-of-state interests in a free market.

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[6] Nor does the ratable-take rule conflict with the NGPA's alleged uniformity or consumer protection purposes. While the congressional desire to *de*control prices uniformly throughout the Nation includes an intent to prevent States from enacting regulation to *re*control them, it does not imply an intent either to create an anarchistic regulatory gap free from property rights and contract rules, or to create a national law of contracts to govern natural gas relationships.

That analysis should control this case. Transco's interest in a free market is not significantly burdened because the ratable-take rule creates no discriminatory burden independent of Transco's supply contracts. The validity of a state rule should not depend on whether, in combination with private contracts, it contributes to a short-run burden. Similarly, enforcement of the ratable-take rule in combination with the take-or-pay obligations does not significantly burden the free-market interest of out-of-state natural gas consumers because the combination will have virtually no effect on consumer prices. High-cost gas makes up only a tiny fraction of the aggregate supply of natural gas. See Pierce, 68 Va. L. Rev., at 88, n. 98 (about 1%). Thus, any increased costs associated with it will tend to be a mere drop in the bucket. Moreover, the rule leaves pipelines free to minimize their losses by simply paying the contract owners their contractual due, and to pay no more than the current spot market price for any noncontract gas it takes. Therefore, enforcement of the rule is unlikely to affect the downstream price that consumers will pay in any significant way.

Nor was it unreasonable for Mississippi to enforce its ratable-take rule when a "ratable-production" rule might have been a less restrictive means of serving the State's legitimate conservation interest. The burden on interstate commerce imposed by the "ratable-take" rule is so minimal and attenuated that there is no occasion to inquire into the existence of a "less restrictive" means. Moreover, a "ratable-production" rule, as even appellant Transco agrees, would place greater administrative and enforcement burdens on the Mississippi regulatory authorities:

> "[A]n order directed to the purchaser of the gas rather than to the producer would seem to be the most feasible method of providing for ratable taking, because it is the purchaser alone who has a first-hand knowledge as to whether his takes from each of his connections in the field are such that production of the wells is ratable. An

order addressed simply to producers requiring each one to produce ratably with others with whose activities it is unfamiliar and over whose activities it has no control would create obvious administrative problems." *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kansas*, 372 U. S., at 100–101 (Harlan, J., dissenting) (footnotes omitted).

I believe that Mississippi's ratable-take rule as applied to high-cost gas offends neither FERC's jurisdiction, the applicable provisions of the NGPA, or the Commerce Clause. I would therefore affirm the judgment of the Supreme Court of Mississippi.

UNITED STATES *v.* LANE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-744. Argued October 9, 1985—Decided January 27, 1986*

James Lane and his son Dennis, respondents in No. 84-744, were indicted on counts for, *inter alia*, mail fraud in connection with insurance claims that were made and that insurers paid for fire damage to a restaurant and duplex that James had hired a professional arsonist to burn. The restaurant was operated by James in partnership with others. Count 1 charged James with mail fraud with regard to that fire. The duplex was owned by a different partnership, of which Dennis was one of the partners. Counts 2 through 4 charged both respondents with mail fraud related to the duplex fire. Count 5 charged both respondents with conspiracy to commit mail fraud in connection with a third arson scheme, and Count 6 charged Dennis with perjury before the grand jury. The Federal District Court denied respondents' pretrial motions for severance on the alleged ground that the charged offenses were misjoined in violation of Federal Rule of Criminal Procedure 8(b), which provides that two or more defendants may be charged in the same indictment if they are alleged to have participated "in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The trial then proceeded jointly before a jury. When evidence relating to the restaurant fire was admitted, the court instructed the jury not to consider that evidence against Dennis, and repeated this instruction in the final charge and admonished the jury to consider each count and defendant separately. The jury returned convictions on all counts. The Court of Appeals reversed and remanded for new trials, holding that the joinder of Count 1 with the other five counts violated Rule 8(b) and that such misjoinder was prejudicial *per se*. The court, however, rejected respondents' contention that there was insufficient evidence to support convictions under Counts 2 through 4 because each charged mailing occurred after each related insurance payment had been received and thus after each scheme to defraud had reached fruition.

Held:

1. Misjoinder under Rule 8(b) is subject to harmless-error analysis and is not reversible error *per se*. An error involving misjoinder "af-

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*Together with No. 84-963, *Lane et al.* v. *United States*, also on certiorari to the same court.

fects substantial rights" and requires retrial only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U. S. 750, 776. It is only by such a holding that Rule 8(b) and Federal Rule of Criminal Procedure 52(a)—which provides that any error "which does not affect substantial rights shall be disregarded"—can be brought into substantial harmony. Here, in the face of overwhelming evidence of guilt, the claimed error was harmless. The District Court provided proper limiting jury instructions, and, moreover, the same evidence on Count 1 would likely have been admissible on joint retrial of the other counts to show James' intent under Federal Rule of Evidence 404(b). Any error therefore failed to have any "substantial influence" on the verdict. Pp. 444–450.

2. There was sufficient evidence to support the convictions on Counts 2 through 4. On the evidence and under proper instructions, the jury could properly find that the mailings charged in Counts 2 and 3 took place while the overall scheme charged in the indictment was still continuing and that the scheme was not completed until after the mailing charged in Count 4, because that mailing, as were the others, was intended to "lull" the insurer into a false sense of security. Pp. 451–453.

735 F. 2d 799, affirmed in part, reversed in part, and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Part III of which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN, J., joined, *post*, p. 453. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 465.

Bruce N. Kuhlik argued the cause for the United States. With him on the briefs were former *Solicitor General Lee*, *Acting Solicitor General Fried*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Joel M. Gershowitz*.

Clifford W. Brown argued the cause for respondents in No. 84–744 and petitioners in No. 84–963. With him on the brief was *Robert Michael Brown*.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits as to whether a misjoinder under Rule 8 of the Federal

Rules of Criminal Procedure is subject to the harmless-error rule,[1] and to determine whether there is sufficient evidence in this case to support convictions for mail fraud under 18 U. S. C. § 1341.

I

A

James Lane and three partners opened the El Toro Restaurant in Amarillo, Texas, in the summer of 1978. The business never operated at a profit, however, and sales began to decline that fall. In November, Lane purchased fire insurance covering the building's contents and improvements and any related business losses. Simultaneously, he hired Sidney Heard, a professional arsonist, to burn the building in order to escape the lease and partnership. On February 27, 1979, Heard set a fire that caused smoke damage to the building's contents. Lane first settled with the insurer on the contents and improvements. He then submitted an income statement that falsely indicated the restaurant had operated at a profit. After the insurance adjuster mailed the statement to the insurer's headquarters, Lane settled his business interruption claim.

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[1] Six Circuits have adopted a *per se* approach holding that misjoinder is always reversible error. See *United States* v. *Turkette*, 632 F. 2d 896, 906, and n. 35 (CA1 1980), rev'd on other grounds, 452 U. S. 576 (1981); *United States* v. *Graci*, 504 F. 2d 411, 414 (CA3 1974); *United States* v. *Bova*, 493 F. 2d 33 (CA5 1974); *United States* v. *Bledsoe*, 674 F. 2d 647, 654, 657–658 (CA8), cert. denied *sub nom. Phillips* v. *United States*, 459 U. S. 1040 (1982); *United States* v. *Eagleston*, 417 F. 2d 11, 14 (CA10 1969); *United States* v. *Ellis*, 709 F. 2d 688, 690 (CA11 1983).

Six have subjected misjoinder claims to harmless-error analysis. See *United States* v. *Ajlouny*, 629 F. 2d 830, 843 (CA2 1980), cert. denied, 449 U. S. 1111 (1981); *United States* v. *Seidel*, 620 F. 2d 1006 (CA4 1980); *United States* v. *Hatcher*, 680 F. 2d 438, 442 (CA6 1982); *United States* v. *Varelli*, 407 F. 2d 735, 747–748 (CA7 1969); *United States* v. *Martin*, 567 F. 2d 849, 854 (CA9 1977); *Baker* v. *United States*, 131 U. S. App. D. C. 7, 21–23, 401 F. 2d 958, 972–974 (1968). Most of these courts had previously taken the view that misjoinder is prejudicial *per se*.

In early 1980, Lane again hired Heard to set fire to a duplex that Lane was moving to a vacant lot in Amarillo. Lane obtained a fire insurance policy on the building, listing the owner as L & L Properties, a partnership between his son Dennis Lane and Andrew Lawson. An accomplice of Heard's burned the duplex on May 1, 1980.

Thereafter, on three occasions Dennis Lane signed proof-of-loss claims for repairs and submitted them to an insurance adjuster, who issued drafts in return totaling $12,000.[2] Each time, the adjuster later mailed the proof-of-loss to the insurer's headquarters. The adjuster issued a final settlement draft for $12,250 on September 16, 1980. Two days later, he mailed a memorandum to headquarters explaining why repairs had exceeded previous estimates by some $10,000. He enclosed invoices supplied by Dennis Lane listing various materials and furniture purportedly purchased to repair and refurbish the duplex. In fact, these invoices had been fabricated by James Lane, Heard, and Heard's secretary.

The Lanes and Lawson met with Heard several weeks after the duplex fire to discuss a proposal to establish and burn a flower shop in Lubbock, Texas. Heard and Dennis Lane picked out a suitable building in July 1980, and an accomplice of Heard's, William Lankford, prepared ficticious invoices for merchandise and delivered some artificial flowers to the building later in August. In November, James Lane insured the contents for $50,000. Heard, however, was later arrested for an unrelated crime, and the planned arson never took place.

In March 1981, an Amarillo newspaper article connected Dennis Lane with a scheme to burn the flower shop with Heard; that same day, James Lane canceled the insurance policy. On May 12, 1981, Dennis Lane appeared before a

[2] Each proof-of-loss form stated that the "loss did not originate by any act, design or procurement on the part of your insured or this affiant" and that "no attempt to deceive [the] company as to the extent of the loss has been made."

federal grand jury investigating Heard. He testified that Heard had nothing to do with the flower shop or with his own dealings with Lankford.

B

James Lane and Dennis Lane were indicted in multiple counts for mail fraud in violation of 18 U. S. C. § 1341, conspiracy in violation of 18 U. S. C. § 371, and perjury in violation of 18 U. S. C. § 1623. Count 1 charged James Lane with mail fraud with regard to the El Toro Restaurant fire. Counts 2 through 4 charged both Lanes with mail fraud related to the duplex fire, and Count 5 charged them with conspiracy to commit mail fraud in connection with the flower shop arson plan. In Count 6, Dennis Lane was charged with perjury before the grand jury.

Prior to trial in the District Court for the Northern District of Texas, the Lanes filed motions for severance contending that the charged offenses were misjoined in violation of Federal Rule of Criminal Procedure 8(b), but the motions were denied and the trial proceeded jointly before a jury. When evidence relating to the El Toro Restaurant fire was admitted, the trial court instructed the jury not to consider that evidence against Dennis Lane. App. 21. The trial judge repeated this instruction in the final charge, together with an instruction regarding the separate consideration to be given each defendant and each count. *Ibid.* The Lanes renewed their severance motions at the end of the Government's evidence and at the close of all evidence, but the motions were again denied. The jury returned convictions on all counts.

On appeal, the Lanes argued that misjoinder under Rule 8(b) had occurred.[3] The Court of Appeals for the Fifth Cir-

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[3] Rule 8(b) provides:

"(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in

cuit concluded that Counts 2 through 6 were properly joined, but agreed "that Count 1 should not have been joined with the others because it was not part of the same series of acts or transactions as Counts 2 through 6." 735 F. 2d 799, 803–804 (1984). The court refused to consider the Government's argument that the error, if any, was harmless, stating only that "Rule 8(b) misjoinder is prejudicial *per se* in this circuit." *Id.*, at 806 (citing *United States* v. *Levine*, 546 F. 2d 658 (CA5 1977)). The court reversed the Lanes' convictions and remanded for new trials.

At the same time, the Court of Appeals rejected the Lanes' contention that there was insufficient evidence to support convictions for mail fraud under Counts 2 through 4 because each charged mailing occurred *after* each related payment had been received, and thus after each scheme had reached fruition.[4] The Court of Appeals distinguished our holding in *United States* v. *Maze*, 414 U. S. 395 (1974), and instead relied on *United States* v. *Sampson*, 371 U. S. 75 (1962), to hold that mailings occurring after receipt of an insurance payment may nevertheless be "in execution of fraud" as required by 18 U. S. C. § 1341 where they are "designed to lull the victims into a false sense of security and postpone investigation." 735 F. 2d, at 807–808.

The court found sufficient evidence for the properly instructed jury to "infer that the mailings were intended to and did have a lulling effect" because they helped persuade the insurer that "the claims were legitimate." *Id.*, at 808. It emphasized that had the proof-of-loss forms not been mailed shortly after issuance of the insurance drafts, the insurer might have been alerted to the possibility of a fraud. *Ibid.*

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one or more counts together or separately and all of the defendants need not be charged in each count."

[4] The Court of Appeals also rejected James Lane's challenge to the sufficiency of the evidence with regard to Count 1. That holding was not challenged in the Lanes' cross-petition.

Similarly, the false invoices submitted by Dennis Lane "gave the impression of a perfectly innocent claim." *Ibid.*

The Government's petition for rehearing was denied. 741 F. 2d 1381 (1984). We granted certiorari, 469 U. S. 1206 (1985). We reverse in part and affirm in part.

II

The Court of Appeals held that misjoinder "is inherently prejudicial."[5] 735 F. 2d, at 804. The Circuits are divided on the question whether misjoinder requires automatic reversal, or whether the harmless-error rule governs.[6] Most Circuits that have adopted the *per se* approach have relied on *McElroy* v. *United States*, 164 U. S. 76 (1896), where this Court applied the joinder statute then in force and reversed convictions of jointly tried defendants after rejecting the Government's argument that there was no showing of prejudice. *Id.*, at 81.

McElroy, however, was decided long before the adoption of Federal Rules of Criminal Procedure 8 and 52, and prior to the enactment of the "harmless error" statute, 28 U. S. C. § 2111, which provides that on appeal we are to ignore "errors or defects which do not affect the substantial rights of the parties." Under Rule 52(a), we are similarly instructed that any error "which does not affect substantial rights shall be disregarded."[7]

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[5] Although the Government continues to believe that Count 1 was properly joined with Counts 2 through 6, it does not challenge that holding here.

[6] See n. 1, *supra*.

[7] JUSTICE STEVENS' partial dissent argues that *McElroy* conclusively determined misjoinder is prejudicial *per se*, and that Rule 8 was intended to represent a restatement of existing law, including the "rule of the *McElroy* case." *Post*, at 467. Rule 8, however, is simply a procedural rule with certain technical requirements, and JUSTICE STEVENS' opinion refers to the Advisory Committee on Rules' citation of *McElroy*, see *post*, at 468, n. 3, making clear they were referring only to those *technical* requirements of prior law. Nowhere is there any indication Rule 8 was in-

The Court's holding in *Chapman* v. *California*, 386 U. S. 18 (1967), made a significant change in the law of harmless error. There, Justice Black, speaking for the Court, emphasized that even "some constitutional errors [may] be deemed harmless, not requiring the automatic reversal of the conviction." *Id.*, at 22. In rejecting the automatic reversal rule, the Court stated:

> "We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. . . . *We decline to adopt any such rule.*" *Id.*, at 21–22 (emphasis added).

Justice Black went on to note that all 50 States follow the harmless-error approach, and

> "the United States long ago through its Congress established . . . the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' 28 U. S. C. §2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules." *Id.*, at 22 (footnote omitted).

Since *Chapman*, we have "consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *United States* v. *Hasting*, 461 U. S. 499, 509 (1983). In *Hasting*, we again emphasized that

> "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial." *Id.*, at 508–509.

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tended to enshrine any substantive "principle" of *McElroy* that misjoinder requires reversal, nor is there any citation of *McElroy*'s specific holding.

In this case, the argument for applying harmless-error analysis is even stronger because the specific joinder standards of Rule 8 are not themselves of constitutional magnitude.[8] Clearly, *Chapman* and *Hasting* dictate that the harmless-error rule governs here.[9]

The applicability of harmless error to misjoinder also follows from *Kotteakos* v. *United States*, 328 U. S. 750 (1946), a case similar to the one at hand. There, some 32 defendants were charged with one conspiracy, when in fact there had been at least eight separate conspiracies. Nineteen defendants were jointly tried, and seven were convicted. The Court applied the harmless-error statute to an error resulting from a variance from the indictment, and held the error was not harmless in that case. Emphasizing the numerous conspiracies involving unrelated defendants, as well as seriously flawed jury instructions, the *Kotteakos* Court reversed the convictions in light of each of the 32 defendants' "right not to be tried *en masse* for the conglomeration of distinct and separate offenses" involved. *Id.*, at 775.

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[8] Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.

[9] JUSTICE STEVENS' partial dissent suggests *Chapman* is irrelevant to our analysis because that case involved a *constitutional* violation, whereas the error here is of a nonconstitutional nature. *Post*, at 472. It is difficult to see any logic in the argument that although the harmless-error rule may be applicable to *constitutional* violations, it should not be applied to violations of mere procedural rules. JUSTICE STEVENS recognizes that the standard for harmless-error analysis adopted in *Chapman* concerning constitutional errors is considerably more onerous than the standard for nonconstitutional errors adopted in *Kotteakos* v. *United States*, 328 U. S. 750 (1946). See *post*, at 472–473, n. 11. The heightened regard we have for constitutional protections surely warrants a conclusion that nonconstitutional provisions must be treated at least comparably, and in *Hasting* we emphasized even "most constitutional violations" must be ignored if they are harmless. 461 U. S., at 509.

Although the Court's review in that case was from the perspective of a variance from the indictment, rather than misjoinder, the Court recognized that misjoinder was implicated, and suggested that the harmless-error rule could similarly apply in that context.[10] *Id.*, at 774–775.

A holding directly involving misjoinder again indicated the harmless-error rule should apply. In *Schaffer* v. *United States*, 362 U. S. 511 (1960), three different groups of defendants were charged with participating in separate criminal acts with one other group of three defendants. The indictment also charged all the defendants with one overall count of conspiracy, making joinder under Rule 8 proper. At the close of the Government's case, however, the District Court concluded there was insufficient evidence of conspiracy and dismissed that count. The court then denied a motion for severance after concluding that defendants failed to show prejudice from the joint trial; the Court of Appeals affirmed. This Court recognized that "the charge which originally justified joinder turn[ed] out to lack the support of sufficient evidence." *Id.*, at 516. Essentially, at that point in the trial, there was a clear error of misjoinder under Rule 8 standards. Nevertheless, the *Schaffer* Court held that once the Rule 8 requirements were met by the allegations in the indictment, severance thereafter is controlled entirely by Federal Rule of Criminal Procedure 14, which requires a showing of prejudice. *Id.*, at 515–516. The Court then affirmed the finding of no prejudice. Although the Court did not reach the harmless-error rule because Rule 8(b) had initially been satisfied, the Court's language surely assumed the rule was applicable.

A plain reading of these cases shows they dictate our holding. Applying the 1919 statute treated in *Kotteakos*, which

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[10] The Court pointed out that "the problem is not merely one of variance . . . but is also essentially one of proper joinder." 328 U. S., at 774. Even so, the Court indicated the harmless-error rule must apply, although perhaps with "restraint." *Id.*, at 775.

governed only "technical errors," 28 U. S. C. § 391 (1946 ed.), the Court emphasized the clear intent of Congress "was simple: To substitute judgment for automatic application of rules." 328 U. S., at 759–760. "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations." *Id.*, at 762. The Court flatly rejected *per se* rules regarding particular errors because "any attempt to create a generalized presumption to apply in all cases would be contrary not only to the spirit of [the statute] but also to the expressed intent of its legislative sponsors." *Id.*, at 765.

Schaffer discussed the current harmless-error statute, which was enacted in 1949 after *Kotteakos* and deleted the qualifying word "technical" regarding errors governed by the rule. See 28 U. S. C. § 2111. The Court again rejected any *per se* rule for joinder errors requiring reversal, refusing to "fashion a hard-and-fast formula that . . . [the] joinder [wa]s error as a matter of law." 362 U. S., at 516. Citing *Kotteakos*, the Court pointed out that there "[t]he dissent agreed that the test of injury resulting from joinder 'depends on the special circumstances of each case.'" 362 U. S., at 517 (quoting 328 U. S., at 777 (Douglas, J., dissenting)).[11]

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[11] Contrary to these clear holdings, JUSTICE STEVENS' partial dissent advocates a rule-by-rule review establishing bright-line *per se* rules whether to conduct harmless-error analysis. *Post*, at 472–474. But on its face, Rule 52(a) admits of no broad exceptions to its applicability. Any assumption that once a "substantial right" is implicated it is inherently "affected" by any error begs the question raised by Rule 52(a). Assuming there is a "substantial right," the inquiry remains whether the error "affects substantial rights" requiring reversal of a conviction. That kind of inquiry requires a review of the entire record. See *United States* v. *Hasting*, 461 U. S., at 509. It is simply too late in the day to argue that Congress intended to incorporate any *per se* rule of *McElroy* for misjoinder following *Kotteakos*, the subsequent enactment of an arguably broader statute, and this Court's prejudice inquiry in *Schaffer*.

In common with other courts, the Court has long recognized that joint trials "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." *Bruton* v. *United States*, 391 U. S. 123, 134 (1968). Rule 8 accommodates these interests while protecting against prejudicial joinder. But we do not read Rule 8 to mean that prejudice results *whenever* its requirements have not been satisfied.

Under Rule 52(a), the harmless-error rule focuses on whether the error "affect[ed] substantial rights." In *Kotteakos* the Court construed a harmless-error statute with similar language, and observed:

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U. S., at 765.

Invoking the *Kotteakos* test, we hold that an error involving misjoinder "affects substantial rights" and requires reversal only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." *Id.*, at 776. Only by so holding can we bring Rules 8 and 52(a) "into substantial harmony, not into square conflict."[12] *Id.*, at 775.

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[12] Respondents argue that application of the harmless-error rule to Rule 8(b) misjoinder will eviscerate Rule 14, which provides the trial court with discretion to grant a severance even if the joinder is proper under Rule 8 when it believes the defendants or the Government may be prejudiced by a joinder. We see no conflict with our holding and the applicability of Rule 14. Rule 14's concern is to provide the trial court with some flexibility when a joint trial may appear to risk prejudice to a party; review of that decision is for an abuse of discretion. Rule 8(b), however, requires the granting of a motion for severance unless its standards are met, even in the absence of prejudice; review on appeal is for an error of law. Applying the harmless-error rule to Rule 8(b) misjoinder simply goes to the additional question whether the error requires setting aside the convictions. We

Of course, "we are not required to review records to evaluate a harmless-error claim, and do so sparingly, [but] we plainly have the authority to do so." *United States* v. *Hasting*, 461 U. S., at 510 (footnote omitted).

In the face of overwhelming evidence of guilt shown here, we are satisfied that the claimed error was harmless. When evidence on misjoined Count 1 was introduced, the District Court provided a proper limiting instruction, and in the final charge repeated that instruction and admonished the jury to consider each count and defendant separately. Moreover, the same evidence on Count 1 would likely have been admissible on joint retrial of Counts 2 through 6 to show James Lane's intent under Federal Rule of Evidence 404(b). Any error therefore failed to have any "substantial influence" on the verdict. *Kotteakos, supra,* at 765.[13]

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need not decide whether the degree of prejudice necessary to support a Rule 14 motion for severance is identical to that necessary to require reversal for a Rule 8(b) error.

JUSTICE STEVENS' partial dissent fails to recognize that the Rule 14 prejudice component involves a different inquiry from the Rule 8 technical requirements. Indeed, the express language of Rule 14, as well as the Advisory Committee Note, shows that Congress tolerates some Rule 8 joinders even when there is prejudice. The first hurdle in obtaining a severance under Rule 14 is a showing of prejudice, and if shown, it remains in the district court's discretion whether to grant the motion.

[13] We can agree with JUSTICE STEVENS' partial dissent "that the harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry." *Post*, at 476; our reliance on the *Kotteakos* test makes that clear. See *supra*, at 449. But that does not in any sense mean that overwhelming evidence of guilt is irrelevant; the threshold of overwhelming evidence is far higher than mere sufficiency to uphold conviction.

Nor may proper limiting instructions or jury charges never be "an adequate response" to a prejudice inquiry. *Post*, at 477. Contrary to the suggestion of the dissent, *Blumenthal* v. *United States*, 332 U. S. 539 (1947), provides direct support for the Court's approach in this case. There the Court recognized that, *in the context of mass trials* (as in *Kotteakos*), limiting instructions on evidence admissible only as to one defendant might in some circumstances be inadequate to prevent prejudice. *Id.*,

III

Respondents challenge the sufficiency of the evidence to sustain their convictions. To find a violation of the mail fraud statute, 18 U. S. C. § 1341,[14] the charged "mailings" must be "for the purpose of executing the scheme." *Kann* v. *United States*, 323 U. S. 88, 94 (1944). Mailings occurring after receipt of the goods obtained by fraud are within the statute if they "were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the

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at 559–560. But here, as in *Blumenthal*, we are not faced with any trial en masse of numerous defendants and unrelated crimes.

When there are few defendants and the trial court is aware of the potential for prejudice, "the risk of transference of guilt over the border of admissibility [may be] reduced to the minimum" by carefully crafted limiting instructions with a strict charge to consider the guilt or innocence of each defendant independently. *Id.*, at 560. We cannot necessarily "assume that the jury misunderstood or disobeyed" such instructions. *Id.*, at 553. Indeed, this Court's conclusion in *Schaffer* that defendants failed to show prejudice was based directly on the fact that "the judge was acutely aware of the possibility of prejudice and was strict in his charge—not only as to the testimony the jury was not to consider, but also as to that evidence which was available in the consideration of the guilt of each [defendant] separately under the respective substantive counts." 362 U. S., at 516.

The same caution was exercised by the trial judge here, and no different result should be required. The Government initially observes that because of the similarity of each arson scheme, "only the court of appeals' narrow reading of Rule 8" led to its finding of misjoinder. At trial, Heard and Lankford—two principal actors—testified against both Lanes, who relied essentially on denials or character defenses. Moreover, the evidence as to Count 1 was distinct and easily segregated from evidence relating to Counts 2 through 6. The misjoinder error, if any, in these circumstances was harmless.

[14] The statute provides in relevant part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . for the purpose of executing such scheme or artifice . . . , places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *United States* v. *Maze*, 414 U. S., at 403. See *United States* v. *Sampson*, 371 U. S. 75 (1962).

Only Counts 2 through 4, involving the duplex fire, are at issue. The Lanes argue that each mailing occurred after irrevocable receipt of the related payment, and thus after each scheme to defraud came to fruition.[15] This argument misconstrues the nature of the indictment, which charged an overall scheme to defraud based on the events surrounding the duplex fire. Counts 2 through 4 merely relate to separate mailings concerning partial payments that were a part of the whole scheme. The jury could properly find the scheme, at the earliest, was not completed until receipt of the last payment on September 16, 1980, which finally settled their claim. Hence, the mailings charged in Counts 2 and 3 clearly took place while the scheme was still continuing.

Moreover, the jury could reasonably have found that the scheme was not completed until the final mailing on September 18, 1980, charged in Count 4, because that mailing was intended (as were the two earlier ones) to "lull" the insurer into a false sense of security.[16] The jury was properly in-

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[15] The Government contends that undisputed testimony shows the insurance drafts issued to the Lanes, unlike normal business checks, were not payable on demand but only upon authorization from the insurer's home office when they arrived at the insurer's bank for collection. If the drafts deposited by the Lanes had been dishonored by the insurer's banks, the amounts would have been charged against their account. The Lanes, therefore, may not have irrevocably received the proceeds of the fraud prior to the final mailing. See Brief for United States 30–31. The Court of Appeals, however, did not rely on this argument, and we decline to resolve this factual issue here.

[16] Our conclusion that the delayed mailings at issue in this case were part of an ongoing scheme to defraud is in accord with our holding in *United States* v. *Sampson*, 371 U. S. 75 (1962). In that case, defendants purported to help businessmen obtain loans or sell their businesses in exchange for an "advance fee." *Id.*, at 77. Following the deposit of checks for these fees, the defendants' plan called for the mailing of a form letter assuring the victims of the fraud that they were receiving the services they

structed that each charged mailing must have been made both "for the purpose of executing the scheme to defraud," App. 22, and *prior* to the scheme's completion, *id.*, at 23, and further that mailings "which facilitate concealment of the scheme" are covered by the statute.[17] *Id.*, at 24.

The judgment of the Court of Appeals, ordering a new trial based on misjoinder of Count 1 with Counts 2 through 6, is reversed in part and affirmed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, joined by JUSTICE BLACKMUN, concurring in part and dissenting in part.

I agree that the evidence was sufficient to sustain the mail fraud convictions and therefore join Part III of the Court's

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paid for. *Id.*, at 78. The Court upheld defendants' convictions for mail fraud because of the "lulling effect" of the delayed mailings.

We see no conflict with our holding in *United States* v. *Maze*, 414 U. S. 395 (1974). There, use of a stolen credit card led to the mailing of charge statements to a bank. We held that the fraud was completed upon the defrauder's receipt of the goods, distinguishing *Sampson* because the mailing of the charge slips, rather than acting to "lull" the bank into acquiescence, instead "increased the probability that [the defrauder] would be detected and apprehended." 414 U. S., at 403. Had the Lanes failed to submit timely proof-of-loss forms here, the insurer might very well have discovered the fraud.

The Lanes contend that the Fifth Circuit's decision in this case also conflicts with *United States* v. *Ledesma*, 632 F. 2d 670 (CA7), cert. denied, 449 U. S. 998 (1980), which reversed a conviction involving the mailing of a fraudulent proof-of-loss form after receipt of insurance proceeds. In that case, however, the Seventh Circuit never discussed *Sampson* or the possibility that the delayed mailing had any "lulling" effect.

[17] The Lanes argue that the Government must show that the charged mailings were specifically intended to lull, rather than showing simply a general intention on their part to defraud, in order to come within *Sampson*'s holding. We need not determine whether any such specific intent must be shown, as we agree with the Court of Appeals that there was sufficient evidence for the jury to infer specific intent to lull here under these instructions, which the Lanes did not challenge on appeal or in their cross-petition.

opinion. I also agree that the Court of Appeals erred in holding that misjoinder under Rule 8 of the Federal Rules of Criminal Procedure is prejudicial *per se*. I write separately, however, because my reasons for reaching this conclusion differ from the Court's, and because I agree with JUSTICE STEVENS that the harmless-error inquiry should be made in the first instance by the Court of Appeals.

I

The Act of February 26, 1919 (1919 Act), 40 Stat. 1181, amended § 269 of the Judicial Code. It provided in part:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 28 U. S. C. § 391 (1925–1926 ed.).

In 1949, this provision was reenacted in its current form as 28 U. S. C. § 2111, and now instructs appellate courts to "give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." The 1919 Act was also incorporated in the Federal Rules of Criminal Procedure, and Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also, Fed. Rule Civ. Proc. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"). Although § 2111 and Rule 52(a) refer to "errors or defects" without the qualifying word "technical," this change did not alter the substantive legal test. See H. R. Rep. No. 352, 81st Cong., 1st Sess., 18 (1949) (§ 2111 "[i]ncorporates" former harmless-error statute); Advisory Committee's

Notes on Fed. Rule Crim. Proc. 52(a), 18 U. S. C. App., p. 657 (Rule is a "restatement of existing law").

The 1919 Act, § 2111, and Rule 52(a) all provide that an error is to be disregarded unless it "affects the substantial rights of the parties." This litigation thus presents a straightforward question of statutory construction: what does the phrase "affects the substantial rights of the parties" mean? Respondents in No. 84-744 contend that the term "substantial rights" refers to a particular class of rights which are essential to a fair trial and argue that errors which "affect" these rights cannot be disregarded on appeal. According to respondents, the 1919 Act, as reenacted in § 2111 and Rule 52(a), incorporated our holding in *McElroy* v. *United States*, 164 U. S. 76 (1896), that joinder is one of these "substantial rights," so that misjoinder is *per se* reversible.

For the reasons which follow, I conclude that the question whether a particular error "affects the substantial rights of the parties" does not entail a process of classification, whereby some rights are deemed "substantial" and errors affecting these rights are automatically reversible. Rather, an error "affects substantial rights" only if it casts doubt on the outcome of the proceeding. In other words, subject to the exceptions discussed in Part II (most importantly the exception for constitutional errors), I read § 2111 and Rule 52(a) to require harmless-error inquiry for all procedural errors. As none of these exceptions is applicable to misjoinder in violation of Rule 8, I concur in the Court's result on this issue.

Reference to whether error "affected the substantial rights of the parties" was not invented by Congress in 1919. The phrase was commonly used by courts throughout the 19th century to express the conclusion that particular claims of error did or did not warrant reversal. However, as used by these courts, error which "affected the substantial rights of the parties" was generally understood to refer, not to errors respecting a particular class of rights, but rather to any error which affected the fairness of the trial as a whole by calling

into question the reliability of the result. See, *e. g.*, *Connors* v. *United States*, 158 U. S. 408, 411, 414 (1895); *Maish* v. *Arizona*, 164 U. S. 599, 602 (1896); *Williams* v. *United States*, 168 U. S. 382, 390–398 (1897); *American Surety Co.* v. *Pauly*, 170 U. S. 133, 159 (1898); *McCabe & Steen Constr. Co.* v. *Wilson*, 209 U. S. 275, 279 (1908); *Holmgren* v. *United States*, 217 U. S. 509, 523–524 (1910). In other words, the statement that an error did not "affect the substantial rights of the parties" was a way of stating the conclusion that the error was not prejudicial.

A careful reading of *McElroy* demonstrates that it is consistent with this understanding of the phrase "affects the substantial rights of the parties." In *McElroy*, five defendants were charged in two indictments with separate assaults and in a third indictment with arson. Three of the defendants were also charged in yet a fourth indictment with another assault. After explaining these charges, the Court noted that "it is the settled rule . . . to confine the indictment to one distinct offence or restrict the evidence to one transaction" because "[i]n cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defence, or to prejudice him as to his challenges . . . ." 164 U. S., at 80. The Court then stated: "Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error." *Ibid.* In context, this merely restates the common-law understanding that an error is reversible if it prejudices the defendant. The Court did not state that joinder is a "substantial right" and, for this reason, any error respecting joinder is reversible. Rather, the Court held that "[i]t cannot be said in [a case of improper joinder] that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions." *Id.*, at 81. In other words, the

Court concluded that misjoinder is the kind of error which must be presumed to have prejudiced the accused and, for *that* reason, misjoinder affects his "substantial rights." As discussed in Part II, the irrebuttable presumption that misjoinder is prejudicial is inconsistent with the Court's subsequent harmless-error jurisprudence and can be overruled. For the moment, however, it is important only to note that nothing in *McElroy* suggests that the requirement that error have "affect[ed] the substantial rights of the parties" refers to anything other than that the error have been prejudicial.

Absent some contrary indication, then, it would seem logical to conclude that when Congress used the phrase "affect[s] the substantial rights of the parties" in the 1919 Act, Congress meant to require an inquiry into whether an error cast doubt on the verdict, not to create a class of rights as to which error was *per se* reversible. The legislative history of the 1919 Act confirms that this was in fact what Congress intended.

The primary impetus for the enactment of the 1919 Act was the practice in some jurisdictions of reversing convictions on appeal for any procedural error at trial, without regard to whether the error was prejudicial. See *Kotteakos* v. *United States*, 328 U. S. 750, 758–759 (1946). There was also concern over the inconsistent application of harmless-error analysis by other courts, this Court in particular. See H. R. Rep. No. 913, 65th Cong., 3d Sess., 2 (1919) (quoting H. R. Rep. No. 611, 62d Cong., 2d Sess., 2 (1912)). The large number of reversals which resulted from failure to scrutinize errors for their prejudicial effect was criticized by leaders of the legal profession, including Taft, Pound, Wigmore, and Hadley. See *Kotteakos*, *supra*, at 758–759. After prolonged consideration, Congress responded to this criticism by passing the 1919 Act. The House Report accompanying the Act explained:

> "'It is the purpose of the . . . bill to enact, in so far as the appellate courts are concerned, that in the consideration

in an appellate court of a writ of error or an appeal judgment shall be rendered upon the merits without permitting reversals for technical defects in the procedure below and *without presuming that any error which may appear had been of necessity prejudicial to the complaining party*.'" H. R. Rep. No. 913, *supra*, at 2 (quoting H. R. Rep. No. 611, *supra*, at 2) (emphasis added).

The theme that reversal be limited to prejudicial errors is found throughout the legislative history. For example, the Report accompanying the first version of the bill to pass the House of Representatives explained the meaning of the requirement that error be disregarded unless it "affect[s] the substantial rights of the parties" by quoting from an article by President Taft: "'No judgment of the court below should be reversed except for an error which the court, after hearing *[sic]* the entire evidence, can affirmatively say would have led to a different verdict.'" H. R. Rep. No. 1949, 61st Cong., 3d Sess., 1 (1911) (quoting Taft, The Administration of Criminal Law, 15 Yale L. J. 1, 16 (1905)). The Report criticized the practice of reversing judgments for errors which "did not in the least affect the substantial rights of the parties, *the real merits of the case having been properly adjudicated upon the first trial*." H. R. Rep. No. 1949, *supra*, at 2 (emphasis added). See also, *ibid.* (quoting Justice O'Gorman of the New York Supreme Court to the effect that "[o]ne of the gravest faults with our present mode of trial is the ease and frequency with which judgments are reversed on technicalities which do not affect the merits of the case, and which at no stage of the case have affected the merits"); H. R. Rep. No. 1218, 63d Cong., 3d Sess. (1914); H. R. Rep. No. 264, 64th Cong., 1st Sess. (1916).

Our decision in *Kotteakos* v. *United States*, *supra*, forecloses any remaining questions as to the interpretation of the phrase "affects substantial rights of the parties." In *Kotteakos*, we expressly rejected the argument that the 1919 Act required a determination of "what are only technical,

what substantial rights; and what really affects the latter hurtfully." 328 U. S., at 761. We held instead that the Act's command to disregard errors unless they "affect the substantial rights of the parties" was a command not to overturn a conviction unless, after examining the record as a whole, the court concludes that an error may have had "substantial influence" on the outcome of the proceeding. *Id.*, at 765. Justice Rutledge's explanation, which includes a description of the proper analysis to apply in evaluating the effect of procedural errors, is well worth repeating:

> "It comes down on its face to a very plain admonition: 'Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.' . . .
>
> "Easier was the command to make than it has been always to observe. This, in part because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.
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> . . . . .
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> "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance

for decision on the case as a whole, are material factors in judgment.

. . . . .

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.*, at 760–765 (citations and footnotes omitted).[1]

II

This interpretation of § 2111 and Rule 52(a) as requiring examination of the prejudicial effect of all procedural errors is subject to several exceptions. First, and most importantly, constitutional errors are governed by the Due Process Clauses of the Fifth and Fourteenth Amendments rather than by § 2111 and Rule 52(a). See *Chapman* v. *California*, 386 U. S. 18 (1967); *United States* v. *Hasting*, 461 U. S. 499 (1983). Thus, the test for harmless constitutional error is stricter than its statutory counterpart. Compare, *Chapman*, *supra*, at 24 (prosecution must establish that the error

[1] It scarcely needs repeating that, since correction may come from the legislature, considerations of *stare decisis* are at their strongest when this Court confronts its previous constructions of a statute. Cf. *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–407 (1932) (Brandeis, J., dissenting).

was "harmless beyond a reasonable doubt"), with *Kotteakos*, 328 U. S., at 765 (error is harmless unless it had "substantial influence" on the outcome or leaves one in "grave doubt" as to whether it had such effect).[2] In addition, Congress may, of course, expressly provide that a particular right is excluded from the operation of the harmless-error rule. Neither of these exceptions applies to misjoinder in violation of Rule 8, however. Misjoinder does not ordinarily rise to the level of a constitutional violation,[3] and nothing in the language or

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[2] Until *Chapman* v. *California*, 386 U. S. 18 (1967), harmless-error analysis was considered inapplicable to errors respecting constitutional rights. See *id.*, at 42–44 (Stewart, J., concurring in result) ("in a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless'" (citing and discussing examples)); see also, *Kotteakos*, 328 U. S., at 764–765, and n. 19. In *Chapman*, we altered this practice and held that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." 386 U. S., at 22. Although we have since held that the *Chapman* harmless-error test applies to "most constitutional violations," *United States* v. *Hasting*, 461 U. S., at 509, harmless-error analysis remains inapplicable to many constitutional rights. *E. g.*, *Vasquez* v. *Hillery*, *ante*, p. 254 (discrimination in grand jury selection); *Connecticut* v. *Johnson*, 460 U. S. 73, 84–88 (1983) (opinion of BLACKMUN, J.) (*Sandstrom* violation); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (right to counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (right to impartial tribunal).

Because the source and nature of the harmless-error test for constitutional errors does not derive from § 2111 or Rule 52(a), our cases concerning constitutional errors do not affect, and are not affected by, our decision today, which applies only to the statutory harmless-error doctrine.

[3] But cf. *Bruton* v. *United States*, 391 U. S. 123 (1968). It is also possible that a particular case of misjoinder may be so egregious as to constitute a deprivation of due process. If this were the case, the error would be governed by *Chapman* rather than by § 2111 or Rule 52(a). See n. 4, *infra*. Of course, a joinder of claims or parties that was so improper as to violate the Due Process Clause would undoubtedly also be prejudicial.

history of either the statutory harmless-error provisions or Rule 8 indicates that Congress chose to except misjoinder from harmless-error scrutiny.[4]

JUSTICE STEVENS' partial dissent recognizes two further exceptions: (1) "when an independent value besides reliability of the outcome suggests that [harmless-error] analysis is inappropriate," and (2) "when the harmlessness of the error cannot be measured with precision." *Post*, at 474. Although the cases he cites to support these additional exceptions involved constitutional errors, JUSTICE STEVENS may well be correct in asserting that they also apply to errors governed by the statutory harmless-error provisions. I need not decide that question to conclude, as does JUSTICE STEVENS, that—like the first two exceptions—neither applies to misjoinder.

The applicability of the exception to protect values other than reliability is easily disposed of. Rules respecting joinder are based on recognition that the multiplication of charges or defendants may confuse the jury and lead to inferences of habitual criminality or guilt by association. *McElroy*, 164 U. S., at 80. Apart from this, however, joinder rules do not serve "an independent value besides reliability of the outcome" justifying an exception to the harmless-error principle. Surely it cannot be maintained that misjoinder affects a right so fundamental to a fair trial that it "'infect[s] the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained.'" *Post*, at 474, n. 15 (quoting *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (STEVENS, J., dissenting)).

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[4] As explained above, the 1919 Act was not intended to codify a rule of *per se* reversal for particular rights, much less for misjoinder. Similarly, as the majority points out, nothing in the legislative history of Rule 8 indicates an intent to do anything more then set forth the technical requirements for and limitations on the joinder of claims or defendants. *Ante*, at 444–445, n. 7.

The exception for errors as to which the prejudicial effect cannot be measured with precision requires closer consideration. As previously noted, *McElroy* held that misjoinder is *per se* reversible because a court can never safely conclude that it was not prejudicial. 164 U. S., at 81. However, trial courts routinely inquire into possible prejudice from joint trials when considering motions for severance under Federal Rule of Criminal Procedure 14, and appellate courts just as routinely perform that inquiry in reviewing Rule 14 rulings.[5] To be sure, problems of jury confusion arising from misjoinder may be substantial. It is also quite easy for the jury to be prejudiced by evidence of other crimes or by inferences from an accused's association with other defendants. Thus, it may be that, once the proper test for harmless error is applied, most misjoinders will in fact result in reversal. However, the prejudice that may result from misjoinder is not so difficult to ascertain that it must always be presumed to be present. Whatever force the holding in *McElroy* may once have had, its precedential force has been greatly eroded by the 1919 Act, whose legislative history disapproves of such presumptions, *supra*, at 457–458, and by subsequent decisions such as *Kotteakos*.[6] Today, adherence to the view that misjoinder is *per se* prejudicial would stand out as a stark and unjustified anomaly, leading to just the sort of unnecessary reversals that inspired enactment of the

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[5] The Court correctly notes in its opinion, see *ante*, at 449–450, n. 12, that while the nature of the inquiry under Rules 8 and 14 is similar, the purposes and scope of these Rules are different.

[6] *Kotteakos* rejected the argument that variance between the indictment and proof at trial should be *per se* reversible because such errors "naturally" result in prejudice. Relying on the legislative history of the harmless-error rule, the Court concluded that such presumptions should not lightly be inferred. "The only permissible presumption," the Court said, "would seem to be particular, arising from the nature of the error and 'its natural effect' for or against prejudice in the particular setting." 328 U. S., at 765–766.

1919 Act. To the extent that *McElroy* states a contrary holding, I would overrule it.

III

The Court goes on to resolve the harmless-error question. I respectfully dissent. To begin with, I agree with JUSTICE STEVENS that "[u]ndertaking a harmless-error analysis is perhaps the least useful function that this Court can perform." *Post*, at 476. See *United States* v. *Hasting*, 461 U. S., at 520, n. 2 (opinion of BRENNAN, J.); see also, *Connecticut* v. *Johnson*, 460 U. S. 73, 102 (1983) (POWELL, J., dissenting). Having concluded that a harmless-error inquiry is required, I, like JUSTICE STEVENS, think we should remand to the Court of Appeals, which is in a better position than we are to study the complete trial record with care.

Moreover, it is apparent that the Court's perfunctory effort to evaluate the effect of this error is inadequate. The Court tells us simply that the error is harmless "[i]n the face of overwhelming evidence of guilt shown here . . . ." *Ante*, at 450. But where is the "examination of the proceedings in their entirety" called for by *Kotteakos?* See 328 U. S., at 762. *Kotteakos* instructs the reviewing court to "ponde[r] all that happened without stripping the erroneous action from the whole," and expressly states that "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Id.*, at 765. Obviously, the existence of overwhelming evidence is relevant to determining the "effect the error had or reasonably may be taken to have had upon the jury's decision." *Id.*, at 764. But I would have thought it equally obvious that, at the very least, consideration of the magnitude of the error in the context of the trial would also be called for; this the Court has not done. The Court also tells us that the error was harmless because the same evidence "would likely have been admissible" at a joint retrial of the defendants without the improper count. *Ante*, at 450. However, as I thought

Kotteakos made clear, that is irrelevant. The crucial thing is the effect the error had in the proceedings which actually took place, not whether the same thing could have been done in hypothetical proceedings. See 328 U. S., at 762–765. Harmless-error analysis is not an excuse for overlooking error because the reviewing court is itself convinced of the defendant's guilt. The determination of guilt is for the jury to make, and the reviewing court is concerned solely with whether the error may have had a "substantial effect" upon that body.

Justice Traynor of the California Supreme Court wrote that "the evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex." R. Traynor, The Riddle of Harmless Error 80 (1970). It is a task this Court is manifestly ill-equipped to undertake. See *United States* v. *Hasting*, *supra*, at 516–518 (STEVENS, J., concurring in judgment). I would remand the case for the Court of Appeals to undertake the task.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

> "Harmless Error. Any error, defect, irregularity or variance which *does not affect substantial rights* shall be disregarded." (Emphasis added.)

The question presented in No. 84–744 is whether a misjoinder of defendants prohibited by Rule 8(b) is an error which affects substantial rights.[1] In my opinion, the Court

[1] Rule 8(b) of the Federal Rules of Criminal Procedure provides: "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

has answered that question incorrectly; moreover, its opinion unfortunately confuses rather than clarifies the law of "harmless error."

I

Our central task is, of course, to construe Rule 8(b) of the Federal Rules of Criminal Procedure. Thus, we must consider the history, purpose, and language of that Rule.

Prior to the adoption of the Federal Rules of Criminal Procedure, this Court decided that the misjoinder of defendants, as well as the misjoinder of offenses, was an error that deprived the accused of "a substantial right." *McElroy* v. *United States*, 164 U. S. 76, 80 (1896). *McElroy* concerned both kinds of misjoinder. Five defendants were charged with offenses committed on April 16, 1894, and May 1, 1894, but only three of them were charged with a separate offense committed on April 16, 1894. The two defendants who were not charged with the separate offense made essentially the same objection to their joint trial as did Dennis Lane in this case. As to those two defendants, the Government confessed error and the Court unanimously reversed and remanded for a new trial.[2] As to the other three defendants,

[2] "It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried.

. . . . .

"It is admitted by the government that the judgments against Stufflebeam and Charles Hook must be reversed . . . ." 164 U. S., at 80.

In confessing error, the Government seemed to concede that reversal was appropriate without any specific showing of prejudice. See Brief for United States in *McElroy* v. *United States*, O. T. 1896, No. 402, p. 6 ("It cannot be certainly affirmed that Stufflebeam and Charles Hook were not embarrassed and prejudiced, in their defense to the indictments under which they stood charged, by the fact that they were compelled to make their defense in a proceeding in which McElroy, Bland, and Hook were prosecuted for arson committed April 16, 1894, which was on the same day of the assaults and fifteen days before the arson for which they were tried").

the majority of the Court held that a misjoinder of offenses had occurred, and required a new trial without any special showing of prejudice. After reviewing the misjoinder of defendants and of offenses, the Court concluded:

> "Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error." *Ibid.*

Thus, almost a half century before the adoption of Rule 8, the Court squarely held that protection against misjoinder was a "substantial right," and that the violation of the misjoinder rule required reversal.

Today, the Court does not dispute that *McElroy* required reversal for misjoinder. Instead, the Court suggests, rather obliquely, that three developments have undermined that holding: (1) the adoption of Rule 8; (2) the adoption of Rule 52(a) and the passage of the harmless-error statute; and (3) the development of a harmless-error doctrine in constitutional law. *Ante*, at 444–446. The reliance on the harmless-error developments will be addressed in more detail. Since we are construing Rule 8, however, the majority's bare citation to it—and apparent reliance on the history of its passage—must be first considered.

The majority seems to be of the view that the adoption of Rule 8 cast doubt on the validity of *McElroy*. *Ante*, at 444. Far from disavowing *McElroy*, however, the Federal Rules continued the misjoinder rule. The notes of the Advisory Committee on Rules state that both subdivisions of Rule 8 represent "substantially a restatement of existing law." Neither the text of Rule 8, nor the Advisory Committee Notes, nor the history of the Rule contains *any* suggestion that Rule 8 was intended to change the rule of the *McElroy* case. Indeed, the Advisory Committee displayed a keen awareness of the *McElroy* precedent by citing the opinion in

its discussion of misjoinder.[3] At the time the Federal Rules were being considered, moreover, commentators shared the Advisory Committee's view that the Rules merely continued the misjoinder doctrine in its then current form, and restated existing law.[4] The principle that misjoinder deprives the accused of "a substantial right" and therefore is "revisable on error" thus remained the law when the Federal Rules of Criminal Procedure became effective in 1946.

Furthermore, if one reads Rule 8 in conjunction with Rule 14, it is immediately apparent that the draftsmen of the Rules regarded every violation of Rule 8 as inherently prejudicial. For Rule 14 authorizes the Court to grant a severance, even in the absence of a Rule 8 violation, if either the defendant or the Government is prejudiced by a joinder of offenses or defendants.[5] Thus, it seems clear that the draftsmen of the Rules regarded violations of Rule 8 as inherently prejudicial, and recognized that even joinders that were not prohibited by the Rule should be forbidden if a party

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[3] See 5 Federal Rules of Criminal Procedure: Documentary History, Second Preliminary Draft, Feb. 1944, Note to Rule 8, pp. 35–36 ("Since the counts of two or more indictments consolidated for trial, under 18 U. S. C. § 557, are 'put . . . in the same category as if they were separate counts in one indictment,' *McElroy* v. *United States*, 164 U. S. 76, 77 (1896), this type of joinder is more widely practiced than is generally realized").

[4] See Maguire, Proposed New Federal Rules of Criminal Procedure, 23 Ore. L. Rev. 56, 59 (1943) ("Subdivision (b) of Rule 9 provides for a joinder of defendants where they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting or resulting in an offense, and that they may be charged in one or more counts, together or separately, in any manner indicating their respective participation in the offense or offenses. . . . This rule merely restates the present Federal statute . . ."). "Rule 9" became the current "Rule 8" without substantial change. See Orfield, Joinder in Federal Criminal Procedure, 26 F. R. D. 23, 28–29 (1960).

[5] Rule 14 provides, in pertinent part: "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

could demonstrate actual prejudice. This is the way Professor Charles Wright interpreted the intent of the draftsmen in his 1969 treatise. He wrote:

> "Indeed there would be no point in having Rule 8 if the harmless error concept were held applicable to it. If that concept could be applied, then defendant could obtain reversal only if the joinder were prejudicial to him. But Rule 14 provides for relief from prejudicial joinder, and a defendant can obtain a reversal, in theory at least, if he has been prejudiced even though the joinder was proper. If misjoinder can be regarded as harmless error, then reversal could be had only for prejudice whether the initial joinder was proper or improper. If that were true, it would be pointless to define in Rule 8 the limits on joinder, since it would no longer be of significance whether those limits were complied with, and the draftsmen would have been better advised to allow unlimited joinder of offenses and defendants, subject to the power of the court to give relief if the joinder were prejudicial." 1 C. Wright, Federal Practice and Procedure, § 144, p. 329 (1969).[6]

Other commentators have agreed that the structure of the Federal Rules strongly supports the conclusion that the draftsmen viewed a violation of the misjoinder rule as inherently prejudicial.[7]

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[6] In his current edition, Professor Wright notes that a number of federal courts have held that misjoinder may be harmless error, but he concludes that "there remains much to be said for what was once the almost-unanimous view that misjoinder is never harmless error." 1 C. Wright, Federal Practice and Procedure: Criminal, § 145, p. 532 (2d ed. 1982).

[7] See Note, Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion, 6 Hofstra L. Rev. 533, 544, n. 65 (1978) ("Implicit in the assertion that rule 8 sets the limits of tolerable prejudice is the argument that if its purpose is not to set such limits there is no purpose in the rule. Rule 14 would vest all questions of joinder in the trial court. . . . As both rule 14 and rule 8 were included in the rules, rule 8 must have been intended to establish the outer bounds

Thus, a review of the state of the law of joinder at the time the Federal Rules of Criminal Procedure were adopted, of the Advisory Committee's intent to restate then-existing law, and of the text of the Rules themselves requires a conclusion that a Rule 8 misjoinder violation is an error that affects the substantial rights of the accused and therefore requires reversal of a conviction.

II

In addition to its unexplained reference to the adoption of Rule 8, the Court suggests that its new misjoinder rule—that prejudice must be shown to justify reversal of a Rule 8 misjoinder error—is supported by its interpretation of developments in the law of "harmless-error." Specifically, the Court observes that the *McElroy* approach has been undermined by the passage of a harmless-error statute and rule, *ante*, at 444, and by the development of a harmless-error doctrine for constitutional errors, *ante*, at 445. Although the majority does not distinguish between these two categories, they require separate analysis. Neither category, however, remotely supports the majority's bald assertion that misjoinder should not be viewed as affecting "substantial rights," and thus not be viewed as inherently prejudicial.

The majority refers to the current harmless-error statute, 28 U. S. C. § 2111, and to Rule 52(a). As the majority points out, both define harmless error in terms of whether a violation affects "substantial rights."[8] Since this Court had already made clear that misjoinder affected "substantial

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within which the trial court has discretionary power under rule 14"). In my view, the majority's discussion of this issue, *ante*, at 449–450, n. 12, fails to answer this straightforward reading of Rule 8 and Rule 14.

[8] See 28 U. S. C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties"); Fed. Rule Crim. Proc. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded").

rights," *McElroy*, 164 U. S. 76 (1896), it is curious that the majority concludes, with no support at all, that the passage of a statute and Rule which allowed for correction of errors that did not affect "substantial rights" somehow changed the legal status of a violation that had been described in precisely those words. This view is especially curious when it is remembered that the Rule governing joinder was viewed by the draftsmen as a restatement of existing law.

To be sure, *McElroy* was decided before the first harmless-error statute was passed in 1919. That statute, a reaction to the hypertechnicality that had developed in American jurisprudence, did mark a significant change in our system's view of the effect of error.[9] But it is a long leap from that recognition to a view that the passage of the harmless-error statute in 1919—and the subsequent adoption of Rule 52(a) in 1946 and the passage of the current harmless-error statute in 1949—summarily jettisoned all prior jurisprudence on the errors that affected "substantial rights." Indeed, interpretations of the 1919 statute accorded it a very different mission. As Justice Frankfurter explained in refusing to require a showing of prejudice to justify reversal for a statutory violation: "Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." *Bruno* v. *United States*, 308 U. S. 287, 294 (1939). And, while Rule 52(a) and the 1949 harmless-error statute were changed in a way that some commentators have found significant,[10] the

[9] For a discussion of the background of the 1919 statute, see *Kotteakos* v. *United States*, 328 U. S. 750, 758–760 (1946).

[10] The 1919 statute referred to "*technical* errors, defects, or exceptions which do not affect the substantial rights of the parties." 40 Stat. 1181, 28 U. S. C. § 391 (1946 ed.) (emphasis added). Rule 52(a) referred to "[a]ny error, defect, irregularity or variance which does not affect substantial rights"; the 1949 statute referred to "errors or defects which do not affect the substantial rights of the parties." 28 U. S. C. § 2111. See Note, 6

continuation of "substantial rights" as the benchmark for assessing the harmlessness of error provides no support for the proposition that anyone intended to change something that had been found to affect a "substantial right" into something that did not affect a substantial right.

Thus, neither the harmless-error statute, passed within a few years of the adoption of Rule 8, nor Rule 52(a), adopted at the same time as Rule 8, changed the interpretation of the misjoinder rule reflected in Rule 8.

The harmless-error statute and Rule are, however, at least relevant to the inquiry at hand. In contrast, the majority's reliance on *Chapman* v. *California*, 386 U. S. 18 (1967), *ante*, at 445, is plainly misplaced. The majority observes: "Clearly, *Chapman* and *Hasting* dictate that the harmless-error rule governs here." *Ante*, at 446. Nothing could be less clear. This case does not involve a claim of constitutional error. The harmless-error doctrine that was enunciated in *Chapman* thus does not settle the issue raised by this case. Simply because constitutional errors may be subject to a harmless-error inquiry does not mean that all nonconstitutional errors must be subject to harmless-error analysis, and this Court has never so held.[11] Rather, our mission in

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Hofstra L. Rev., *supra* n. 7, at 540 (discussing possible significance of change). But cf. H. R. Rep. No. 352, 81st Cong., 1st Sess., 18 (1949) (new harmless-error statute intended to "incorporate" former harmless-error statute); Rule 52(a), Notes of Advisory Committee on Rules, 18 U. S. C. App., p. 657 (Rule intended as "a restatement of existing law"); *Kotteakos*, 328 U. S., at 757, n. 9 (citing Advisory Committee comment that Rule 52(a) was intended as " 'a restatement of existing law' ").

[11] That the Court has recognized the difference between constitutional and nonconstitutional harmless-error inquiries is reflected in the considerable difference in the Court's standards on these two subjects. Compare *Chapman*, 386 U. S., at 24 ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"), with *Kotteakos* v. *United States*, 328 U. S., at 765 (in nonconstitutional cases, "[t]he inquiry . . . is . . . whether the error itself had substantial influence"). To the extent that the majority ultimately cites the *Kotteakos* standard as governing this case, *ante*, at

reviewing nonconstitutional errors is, first, to discern whether the rule or statute which is being violated was intended to be subject to harmless-error analysis. If there is a definitive answer to that question, our inquiry should be at an end.[12] If there is no definitive answer, then we must try to assess the rule or statute in question in light of the purpose of the harmless-error rule and statute. We should not, however, rewrite existing law by adopting a presumption that, simply because a violation is nonconstitutional, it is automatically subject to harmless-error inquiry.

As the majority observes, the Court's willingness to invoke the harmless-error doctrine has expanded dramatically in recent years. This expansion is a source of considerable concern,[13] particularly because the Court has often been unclear and imprecise in its increasingly frequent invocation of harm-

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449, it is consistent with this distinction in our case law; to the extent that the majority suggests that *Chapman* controls the outcome of this case, however, *ante*, at 446, it reveals confusion about this distinction.

[12] Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress").

[13] See Comment, Harmless Error: Abettor of Courtroom Misconduct, 74 J. Crim. L. & C. 457, 475 (1983) ("The harmless error standards as currently applied in review of criminal trials are eroding the integrity of the criminal justice system by encouraging violations of longstanding trial rules"); Goldberg, Harmless Error: Constitutional Sneak Thief, 71 J. Crim. L. & C. 421, 422 (1980) ("the doctrine of harmless constitutional error destroys important constitutional and institutional values"); Note, Harmful Use of Harmless Error in Criminal Cases, 64 Cornell L. Rev. 538, 540 (1979) ("increased use of harmless error analysis is inherently dangerous regardless of whether the errors violate the Constitution, statutes, or the common law") (footnotes omitted); Cameron & Osborn, When Harmless Error Isn't Harmless, 1971 Law & Social Order 23, 42 ("while the harmless error doctrine is an extremely useful device . . . it is not one that is without its dangers"). Cf. *United States* v. *Jackson*, 429 F. 2d 1368, 1373 (CA7 1970) (Clark, J., sitting by designation) ("'Harmless error' is swarming around the 7th Circuit like bees. . . . [T]he courts may have to act to correct a presently alarming situation").

less error.[14] In my view, harmless-error analysis is inappropriate in at least three situations: (1) when it is clear that a statute or Rule was not intended to be subject to such a rule; (2) when an independent value besides reliability of the outcome suggests that such analysis is inappropriate;[15] and (3) when the harmlessness of an error cannot be measured with precision.[16] In my view, misjoinder clearly falls into the first

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[14] See Field, Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale, 125 U. Pa. L. Rev. 15, 32 (1976) ("In sum, the case law on the content of the harmless error standard is less than lucid. There is some indication that Supreme Court opinions slip back and forth from one suggested standard to another, without explicit notice of the change, though the change could produce different results in many cases"); Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988 (1973) ("Chaos surrounds the standard for appellate review of errors in criminal proceedings"); Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 53 Minn. L. Rev. 519, 557 (1969) ("the Court, if only in an effort to further the interest of net judicial economy, should attempt to delineate certain well-defined classes of constitutional error which require automatic reversal").

[15] In the constitutional area, the Court has made clear that certain independent values render a harmless-error analysis inappropriate. See, *e. g.*, *Rose* v. *Mitchell*, 443 U. S. 545 (1979) (racial discrimination in the selection of a grand jury is not subject to harmless-error analysis); *Chapman*, 386 U. S., at 23 ("there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"). Cf. *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (STEVENS, J., dissenting) (some constitutional errors "are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained").

[16] In *Holloway* v. *Arkansas*, 435 U. S. 475, 491 (1978), CHIEF JUSTICE BURGER explained that harmless error was inappropriate in assessing the constitutional error of inappropriate joint representation in part because such an inquiry required "unguided speculation." See also Note, 64 Cornell L. Rev., *supra* n. 13, at 563–564 ("*Holloway*'s rationale naturally extends beyond the sixth amendment: it suggests that a rule of automatic reversal should apply to those fundamental, pervasive errors that have uncertain prejudicial impact. . . . The rule of automatic reversal should be extended to all errors, whether or not pervasive or constitutional, that result in unascertainable prejudice") (footnotes omitted).

category. It also has elements of the second and third. Misjoinder implicates the independent value of individual responsibility and our deep abhorrence of the notion of "guilt by association." Our criminal justice system has expanded considerably in its tolerance of multiple joinders and massive conspiracy trials. The rule against misjoinder remains, however, as an ultimate safeguard of our cherished principle that one is tried for one's own deeds, and not for another's.[17] The harmfulness of misjoinder is also the type of error that has consequences that are difficult to measure with precision.[18] These concerns may or may not outweigh the societal interests that motivate the Court today, but they are surely strong enough to demonstrate that the draftsmen of the Federal Rules acted responsibly when they adhered to the time-honored rule of the *McElroy* case. The misjoinder Rule that they crafted is clear, and should be respected.[19] Misjoinder affects "substantial rights," and should lead to reversal.

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[17] Cf. *Krulewitch* v. *United States*, 336 U. S. 440, 457–458 (1949) (Jackson, J., concurring) ("Few instruments of injustice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice").

[18] See Note, 6 Hofstra L. Rev., *supra* n. 7, at 563 (harmless error "is inaccurate as a test for ascertaining the prejudice resulting from misjoinder because of the impossibility of determining the extent of that prejudice").

[19] The majority's suggestion that two Supreme Court opinions have held misjoinder subject to the harmless-error rule is erroneous. The majority writes: "A holding directly involving misjoinder again indicated the harmless-error rule should apply." *Ante*, at 447. The decision cited by the majority for this proposition, *Schaffer* v. *United States*, 362 U. S. 511 (1960), explicitly found no Rule 8 error and explicitly disavowed the type of "indication" claimed by the majority. See 362 U. S., at 517 ("The harmless-error rule, which was the central issue in *Kotteakos*, is not even reached in the instant case, since here the joinder was proper under Rule 8(b) and no error was shown"). Thus, the majority's discussion of *Schaffer*, *ante*, at 447–448, is completely beside the point. Indeed, one year after *Schaffer* was decided, it was read to support, not the majority's conclusion, but the viability of the *McElroy* rule. See *Ward* v. *United States*, 110 U. S. App. D. C. 136, 137, 289 F. 2d 877, 878 (1961) (Burger,

III

Undertaking a harmless-error analysis is perhaps the least useful function that this Court can perform, cf. *United States* v. *Hasting*, 461 U. S. 499, 516–518 (1983) (STEVENS, J., concurring in judgment). For that reason, a decision that a harmless-error inquiry is required should lead to a remand to the Court of Appeals, which is in a far better position than we are to study the complete trial record with care. The majority's opinion in this case confirms the general advisability of that approach.

The Court's conclusion that Dennis Lane suffered no prejudice is based on three cursory observations. First, the Court asserts, with no explanation, that there was "overwhelming evidence" of his guilt. *Ante*, at 450. There are at least two problems with this observation. The first is that the majority fails to appreciate the *Kotteakos* recognition that the harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry.[20] The second is that,

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J.) (citing *Schaffer* and *McElroy* to reject Government suggestion that defendant must show prejudice to obtain reversal after misjoinder of defendants has been established).

Similarly, the majority's claim that *Kotteakos* "suggested that the harmless-error rule could similarly apply" to misjoinder, *ante*, at 447, vastly overstates the case. The Court noted that a possible joinder violation gave added weight to its conclusion that the error before it was *not* harmless. 328 U. S., at 774–775. The Court observed that "§ 269 [the harmless-error statute] carries the threat of overriding the requirement of § 557 for substituting separate counts in the place of separate indictments, unless the application of § 269 is made with restraint. The two sections must be construed and applied so as to bring them into substantial harmony, not into square conflict." *Id.*, at 775. This expression of concern about the possible effect of harmless error on misjoinder, however, hardly supports the notion that *Kotteakos* held misjoinder subject to harmless-error analysis. And, despite the majority's view that its holding is the only way to bring harmless error and misjoinder into "substantial harmony," *ante*, at 449, a conclusion that misjoinder necessarily affects substantial rights produces the same harmony.

[20] In *Kotteakos*, the Court accepted the defendants' concession that the evidence was not "insufficient, if considered apart from the alleged errors

even if it were faithfully applying the *Kotteakos* distinction between sufficiency of the evidence and harmless error, the majority utterly fails to explain its statement about "overwhelming evidence." A reading of *Kotteakos* reveals that only the most painstaking and thorough review of an entire trial record can justify a conclusion that its standard has, or has not, been met. The opinion the Court announces today contains no indication that it has made that kind of analysis of the case against Dennis Lane.[21]

Second, the Court notes that the jury was properly instructed to evaluate the evidence under each count and against each defendant separately. Since that instruction should be given routinely in every case in which there is a joinder of defendants or offenses, it surely cannot be regarded as an adequate response to a claim that a misjoinder was prejudicial.[22]

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relating to the proof and the instructions at the trial." 328 U. S., at 753. The Court went on to emphasize that the harmless-error analysis is fundamentally different from the sufficiency analysis. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.*, at 765. Even though the evidence was concededly sufficient without the errors, the Court thus found the errors not harmless, and the convictions reversible. The majority quotes the relevant passage from *Kotteakos*, *ante*, at 449, but fails to reflect its principle in its analysis.

[21] The only specific evidence even mentioned by the majority—the testimony of Heard and Lankford, *ante*, at 450–451, n. 13—represents accomplice testimony. Such testimony is, of course, generally recognized as posing special evidentiary problems. See, *e. g.*, 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 107 [04], pp. 107–50—107–51 (1985); 3 S. Gard, Jones on Evidence § 20:60, pp. 736–737 (6th ed. 1972).

[22] Indeed, in the year following *Kotteakos*, this Court made clear that proper jury instructions might not alleviate the problems inherent in joint trials:

"The grave danger in this case, if any, arose not from the trial court's rulings upon admissibility or from its instructions to the jury. As we have said, these were as adequate as might reasonably be required in a joint trial. The danger rested rather in the risk that the jury, in disregard of

Finally, the Court rather hesitantly suggests that the evidence on Count 1 "would likely have been admissible" in a joint retrial on Counts 2–6, *ante*, at 450. The Court thus assumes that a joint retrial is inevitable. Of course, if misjoinder is found only as to Dennis Lane, as I suggest below, then the majority's point collapses. In any event, nothing in *Kotteakos* or in our harmless-error precedents suggests that this Court should find an error harmless because of the Court's completely untested speculations about a possible future retrial. Not surprisingly, *Kotteakos* suggests precisely the opposite.[23]

A determination that an error was harmless is an extremely weighty conclusion; it implicates profound notions of fairness and justice.[24] Even if the majority is correct that Rule 8 misjoinder should be subject to harmless-error analysis, I am convinced that the majority's summary finding of harmless error in this case fails to give the issue the attention it deserves.[25]

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the court's direction, would transfer, consciously or unconsciously, the effect of the excluded admissions from the case as made against Goldsmith and Weiss across the barrier of the exclusion to the other three defendants." *Blumenthal* v. *United States*, 332 U. S. 539, 559 (1947).

[23] "The Government's theory seems to be, in ultimate logical reach, that the error presented by the variance is insubstantial and harmless, if the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a separate trial. For reasons we have stated and in view of the authorities cited, this is not and cannot be the test under § 269 [the harmless error statute]." 328 U. S., at 767.

[24] See R. Traynor, The Riddle of Harmless Error 80 (1970) ("[T]he evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex. Each evaluation bears upon our traditional understanding that fair trial encompasses not only fair notice and an adequate opportunity to be heard before the appropriate tribunal, but also an orderly presentation of evidence and a rational application of the law thereto").

[25] A more searching review of the record might require the majority to confront certain troublesome aspects of this erroneous joinder. The majority might have to confront the fact that at least 9 of the Government's 26

IV

I agree with the Court's conclusion that the evidence was sufficient to sustain both convictions of mail fraud and therefore join Part III of its opinion. I also agree with the judgment insofar as it upholds the conviction of James Lane. It is perfectly clear that the violation of Rule 8(b)—the rule prohibiting the improper joinder of *defendants*—occasioned by the misjoinder of Count 1 did not affect James Lane because he was the defendant in Count 1. But since there is no claim that the son, Dennis Lane, took any part in Count 1 (the mail fraud regarding the 1979 El Toro Restaurant fire), I believe that his right not to be joined as a defendant in his father's trial for that felony was a "substantial right" that was adversely affected by the misjoinder.

In my view, the Court's opinion misconstrues the history and purpose of Rule 8, sows further confusion in the Court's

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witnesses—more than one third—addressed the El Toro fire, the offense for which Dennis Lane was not charged. See Testimony of Morris Loewenstern, Tr. 33–43; Testimony of Earl Simpson, *id.*, at 44–50; Testimony of Cindy Wright, *id.*, at 58–59; Testimony of David Lard, *id.*, at 62–89, 96–103; Testimony of Ben Shaw, *id.*, at 103–112; Testimony of Jack Stotts, *id.*, at 113–123; Testimony of Wayne Cox, *id.*, at 123–132; Testimony of Jay Messenger, *id.*, at 139–157; and Testimony of Sidney Heard, *id.*, at 230–243. It might have to confront the fact that two of the defense witnesses similarly focused on the El Toro fire. See Testimony of Janie Malone, *id.*, at 681–736; Testimony of Jess Maddox, *id.*, at 891–894. It might have to confront the fact that, in their closing arguments, both the Government and the defense counsel devoted considerable attention to the El Toro fire. See Government's closing argument, *id.*, at 989–993; Defense closing argument, *id.*, at 1008–1014. And it might, finally, have to confront the fact that the prosecutor's closing words to the jury were that "*each* of these charges has been proved against J. C. Lane *and Dennis Lane* beyond a reasonable doubt." *Id.*, at 1051 (emphasis added).

This is not to say that I have studied the record with sufficient care to conclude that, if misjoinder is subject to harmless-error analysis, the error here was not harmless. Rather, it is to say that I am convinced that the majority's opinion gives no indication of having wrestled with the complexities of the 1,000-page trial transcript in a manner that would permit its confident assertion that the error was harmless.

harmless-error jurisprudence, and fails to make the kind of harmless-error analysis that Rule 52(a) requires. Because I do not consider these errors harmless, I respectfully dissent from the judgment regarding Dennis Lane in No. 84–744.

WITTERS v. WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 84-1070. Argued November 6, 1985—Decided January 27, 1986

Petitioner, suffering from a progressive eye condition, applied to the Washington Commission for the Blind for vocational rehabilitation assistance pursuant to a Washington statute. At the time, he was attending a private Christian college seeking to become a pastor, missionary, or youth director. The Commission denied aid on the ground that it was prohibited by the State Constitution, and this ruling was upheld on administrative appeal. Petitioner then brought an action in State Superior Court, which affirmed the administrative ruling on the same state-law grounds. The Washington Supreme Court affirmed but based its ruling on the Establishment Clause of the First Amendment, holding that the provision of aid to petitioner would have the primary effect of advancing religion in violation of that Clause.

Held: On the record, extension of aid under the Washington vocational rehabilitation program to finance petitioner's training at the Christian college would not advance religion in a manner inconsistent with the Establishment Clause. Pp. 485-490.

(a) As far as the record shows, assistance provided under the Washington program is paid directly to the student, who then transmits it to the educational institution of his or her choice. The program is in no way skewed towards religion and creates no financial incentive for students who undertake sectarian education. Pp. 487-488.

(b) Moreover, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education. P. 488.

(c) On the facts, it is inappropriate to view any aid ultimately flowing to the Christian college as resulting from a *state* action sponsoring or subsidizing religion. Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion. Pp. 488-489.

102 Wash. 2d 624, 689 P. 2d 53, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined, and in Parts I and III of which O'CONNOR, J.,

joined. WHITE, J., filed a concurring opinion, *post*, p. 490. POWELL, J., filed a concurring opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 490. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 493.

Michael P. Farris argued the cause and filed briefs for petitioner.

Timothy R. Malone, Assistant Attorney General of Washington, argued the cause for respondent. With him on the brief were *Kenneth O. Eikenberry*, Attorney General, *Philip H. Austin*, Senior Deputy Attorney General, and *David R. Minkel*, Assistant Attorney General.*

JUSTICE MARSHALL delivered the opinion of the Court.

The Washington Supreme Court ruled that the First Amendment precludes the State of Washington from extending assistance under a state vocational rehabilitation assistance program to a blind person studying at a Christian college and seeking to become a pastor, missionary, or youth director. Finding no such federal constitutional barrier on the record presented to us, we reverse and remand.

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Acting Solicitor General Fried, Acting Assistant Attorney General Willard, Michael C. McConnell, Anthony J. Steinmeyer*, and *Michael Jay Singer;* for the American Jewish Committee by *Samuel Rabinove* and *Richard T. Foltin;* for the American Jewish Congress by *Marc D. Stern* and *Ronald A. Krauss;* for the Christian Legal Society et al. by *Samual Eric Hans Ericsson, Kimberly Wood Colby*, and *Forest D. Montgomery;* for the Rutherford Institute et al. by *Larry L. Crain, Guy O. Farley, Jr., John W. Whitehead, James J. Knicely, Thomas O. Kotouc, Wendell R. Bird*, and *William B. Hollberg;* and for the National Legal Christian Foundation.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Charles B. Wiggins, Jack D. Novik, Charles S. Sims*, and *Burt Neuborne;* for Americans United for Separation of Church and State by *Lee Boothby* and *Walter E. Carson;* and for the Anti-Defamation League of B'nai B'rith et al. by *Ruti G. Teitel, Justin J. Finger, Jeffrey P. Sinensky*, and *Steven M. Freeman*.

I

Petitioner Larry Witters applied in 1979 to the Washington Commission for the Blind for vocational rehabilitation services pursuant to Wash. Rev. Code § 74.16.181 (1981).[1] That statute authorized the Commission, *inter alia*, to "[p]rovide for special education and/or training in the professions, business or trades" so as to "assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care." *Ibid.* Petitioner, suffering from a progressive eye condition, was eligible for vocational rehabilitation assistance under the terms of the statute.[2] He was at the time attending Inland Empire School of the Bible, a private Christian college in Spokane, Washington, and studying bible, ethics, speech, and church administration in order to equip himself for a career as a pastor, missionary, or youth director. App. 7–8.

The Commission denied petitioner aid. It relied on an earlier determination embodied in a Commission policy statement that "[t]he Washington State constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas," *id.*, at 4, and on its conclusion that petitioner's training was "religious

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[1] In 1983 the Washington Legislature repealed chapters 74.16 and 74.17 of the Code, enacting in their place a new chapter 74.18. The statutory revision abolished the Commission for the Blind and created respondent Department of Services for the Blind. See 1983 Wash. Laws, ch. 194, § 3. We shall refer to respondent for purposes of this opinion as "the Commission."

[2] Washington Rev. Code, ch. 74.18, see n. 1, *supra*, establishes a requirement that aid recipients be persons who "(1) have no vision or limited vision which constitutes or results in a substantial handicap to employment and (2) can reasonably be expected to benefit from vocational rehabilitation services in terms of employability." Wash. Rev. Code § 74.18.130 (1983) (effective June 30, 1983). It has not been established whether petitioner is eligible for aid under the new standard. That determination, however, will have no effect on any claim asserted by petitioner for reimbursement of aid withheld beginning in 1979.

instruction" subject to that ban. *Id.*, at 1. That ruling was affirmed by a state hearings examiner, who held that the Commission was precluded from funding petitioner's training "in light of the State Constitution's prohibition against the state directly or indirectly supporting a religion." App. to Pet. for Cert. F–6. The hearings examiner cited Wash. Const., Art. I, § 11, providing in part that "no public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment," and Wash. Const., Art. IX, § 4, providing that "[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." App. to Pet. for Cert. F–4. That ruling, in turn, was upheld on internal administrative appeal.

Petitioner then instituted an action in State Superior Court for review of the administrative decision; the court affirmed on the same state-law grounds cited by the agency. The State Supreme Court affirmed as well. *Witters* v. *Commission for the Blind*, 102 Wash. 2d 624, 689 P. 2d 53 (1984). The Supreme Court, however, declined to ground its ruling on the Washington Constitution. Instead, it explicitly reserved judgment on the state constitutional issue and chose to base its ruling on the Establishment Clause of the Federal Constitution. The court stated:

> "The Supreme Court has developed a 3-part test for determining the constitutionality of state aid under the establishment clause of the First Amendment. 'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion."' *Lemon* v. *Kurtzman*, [403 U. S. 602, 612–613 (1971)]. To withstand attack under the establishment clause, the challenged state action

must satisfy each of the three criteria." *Id.*, at 627–628, 689 P. 2d, at 55.

The Washington court had no difficulty finding the "secular purpose" prong of that test satisfied. Applying the second prong, however, that of "principal or primary effect," the court held that "[t]he provision of financial assistance by the State to enable someone to become a pastor, missionary, or church youth director clearly has the primary effect of advancing religion." *Id.*, at 629, 689 P. 2d, at 56. The court, therefore, held that provision of aid to petitioner would contravene the Federal Constitution. In light of that ruling, the court saw no need to reach the "entanglement" prong; it stated that the record was in any case inadequate for such an inquiry.

We granted certiorari, 471 U. S. 1002 (1985), and we now reverse.

II

The Establishment Clause of the First Amendment has consistently presented this Court with difficult questions of interpretation and application. We acknowledged in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon*, *supra*, at 612, quoted in *Mueller* v. *Allen*, 463 U. S. 388, 393 (1983). Nonetheless, the Court's opinions in this area have at least clarified "the broad contours of our inquiry," *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 761 (1973), and are sufficient to dispose of this case.

We are guided, as was the court below, by the three-part test set out by this Court in *Lemon* and quoted *supra*, at 484–485. See *Grand Rapids School District* v. *Ball*, 473 U. S. 373, 382–383 (1985). Our analysis relating to the first prong of that test is simple: all parties concede the unmistakably secular purpose of the Washington program. That program was designed to promote the well-being of the visually handicapped through the provision of vocational rehabilita-

tion services, and no more than a minuscule amount of the aid awarded under the program is likely to flow to religious education. No party suggests that the State's "actual purpose" in creating the program was to endorse religion, *Wallace* v. *Jaffree*, 472 U. S. 38, 74 (1985), quoting *Lynch* v. *Donnelly*, 465 U. S. 668, 690 (1984) (O'CONNOR, J., concurring), or that the secular purpose articulated by the legislature is merely "sham." *Wallace*, *supra*, at 64 (POWELL, J., concurring).

The answer to the question posed by the second prong of the *Lemon* test is more difficult. We conclude, however, that extension of aid to petitioner is not barred on that ground either.[3] It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its em-

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[3] Respondent offers extensive argument before this Court relating to the practical workings of the state vocational assistance program. Focusing on the asserted practical "nature and operation of that program," Brief for Respondent 6, respondent asserts that the nature of the program in fact leads to an impermissible "symbolic union" of governmental and religious functions, "requir[ing] government choices at every step of the rehabilitation process" and "intertwining . . . governmental decisionmaking . . . with decisionmaking by church and school authorities." *Id.*, at 20. Respondent contends that the program therefore violates the second and third prongs of the *Lemon* test in a way that "hands off" aid, such as that provided pursuant to the GI Bill, does not. *Id.*, at 11.

This argument, however, was not presented to the state courts, and appears to rest in large part on facts not part of the record before us. Because this Court must affirm or reverse upon the case as it appears in the record, *Russell* v. *Southard*, 12 How. 139, 159 (1851); see also *New Haven Inclusion Cases*, 399 U. S. 392, 450, n. 66 (1970), we have no occasion to consider the argument here. Nor is it appropriate, as a matter of good judicial administration, for us to consider claims that have not been the subject of factual development in earlier proceedings. On remand, it will be up to the Washington Supreme Court as a matter of state procedural law whether and to what extent it should reopen the record for the introduction of evidence on the issues raised for the first time in this Court.

ployees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary. It is equally well settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in-kind, where the effect of the aid is "that of a direct subsidy to the religious school" from the State. *Grand Rapids School District* v. *Ball*, 473 U. S., at 394. Aid may have that effect even though it takes the form of aid to students or parents. *Ibid.*; see, *e. g.*, *Wolman* v. *Walter*, 433 U. S. 229, 248–251 (1977); *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*; *Sloan* v. *Lemon*, 413 U. S. 825 (1973). The question presented is whether, on the facts as they appear in the record before us, extension of aid to petitioner and the use of that aid by petitioner to support his religious education is a permissible transfer similar to the hypothetical salary donation described above, or is an impermissible "direct subsidy."

Certain aspects of Washington's program are central to our inquiry. As far as the record shows, vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.[4] Washington's program is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited," *Committee for Public Education & Religious*

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[4] This is not the case described in *Grand Rapids School District* v. *Ball*, 473 U. S. 373, 396 (1985) ("Where . . . no meaningful distinction can be made between aid to the student and aid to the school, 'the concept of a loan to individuals is a transparent fiction' "), quoting *Wolman* v. *Walter*, 433 U. S. 229, 264 (1977) (opinion of POWELL, J.); see also *Wolman*, *supra*, at 250.

Liberty v. *Nyquist*, 413 U. S., at 782–783, n. 38, and is in no way skewed towards religion. It is not one of "the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court," *id.*, at 785. It creates no financial incentive for students to undertake sectarian education, see *id.*, at 785–786. It does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.

Further, and importantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education. The function of the Washington program is hardly "to provide desired financial support for nonpublic, sectarian institutions." *Id.*, at 783; see *Sloan* v. *Lemon*, *supra;* cf. *Meek* v. *Pittenger*, 421 U. S. 349, 363–364 (1975). The program, providing vocational assistance to the visually handicapped, does not seem well suited to serve as the vehicle for such a subsidy. No evidence has been presented indicating that any other person has ever sought to finance religious education or activity pursuant to the State's program. The combination of these factors, we think, makes the link between the State and the school petitioner wishes to attend a highly attenuated one.

On the facts we have set out, it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion. Nor does the mere circumstance

that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion. See *Lynch* v. *Donnelly*, 465 U. S., at 688 (O'CONNOR, J., concurring). Thus, while *amici* supporting respondent are correct in pointing out that aid to a religious institution unrestricted in its potential uses, if properly attributable to the State, is "clearly prohibited under the Establishment Clause," *Grand Rapids*, *supra*, at 395, because it may subsidize the religious functions of that institution, that observation is not apposite to this case. On the facts present here, we think the Washington program works no state support of religion prohibited by the Establishment Clause.[5]

III

We therefore reject the claim that, on the record presented, extension of aid under Washington's vocational rehabilitation program to finance petitioner's training at a Christian college to become a pastor, missionary, or youth director would advance religion in a manner inconsistent with the Establishment Clause of the First Amendment. On remand, the state court is of course free to consider the applicability of the "far stricter" dictates of the Washington State Constitution, see *Witters* v. *Commission for the Blind*, 102 Wash. 2d, at 626, 689 P. 2d, at 55. It may also choose to reopen the factual record in order to consider the arguments made by respondent and discussed in nn. 3 and 5, *supra*. We decline petitioner's invitation to leapfrog consideration of those issues by holding that the Free Exercise Clause *requires* Washington to extend vocational rehabilitation aid to petitioner regardless of what the State Constitution commands or further factual development reveals, and we ex-

[5] We decline to address the "entanglement" issue at this time. As a prudential matter, it would be inappropriate for us to address that question without the benefit of a decision on the issue below. Further, we have no reason to doubt the conclusion of the Washington Supreme Court that that analysis could be more fruitfully conducted on a more complete record.

press no opinion on that matter. See *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568 (1947).

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring.

I remain convinced that the Court's decisions finding constitutional violations where a State provides aid to private schools or their students misconstrue the Establishment Clause and disserve the public interest. Even under the cases in which I was in dissent, however, I agree with the Court that the Washington Supreme Court erred in this case. Hence, I join the Court's opinion and judgment. At the same time, I agree with most of JUSTICE POWELL's concurring opinion with respect to the relevance of *Mueller* v. *Allen*, 463 U.S. 388 (1983), to this case.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring.

The Court's omission of *Mueller* v. *Allen*, 463 U. S. 388 (1983), from its analysis may mislead courts and litigants by suggesting that *Mueller* is somehow inapplicable to cases such as this one.[1] I write separately to emphasize that *Mueller* strongly supports the result we reach today.

As the Court states, the central question in this case is whether Washington's provision of aid to handicapped students has the "principal or primary effect" of advancing religion. *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971). See also *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 783–785, n. 39 (1973). *Mueller* makes the answer clear: state programs that are wholly

[1] The Court offers no explanation for omitting *Mueller* from its substantive discussion. Indeed, save for a single citation on a phrase with no substantive import whatever, *ante*, at 485, *Mueller* is not even mentioned.

neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* v. *Kurtzman* test,[2] because any aid to religion results from the private choices of individual beneficiaries. *Mueller*, 463 U. S., at 398–399. Thus, in *Mueller*, we sustained a tax deduction for certain educational expenses, even though the great majority of beneficiaries were parents of children attending sectarian schools. *Id.*, at 401. We noted the State's traditionally broad taxing authority, *id.*, at 396, but the decision rested principally on two other factors. First, the deduction was equally available to parents of public school children and parents of children attending private schools. *Id.*, at 397; see *Nyquist*, *supra*, at 782–783, n. 38. Second, any benefit to religion resulted from the "numerous private choices of individual parents of school-age children." *Mueller*, *supra*, at 399.

The state program at issue here provides aid to handicapped students when their studies are likely to lead to employment. Aid does not depend on whether the student wishes to attend a public university or a private college, nor does it turn on whether the student seeks training for a religious or a secular career. It follows that under *Mueller* the State's program does not have the "principal or primary effect" of advancing religion.[3]

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[2] Cf. *Sloan* v. *Lemon*, 413 U. S. 825, 832 (1973):

"The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions."

[3] Contrary to the Court's suggestion, see *ante*, at 488, this conclusion does not depend on the fact that petitioner appears to be the only handicapped student who has sought to use his assistance to pursue religious training. Over 90% of the tax benefits in *Mueller* ultimately flowed to religious institutions. Compare *Mueller* v. *Allen*, 463 U. S., at 401, with *id.*, at 405 (MARSHALL, J., dissenting). Nevertheless, the aid was thus

The Washington Supreme Court reached a different conclusion because it found that the program had the practical effect of aiding religion *in this particular case*. *Witters* v. *Commission for the Blind*, 102 Wash. 2d 624, 628–629, 689 P. 2d 53, 56 (1984). In effect, the court analyzed the case as if the Washington Legislature had passed a private bill that awarded petitioner free tuition to pursue religious studies.

Such an analysis conflicts with both common sense and established precedent.[4] Nowhere in *Mueller* did we analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather, we looked to the nature and consequences of the program *viewed as a whole*. *Mueller*, *supra*, at 397–400. The same is true of our evaluation of the tuition reimbursement programs at issue in *Nyquist*, *supra*, at 780–789, and *Sloan* v. *Lemon*, 413 U. S. 825, 830–832 (1973). See also *Board of Education* v. *Allen*, 392 U. S. 236, 243–244, 248 (1968); *Everson* v. *Board of Education*, 330 U. S. 1, 16–17 (1947). This is the appropriate perspective for this case as well. Viewed in the proper light, the Washington program easily satisfies the second prong of the *Lemon* test.

I agree, for the reasons stated by the Court, that the State's program has a secular purpose, and that no entanglement challenge is properly raised on this record. I therefore join the Court's judgment. On the understanding that nothing we do today lessens the authority of our decision in *Mueller*, I join the Court's opinion as well.

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channeled by individual parents and not by the State, making the tax deduction permissible under the "primary effect" test of *Lemon*.

[4] Under the Washington Supreme Court's approach, the government could never provide aid of any sort to one who would use it for religious purposes, no matter what the characteristics of the challenged program. This Court has never taken such an approach. See *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970); *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947).

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I join Parts I and III of the Court's opinion, and concur in the judgment. I also agree with the Court that both the purpose and effect of Washington's program of aid to handicapped students are secular. As JUSTICE POWELL's separate opinion persuasively argues, the Court's opinion in *Mueller* v. *Allen*, 463 U. S. 388 (1983), makes clear that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* v. *Kurtzman* test, because any aid to religion results from the private decisions of beneficiaries." *Ante*, at 490–491 (POWELL, J., concurring) (footnote omitted). The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief. See *Lynch* v. *Donnelly*, 465 U. S. 668, 690 (1984) (O'CONNOR, J., concurring).

MIDLANTIC NATIONAL BANK *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-801. Argued October 16, 1985—Decided January 27, 1986*

Quanta Resources Corp. (Quanta) processed waste oil at facilities located in New York and New Jersey. The New Jersey Department of Environmental Protection (NJDEP) discovered that Quanta had violated a provision of the operating permit for the New Jersey facility by accepting oil contaminated with a toxic carcinogen. During negotiations with NJDEP for the cleanup of the New Jersey site, Quanta filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, and after NJDEP had issued an order requiring cleanup, Quanta converted the action to a liquidation proceeding under Chapter 7. An investigation of the New York facility then revealed that Quanta had also accepted similarly contaminated oil at that site. The trustee notified the creditors and the Bankruptcy Court that he intended to abandon the property under § 554(a) of the Bankruptcy Code, which authorizes a trustee to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." The City and the State of New York objected, contending that abandonment would threaten the public's health and safety, and would violate state and federal environmental law. The Bankruptcy Court approved the abandonment, and, after the District Court affirmed, an appeal was taken to the Court of Appeals for the Third Circuit. Meanwhile, the Bankruptcy Court also approved the trustee's proposed abandonment of the New Jersey facility over NJDEP's objection, and NJDEP took a direct appeal to the Court of Appeals. In separate judgments, the Court of Appeals reversed, holding that the Bankruptcy Court erred in permitting abandonment.

Held: A trustee in bankruptcy may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards. Congress did not intend for § 554(a) to pre-empt all state and local laws. A bankruptcy court does not have the power to authorize an abandonment without formulat-

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*Together with No. 84-805, *O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor* v. *City of New York et al.*, and *O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor* v. *New Jersey Department of Environmental Protection*, also on certiorari to the same court.

ing conditions that will adequately protect the public's health and safety. Pp. 500–507.

(a) Before the 1978 revisions of the Bankruptcy Code, which codified in § 554 the judicially developed rule of abandonment, the trustee's abandonment power had been limited by a judicially developed doctrine intended to protect legitimate state and federal interests. In codifying the rule of abandonment, Congress also presumably included the corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws. Pp. 500–501.

(b) Neither this Court's decisions nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety. Where the Bankruptcy Code has conferred other special powers upon the trustee and where there was no common-law limitation on such powers, Congress has expressly provided that the trustee's efforts to marshal and distribute the estate's assets must yield to governmental interests in public health and safety. It cannot be assumed that Congress, having placed such limitations upon other aspects of trustees' operations, intended to discard the well-established judicial restriction on the abandonment power. Moreover, 28 U. S. C. § 959(b), which commands the trustee to "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State," provides additional evidence that Congress did not intend for the Bankruptcy Code to pre-empt all state laws. Pp. 502–505.

(c) Additional support for restricting the abandonment power is found in repeated congressional emphasis, in other statutes, on the goal of protecting the environment against toxic pollution. Pp. 505–506.

739 F. 2d 912 and 739 F. 2d 927, affirmed.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined, *post*, p. 507.

A. Dennis Terrell argued the cause for petitioner in No. 84–801. With him on the brief was *Kenneth S. Kasper*. *William F. McEnroe* argued the cause for petitioner in No. 84–805. With him on the brief was *Thomas J. O'Neill*, *pro se*.

Mary C. Jacobson, Deputy Attorney General of New Jersey, argued the cause for respondent in No. 84–801. With her on the brief were *Irwin I. Kimmelman*, Attorney Gen-

eral, *James J. Ciancia*, Assistant Attorney General, and *Richard F. Engel* and *Ross A. Lewin*, Deputy Attorneys General. *Robert Hermann*, Solicitor General of New York, argued the cause for respondents in No. 84–805. With him on the brief were *Robert Abrams*, Attorney General, *Nancy Stearns*, *Norman Spiegel*, and *Christopher Keith Hall*, Assistant Attorneys General, *Frederick A. O. Schwarz, Jr.*, and *Leonard Koerner*.*

JUSTICE POWELL delivered the opinion of the Court.

These petitions for certiorari, arising out of the same bankruptcy proceeding, present the question whether § 554(a) of the Bankruptcy Code, 11 U. S. C. § 554(a),[1] authorizes a trustee in bankruptcy to abandon property in contravention of state laws or regulations that are reasonably designed to protect the public's health or safety.

I

Quanta Resources Corporation (Quanta) processed waste oil at two facilities, one in Long Island City, New York, and

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**Thomas H. Jackson*, *pro se*, filed a brief of *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the United States by *Acting Solicitor General Fried*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Claiborne*, *Kathryn A. Oberly*, and *Dirk D. Snel*; for the State of California by *John K. Van de Kamp*, Attorney General, *Theodora Berger*, Assistant Attorney General, and *Reed Sato*, *Lisa S. Trankley*, and *Craig C. Thompson*, Deputy Attorneys General; and for the State of West Virginia et al. by *Charlie Brown*, Attorney General of West Virginia, *Steven Johnston Knopp*, Assistant Attorney General, *James D. Morris*, and *Howard J. Wein*.

Ronald A. Zumbrun and *Robert K. Best* filed a brief for the Pacific Legal Foundation as *amicus curiae*.

[1] Section 554(a) reads:

"After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate."

Technical amendments in the Bankruptcy Amendments and Federal Judgeship Act of 1984 added the words "and benefit" after "value" in § 554(a). Pub. L. 98–353, Tit. III, § 468(a), 98 Stat. 380.

the other in Edgewater, New Jersey. At the Edgewater facility, Quanta handled the oil pursuant to a temporary operating permit issued by the New Jersey Department of Environmental Protection (NJDEP), respondent in No. 84-801. In June 1981, Midlantic National Bank, petitioner in No. 84-801, provided Quanta with a $600,000 loan secured by Quanta's inventory, accounts receivable, and certain equipment. The same month, NJDEP discovered that Quanta had violated a specific prohibition in its operating permit by accepting more than 400,000 gallons of oil contaminated with PCB, a highly toxic carcinogen. NJDEP ordered Quanta to cease operations at Edgewater, and the two began negotiations concerning the cleanup of the Edgewater site. But on October 6, 1981, before the conclusion of negotiations, Quanta filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. The next day, NJDEP issued an administrative order requiring Quanta to clean up the site. Quanta's financial condition remained perilous, however, and the following month, it converted the action to a liquidation proceeding under Chapter 7. Thomas J. O'Neill, petitioner in No. 84-805, was appointed trustee in bankruptcy, and subsequently oversaw abandonment of both facilities.

After Quanta filed for bankruptcy, an investigation of the Long Island City facility revealed that Quanta had accepted and stored there over 70,000 gallons of toxic, PCB-contaminated oil in deteriorating and leaking containers. Since the mortgages on that facility's real property exceeded the property's value, the estimated cost of disposing of the waste oil plainly rendered the property a net burden to the estate. After trying without success to sell the Long Island City property for the benefit of Quanta's creditors, the trustee notified the creditors and the Bankruptcy Court for the District of New Jersey that he intended to abandon the property pursuant to § 554(a). No party to the bankruptcy proceeding disputed the trustee's allegation that the site was "burdensome" and of "inconsequential value to the estate" within the meaning of § 554.

The City and the State of New York (collectively New York), respondents in No. 84–805, nevertheless objected, contending that abandonment would threaten the public's health and safety, and would violate state and federal environmental law. New York rested its objection on "public policy" considerations reflected in applicable local laws, and on the requirement of 28 U. S. C. § 959(b) that a trustee "manage and operate" the property of the estate "according to the requirements of the valid laws of the State in which such property is situated." New York asked the Bankruptcy Court to order that the assets of the estate be used to bring the facility into compliance with applicable law. After briefing and argument, the court approved the abandonment, noting that "[t]he City and State are in a better position in every respect than either the Trustee or debtor's creditors to do what needs to be done to protect the public against the dangers posed by the PCB-contaminated facility." The District Court for the District of New Jersey affirmed, and New York appealed to the Court of Appeals for the Third Circuit.

Upon abandonment, the trustee removed the 24-hour guard service and shut down the fire-suppression system. It became necessary for New York to decontaminate the facility, with the exception of the polluted subsoil, at a cost of about $2.5 million.[2]

On April 23, 1983, shortly after the District Court had approved abandonment of the New York site, the trustee gave notice of his intention to abandon the personal property at the Edgewater site, consisting principally of the contaminated oil. The Bankruptcy Court approved the abandonment on May 20, over NJDEP's objection that the estate had

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[2] The sole issue presented by these petitions is whether a trustee may abandon property under § 554 in contravention of local laws designed to protect the public's health and safety. New York is claiming reimbursement for its expenditures as an administrative expense. That question, however, like the question of the ultimate disposition of the property, is not before us.

sufficient funds to protect the public from the dangers posed by the hazardous waste.[3]

Because the abandonments of the New Jersey and New York facilities presented identical issues, the parties in the New Jersey litigation consented to NJDEP's taking a direct appeal from the Bankruptcy Court to the Court of Appeals pursuant to § 405(c)(1)(B) of the Bankruptcy Act of 1978.

A divided panel of the Court of Appeals for the Third Circuit reversed. *In re Quanta Resources Corp.*, 739 F. 2d 912 (1984); *In re Quanta Resources Corp.*, 739 F. 2d 927 (1984). Although the court found little guidance in the legislative history of § 554, it concluded that Congress had intended to codify the judge-made abandonment practice developed under the previous Bankruptcy Act. Under that law, where state law or general equitable principles protected certain public interests, those interests were not overridden by the judge-made abandonment power. The court also found evidence in other provisions of the Bankruptcy Code that Congress did not intend to pre-empt all state regulation, but only that grounded on policies outweighed by the relevant federal in-

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[3] The trustee was not required to take even relatively minor steps to reduce imminent danger, such as security fencing, drainage and diking repairs, sealing deteriorating tanks, and removing explosive agents. Moreover, the trustee's abandonment at both sites aggravated already existing dangers by halting security measures that prevented public entry, vandalism, and fire. Joint Appendix in No. 83–5142 (CA3), pp. 11–12 (affidavit of Richard Docyk, Deputy Chief Inspector for N. Y. City Fire Department); *id.*, at 26 (transcript of proceedings before DeVito, J.). The 470,000 gallons of highly toxic and carcinogenic waste oil in unguarded, deteriorating containers "present risks of explosion, fire, contamination of water supplies, destruction of natural resources, and injury, genetic damage, or death through personal contact." Brief for United States as *Amicus Curiae* 4, 23; see Joint Appendix, *supra*, at 17 (70,000 gallons at New York site); Appendix in No. 83–5730 (CA3), p. A7 (400,000 gallons at New Jersey site); *id.*, at A46 (deteriorating containers); Joint Appendix, *supra*, at 11 (deteriorating tanks); *id.*, at 26 (guard service); *id.*, at 12 (risk of fire); *id.*, at 11 (contamination of adjacent areas); *id.*, at 20 (health effects of exposure to PCBs and their derivatives).

terests. Accordingly, the Court of Appeals held that the Bankruptcy Court erred in permitting abandonment, and remanded both cases for further proceedings.[4]

We granted certiorari and consolidated these cases to determine whether the Court of Appeals properly construed § 554, 469 U. S. 1207 (1985). We now affirm.

II

Before the 1978 revisions of the Bankruptcy Code, the trustee's abandonment power had been limited by a judicially developed doctrine intended to protect legitimate state or federal interests. This was made clear by the few relevant cases. In *Ottenheimer* v. *Whitaker*, 198 F. 2d 289 (CA4 1952), the Court of Appeals concluded that a bankruptcy trustee, in liquidating the estate of a barge company, could not abandon several barges when the abandonment would have obstructed a navigable passage in violation of federal law. The court stated:

> "The judge-made [abandonment] rule must give way when it comes into conflict with a statute enacted in order to ensure the safety of navigation; for we are not dealing with a burden imposed upon the bankrupt or his property by contract, but a duty and a burden imposed upon an owner of vessels by an Act of Congress in the public interest." *Id.*, at 290.

In *In re Chicago Rapid Transit Co.*, 129 F. 2d 1 (CA7), cert. denied *sub nom. Chicago Junction R. Co.* v. *Sprague*, 317 U. S. 683 (1942), the Court of Appeals held that the trustee of a debtor transit company could not cease its opera-

[4]Judge Gibbons dissented, arguing that § 554 permits abandonment without any exception analogous to that provided to the automatic stay. The dissent further contended that the majority's interpretation of § 554 raised substantial questions under the Takings Clause by potentially destroying the interest of secured creditors, see *United States* v. *Security Industrial Bank*, 459 U. S. 70 (1982), and that the majority had failed to address the important underlying issue of the priority of the States' claims for reimbursement.

tion of a branch railway line when local law required continued operation. While the court did not forbid the trustee to abandon property (*i. e.*, to reject an unexpired lease), it conditioned his actions to ensure compliance with state law. Similarly, in *In re Lewis Jones, Inc.*, 1 BCD 277 (Bkrtcy Ct. ED Pa. 1974), the Bankruptcy Court invoked its equitable power to "safeguard the public interest" by requiring the debtor public utilities to seal underground steam lines before abandoning them.

Thus, when Congress enacted § 554, there were well-recognized restrictions on a trustee's abandonment power. In codifying the judicially developed rule of abandonment, Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws. The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 266–267 (1979). The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." *Swarts* v. *Hammer*, 194 U. S. 441, 444 (1904); see *Palmer* v. *Massachusetts*, 308 U. S. 79, 85 (1939) ("If this old and familiar power of the states [over local railroad service] was withdrawn when Congress gave district courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change"). Although these cases do not define for us the exact contours of the trustee's abandonment power, they do make clear that this power was subject to certain restrictions when Congress enacted § 554(a).

III

Neither the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety. As we held last Term when the State of Ohio sought compensation for cleaning the toxic waste site of a bankrupt corporation:

> "Finally, we do not question that anyone in possession of the site—whether it is [the debtor] or another in the event the receivership is liquidated and the trustee abandons the property, or a vendee from the receiver *or the bankruptcy trustee*—must comply with the environmental laws of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions." *Ohio* v. *Kovacs*, 469 U. S. 274, 285 (1985) (emphasis added).

Congress has repeatedly expressed its legislative determination that the trustee is not to have *carte blanche* to ignore nonbankruptcy law. Where the Bankruptcy Code has conferred special powers upon the trustee and where there was no common-law limitation on that power, Congress has expressly provided that the efforts of the trustee to marshal and distribute the assets of the estate must yield to governmental interest in public health and safety. *Infra*, at 503–504. One cannot assume that Congress, having placed these limitations upon other aspects of trustees' operations, intended to discard a well-established judicial restriction on the abandonment power. As we held nearly two years ago in the context of the National Labor Relations Act, "the debtor-in-possession is not relieved of all obligations under the [Act] simply by filing a petition for bankruptcy." *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 534 (1984).

The automatic stay provision of the Bankruptcy Code, § 362(a),[5] has been described as "one of the fundamental debtor protections provided by the bankruptcy laws." S. Rep. No. 95-989, p. 54 (1978); H. R. Rep. No. 95-595, p. 340 (1977). Despite the importance of § 362(a) in preserving the debtor's estate, Congress has enacted several categories of exceptions to the stay that allow the Government to commence or continue legal proceedings. For example, § 362(b)(5) permits the Government to enforce "nonmonetary" judgments against a debtor's estate. It is clear from the legislative history that one of the purposes of this exception is to protect public health and safety:

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[5] Section 362(a) provides:

"(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U. S. C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

"(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

"(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

"(3) any act to obtain possession of property of the estate or of property from the estate;

"(4) any act to create, perfect, or enforce any lien against property of the estate;

"(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

"(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

"(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

"(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor."

> "Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, *environmental protection*, consumer protection, *safety, or similar police or regulatory laws*, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." H. R. Rep. No. 95–595, *supra*, at 343 (emphasis added); S. Rep. No. 95–989, *supra*, at 52 (emphasis added).

Petitioners have suggested that the existence of an express exception to the automatic stay undermines the inference of a similar exception to the abandonment power: had Congress sought to restrict similarly the scope of § 554, it would have enacted similar limiting provisions. This argument, however, fails to acknowledge the differences between the predecessors of §§ 554 and 362. As we have noted, the exceptions to the judicially created abandonment power were firmly established. But in enacting § 362 in 1978, Congress significantly broadened the scope of the automatic stay, see 1 W. Norton, Bankruptcy Law and Practice § 20.03, pp. 5–6 (1981), an expansion that had begun only five years earlier with the adoption of the Bankruptcy Rules in 1973, see *id.*, § 20.02, at 4–5. Between 1973 and 1978, some courts had stretched the expanded automatic stay to foreclose States' efforts to enforce their antipollution laws,[6] and Congress wanted to overrule these interpretations in its 1978 revision. See H. R. Rep. No. 95–595, *supra*, at 174–175. In the face of the greatly increased scope of § 362, it was necessary for Congress to limit this new power expressly.

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[6] See, *e. g.*, *In re Hillsdale Foundry Co.*, 1 BCD 195 (Bkrtcy Ct. WD Mich. 1974) (action by Michigan Attorney General to enforce State's antipollution laws held subject to automatic stay). The House Report also referred to an unreported case from Texas where a stay prevented the State of Maine from closing down a debtor's plant that was polluting a river in violation of the State's environmental protection laws. H. R. Rep. No. 95–595, pp. 174–175 (1977).

Title 28 U. S. C. § 959(b)[7] provides additional evidence that Congress did not intend for the Bankruptcy Code to pre-empt all state laws. Section 959(b) commands the trustee to "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State." The petitioners have contended that § 959(b) is relevant only when the trustee is actually operating the business of the debtor, and not when he is liquidating it. Even though § 959(b) does not directly apply to an abandonment under § 554(a) of the Bankruptcy Code—and therefore does not delimit the precise conditions on an abandonment—the section nevertheless supports our conclusion that Congress did not intend for the Bankruptcy Code to pre-empt all state laws that otherwise constrain the exercise of a trustee's powers.

IV

Although the reasons elaborated above suffice for us to conclude that Congress did not intend for the abandonment power to abrogate certain state and local laws, we find additional support for restricting that power in repeated congressional emphasis on its "goal of protecting the environment against toxic pollution." *Chemical Manufacturers Assn., Inc.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 143 (1985). Congress has enacted a Resource Conservation and Recovery Act, 42 U. S. C. §§ 6901–6987, to regulate the treatment, storage, and disposal of hazardous wastes by monitoring wastes from their creation until after their permanent disposal. That Act authorizes the United States to seek judicial or administrative restraint of activities involv-

[7] Section 959(b) provides:

"Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

ing hazardous wastes that "may present an imminent and substantial endangerment to health or the environment." 42 U. S. C. § 6973; see also S. Rep. No. 98-284, p. 58 (1983). Congress broadened the scope of the statute and tightened the regulatory restraints in 1984.[8] In the Comprehensive Environmental Response, Compensation, and Liability Act, as amended by Pub. L. 98-80, § 2(c)(2)(B), Congress established a fund to finance cleanup of some sites and required certain responsible parties to reimburse either the fund or the parties who paid for the cleanup. The Act also empowers the Federal Government to secure such relief as may be necessary to avert "imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance." 42 U. S. C. § 9606. In the face of Congress' undisputed concern over the risks of the improper storage and disposal of hazardous and toxic substances, we are unwilling to presume that by enactment of § 554(a), Congress implicitly overturned longstanding restrictions on the common-law abandonment power.

V

In the light of the Bankruptcy trustee's restricted pre-1978 abandonment power and the limited scope of other Bankruptcy Code provisions, we conclude that Congress did not intend for § 554(a) to pre-empt all state and local laws. The

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[8] Congress eliminated the small generator exception and subjected many more facilities to the regulations. Pub. L. 98-616, 98 Stat. 3221, 3248-3272 (codified at 42 U. S. C. § 6921(d) (1982 ed., Supp. III)). Another provision automatically broadens the Act's coverage by automatically assigning a hazardous rating to substances that the Environmental Protection Agency does not classify by a set deadline. 98 Stat. 3227-3231 (codified at 42 U. S. C. §§ 6924(d), (e), (f)(3), (g)(6) (1982 ed., Supp. III)). Amended enforcement provisions allow more citizen suits, 98 Stat. 3271-3272 (codified at 42 U. S. C. § 6973 (1982 ed., Supp. III)), and authorize administrative orders or suits to compel "corrective action" after a leak has occurred. 98 Stat. 3257-3258 (codified at 42 U. S. C. § 6928(h) (1982 ed., Supp. III)).

Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety. Accordingly, without reaching the question whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself, we hold that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.* Accordingly, we affirm the judgments of the Court of Appeals for the Third Circuit.

It is so ordered.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, dissenting.

The Court today concludes that Congress did not intend the abandonment provision of the Bankruptcy Code, 11 U. S. C. § 554(a), to pre-empt "certain state and local laws." In something of a surprise ending, the Court limits the class of laws that can prevent an otherwise authorized abandonment by a trustee to those "reasonably designed to protect the public health or safety from identified hazards." While this limitation reduces somewhat the scope of my disagreement with the result reached, it renders both the *ratio decidendi* and the import of the Court's opinion quite unclear. More important, I remain unconvinced by the Court's arguments supporting state power to bar abandonment. The principal and only independent ground offered—that Congress codified "well-recognized restrictions of a trustee's abandonment power"—is particularly unpersuasive. It rests on a misreading of three pre-Code cases, the elevation of that

*This exception to the abandonment power vested in the trustee by § 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm.

misreading into a "well-recognized" exception to the abandonment power, and the unsupported assertion that Congress must have meant to codify the exception (or something like it). These specific shortcomings in the Court's analysis, which are addressed in greater detail below, stem at least in part from the Court's failure to discuss even in passing either the nature of abandonment or its role in federal bankruptcy.

Abandonment is "the release from the debtor's estate of property previously included in that estate." 2 W. Norton, Bankruptcy Law and Practice § 39.01 (1984), citing *Brown* v. *O'Keefe*, 300 U. S. 598, 602–603 (1937). Prior to enactment of the Bankruptcy Code in 1978, there was no statutory provision specifically authorizing abandonment in liquidation cases. By analogy to the trustee's statutory power to reject executory contracts, courts had developed a rule permitting the trustee to abandon property that was worthless or not expected to sell for a price sufficiently in excess of encumbrances to offset the costs of administration. 4 L. King, Collier on Bankruptcy ¶ 554.01 (15th ed. 1985) (hereinafter Collier).[1] This judge-made rule served the overriding purpose of bankruptcy liquidation: the expeditious reduction of the debtor's property to money, for equitable distribution to creditors, *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 227 (1930). 4 Collier ¶ 554.01. Forcing the trustee to administer burdensome property would contradict this purpose, slowing the administration of the estate and draining its assets.

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[1] Under the former Bankruptcy Act, title to the debtor's property vested in the trustee. Abandonment divested the trustee of title and revested it in the debtor. 4 Collier ¶ 554.02[2]. Under the Code, the trustee no longer takes title to the debtor's property, and he is simply divested of control over the property by the abandonment. *Ibid.* Although § 554 does not specify to whom the property is abandoned, the legislative history suggests that it is to the person having a possessory interest in the property. S. Rep. No. 95–989, p. 92 (1978); *Ohio* v. *Kovacs*, 469 U. S. 274, 284–285, n. 12 (1985).

The Bankruptcy Code expressly incorporates the power of abandonment into federal bankruptcy legislation for the first time. The relevant provision bears repeating:

> "(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." 11 U. S. C. § 554(a) (amended 1984).

This language, absolute in its terms, suggests that a trustee's power to abandon is limited only by considerations of the property's value to the estate. It makes no mention of other factors to be balanced or weighed and permits no easy inference that Congress was concerned about state environmental regulations.[2] Indeed, as the Court notes, when Congress *was* so concerned it expressed itself clearly, specifically exempting some environmental injunctions from the automatic stay provisions of § 362 of the Code, 11 U. S. C. §§ 362(b)(4), (5) (1982 ed. and Supp. II). See *Ohio* v. *Kovacs*, 469 U. S. 274 (1985).

Nor does the scant legislative history of § 554 support the Court's interpretation. Nowhere does that legislative his-

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[2] Last Term in *Ohio* v. *Kovacs*, *supra*, which involved the dischargeability of certain environmental injunctions in bankruptcy, we briefly addressed the abandonment of hazardous waste sites:

"After notice and hearing, the trustee many abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate. 11 U. S. C. § 554. Such abandonment is to the person having the possessory interest in the property. S. Rep. No. 95-989, p. 92 (1978). . . . If the site at issue were [the debtor's] property, the trustee would shortly determine whether it was of value to the estate. If the property was worth more than the costs of bringing it into compliance with state law, the trustee would undoubtedly sell it for its net value, and the buyer would clean up the property, in which event whatever obligation [the debtor] might have had to clean up the property would have been satisfied. If the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of his or its ability." *Id.*, at 284-285, n. 12.

tory suggest that Congress intended to limit the trustee's authority to abandon burdensome property where abandonment might be opposed by those charged with the exercise of state police or regulatory powers.

The Court seeks to turn the seemingly unqualified language and the absence of helpful legislative history to its advantage. Adopting the reasoning of the Court of Appeals, the Court argues that in light of Congress' failure to elaborate, § 554 must have been intended to codify prior "abandonment" case law, and that under prior law "a trustee could not exercise his abandonment power in violation of certain state and federal laws," *ante*, at 501. I disagree. We have previously expressed our unwillingness to read into unqualified statutory language exceptions or limitations based upon legislative history unless that legislative history demonstrates with extraordinary clarity that this was indeed the intent of Congress. *E. g.*, *Garcia* v. *United States*, 469 U. S. 70, 75 (1984). I think that upon analysis the "legislative history" relied upon by the Court here falls far short of this standard.

The Court relies on just three cases for its claimed "established corollary" to the pre-Code abandonment power. A close reading of those cases, however, reveals that none supports the rule announced today. In *Ottenheimer* v. *Whitaker*, 198 F. 2d 289 (CA4 1952), the Court of Appeals held that a trustee could not abandon worthless barges obstructing traffic in Baltimore Harbor when the abandonment would have violated federal law. The Court concluded that the "judge-made rule [of abandonment] must give way" to "an Act of Congress in the public interest." *Id.*, at 290. *Ottenheimer* thus depended on the need to reconcile a conflict between a judicial gloss on the Bankruptcy Act and the commands of another federal statute. We implicitly confirmed the validity of such an approach two Terms ago in *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 523–524 (1984). Here, by contrast, the "conflict" is with the uncertain commands of

state laws that the Court declines to identify.[3] In addition, the Court of Appeals relied heavily on the fact that the pre-Code law of abandonment was judge-made, which in turn raises the somewhat Delphic inquiry as to whether that court would have decided the case the same way under the present Code.

In re Lewis Jones, Inc., 1 BCD 277 (Bkrtcy Ct. ED Pa. 1974), was a Bankruptcy Court decision concluding that the principle of *Ottenheimer* did not apply because there was no conflicting statute. But because the right to abandon was based on judge-made law, the court nonetheless found itself free to protect the public interest by requiring a trustee seeking abandonment to first spend funds of the estate to seal manholes and vents in an underground pipe network. While this case admittedly comes closer to supporting the Court's position than does *Ottenheimer*, it too turns on the judge-made nature of the abandonment power. Moreover, I do not believe that the isolated decision of a single Bankruptcy Court rises to the level of "established law" that we can fairly assume Congress intended to incorporate. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 379–382 (1982).

In *In re Chicago Rapid Transit Co.*, 129 F. 2d 1 (CA7), cert. denied *sub nom. Chicago Junction R. Co.* v. *Sprague*, 317 U. S. 683 (1942), the District Court sitting in bankruptcy had authorized the bankrupt to abandon a lease of a rail line, and a lessor appealed. The bankrupt did not appeal the District Court's imposition of conditions on the abandonment; the propriety of those conditions thus was not before the

[3] The Court finds "additional support" for its restriction of the abandonment power in recent federal statutes concerned with protecting the environment. If these statutes operated to bar abandonment here—something neither respondents nor the Court suggests—then this might be a different case. See *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513 (1984). But the statutes do not bar abandonment, and the majority's reference to their obvious concern over the risks of storing hazardous substances is little more than a makeweight.

Court of Appeals, which affirmed the District Court's *authorization* of abandonment. So while there may be dicta in the Court of Appeals' opinion that would support some limitation on the power of abandonment, the holding of the case certainly does not. In short, none of these cases supports the Court's view that § 554(a) contains an implicit exception for "certain state and local laws."

Even assuming these cases stand for the proposition ascribed to them in the Court's opinion, that opinion's brief discussion of the cases, *ante*, at 500–501, certainly does not support the claim that they reflect an "established corollary" to pre-Code abandonment law. Generally speaking, three rather isolated cases do not constitute the sort of settled law that we can fairly assume Congress intended to codify absent some expression of its intent to do so. Perhaps recognizing this, respondents place substantial reliance for their view that the exception was "well settled" on the following statement in the (pre-Code) 14th edition of Collier on Bankruptcy, accompanying a citation to *Ottenheimer* and *Chicago Rapid Transit:* "Recent cases illustrate, however, that the trustee in the exercise of the power to abandon is subject to the application of general regulations of a police nature." 4A J. Moore, Collier on Bankruptcy ¶ 70.42[2], pp. 502–504 (14th ed. 1978); see also *In re Quanta Resources Corp.*, 739 F. 2d 912, 916 (1984) (quoting same language from Collier). Respondents further observe that the section of this treatise addressing abandonment was cited in a note to an early precursor of § 554, § 4–611 of the proposed Bankruptcy Act of 1973, H. R. Doc. No. 93–137, Part II, p. 181, reprinted in A. Resnick & E. Wypyski, 2 Bankruptcy Reform Act of 1978: A Legislative History, Doc. No. 22 (1979). While resourceful, this argument is wholly unpersuasive.

The reference to Collier is not part of the Code's "'legislative history' in any meaningful sense of the term," *Board of Governors, FRS* v. *Dimension Financial Corp.*, *ante*, at 372. And the proposition for which the section in Collier is cited is

not the view that authority for abandonment is qualified by state police power, but instead the much less remarkable proposition that "[t]he concept of abandonment is well recognized in the case law. See 4A Collier ¶ 70.42[3]." In order to divine that the statutory power to abandon in the proposed Code was to be conditioned on compliance with state police power regulations, therefore, a Senator or Congressman would not merely have had to look at the legislative history of the precursor to the Code, but also would have had to read the several-page treatise section cited in that earlier legislative history

Neither the three cases cited by the Court nor the attenuated reference to the since superseded version of Collier supports the inference that Congress, while writing § 554 in unqualified terms, intended to incorporate so ill-defined and uncertain an exception to the abandonment authority of the trustee. After suggesting that "if Congress intends for legislation to change the interpretation of a judicially created concept" it should do so expressly, *ante*, at 501, the Court concedes that these cases "do not define for us the exact contours of the trustee's abandonment power," *ibid.* The Court never identifies the source from which it draws the "exact contours" of the rule it announces today; congressional intent does not appear to be a likely candidate. Congress knew how to draft an exception covering the exercise of "certain" police powers when it wanted to. See 11 U. S. C. §§ 362(b)(4), (5) (1982 ed. and Supp. II); *supra*, at 509. It also knew how to draft a qualified abandonment provision. See § 1170(a)(2) (abandonment of railroad lines permitted only if "consistent with the public interest"). Congress' failure to so qualify § 554 indicates that it intended the relevant inquiry at an abandonment hearing to be limited to whether the property is burdensome and of inconsequential value to the estate.

I find the Court's discussion of 28 U. S. C. § 959(b) somewhat difficult to fathom. After suggesting that § 959(b)

"provides additional evidence" for the self-evident proposition "that Congress did not intend for the Bankruptcy Code to pre-empt all state laws," *ante*, at 505, the Court concedes that the provision "does not *directly* apply to an abandonment under § 554(a) of the Bankruptcy Code," *ibid.* (emphasis added). The precise nature of its *indirect* application, however, is left unclear. Respondents contend that § 959(b) operates to bar abandonment in these cases. Assuming that temporary management or operation of a facility during liquidation is governed by § 959(b), I believe that a trustee's filing of a petition to abandon, as opposed to continued operation of a site pending a decision to abandon, does not constitute "manage[ment]" or "opera[tion]" under that provision. Not only would a contrary reading strain the language of § 959(b), cf. *In re Adelphi Hospital Corp.*, 579 F. 2d 726, 729, n. 6 (CA2 1978) *(per curiam)* (in pre-Code liquidation proceeding trustee "is in no sense a manager of an institution's operations"), it also would create an exception to the abandonment power without a shred of evidence that Congress intended one. As one commentator has noted, § 554(a) "is among the few provisions in the Bankruptcy Code that do not contain explicit exceptions." Note, 85 Colum. L. Rev. 870, 883 (1985). I would not read 28 U. S. C. § 959(b) as creating an implicit exception.

Citing *SEC* v. *United Realty & Improvement Co.*, 310 U. S. 434, 455 (1940), respondents argue that the Bankruptcy Court's equitable powers support the result reached below. I disagree. While the Bankruptcy Court is a court of equity, the Bankruptcy Code "does not authorize freewheeling consideration of every conceivable equity." *Bildisco & Bildisco*, 465 U. S., at 527. The Bankruptcy Court may not, in the exercise of its equitable powers, enforce its view of sound public policy at the expense of the interests the Code is designed to protect. In these cases, it is undisputed that the properties in question were burdensome and of inconsequential value to the estate. Forcing the trustee to expend es-

tate assets to clean up the sites would plainly be contrary to the purposes of the Code.

I fully appreciate the Court's concern that abandonment may "aggravat[e] already existing dangers by halting security measures that preven[t] public entry, vandalism, and fire." *Ante*, at 499, n. 3. But in almost all cases, requiring the trustee to notify the relevant authorities before abandoning will give those authorities adequate opportunity to step in and provide needed security. As the Bankruptcy Court noted in No. 84-805: "The City and State are in a better position in every respect than either the Trustee or debtor's creditors to do what needs to be done to protect the public against the dangers posed by the PCB-contaminated facility." App. to Pet. for Cert. 73a. And requiring notice before abandonment in appropriate cases is perfectly consistent with the Code. It advances the State's interest in protecting the public health and safety, and, unlike the rather uncertain exception to the abandonment power propounded by the Court, at the same time allows for the orderly liquidation and distribution of the estate's assets. Here, of course, the trustee provided such notice and the relevant authorities were afforded an opportunity to take appropriate preventative and remedial measures.

I likewise would not exclude the possibility that there may be a far narrower condition on the abandonment power than that announced by the Court today, such as where abandonment by the trustee itself might create a genuine emergency that the trustee would be uniquely able to guard against. The United States in its brief as *amicus curiae* suggests, for example, that there are limits on the authority of a trustee to abandon dynamite sitting on a furnace in the basement of a schoolhouse. Although I know of no situations in which trustees have sought to abandon dynamite under such circumstances, the narrow exception that I would reserve surely would embrace that situation.

What the Court fails to appreciate is that respondents' interest in these cases lies not just in protecting public health and safety but also in protecting the public fisc. In No. 84–805, before undertaking cleanup efforts, New York unsuccessfully sought from the Bankruptcy Court a first lien on the Long Island City property to the extent of any expenditures it might make to bring the site into compliance with state and local law. New York did not appeal the court's denial of a first lien, and proceeded to clean up the site (except for the contaminated subsoil). It now presses a claim for reimbursement, maintaining that the trustee should not have been allowed to abandon the site. The New Jersey Department of Environmental Protection, in No. 84–801, apparently seeks to undo the abandonment and force the trustee to expend the estate's remaining assets cleaning up the site, thereby reducing the cleanup costs that must ultimately be borne by the State.[4]

The Court states that the "abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm." *Ante*, at 507, n. 9. Because the Court declines to identify those laws that its deems so "reasonably calculated," I can only speculate about its view of respondents' claim that abandonment can be conditioned on a total cleanup. One might assume, however, that since it affirms the judgments below the Court means to adopt respondents' position. The Court of Appeals, as I read its opinions in these cases, apparently would require the trustee to expend all of Quanta's available assets to clean up the sites.[5] But barring abandonment and forcing a cleanup would effectively

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[4] NJDEP does not contend that the estate, including any assets otherwise subject to Midlantic's secured claim, contains sufficient assets to complete the cleanup.

[5] I would think that this command qualifies, in the words of the Court, as a "conditio[n] on abandonment . . . so onerous as to interfere with the bankruptcy adjudication itself," *ante*, at 507.

place respondents' interest in protecting the public fisc ahead of the claims of other creditors. Congress simply did not intend that § 554 abandonment hearings would be used to establish the priority of particular claims in bankruptcy. While States retain considerable latitude to ensure that priority status is allotted to their cleanup claims, see *Ohio* v. *Kovacs*, 469 U. S., at 285–286 (O'CONNOR, J., concurring), I believe that the Court errs by permitting them to impose conditions on the abandonment power that Congress never contemplated. Accordingly, in each of these cases I would reverse the judgment of the Court of Appeals.

PARSONS STEEL, INC., ET AL. *v.* FIRST ALABAMA BANK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84-1616. Argued December 3, 1985—Decided January 27, 1986

Petitioners sued respondents in an Alabama state court, alleging that respondent bank had fraudulently induced petitioner individuals to permit a third person to take control of a subsidiary of petitioner corporation and eventually to obtain complete ownership. Subsequently, the subsidiary was adjudicated an involuntary bankrupt. Petitioners then sued the bank in Federal District Court, alleging that the same conduct on the bank's part that was the subject of the state suit violated the Bank Holding Company Act (BHCA) amendments. The federal action went to trial before the state action, and the District Court granted judgment n.o.v. for the bank. The Court of Appeals affirmed. Thereafter, respondents pleaded a res judicata defense in the state action based on the federal judgment, but the Alabama court denied the defense. After the state complaint was amended to include a Uniform Commercial Code (UCC) claim that the bank's foreclosure sale of the subsidiary's assets was commercially unreasonable, the jury returned a verdict for damages in petitioners' favor. Respondents then returned to the District Court and filed an injunctive action against petitioners. Holding that the state fraud and UCC claims should have been raised in the federal action as pendent to the BHCA claim and accordingly that the BHCA judgment barred the state claims under res judicata, the District Court enjoined petitioners from further prosecuting the state action. The Court of Appeals affirmed, holding that the parties to the BHCA action were barred by res judicata from raising the state claims in state court after the entry of the federal judgment, and that the federal injunction was proper under the "relitigation exception" to the Anti-Injunction Act, which generally prohibits a federal court from enjoining state proceedings but excepts from the prohibition the issuance of an injunction by a federal court "where necessary . . . to protect or effectuate its judgments." The court did not consider the possible preclusive effect under Alabama law of the state court's resolution of the res judicata issue, holding instead that the "relitigation exception" to the Anti-Injunction Act worked a *pro tanto* amendment to the Full Faith and Credit Act, which requires federal courts as well as state courts to give state judicial proceedings "the

same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken."

Held: The Court of Appeals erred by refusing to consider the possible preclusive effect under Alabama law of the state-court judgment. Even if the state court mistakenly rejected respondents' res judicata claim, this would not justify the highly intrusive remedy of a federal-court injunction against enforcement of the state-court judgment. Rather, the Full Faith and Credit Act requires that the federal courts give the state-court judgment, and particularly the state court's resolution of the res judicata issue, the same preclusive effect it would have in another court of the same State. Pp. 523–526.

747 F. 2d 1367, reversed and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court.

Frank M. Wilson argued the cause for petitioners. With him on the briefs was *James Jerry Wood.*

M. Roland Nachman, Jr., argued the cause for respondents. With him on the brief was *James A. Byram, Jr.*

JUSTICE REHNQUIST delivered the opinion of the Court.

The Full Faith and Credit Act, 28 U. S. C. § 1738, requires federal courts as well as state courts to give state judicial proceedings "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken." The Anti-Injunction Act, 28 U. S. C. § 2283, generally prohibits a federal court from granting an injunction to stay proceedings in a state court, but excepts from that prohibition the issuance of an injunction by a federal court "where necessary . . . to protect or effectuate its judgments." In the present case the Court of Appeals for the Eleventh Circuit held that the quoted exception to the latter Act worked a *pro tanto* amendment to the former, so that a federal court might issue an injunction against state-court proceedings even though the prevailing party in the federal suit had litigated in the state court and lost on the res judicata effect of the federal judgment. We granted certiorari to consider this question, 472 U. S. 1026 (1985), and now reverse the judgment of the Court of Appeals.

Petitioners Parsons Steel, Inc., and Jim and Melba Parsons sued respondents First Alabama Bank of Montgomery and Edward Herbert, a bank officer, in Alabama state court in February 1979, essentially alleging that the bank had fraudulently induced the Parsons to permit a third person to take control of a subsidiary of Parsons Steel and eventually to obtain complete ownership of the subsidiary. The subsidiary was adjudicated an involuntary bankrupt in April 1979, and the trustee in bankruptcy was added as a party plaintiff in the state action. In May 1979 Parsons Steel and the Parsons sued the bank in the United States District Court for the District of Alabama, alleging that the same conduct on the part of the bank that was the subject of the state-court suit also violated the Bank Holding Company Act (BHCA) amendments, 12 U. S. C. §§ 1971–1978. The trustee in bankruptcy chose not to participate in the federal action.

The parties conducted joint discovery in the federal and state actions. The federal action proceeded to trial on the issue of liability before the state action went to trial. A jury returned a verdict in favor of petitioners, but the District Court granted judgment n.o.v. to the bank. That judgment was affirmed on appeal. *Parsons Steel, Inc.* v. *First Alabama Bank of Montgomery*, 679 F. 2d 242 (CA11 1982). After the federal judgment was entered, respondents pleaded in the state action the defenses of res judicata and collateral estoppel based on that judgment. The Alabama court, however, ruled that res judicata did not bar the state action. Almost a year after the federal judgment was entered, the state complaint was amended to include a Uniform Commercial Code (UCC) claim that the bank's foreclosure sale of the subsidiary's assets was commercially unreasonable. A jury returned a general verdict in favor of petitioners, awarding a total of four million and one dollars in damages.

Having lost in state court, respondents returned to the District Court that had previously entered judgment in the

bank's favor and filed the present injunctive action against petitioners, the plaintiffs in the state action.[1] The District Court found that the federal BHCA suit and the state action were based on the same factual allegations and claimed substantially the same damages. The court held that the state claims should have been raised in the federal action as pendent to the BHCA claim and accordingly that the BHCA judgment barred the state claims under res judicata. Determining that the Alabama judgment in effect nullified the earlier federal-court judgment in favor of the bank, the District Court enjoined petitioners from further prosecuting the state action.

A divided panel of the Court of Appeals affirmed in relevant part, holding that the issuance of the injunction was not "an abuse of discretion" by the District Court. 747 F. 2d 1367, 1381 (1980). The majority first agreed with the District Court that the fraud and UCC claims presented issues of fact and law that could have been and should have been raised in the same action as the BHCA claim. Thus the parties to the BHCA action and their privies, including the trustee in bankruptcy, were barred by res judicata from raising these claims in state court after the entry of the federal judgment.

The majority then held that the injunction was proper under the so-called "relitigation exception" to the Anti-Injunction Act, 28 U. S. C. § 2283, which provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or *to protect or effectuate its judgments*" (emphasis added).

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[1] Although the opinion of the Court of Appeals does not mention it, respondents apparently also filed in state court a timely post-trial motion for new trial or judgment n.o.v.

In reaching this holding, the majority explicitly declined to consider the possible preclusive effect, pursuant to the Full Faith and Credit Act, 28 U. S. C. § 1738,[2] of the state court's determination after full litigation by the parties that the earlier federal-court judgment did not bar the state action. According to the majority, "while a federal court is generally bound by other state court determinations, the relitigation exception empowers a federal court to be the final adjudicator as to the res judicata effects of its prior judgments on a subsequent state action." 747 F. 2d, at 1376 (footnote omitted).

Finally, the majority ruled that respondents had not waived their right to an injunction by waiting until after the trial in the state action was completed. The majority concluded that the state-court pleadings were so vague that it was not clear until after trial that essentially the same cause of action was involved as the BHCA claim and that the earlier federal judgment was in danger of being nullified. According to the majority, the Anti-Injunction Act does not limit the power of a federal court to protect its judgment "to specific points in time in state court trials or appellate procedure." *Id.*, at 1377.[3]

The dissenting judge rejected "the majority's conclusion that the Anti-Injunction Act . . . implicitly amended the Full Faith and Credit Act, 28 U. S. C. § 1738." *Id.*, at 1381 (Hill, J., dissenting). He agreed with the majority that "section 2283 allows the district court to enter an injunction, perhaps grounded in the concept of res judicata, unless the state court

[2] The Full Faith and Credit Act provides, in pertinent part, that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

[3] The Court of Appeals remanded the case to the District Court for a determination whether the trustee in bankruptcy should be allowed to litigate his UCC claim in state court because the trustee was not a party to the federal suit and the UCC claim might have been based on facts other than those that formed the basis for the federal action.

has already addressed the res judicata issue on the merits," but would have held in cases where the state court has decided the res judicata issue that "section 1738 requires the federal court to afford full faith and credit to the state court's resolution of the issue." *Ibid.*

In our view, the majority of the Court of Appeals gave unwarrantedly short shrift to the important values of federalism and comity embodied in the Full Faith and Credit Act. As recently as last March, in *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U. S. 373 (1985), we reaffirmed our holding in *Migra* v. *Warren City School Dist. Bd. of Education*, 465 U. S. 75 (1984), that under the Full Faith and Credit Act a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give. "It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 481–482 (1982). The Full Faith and Credit Act thus "allow[s] the States to determine, subject to the requirements of the statute and the Due Process Clause, the preclusive effect of judgments in their own courts." *Marrese*, *supra*, at 380.

In the instant case, however, the Court of Appeals did not consider the possible preclusive effect under Alabama law of the state-court judgment, and particularly of the state court's resolution of the res judicata issue, concluding instead that the relitigation exception to the Anti-Injunction Act limits the Full Faith and Credit Act. We do not agree. "[A]n exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer*, *supra*, at 468; *Allen* v. *McCurry*, 449 U. S. 90, 99 (1980). Here, as in *Kremer*, there is no claim of an express repeal; rather, the Court of Appeals found an implied repeal. "'It

is, of course, a cardinal principle of statutory construction that repeals by implication are not favored,' *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 154 (1976); *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 168 (1976), and whenever possible, statutes should be read consistently." 456 U. S., at 468. We believe that the Anti-Injunction Act and the Full Faith and Credit Act can be construed consistently, simply by limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue. Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.

The contrary holding of the Court of Appeals apparently was based on the fact that Congress in 1948 amended the Anti-Injunction Act to overrule this Court's decision in *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118 (1941), in favor of the understanding of prior law expressed in Justice Reed's dissenting opinion. See Revisor's Note to 1948 Revision of Anti-Injunction Act, 28 U. S. C., p. 377. But the instant case is a far cry from *Toucey*, and one may fully accept the logic of Justice Reed's dissent without concluding that it sanctions the result reached by the Court of Appeals here. In each of the several cases involved in *Toucey*, the prevailing party in the federal action sought an injunction against relitigation in state court as soon as the opposing party commenced the state action, and before there was any resolution of the res judicata issue by the state court. In the instant case, on the other hand, respondents chose to fight out the res judicata issue in state court first, and only after losing there did they return to federal court for another try.

The Court of Appeals also felt that the District Court's injunction would discourage inefficient simultaneous litigation in state and federal courts on the same issue—that is, the res

judicata effect of the prior federal judgment. But this is one of the costs of our dual court system:

> "In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts." *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 295 (1970).

Indeed, this case is similar to *Atlantic Coast Line*, in which we held that the various exceptions to the Anti-Injunction Act did not permit a federal court to enjoin state proceedings in circumstances more threatening to federal jurisdiction than the circumstances of this case. There we stated that the phrase "to protect or effectuate its judgments" authorized a federal injunction of state proceedings only "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Ibid.*

We hold, therefore, that the Court of Appeals erred by refusing to consider the possible preclusive effect, under Alabama law, of the state-court judgment. Even if the state court mistakenly rejected respondents' claim of res judicata, this does not justify the highly intrusive remedy of a federal-court injunction against the enforcement of the state-court judgment. Rather, the Full Faith and Credit Act requires that federal courts give the state-court judgment, and particularly the state court's resolution of the res judicata issue, the same preclusive effect it would have had in another court of the same State. Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court. See *Angel* v. *Bullington*, 330 U. S. 183 (1947).

We think the District Court is best situated to determine and apply Alabama preclusion law in the first instance. See *Marrese* v. *American Academy of Orthopaedic Surgeons*,

supra, at 386–387; *Migra* v. *Warren City School Dist. Bd. of Education*, 465 U. S., at 87. Should the District Court conclude that the state-court judgment is not entitled to preclusive effect under Alabama law and the Full Faith and Credit Act, it would then be in the best position to decide the propriety of a federal-court injunction under the general principles of equity, comity, and federalism discussed in *Mitchum* v. *Foster*, 407 U. S. 225, 243 (1972).

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[4]

It is so ordered.

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[4] As an alternative basis for reversing the decision of the Court of Appeals, petitioners contend that the relitigation exception to the Anti-Injunction Act was never intended by Congress to allow the issuance of a federal-court injunction in situations where the later state action involves claims that could have been litigated, but were not actually litigated, in the prior federal action. Petitioners also ask us to review the Court of Appeals' holding that the trustee in bankruptcy, who was not a party to the first federal action, was nevertheless bound under res judicata by the judgment of the District Court in that action. Because of our resolution of the primary issue raised by petitioners, we do not address these additional arguments.

Reporter's Note

Orders commencing with January 18, 1986, begin with page 1078. The preceding orders in 474 U. S., from October 7, 1985, through January 13, 1986, were reported in Part 1, at 801–1078. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

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No. 84-6742. BAILEY ET AL. *v.* BUCKEYE CELLULOSE CORP., *ante*, p. 863. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 85-17. VERNON *v.* MAGGIO, WARDEN, *ante*, p. 945. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 85-5041. CHANDLER *v.* LORD, *ante*, p. 853. Motion for leave to file petition for rehearing denied.

No. 85-5316. WILSON *v.* UNITED STATES ET AL., *ante*, p. 921. Motion of petitioner for leave to file petition for rehearing out of time denied.

JANUARY 18, 1986

Dismissal Under Rule 53

No. 85-173. KEY INTERNATIONAL MANUFACTURING, INC. *v.* MORSE/DIESEL, INC., ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 762 F. 2d 990.

JANUARY 21, 1986

Affirmed on Appeal

No. 85-714. TEXAS ET AL. *v.* UNITED STATES. Affirmed on appeal from D. C. W. D. Tex.

Certiorari Granted—Vacated and Remanded

No. 84-1706. PACYNA *v.* MARSH, SECRETARY OF THE ARMY. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to transfer the case pursuant to 28 U. S. C. § 1631 to the United States Court of Appeals for the Federal Circuit. See 28 U. S. C. § 1295(a)(2). Reported below: 751 F. 2d 374.

No. 84-1750. BALLAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to transfer the case pursuant to 28 U. S. C. § 1631 to the United States Court of Appeals for the Federal Circuit. See 28 U. S. C. § 1295(a)(2). Reported below: 747 F. 2d 915.

Miscellaneous Orders

No. A–483. SCHUCHMAN ET UX. *v.* UNITED STATES. D. C. S. D. Ill. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–522. IN RE DISBARMENT OF KAMINSKY. Disbarment entered. [For earlier order herein, see *ante*, p. 896.]

No. D–532. IN RE DISBARMENT OF HEFNER. Disbarment entered. [For earlier order herein, see *ante*, p. 992.]

No. D–536. IN RE DISBARMENT OF LOVETT. It is ordered that Lee Gilson Lovett, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–542. IN RE DISBARMENT OF BOWLES. It is ordered that Robert William Bowles, Jr., of Orlando, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–543. IN RE DISBARMENT OF DEGLOW. It is ordered that Riner Ernest Deglow, of Spokane, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84–902. WARDAIR CANADA INC. *v.* FLORIDA DEPARTMENT OF REVENUE. Sup. Ct. Fla. [Probable jurisdiction noted, *ante*, p. 943.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Aer Lingus et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied.

No. 84–1903. POSADAS DE PUERTO RICO ASSOCIATES, DBA CONDADO HOLIDAY INN *v.* TOURISM COMPANY OF PUERTO RICO ET AL. Sup. Ct. P. R. [Probable jurisdiction postponed, *ante*, p. 917.] Motion of Association of National Advertisers, Inc., for leave to file a brief as *amicus curiae* granted.

No. 84–2030. BROWN-FORMAN DISTILLERS CORP. *v.* NEW YORK STATE LIQUOR AUTHORITY. Ct. App. N. Y. [Probable

jurisdiction noted, *ante*, p. 814.] Motion of Wine & Spirits Wholesalers of America, Inc., for leave to file a brief as *amicus curiae* granted. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 85-21. SQUARE D CO. ET AL. *v.* NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 815.] Motions of Association of American Railroads, American Information Technologies Corp. et al., and National Motor Freight Traffic Association, Inc., et al. for leave to file briefs as *amici curiae* granted.

No. 85-93. BAZEMORE ET AL. *v.* FRIDAY ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 978.] Motion of National Committee on Pay Equity et al. for leave to file a brief as *amici curiae* granted.

No. 85-195. ICICLE SEAFOODS, INC. *v.* WORTHINGTON ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 900.] Motion of Maryland Casualty Co. for leave to file a brief as *amicus curiae* granted.

No. 85-390. CITY OF LOS ANGELES ET AL. *v.* PREFERRED COMMUNICATIONS, INC. C. A. 9th Cir. [Certiorari granted, *ante*, p. 979.] Motions for leave to file briefs as *amici curiae* filed by the following are granted: UNDA-USA, National Catholic Association for Broadcasters & Allied Communicators; Office of Communication of United Church of Christ et al.; National Association of Broadcasters; Mountain States Telephone & Telegraph Co. et al.; Wisconsin Bell, Inc.; and National Federation of Cable Programmers et al.

No. 85-1085. AFRO-AMERICAN POLICE ASSN., INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioners to expedite consideration of this case denied.

No. 85-5404. ALLEN *v.* ILLINOIS. Sup. Ct. Ill. [Certiorari granted, *ante*, p. 979.] Motion of Mental Health Information Service, Second Judicial Department, for leave to file a brief as *amicus curiae* granted.

Certiorari Granted

No. 85-495. ANSONIA BOARD OF EDUCATION ET AL. *v.* PHILBROOK ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 757 F. 2d 476.

No. 85-5915. WRIGHT ET AL. *v.* CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY. C. A. 4th Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 771 F. 2d 833.

Certiorari Denied

No. 85-513. KENDALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 766 F. 2d 1426.

No. 85-526. LOVE ET AL. *v.* UNITED STATES; and
No. 85-576. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 1052.

No. 85-549. CALIFORNIA *v.* CALLAHAN. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 168 Cal. App. 3d 631, 214 Cal. Rptr. 294.

No. 85-573. PUBLIC SERVICE COMPANY OF COLORADO *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 754 F. 2d 1555.

No. 85-598. GRUMMAN OHIO CORP. ET AL. *v.* CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 108 App. Div. 2d 1105, 487 N. Y. S. 2d 242.

No. 85-614. TAYLOR *v.* LOCAL 980, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURE IMPLEMENT WORKERS OF AMERICA. C. A. 3d Cir. Certiorari denied. Reported below: 761 F. 2d 931.

No. 85-625. NORTHERN CALIFORNIA RETAIL CLERKS UNION & FOOD EMPLOYERS JOINT PENSION TRUST FUND *v.* AWARD SERVICE, INC. C. A. 9th Cir. Certiorari denied. Reported below: 763 F. 2d 1066.

No. 85-654. HURVITZ *v.* DIVISION OF MEDICAL QUALITY, BOARD OF MEDICAL QUALITY ASSURANCE, DEPARTMENT OF CONSUMER AFFAIRS OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-666. ALLBRITTON COMMUNICATIONS CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 766 F. 2d 812.

No. 85-668. WHEELER ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 768 F. 2d 1333.

No. 85-674. KENTON MEADOWS CO., INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 766 F. 2d 142.

No. 85-685. ESCHLER ET AL. *v.* BOEING CO.; and
No. 85-703. SCHOENBORN ET AL. *v.* BOEING CO. C. A. 3d Cir. Certiorari denied. Reported below: 769 F. 2d 115.

No. 85-691. RAMSEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 761 F. 2d 603.

No. 85-706. LOMBARD'S INC. *v.* PRINCE MANUFACTURING, INC. C. A. 11th Cir. Certiorari denied. Reported below: 753 F. 2d 974.

No. 85-716. VEAL *v.* DEROBERTIS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 926.

No. 85-718. AMERICAN METHYL CORP. *v.* MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 247 U. S. App. D. C. 268, 768 F. 2d 385.

No. 85-724. MANDANICI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 158.

No. 85-734. BRESSLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 287.

No. 85-748. KELLER *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 182.

No. 85-761. BORYS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 766 F. 2d 304.

No. 85-802. JOHN HOLMAN & SONS, LTD., ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO (CORREIA ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-824. NATIONAL RIFLE ASSOCIATION OF AMERICA ET AL. *v.* MINNESOTA STATE ETHICAL PRACTICES BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 761 F. 2d 509.

No. 85-856. FIDELITY & CASUALTY COMPANY OF NEW YORK *v.* PHILADELPHIA RESINS CORP. C. A. 10th Cir. Certiorari denied. Reported below: 766 F. 2d 440.

No. 85-870. METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL. *v.* KELLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 773 F. 2d 677.

No. 85-872. SCHOR ET AL. *v.* CONTICOMMODITY SERVICES, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 248 U. S. App. D. C. 155, 770 F. 2d 211.

No. 85-887. BASIN ELECTRIC POWER COOPERATIVE *v.* MIDWEST PROCESSING CO. C. A. 8th Cir. Certiorari denied. Reported below: 769 F. 2d 483.

No. 85-892. OHLE ET AL. *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 343 Pa. Super. 611, 494 A. 2d 480.

No. 85-901. SHEFFER ET AL. *v.* MALLONN, AUDITOR, CITY OF CANTON, OHIO, ET AL. Ct. App. Ohio, Stark County. Certiorari denied.

No. 85-910. WHITEHEAD *v.* SOUTHERN RAILWAY CO. Ct. App. Ky. Certiorari denied.

No. 85-919. GILLESPIE *v.* WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 771 F. 2d 1035.

No. 85-921. CARL E. WIDELL & SONS *v.* ELLISON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 894.

No. 85-5127. LAWRENCE *v.* CUNNINGHAM, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 85-5147. HAYNES *v.* VERDEYEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 647.

No. 85-5163. CARR *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 85-5264. THORNTON *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 85-5437. MORA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 768 F. 2d 1197.

No. 85-5535. WRIGHT *v.* BOURBEAU ET AL. App. Ct. Conn. Certiorari denied. Reported below: 3 Conn. App. 512, 490 A. 2d 522.

No. 85-5600. BROWN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 85-5610. PRUITT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1256.

No. 85-5619. CAMPBELL *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1059.

No. 85-5625. SAKELLAR *v.* LOCKHEED MISSILES & SPACE CO. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 1453.

No. 85-5628. DODSON *v.* COOPER, SUPERINTENDENT, SHADOW MOUNTAIN CORRECTIONAL FACILITY. Sup. Ct. Colo. Certiorari denied. Reported below: 705 P. 2d 500.

No. 85-5633. CALPIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 916.

No. 85-5830. ARNEY ET AL. *v.* BLACK ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-5838. HAYES *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 131 Ill. App. 3d 1166, 493 N. E. 2d 1224.

No. 85-5840. GLICK *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 2d 737.

No. 85-5847. BROWN *v.* WOODS ET AL. Ct. App. Ga. Certiorari denied.

No. 85-5850. LILLARD *v.* GREER, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1050.

No. 85-5854. HUGHS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1171.

No. 85-5855. CRAWFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85-5856. GOODWIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 2d 631.

No. 85-5857. DAMPIER *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1168.

No. 85-5861. BAXTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85-5862. CHINDAWONGSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 771 F. 2d 840.

No. 85-5863. FLOWERS *v.* GENERAL MOTORS CORP., BUICK MOTOR DIVISION. Sup. Ct. Mich. Certiorari denied. Reported below: 422 Mich. 910.

No. 85-5864. BRANCEWICZ *v.* C. E. LUMMUS CO. C. A. 3d Cir. Certiorari denied.

No. 85-5869. LAYNE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 916.

No. 85-5870. BOAG *v.* RAINES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 769 F. 2d 1341.

No. 85-5871. PRITCHARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 773 F. 2d 873.

No. 85-5876. MCQUEEN *v.* BARTON, ASSISTANT SUPERINTENDENT, OPERATIONS, FLORIDA STATE PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1237.

No. 85-5877. ZENO *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-5883. WELCH *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 37.

No. 85-5884. MUHAMMED, AKA GRIFFITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 776 F. 2d 1045.

No. 85-5885. TUCKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1171.

No. 85-5887. OWENS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 497 A. 2d 1086.

No. 85-5888. McKENZIE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 2d 602.

No. 85-5909. WHARTON *v.* ABBEVILLE SCHOOL DISTRICT NO. 60 ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-5945. LUQMAN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 85-6027. WEST *v.* WARREN COUNTY FISCAL COURT ET AL. C. A. 6th Cir. Certiorari before judgment denied.

No. 85-472. BULLOCH ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR would grant certiorari. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 763 F. 2d 1115.

No. 85-581. BULLOCH ET AL. *v.* PEARSON ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR would grant certiorari. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 768 F. 2d 1191.

No. 85-509. SESTRIC *v.* CLARK ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 765 F. 2d 655.

No. 85-528. GOLDFARB *v.* SUPREME COURT OF VIRGINIA ET AL. C. A. 4th Cir. Motion of American Corporate Counsel Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 766 F. 2d 859.

No. 85-735. SIRIPAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 771 F. 2d 840.

No. 85-898. GEIGER, CONSERVATOR OF THE ESTATE OF GEIGER *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 769 F. 2d 583.

No. 85-847. MASON ET AL. *v.* CONTINENTAL GROUP, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1219.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In this case, the United States Court of Appeals for the Eleventh Circuit ruled that beneficiaries of an Employee Retirement Income Security Act (ERISA) plan must exhaust internal plan remedies before suing plan fiduciaries on the basis of an alleged violation of duties imposed by the statute. Although this ruling is consistent with the law of the Seventh Circuit, see *Kross* v. *Western Electric Co.*, 701 F. 2d 1238 (1983), it is at odds with a decision of the Ninth Circuit, *Amaro* v. *Continental Can Co.* 724 F. 2d 747 (1984), which held that plaintiffs alleging a statutory violation (as opposed to a mere denial of benefits owing under an ERISA plan) need not exhaust internal remedies.* The Third Circuit has noted the existence of this conflict but failed to take a direct position on it, see *Barrowclough* v. *Kidder, Peabody & Co.*, 752 F. 2d 923, 939, n. 15 (1985), although that court's acceptance of the notion that statutory ERISA claims are normally not arbitrable seems to reflect agreement with the Ninth Circuit's approach. See *id.*, at 941.

I believe that the Court should grant certiorari in this case in order to resolve the uncertainty over the existence of an exhaustion requirement in cases of this kind. The increasing significance of ERISA litigation is apparent from the growing number of such cases that appear on our docket; in a field so productive of federal litigation, the need for clear procedural rules governing access to the federal courts is imperative. Moreover, because the coverage of particular ERISA plans frequently extends to beneficiaries in more than one State—and, no doubt, in more than one judicial circuit—differences in the rules governing access to federal court for the purpose of pressing a claim under ERISA may have the troubling effect of encouraging forum-shopping by plaintiffs. Accordingly, the conflict among the Circuits over the issue of an exhaustion requirement under ERISA can hardly be passed

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*Cf. *Amato* v. *Bernard*, 618 F. 2d 559 (CA9 1980) (adopting exhaustion requirement where beneficiary merely seeks benefits due under the terms of an ERISA plan).

over as an unimportant one unworthy of this Court's attention. I therefore dissent from the denial of certiorari.

No. 85-5571. MESSER *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN dissents from the denial of the petition for writ of certiorari. Reported below: 760 F. 2d 1080.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The petitioner in this case, James Messer, was sentenced to death by a jury that was unable in any meaningful fashion to give him the "individualized consideration" to which he has a constitutional right, *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (plurality opinion), because of egregiously unprofessional assistance by his trial counsel. I believe that petitioner has clearly met the standard that this Court set in *Strickland* v. *Washington*, 466 U. S. 668 (1984), for establishing ineffective assistance during the sentencing phase of his trial, and I would accordingly grant the petition and vacate petitioner's sentence.

I

Petitioner was convicted of kidnaping and murdering his 8-year-old niece. After his conviction and sentence were affirmed on direct review, he sought a writ of habeas corpus in state court, alleging, *inter alia*, ineffective assistance of counsel. The court declined to hold a hearing, made no findings, and denied the writ. Petitioner then sought federal habeas relief. The Magistrate to whom the case was referred recommended that the writ be granted as to the sentence, concluding that petitioner had received ineffective assistance during the penalty phase. The District Court nevertheless denied the writ. It concluded that petitioner had not established prejudice, as required by *Strickland*, *supra*, and therefore did not reach the question whether counsel gave adequate assistance. The Court of Appeals affirmed, 760 F. 2d 1080 (CA11 1985), with one judge dissenting, *id.*, at 1093 (Johnson, J.).

II

The only factfinder that has considered the question, the Federal Magistrate, found that petitioner has met the first *Strickland* criterion—that counsel's performance at the sentencing phase was "outside the wide range of professionally competent assistance,"

Strickland, supra, at 690. Even the most cursory review of petitioner's trial demonstrates that the Magistrate's conclusion was inescapable.

At petitioner's hearing before the Magistrate, counsel testified that he had decided as a matter of strategy to adopt a "low-key" approach during the guilt phase, in hopes of establishing credibility with the jury. He had then hoped to "humanize" petitioner during the sentencing phase and try to convince the jury to spare petitioner's life. 760 F. 2d, at 1088. Both the majority and the dissenter in the Court of Appeals concluded that this strategy was not unreasonable in light of the overwhelming evidence of petitioner's guilt. *Id.*, at 1090, 1095.

Counsel succeeded admirably in implementing the first part of his strategy. He made no opening statement and put on no case in chief. He performed only cursory cross-examination, and did not object to any evidence. *Id.*, at 1089. Counsel's attempts to carry out the second prong of his strategy, however, were piteously deficient. His brief summation during the guilt phase, after acknowledging his "frustration" with the case, App. B to Pet. for Cert. 14 (opinion of District Court), went on to "emphasize the horror of the crime," 760 F. 2d, at 1095 (Johnson, J., dissenting), to the very jury that would soon be called upon to determine whether the murder was "outrageously or wantonly vile, horrible, or inhuman," Ga. Code Ann. § 17-10-30(b)(7) (1982).

During the penalty phase, counsel put on a single witness, petitioner's mother. She testified concerning petitioner's childhood, which was marred by mistreatment at the hands of his father and his parents' subsequent divorce. The effect of this implied plea for pity, however, was then destroyed when counsel, despite having previously warned the witness to avoid the topic, asked her what petitioner had told her about his expectations. She replied "he and I both, my sister, and my mother expect the death penalty here." *Id.*, at 1096.

It was counsel's summation during the penalty phase, however, that led the Magistrate to conclude that petitioner's Sixth Amendment right to counsel had been violated. His statement, which the Magistrate called a "nonargument," *id.*, at 1097, made no mention of petitioner's mother's testimony nor of any other mitigating

evidence.* Counsel did not inform the jury, during summation or at any other time, that petitioner had no prior criminal history, had been steadily employed, had an honorable military record, had been a regular churchgoer, and had cooperated with the police. See *id.*, at 1096, n. 2. Counsel did not give the jury a single reason why it should spare petitioner's life. As the Magistrate noted, counsel "utterly failed to point out any matters which were favorable to [petitioner]—to 'humanize' him, even though this was his alleged 'tactic.'" App. C to Pet. for Cert. 51 (Magistrate's Report and Recommendation). Instead, counsel repeatedly hinted that death was the most appropriate sentence for petitioner. He "focused on the awesome burden placed on the jury in determining Messer's fate and the fortitude that would be required of a juror to decide to let him live, as if the easiest and most obvious verdict were the death sentence." 760 F. 2d, at 1097.

The net result was that petitioner was without an advocate at the sentencing phase. "No one addressed the jury and said that Messer did not deserve to die." *Ibid.* Like the Magistrate and the dissenter in the Court of Appeals, I cannot help but conclude that a total breakdown in the adversarial process occurred in this case.

III

The District Court rejected the Magistrate's conclusion because it felt that petitioner had not established the second *Strickland* criterion—that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland, supra,* at 694. The Court of Appeals held that counsel's performance was not constitutionally deficient. Yet it never even mentioned counsel's summation nor the Magistrate's finding that the summation was unreasonable and ineffective. I can only presume that the Court of Appeals failed to find prejudice as to the summation, based on its conclusory statement that "petitioner has failed to show that [counsel's] performance during the sentencing phase was deficient to the extent that this court cannot rely on the result as being just." 760 F. 2d, at 1092 (citation omitted).

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*Counsel's summation at the penalty phase, in its entirety, is set out in an Appendix to this opinion.

The result below is thus an example of the gross unfairness that results when the *Strickland* prejudice standard is applied without regard to the special characteristics of a capital sentencing proceeding. See *Strickland*, 466 U. S., at 715–717 (MARSHALL, J., dissenting). Those proceedings have a much different function than the relatively mechanical inquiry of the guilt phase, and the likelihood that an appellate court can accurately divine a jury's probable response to evidence or arguments is accordingly less. Just last Term this Court reiterated that a capital defendant has a constitutional right to the consideration of "[w]hatever intangibles a jury might consider in its sentencing determination." *Caldwell* v. *Mississippi*, 472 U. S. 320, 330 (1985); see also *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (defendant has constitutional right to consideration of mitigating factors). Yet as applied by the courts below, *Strickland* permits unprofessional conduct by trial counsel to deprive a capital defendant of that right.

Viewed in the correct light—that is, considering what the jury in this case might have done if presented with a true adversarial debate on the appropriateness of sentencing petitioner to death—one cannot possibly conclude that there is no "reasonable probability" that the outcome would have been different. This is not a case in which, despite unreasonable errors by counsel, the jury was presented with a substantially accurate picture of the defendant and with some cogent argument in favor of life. The jury here was never apprised of several substantial mitigating factors. More important, counsel presented the jury with no reasons to spare petitioner's life and, indeed, strongly intimated that he could think of none.

Despite these strong indicia of unreliability, the District Court found the absence of prejudice as to the *sentencing* phase based primarily on its conclusion that the evidence of petitioner's *guilt* was overwhelming, App. B to Pet. for Cert. 3, and the Court of Appeals blithely assumed the jury's role, finding the result "just," 760 F. 2d, at 1092. If the *Strickland* prejudice standard has any vitality at all, it requires a more searching inquiry than that. I dissent.

APPENDIX TO OPINION OF MARSHALL, J., DISSENTING

"Your Honor, ladies and gentlemen, since ya'll were selected I might add I haven't taken the opportunity to talk to ya'll a lot

but I have been honest and in that honesty I haven't tried in any form or fashion to do anything other than see that the facts in this case were presented and they were very ably presented, there's no question about that.

"Now, I knew that when I got involved in this case at the beginning they would be. The question in this case is not the facts. Twenty-nine times I said 'no questions.' Thirty times I said 'no objections' to a witness being excused. Each and every one of us knows the young girl died. Like Mr. Foster, I have two young children of my own and believe you me that makes it more difficult for me to stand here in front of you all right now, each and every one of you, than it does for Mr. Foster, I dare say. I don't ask you to appreciate that. I don't ask for that at all. I just want to be straight up and honest about this whole thing and where we're all coming from. Each and every one of you in this jury box know before this case started, or had some slight idea, that we were going to be at this point today where we are now and the decision was going to come down to the twelve of you and what you determine to be Mr. Messer's fate.

"I dare say, and it has been suggested to me, and I say this in all humble candor, by some both here and in Rome that I ought to argue to this jury to leave him alive is a more cruel punishment because he's got to live with it, so I don't know what to say to you. I really don't. I know that at this particular point there is no question in my mind that the verdict this jury spoke in this court room today was the truth. I don't contest that at all. The question is when the judge tells you what the law is in this situation and what is considered to make something aggravating circumstances, what is considered to mitigate circumstances, he's also going to tell you that in a situation like this you can almost disregard those and leave it up to yourselves, your gut feeling as to what it is you feel speaks the voice of the community.

"Now, the community, a great part of the community, has been here in this court room as potential jurors and as members of the audience, and it concerns Polk County. Interestingly enough Judge Winn told me two weeks ago that he didn't think there would be anyone here by the end of the trial that it had been a long time since there had been a trial like this and the last time a good many years ago he could remember that there just wasn't ten or fifteen people by the time the trial got done with, people were just that uninterested. But that's not true in this situation

because people have been very interested, and very interested right now with what is this community's voice through ya'll going to be.

"Unfortunately I do not agree again with Mr. Foster as to his position that each and every one of you by rendering a verdict that speaks for the death penalty are being brave. In not doing that you're showing people outside of Polk County that you don't know how to deal with people who take the lives of others in Polk County. That's not the issue. Nor is it the bravest thing to do in this situation to vote the death penalty. It would take a heck of a lot more guts to say that there's something in that human being who sits over there, sits over there having to remember what ya'll have just learned about him. There's something that put him on this earth and it's worth leaving on this earth. Ya'll have the power to extinguish him from this earth, a legal right to do that if you so desire. The District Attorney does not have that right. You are but his implement to do that, each one of you, all twelve of you, to the extent that you choose to use that the law allows each and every one of you to do it. That's an awesome responsibility and I dare say I would rather be over here than in ya'll's seats, because as a parent under these circumstances . . . but that's for ya'll to decide. Please however, as the judge will charge you, the decision is each and every one of yours individually and then as a group, your decision be it give him life or death is your decision, you need not worry about what happens after that decision as to how it's carried out. That makes it a lot easier as far as the decision is concerned in having to live with it but it's still your decision, and if your decision is life that is a decision that you have come about to make freely and honestly based upon all that you've heard in the case and there might be some reason to leave this man on the face of the earth then hold onto that decision, if not then let it go, but make it your own decision each and every one of you, don't make it a decision of your friends and neighbors that you just adopt. I dare say ten years ago had any of you ever pictured yourselves being in this situation and having to make this decision ten years from then you wouldn't.

"Thank you." Tr. 516–519.

No. 85–5678. McKENNA *v.* NEVADA. Sup. Ct. Nev.;
No. 85–5727. JOHNSON *v.* MARYLAND. Ct. App. Md.;
No. 85–5831. STANO *v.* FLORIDA. Sup. Ct. Fla.;

No. 85-5882. GRIFFIN *v.* FLORIDA. Sup. Ct. Fla.;

No. 85-5926. BUTLER *v.* SOUTH CAROLINA. Sup. Ct. S. C.; and

No. 85-5930. FRANCIS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 85-5678, 101 Nev. 338, 705 P. 2d 614; No. 85-5727, 303 Md. 487, 495 A. 2d 1; No. 85-5831, 473 So. 2d 1282; No. 85-5882, 474 So. 2d 777; No. 85-5926, 286 S. C. 441, 334 S. E. 2d 813; No. 85-5930, 473 So. 2d 672.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85-5747. WRIGHT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 473 So. 2d 1277.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

I would grant certiorari in this capital case to ensure that the Florida courts have not sentenced a man to die based on a conviction obtained in violation of the Sixth Amendment.

On February 6, 1983, a woman was found murdered in the bedroom of her home. She apparently had died the previous night after being raped and stabbed. All the doors to her home were locked, but a back window was found open. Several weeks later, Charles Westberry told his wife that petitioner Joel Wright had come to Westberry's trailer shortly after daylight on the morning of February 6 and had confessed to killing the victim. Wright lived with his parents near the victim's home. Westberry's wife notified the police, and Wright was arrested and tried for the crime. At trial, Westberry was the State's principal witness. He testified that Wright had told him on the morning of February 6 that Wright had entered the victim's house through the back window to steal money, that the victim had discovered him as he was wiping his fingerprints from her purse, and that he had killed her because he did not want to return to prison. According to Westberry, Wright counted out $290 he claimed to have taken from the victim's home, and he asked Westberry to tell the authorities that Wright had spent the previous night at Westberry's

trailer. Another witness for the State testified that, approximately one month before the murder, he and Wright had stolen money from the victim's home after entering through the window later found open on February 6. The jury also was told that a fingerprint identified as Wright's had been found on a portable stove in the victim's bedroom.

Wright took the stand and denied involvement in the murder. He testified that he had returned home from a party at approximately 1 a. m. on February 6, but had found himself locked out. He claimed that he then had walked along Highway 19 to Westberry's trailer, where he had spent the night. He also presented a witness who testified that, late on the night of February 5 and early in the morning of February 6, he had seen a group of three men, whom he had not recognized, in the general vicinity of the victim's home.

After the close of evidence but prior to final arguments, the defense moved to reopen the case in order to introduce the testimony of a newly discovered witness, Kathy Waters. Waters apparently had read newspaper accounts of the trial, had listened to parts of the testimony, and had discussed the trial with friends in attendance. She offered to testify that, shortly after midnight on February 6, she had seen a person who could have been Wright walking along Highway 19, and had also observed three persons she did not recognize near the victim's home. Waters claimed that she had not realized she possessed relevant information until the morning her testimony was proffered, and that she had come forward of her own volition. The trial judge denied Wright's motion, noting that Florida's sequestration rule would be rendered "meaningless" if, after discussing the case with others, a witness were permitted "to testify in support of one side or the other, almost as if that testimony were tailor-made." 473 So. 2d 1277, 1279 (1985). Although the State acknowledged that the violation of the sequestration rule had been inadvertent, it argued that the prosecution "could very well be substantially prejudiced" if Waters were permitted to testify. *Id.*, at 1280. Wright was convicted and sentenced to die.

On appeal, the Supreme Court of Florida held that the trial judge's rigid application of the State's sequestration rule was inconsistent with Wright's Sixth Amendment right to present witnesses in his behalf. The court affirmed the conviction, however, because it deemed the error harmless:

> "The record already contained unrefuted testimony that three individuals were gathered near the victim's home. The defense did not contend that the proffered witness would purport to identify [Wright] as the person she observed on the road or that her testimony, if accepted by the jury, would require a finding by the jury that [Wright] did not commit the murder. Based upon our review of the record, including the nature of the proffered testimony, we conclude that the excluded evidence would not have affected the verdict and its exclusion was harmless beyond a reasonable doubt." 473 So. 2d, at 1280–1281.

The State Supreme Court thus recognized that a conviction resulting from a trial marred by constitutional error must be reversed unless the error was "harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U. S. 18, 24 (1967); see also, *e. g.*, *United States* v. *Hasting*, 461 U. S. 499 (1983). It seems to me, however, that the court failed to show the requisite attentiveness to the possibility of prejudice. A constitutional violation may be excused under *Chapman* only if the State "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U. S., at 24. It is not sufficient for a reviewing court to conclude, as the Supreme Court of Florida appears to have done in this case, that in its judgment the error did not change the verdict. The question is whether the State has disproved any "reasonable possibility" that the error made a difference. *Ibid.*; *Fahy* v. *Connecticut*, 375 U. S. 85, 86 (1963).

The State of Florida may well be able to carry that burden in this case, but nothing in the Supreme Court's opinion or in the State's brief before this Court convinces me that it has done so. Since Wright's fingerprint could have been left during the alleged earlier break-in, this case comes down to Wright's word against Westberry's. Waters' testimony obviously would not have proved Wright innocent, but it would have provided some corroboration for Wright's story. Questions of witness credibility, of course, are within the "special province" of the factfinder, *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 856 (1982), and I cannot say "beyond a reasonable doubt" that the corroboration Waters offered could not have altered the jury's assessment of the conflicting stories. More to the point, I do not

see how the Supreme Court of Florida could make that statement, particularly given the prosecution's claim of potentially substantial prejudice and the trial judge's suggestion that Waters' testimony appeared almost "tailor-made" for the defense.

The *Chapman* rule was meant to be more than merely a formula to incant before affirming the results of constitutionally infirm prosecutions. For the rule to have content, a reviewing court must not declare a constitutional error harmless without first conducting a careful and probing inquiry into the possibility of prejudice. Nothing less will suffice if the court is to be convinced "beyond a reasonable doubt" that the error had no effect on the verdict. Furthermore, at least in any case where the harmlessness of an error is as questionable as it is here, an appellate court should spell out its reasoning in sufficient detail to permit this Court to verify compliance with *Chapman*. Our concern of course must be not merely that *Chapman* is cited, but that it is followed conscientiously. For me, that concern is not satisfied by the opinion of the Florida Supreme Court in this case, particularly given the sentence imposed. Consequently, I would grant certiorari, vacate the judgment, and remand for a determination whether there is any "reasonable possibility" that the automatic exclusion of Waters' testimony contributed to Wright's conviction.

Rehearing Denied

No. 85-48. SUAREZ *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 844;

No. 85-247. CRANBERG *v.* CONSUMERS UNION OF UNITED STATES, INC., ET AL., *ante*, p. 850;

No. 85-295. COUNTY OF LOS ANGELES ET AL. *v.* KLING, *ante*, p. 936;

No. 85-583. FAHEY *v.* BECKLEY ET AL., *ante*, p. 1001;

No. 85-650. MCCORSTIN *v.* UNITED STATES STEEL CORP., *ante*, p. 1008;

No. 85-5121. FREELAND *v.* UNITED STATES, *ante*, p. 1009;

No. 85-5547. SPELLMAN *v.* INTEGON GENERAL INSURANCE CORP., *ante*, p. 1010; and

No. 85-5647. WILSON *v.* UNITED STATES, *ante*, p. 1012. Petitions for rehearing denied.

No. 84-6943. MAZAK *v.* UNITED STATES, *ante*, p. 840; and

No. 85-5177. GORDON *v.* IDAHO, *ante*, p. 803. Motions for leave to file petitions for rehearing denied.

JANUARY 27, 1986

Appeals Dismissed

No. 85-616. SHARON STEEL CORP. *v.* CITY OF FAIRMONT, WEST VIRGINIA, ET AL. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: —— W. Va. ——, 334 S. E. 2d 616.

No. 85-871. WILLARDO *v.* INDIANA. Appeal from Ct. App. Ind. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 476 N. E. 2d 540.

No. 85-967. SMITH ET UX. *v.* UNITED STATES ET AL. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-5786. DAVIS *v.* FIRST STATE BANK. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 85-193. U. S. TRUST CORP. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Board of Governors of Federal Reserve System* v. *Dimension Financial Corp.*, *ante*, p. 361. Reported below: 760 F. 2d 1135.

No. 85-833. CHULA VISTA CITY SCHOOL DISTRICT ET AL. *v.* BENNETT, SECRETARY OF EDUCATION. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to transfer the case pursuant to 28 U. S. C. § 1631 to the United States Court of Appeals for the Federal Circuit. See 28 U. S. C. § 1295(a)(2). Reported below: 762 F. 2d 762.

Miscellaneous Orders

No. ———. PESCOSOLIDO ET AL. *v.* SECRETARY OF AGRICULTURE. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–551. DOLE, SECRETARY OF TRANSPORTATION, ET AL. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. Application of the Solicitor General to vacate a stay entered January 3, 1986, by the United States Court of Appeals for the Ninth Circuit, presented to JUSTICE REHNQUIST, and by him referred to the Court, granted.

No. D–527. IN RE DISBARMENT OF MANN. Disbarment entered. [For earlier order herein, see *ante*, p. 917.]

No. D–531. IN RE DISBARMENT OF CAMACHO. Disbarment entered. [For earlier order herein, see *ante*, p. 991.]

No. 84–2030. BROWN-FORMAN DISTILLERS CORP. *v.* NEW YORK STATE LIQUOR AUTHORITY. Ct. App. N. Y. [Probable jurisdiction noted, *ante*, p. 814.] Motion of National Conference of State Legislatures et al. for leave to file a brief as *amici curiae* granted. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 85–93. BAZEMORE ET AL. *v.* FRIDAY ET AL.; and
No. 85–428. UNITED STATES ET AL. *v.* FRIDAY ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 978.] Motion of the Solicitor General for divided argument granted, and the Solicitor General is allotted 12 minutes for oral argument and petitioners Bazemore et al. are allotted 18 minutes for oral argument.

No. 85–217. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO *v.* DAVIS. Sup. Ct. Ala. [Probable jurisdiction noted, *ante*, p. 899.] Motion of National Right to Work Legal Defense Foundation, Inc., for leave to file a brief as *amicus curiae* granted.

No. 85–385. BROCK, SECRETARY OF LABOR *v.* PIERCE COUNTY. C. A. 9th Cir. [Certiorari granted, *ante*, p. 944.] Motion of National Association of Counties et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 85–390. CITY OF LOS ANGELES ET AL. *v.* PREFERRED COMMUNICATIONS, INC. C. A. 9th Cir. [Certiorari granted, *ante*, p. 979.] Motion of National Institute of Municipal Law Officers for leave to file a brief as *amicus curiae* granted.

No. 85–546. UNITED STATES *v.* MOTTAZ. C. A. 8th Cir. [Certiorari granted, *ante*, p. 994.] Motion of American Land Title Association for leave to file a brief as *amicus curiae* granted.

No. 85-5404. ALLEN *v.* ILLINOIS. Sup. Ct. Ill. [Certiorari granted, *ante*, p. 979.] Motion of Edwin F. Mandel Legal Aid Clinic for leave to file a brief as *amicus curiae* granted.

No. 85-5749. IN RE ST. CLAIRE;
No. 85-5835. IN RE PATRASCU; and
No. 85-5973. IN RE THANH. Petitions for writs of mandamus denied.

No. 85-5875. IN RE MAY; and
No. 85-5878. IN RE MAY. Petitions for writs of mandamus and/or prohibition denied.

No. 85-5866. IN RE GRIFFIN. Petition for writ of prohibition denied.

Certiorari Granted

No. 84-1947. CERBONE, JUSTICE OF THE VILLAGE COURT, VILLAGE OF MT. KISCO, NEW YORK, ET AL. *v.* CONWAY. C. A. 2d Cir. Certiorari granted limited to Questions 1, 2, 3, and 4 presented by the petition. Reported below: 750 F. 2d 205 and 758 F. 2d 46.

Certiorari Denied. (See also Nos. 85-871, 85-967, and 85-5786, *supra.*)

No. 84-1867. GILLIES *v.* DELOZIER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 758 F. 2d 647.

No. 84-6216. AUSLEY ET AL. *v.* MITCHELL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 748 F. 2d 224.

No. 85-155. COUGHLIN ET AL. *v.* PATTERSON. C. A. 2d Cir. Certiorari denied. Reported below: 761 F. 2d 886.

No. 85-210. TOWN OF SAUGUS ET AL. *v.* VOUTOUR. C. A. 1st Cir. Certiorari denied. Reported below: 761 F. 2d 812.

No. 85-535. QUINAULT INDIAN NATION ET AL. *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 2d 1404.

No. 85-547. HARRELL *v.* UNITED STATES;
No. 85-5476. GIBSON *v.* UNITED STATES;
No. 85-5485. GRAVES *v.* UNITED STATES;
No. 85-5488. MARCACCIO *v.* UNITED STATES;

No. 85-5493. WHITE *v.* UNITED STATES;
No. 85-5500. KEATING *v.* UNITED STATES;
No. 85-5506. SEAVER *v.* UNITED STATES;
No. 85-5516. LACKEY *v.* UNITED STATES;
No. 85-5517. HART *v.* UNITED STATES; and
No. 85-5523. RUBY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 1459 and 766 F. 2d 1493.

No. 85-634. KIRCHNER *v.* KIRCHNER. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 474 So. 2d 226.

No. 85-638. CLEMENTE *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 766 F. 2d 1358.

No. 85-700. ALLEN *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 1145.

No. 85-715. MOORE *v.* LAVICKY. C. A. 10th Cir. Certiorari denied. Reported below: 758 F. 2d 468.

No. 85-729. BRONGER ET AL. *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 769 F. 2d 756.

No. 85-742. JEPPESEN & CO. *v.* BROCKLESBY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 1288.

No. 85-747. TIMBERLAKE *v.* UNITED STATES; and
No. 85-5473. ENGELHART *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 767 F. 2d 1479.

No. 85-756. ADAMS *v.* MCILHANY. C. A. 5th Cir. Certiorari denied. Reported below: 764 F. 2d 294.

No. 85-805. VIZBARAS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF VIZBARAS, ET UX. *v.* PRIEBER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 761 F. 2d 1013.

No. 85-825. DAY *v.* SOUTH PARK INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 2d 696.

No. 85-858. DE NARDO *v.* COOK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 911.

No. 85-868. HURWITZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 700 S. W. 2d 919.

No. 85-877. SWAN *v.* TEXAS. Ct. App. Tex., 11th Sup. Jud. Dist. Certiorari denied.

No. 85-883. PARK, DBA ACTION REAL ESTATE *v.* EL PASO BOARD OF REALTORS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 764 F. 2d 1053.

No. 85-895. RATEPAYERS FIGHT BACK *v.* MIDDLE SOUTH ENERGY, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 772 F. 2d 404.

No. 85-896. JOHNSON *v.* LINDEN SHORE DISTRICT. Sup. Ct. Conn. Certiorari denied. Reported below: 197 Conn. 803, 495 A. 2d 282.

No. 85-918. MOTHER GOOSE NURSERY SCHOOLS, INC. *v.* SENDAK, INDIVIDUALLY AND AS FORMER ATTORNEY GENERAL OF INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 2d 668.

No. 85-925. CHRISTENSEN *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 340.

No. 85-928. INSURANCE COMPANY OF NORTH AMERICA ET AL. *v.* PUERTO RICO MARINE MANAGEMENT, INC. C. A. 1st Cir. Certiorari denied. Reported below: 768 F. 2d 470.

No. 85-934. SHOCKLEY *v.* COX ENTERPRISES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 174.

No. 85-936. MORAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 759 F. 2d 777.

No. 85-941. JONES ET AL., INDIVIDUALLY AND AS CO-ADMINISTRATORS FOR THE ESTATE OF CLARK *v.* WELLS, SHERIFF OF MARION COUNTY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1049.

No. 85-945. OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION *v.* SOUTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 2d 730.

No. 85-948. KOSCOT INTERPLANETARY, INC. *v.* BEACHLEY INVESTMENTS, N. V., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1178.

No. 85-952. GRASON ELECTRIC CO. ET AL. *v.* SACRAMENTO MUNICIPAL UTILITY DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 833.

No. 85-5242. MUHAMMAD *v.* SEMICOLE ALLIED VAN LINES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 760 F. 2d 259.

No. 85-5552. HAWKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 1482.

No. 85-5626. HAMM *v.* PARKER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 85-5634. BERNARD *v.* BERNARD ET AL. C. A. 9th Cir. Certiorari denied.

No. 85-5635. HAUPTMANN *v.* WILENTZ ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1070.

No. 85-5649. WAGGONER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 769 F. 2d 253.

No. 85-5681. OGBERAHA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 771 F. 2d 655.

No. 85-5683. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 413.

No. 85-5733. STEWART, AKA WHITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 825.

No. 85-5750. RHODES *v.* UNITED STATES DEPARTMENT OF THE INTERIOR. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 182.

No. 85-5890. BAIG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 85-5891. ANTONELLI *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 85-5892. MOYER *v.* DISTRICT DIRECTOR OF THE INTERNAL REVENUE SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1073.

No. 85-5893. NICKENS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 477 So. 2d 946.

No. 85-5894. TRIPLETT *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 210.

No. 85-5895. MICKENS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 760 F. 2d 539.

No. 85-5896. RUBIN *v.* BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES (WESTERN ILLINOIS UNIVERSITY). C. A. 7th Cir. Certiorari denied.

No. 85-5897. REID *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1063.

No. 85-5898. ZURICA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 35.

No. 85-5899. TRICHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85-5903. BERNARD *v.* WARDEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 148.

No. 85-5904. DARWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 302.

No. 85-5905. LEEK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-5910. PIERCE *v.* UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND FOR 1950 AND 1974 ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 449.

No. 85-5916. SMITH *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 101 Nev. 965.

No. 85-5941. HANRAHAN *v.* WELBORN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1167.

No. 85-5942. COTTON *v.* FEDERAL LAND BANK OF COLUMBIA. Sup. Ct. Ga. Certiorari denied.

No. 85–5956. LARGO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 775 F. 2d 1099.

No. 85–5959. WHAM *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 162.

No. 85–5963. CALVER *v.* OWNERS OF RIDGECREST MOBILE HOME PARK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 299.

No. 85–6006. LEPISCOPO *v.* YORK. C. A. 10th Cir. Certiorari denied.

No. 85–6049. GALLENTINE *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–429. EXXON CORP. *v.* UNITED STATES ET AL.;
No. 85–430. MARATHON PETROLEUM CO. ET AL. *v.* UNITED STATES ET AL.;
No. 85–432. AIR TRANSPORT ASSOCIATION OF AMERICA ET AL. *v.* UNITED STATES ET AL.;
No. 85–440. PHILADELPHIA ELECTRIC CO. *v.* UNITED STATES ET AL.; and
No. 85–444. NATIONAL FREIGHT, INC., ET AL. *v.* UNITED STATES ET AL. Temp. Emerg. Ct. App. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* in No. 85–429 granted. Motion of American Petroleum Institute for leave to file a brief as *amicus curiae* in Nos. 85–429 and 85–430 granted. Certiorari denied. Reported below: 773 F. 2d 1240.

No. 85–720. CLEAR PINE MOULDINGS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 765 F. 2d 148.

No. 85–794. PREUIT & MAULDIN ET AL. *v.* JONES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1250.

JUSTICE WHITE, dissenting.

In *Wilson* v. *Garcia*, 471 U. S. 261 (1985), we held that an action under 42 U. S. C. § 1983 should be considered a personal injury action for purposes of borrowing an appropriate state statute of limitations. The present case presents the question of what to

do when more than one state statute of limitations applies to personal injury actions.

The respondent in this case is an Alabama farmer who brought a § 1983 action against petitioners for allegedly violating his Fourteenth Amendment due process rights by causing his equipment to be seized pursuant to prejudgment attachment writs that petitioners obtained without notice or a hearing. The only significant issue on appeal was the appropriate statute of limitations to borrow from the Alabama Code. 763 F. 2d 1250 (CA11 1985). The Eleventh Circuit explained that its task of applying *Wilson* v. *Garcia*, *supra*, was complicated by the fact that Alabama has not one but two personal injury statutes of limitations. Alabama Code § 6-2-34(1) (1975) governs actions for "any trespass to person or liberty, such as false imprisonment or assault and battery," and has been interpreted by the Alabama courts as applying to actions for trespass. Alabama Code § 6-2-39(a)(5) (1975) governs "[a]ctions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section," and has been interpreted by the Alabama courts as applying to actions for trespass on the case. The Eleventh Circuit resolved its seeming dilemma in applying *Wilson* v. *Garcia* by reasoning that while not all § 1983 actions involve trespass, trespass is "the particular type of wrong that was most paradigmatic, the one category of wrongs that the legislators [who enacted § 1983] intended first and foremost to address." 763 F. 2d, at 1255. Accordingly, the court held that the 6-year statute of limitations provided by § 6-2-34(1), rather than the then 1-year statute of limitations provided by § 6-2-39(a)(5), should govern § 1983 actions in Alabama.[1]

The Eleventh Circuit's decision in this case conflicts with three en banc decisions by the United States Court of Appeals for the Tenth Circuit, all of which were companion cases to the decision we affirmed in *Wilson* v. *Garcia*, *supra*. In *Hamilton* v. *City of Overland Park, Kansas*, 730 F. 2d 613, 614 (1984) (en banc), cert. denied, 471 U. S. 1052 (1985), the Tenth Circuit rejected, for § 1983 purposes, use of the 1-year Kansas statute of limitations governing "'[a]n action for assault, battery, malicious prosecution, or false imprisonment,'" and instead chose the 2-year limitations

[1] Section 6-2-39(a)(5) has been recodified as § 6-2-38(l) (Supp. 1985) and now provides a 2-year statute of limitations, pursuant to an amendment effective January 9, 1985.

period for "'[a]n action for injury to the rights of another, not arising on contract, and not herein enumerated.'" In *Mismash* v. *Murray City*, 730 F. 2d 1366, 1367 (1984) (en banc), cert. denied, 471 U. S. 1052 (1985), the Tenth Circuit similarly rejected use of the 1-year Utah statute of limitations governing "'[a]n action for libel, slander, assault, battery, false imprisonment or seduction,'" and, in the absence of an express Utah statute of limitations governing actions for injury to the rights of another, opted for the 4-year limitations period for "'[a]n action for relief not otherwise provided by law.'" Finally, in *McKay* v. *Hammock*, 730 F. 2d 1367, 1370 (1984) (en banc), a case in which certiorari was not sought, the Tenth Circuit noted that Colorado had distinct statutes of limitations for actions for trespass (one year) and trespass on the case (six years), and, finding the distinction between trespass and trespass on the case irrelevant to § 1983, opted instead to use the residuary 3-year period for "'[a]ll other actions of every kind for which no other period of limitation is provided by law.'"

As the foregoing cases demonstrate, the Tenth Circuit finds it inappropriate to borrow for § 1983 purposes a statute of limitations governing common-law trespasses, preferring instead to look for a statute more compatible with its characterization of a § 1983 action as "in essence an action for injury to personal rights." *Garcia* v. *Wilson*, 731 F. 2d 640, 651 (1984), aff'd, 471 U. S. 261 (1985). The conflict between the Tenth and Eleventh Circuits is evidenced with particular clarity in *Hamilton*, *supra*, where the statutes of limitations chosen and rejected are virtual mirror images of the statutes of limitations chosen and rejected in this case.

The conflict regarding the appropriate criteria for choosing a statute of limitations for § 1983 actions is not limited to the Tenth and Eleventh Circuits. In *Gates* v. *Spinks*, 771 F. 2d 916 (1985), the Fifth Circuit, expressly following the Eleventh Circuit's decision in this case, rejected a 6-year Mississippi residuary statute of limitations which governs negligence and strict-liability personal injury actions in that State, and instead decided that § 1983 cases should be governed by the 1-year limitations period governing "most, if not all, common law intentional torts." *Id.*, at 919. *Gates* v. *Spinks* is worth noting, not only because it is clearly inconsistent with the Tenth Circuit's decision in *Mismash* v. *Murray City*, *supra*, but also because it highlights an effect of following the Eleventh Circuit's decision in this case which is not obvious from the present decision: The § 1983 statute of limitations will

as a rule be shorter if based on a statute of limitations governing intentional torts than it would if based on a more general statute of limitations governing other personal injury actions.[2]

It will not do to argue, as respondent does in his Brief in Opposition 5–8, that no conflict is possible because each state statutory scheme is *sui generis*. It is conflicting principles, not variations in state statutory schemes, that have determined the statutes of limitations chosen for § 1983 actions in the Tenth Circuit on the one hand and the Fifth and Eleventh Circuits on the other.

The conflict between the Circuits presented by this case is not likely to disappear without guidance from this Court.[3] While the Tenth Circuit's characterization of a § 1983 action as one for injury to personal rights is arguably somewhat different from the personal injury characterization we adopted in *Wilson* v. *Garcia*, 471 U. S. 261 (1985), it seems doubtful that the Tenth Circuit will soon overrule its en banc decisions in *Hamilton*, *supra*, and *Mismash*, *supra*, in view of the fact that we denied certiorari in those cases after *Wilson* v. *Garcia* was decided. Had we considered those decisions inconsistent with *Wilson*, our normal course would have been to grant certiorari in order to vacate the decisions below and remand for reconsideration in light of *Wilson*. Since we did not see fit to call for the Tenth Circuit to reconsider those decisions, it is predictable that it will adhere to them, notwithstanding the conflicting decisions by the Eleventh and Fifth Circuits.

It is clear to me that the Court should provide further guidance to the lower courts on the issue here presented, and I see no benefit in delaying its resolution. While I understand the Court's re-

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[2] The following is a sampling, which does not purport to be exhaustive, of statutes of limitations akin to those at issue in the present case. For each State, the first, longer statute of limitations governs actions described in language virtually identical to Ala. Code § 6–2–39(a)(5) (1975), and the second, shorter statute of limitations governs all of the following intentional torts: libel, slander, assault, battery, and false imprisonment. Minn. Stat. §§ 541.05 (6 years), 541.07 (2 years) (Supp. 1985); Mo. Rev. Stat. §§ 516.120 (5 years), 516.140 (2 years) (1978); N. C. Gen. Stat. §§ 1–52(5) (3 years), 1–54(3) (1 year) (1983); Okla. Stat., Tit. 12, §§ 95(Third) (2 years), 95(Fourth) (1 year) (1981); S. C. Code § 15–3–530(5) (6 years) (Supp. 1985), § 15–3–550(1) (2 years) (1976).

[3] Uniformity could also be achieved, of course, by congressional enactment of a uniform period of limitations for § 1983 actions. That course has much to commend it, but it is unacceptable, in my view, to delay resolving a conflict among the Circuits in the hopes that Congress will intervene.

luctance to return so quickly to the issue that we had hoped to lay to rest in *Wilson* v. *Garcia*, *supra*, I must respectfully dissent.

No. 85–878. PAN AMERICAN WORLD AIRWAYS, INC., ET AL. *v.* COOK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 771 F. 2d 635.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

This petition presents the issue whether an integrated employee seniority list that was adopted by an airline pursuant to a merger plan that the Civil Aeronautics Board (CAB) approved as "fair and equitable" can be attacked collaterally by the airline's employees in an action under the Age Discrimination in Employment Act (ADEA), 29 U. S. C. § 621 *et seq.* The United States Court of Appeals for the Second Circuit held that respondents are entitled to bring such a collateral ADEA action. 771 F. 2d 635 (1985). This decision squarely conflicts with *Carey* v. *O'Donnell*, 165 U. S. App. D. C. 46, 506 F. 2d 107 (1974), cert. denied, 419 U. S. 1110 (1975). *Carey* holds that § 1006 of the Federal Aviation Act, 49 U. S. C. App. § 1486, which vests exclusive jurisdiction in the United States Court of Appeals for the District of Columbia Circuit to review CAB orders, precludes a collateral ADEA action of the type allowed by the Second Circuit in the present case. I would grant certiorari to resolve this conflict.

No. 85–888. ADKINS ET AL. *v.* TIMES-WORLD CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 771 F. 2d 829.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

The United States Court of Appeals for the Fourth Circuit held in this case that it had jurisdiction under 28 U. S. C. § 1292(a)(1) to hear respondents' appeal of a District Court order staying arbitration proceedings to which respondents were parties. 771 F. 2d 829 (1985). This holding conflicts with the decisions in *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F. 2d 80 (CA2 1961), cert. denied, 368 U. S. 986 (1962), and *Diematic Mfg. Corp.* v. *Packaging Industries, Inc.*, 516 F. 2d 975 (CA2), cert. denied, 423 U. S. 913 (1975). I would grant certiorari to resolve this conflict.

No. 85-5360. DARWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 757 F. 2d 1193.

No. 85-5365. KHALIQ *v.* BROWN ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari.

No. 85-5533 (A-521). WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death scheduled for February 18, 1986, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 85-5687. CANNON *v* TEXAS. Ct. Crim. App. Tex.;
No. 85-5825. NETHERY *v.* TEXAS. Ct. Crim. App. Tex.; and
No. 85-5946. PEREZ *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: No. 85-5687, 691 S. W. 2d 664; No. 85-5825, 692 S. W. 2d 686; No. 85-5946, 108 Ill. 2d 70, 483 N. E. 2d 250.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85-5776. BRACY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 145 Ariz. 520, 703 P. 2d 464.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153,

227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Petitioner William Bracy was convicted of two murders and sentenced to death. He claims that the state trial court improperly barred him from pursuing, in his cross-examination of a prosecution witness, the only line of questioning that could have revealed that witness' motivation to shade his testimony in favor of the prosecution. He argues that he was thus denied his Sixth Amendment right to confront the State's witnesses against him. *Davis* v. *Alaska*, 415 U. S. 308 (1974). I believe that petitioner's claim may be substantial, requiring that his conviction be vacated.

In the pending case of *Delaware* v. *Van Arsdall* (No. 84-1279), cert. granted, 473 U. S. 923 (1985), this Court is to decide whether an absolute denial of cross-examination of a prosecution witness concerning potential bias can ever be harmless error. The Court denies certiorari in this case without even waiting to consider what light the *Van Arsdall* case will shed on the issues here. Because I consider such haste inappropriate, especially when a man's life is hanging in the balance, I dissent from the denial of certiorari.

Rehearing Denied

No. 84-5630. THOMAS *v.* ARN, SUPERINTENDENT, OHIO REFORMATORY FOR WOMEN, *ante*, p. 140;

No. 84-6270. GREEN ET AL. *v.* MANSOUR, DIRECTOR, MICHIGAN DEPARTMENT OF SOCIAL SERVICES, *ante*, p. 64;

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No. 85-394. IN RE TRACEY, *ante*, p. 899;

No. 85-503. SPARROW *v.* HAJIMAHOLIS ET AL., *ante*, p. 1006;

No. 85-527. FAITH CENTER, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL., *ante*, p. 1006;

No. 85-600. SLOAN ET AL. *v.* HICKS, TRUSTEE IN BANKRUPTCY OF BECKNELL & CRACE COAL CO., INC., BANKRUPT, *ante*, p. 1006;

No. 85-672. COHRAN *v.* CARLIN ET AL., *ante*, p. 1033; and

No. 85-5573. TURNER *v.* NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF SERVICES FOR THE BLIND, ET AL., *ante*, p. 1011. Petitions for rehearing denied.

No. 85-5583. BURTON *v.* SARGENT, WARDEN, *ante*, p. 1011; and

No. 85-5584. BURTON *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, *ante*, p. 1011. Petitions for rehearing denied.

No. 85-5382. WALLACE *v.* UNITED STATES, *ante*, p. 908. Motion for leave to file petition for rehearing denied.

FEBRUARY 10, 1986

Miscellaneous Order

No. A-593. ROOK *v.* RICE, WARDEN. Application for stay of execution of sentence of death scheduled for Friday, February 14, 1986, presented to THE CHIEF JUSTICE, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

FEBRUARY 13, 1986

Dismissal Under Rule 53

No. 85-5989. HORAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 774 F. 2d 1153.

FEBRUARY 14, 1986

Dismissal Under Rule 53

No. 85-6119. IN RE O'DELL. Petition for writ of mandamus dismissed under this Court's Rule 53.

Miscellaneous Order

No. A-622. KENNEDY *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death scheduled for Tuesday, February 18, 1986, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

JUSTICE O'CONNOR took no part in the consideration or decision of this application.

FEBRUARY 21, 1986

Dismissal Under Rule 53

No. 85-995. WESTERN UNION INTERNATIONAL, INC., ET AL. *v.* AMATO ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 773 F. 2d 1402.

Certiorari Denied

No. 85-6372 (A-609). MOORE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay. Certiorari denied. Reported below: 700 S. W. 2d 193.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

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PRELIMINARY PRINT

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PAGES 1-291; 1001-1062

OFFICIAL REPORTS

OF

THE SUPREME COURT

FEBRUARY 24 THROUGH MARCH 3, 1986

HENRY C. LIND
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

OFFICERS OF THE COURT

EDWIN MEESE III, Attorney General.
CHARLES FRIED, Solicitor General.
JOSEPH F. SPANIOL, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
STEPHEN G. MARGETON, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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Freedom of speech—Public utility—Billing envelope—Enclosure of newsletter.—Where (1) appellant public utility distributed in its monthly billing envelopes a newsletter that included political editorials, stories on matters of public interest, energy conservation tips, and information about utility services and bills, and (2) appellee California Public Utilities Commission, in ratemaking proceedings, concluded that "extra space" in envelopes was ratepayers' property and that appellee private organization could use "extra space" four times a year to raise funds and communicate with ratepayers, Commission's decision is vacated as violative of First Amendment. Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal., p. 1.

Right to counsel—Perjury—Counsel's refusal to cooperate.—A criminal defendant's Sixth Amendment right to effective assistance of counsel is not violated when an attorney refuses to cooperate with defendant in presenting perjured testimony at his criminal trial, such as respondent's counsel's threatening to withdraw from representation and to inform court if respondent insisted on committing perjury in his testimony at his murder trial as to defense of self-defense. Nix v. Whiteside, p. 157.

Searches and seizures—Automobile search—Vehicle Identification Number.—Fourth Amendment was not violated where, after respondent was stopped for committing traffic violations, (1) a city police officer opened car's door to move papers obscuring dashboard area where Vehicle Identification Number was located, and observed a gun's handle protruding from underneath driver's seat, (2) gun was then seized and respondent was arrested, and (3) respondent was later convicted of criminal possession of a weapon; New York Court of Appeals' decision to contrary did not rest

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on an adequate and independent state ground so as to deprive this Court of jurisdiction. New York v. Class, p. 106.

Taking of property—Multiemployer pension plan—Employer's liability on withdrawal.—Provisions of multiemployer Pension Plan Amendments Act of 1980 requiring an employer withdrawing from a multiemployer pension plan to pay a fixed and certain debt to plan amounting to employer's proportionate share of plan's "unfunded vested benefits" do not violate Taking Clause of Fifth Amendment. Connolly v. Pension Benefit Guaranty Corp., p. 211.

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Indictments—Grand jury proceedings—Presence of witnesses.—Where (1) a federal grand jury returned an indictment charging defendants with criminal offenses but later returned a superseding indictment expanding one charge, (2) two law enforcement agents testified in tandem before grand jury in support of superseding indictment, (3) defendants did not learn about this until after their jury trial began, and (4) defendants were convicted, petit jury's guilty verdict rendered harmless any error in grand jury's decision that might have flowed from alleged violation of Federal Rule of Criminal Procedure 6(d) in allowing two agents' simultaneous presence before grand jury. United States v. Mechanik, p. 66.

DOUBLE JEOPARDY. See **Constitutional Law.**

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FEDERAL-STATE RELATIONS. See also **National Labor Relations Act.**

Title to seabed—Nantucket Sound.—In proceedings to determine whether title to seabed along Atlantic coast belongs to certain States or United States, Special Master properly concluded that Nantucket Sound

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was not a part of Massachusett's inland waters under "ancient title" doctrine so as to constitute a "historic bay" belonging to Massachusetts. United States v. Maine, p. 89.

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employer to bargain with affiliated union. NLRB v. Financial Institution Employees, p. 192.

Violations of Act—Debarment from doing business with State.—Act pre-empts a Wisconsin statute that debarred, for three years, persons or firms who had violated federal Act three times within a 5-year period from doing business with State. Wisconsin Dept. of Industry v. Gould Inc., p. 282.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1985

PACIFIC GAS & ELECTRIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 84-1044. Argued October 8, 1985—Decided February 25, 1986

Appellant Pacific Gas and Electric Co. has distributed a newsletter in its monthly billing statements for many years. The newsletter has included political editorials, feature stories on matters of public interest, tips on energy conservation, and information about utility services and bills. Appellee Toward Utility Rate Normalization (TURN), in a ratemaking proceeding before appellee California Public Utilities Commission (Commission), urged the Commission to forbid appellant to use billing envelopes to distribute political editorials, on the ground that appellant's customers should not bear the expense of appellant's own political speech. The Commission decided that the envelope space that appellant had used to disseminate the newsletter was the ratepayers' property, defining this "extra space" as the space left over after including the bill and required notices. In an effort to apportion this "extra space" between appellant and its customers, the Commission permitted TURN to use the "extra space" four times a year to raise funds and to communicate with ratepayers with no limitation except to state that its messages were not those of appellant. Arguing that it had a First Amendment right not to help spread a message with which it disagrees, appellant appealed the Commission's order to the California Supreme Court, which denied discretionary review.

Held: The Commission's decision must be vacated.

Remanded.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE O'CONNOR, concluded:

1. The Commission's order impermissibly burdens appellant's affirmative First Amendment rights. Pp. 9–18.

(a) The order awards access to the billing envelopes only to persons or groups, such as TURN, who disagree with appellant's views as expressed in its newsletter and who oppose appellant in Commission proceedings. Such one-sidedness impermissibly burdens appellant's expression. Appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced to help disseminate hostile views. Appellant "might well conclude" that, under these circumstances, "the safe course is to avoid controversy," thereby reducing the free flow of information and ideas. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 257. Pp. 10, 12–15.

(b) The order also impermissibly requires appellant to associate with speech with which appellant may disagree. Appellant may be forced either to appear to agree with TURN's views or to respond. That kind of forced response is antithetical to the free discussion that the First Amendment fosters. For corporations as for individuals, the choice to speak includes within it the choice of what not to say. *Tornillo*, *supra*, at 258. Pp. 10–11, 15–17.

(c) The Commission's determination that the envelopes' "extra space" belongs to the ratepayers does not correct the order's constitutional deficiency. The billing envelopes remain appellant's property. Under the order, appellant must use that property to disseminate views with which it disagrees. Pp. 17–18.

2. The order is neither a narrowly tailored means of serving a compelling state interest nor a permissible time, place, or manner regulation. Pp. 19–20.

JUSTICE MARSHALL concluded that the State, pursuant to the Commission's order, has redefined a property right in the "extra space" in appellant's billing envelopes in such a way as to achieve a result—burdening one party's speech in order to enhance another party's speech—that the First Amendment disallows. *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, distinguished. Pp. 21–26.

POWELL, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and BRENNAN and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 21. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 21. REHNQUIST, J., filed a dissenting opinion, in Part I of which WHITE and STEVENS, JJ., joined, *post*, p. 26. STEVENS, J., filed a dissenting opinion, *post*, p. 35. BLACKMUN, J., took no part in the consideration or decision of the case.

Robert L. Harris argued the cause for appellant. With him on the briefs was *Malcolm H. Furbush*.

Mark Fogelman argued the cause for appellees. With him on the brief for appellee Public Utilities Commission of California were *Janice E. Kerr* and *Hector Anninos*. *Jerome B. Falk, Jr.*, *Steven L. Mayer*, and *Frederic D. Woocher* filed a brief for appellees Toward Utility Rate Normalization et al.*

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*Briefs of *amici curiae* urging reversal were filed for the American Gas Association by *George H. Lawrence*, *David J. Muchow*, *John H. Myler*, and *Carol A. Smoots;* for Bell Atlantic Telephone Companies by *Daniel A. Rezneck* and *Robert A. Levetown;* for Consolidated Edison Co. of New York, Inc., by *Joy Tannian*, *Peter P. Garam*, and *Bernard L. Sanoff;* for the California Chamber of Commerce by *John R. Reese;* for the Edison Electric Institute by *Robert L. Baum*, *Peter B. Kelsey*, *William L. Fang*, and *James H. Byrd;* for the Gas Distributors Information Service by *Paul A. Lenzini;* for the Legal Foundation of America by *David Crump*, *Jean F. Powers*, and *Bradley Ford Stuebling;* for the Mid-America Legal Foundation by *John M. Cannon*, *Susan W. Wanat*, and *Ann Plunkett Sheldon;* for the Mountain States Legal Foundation by *Constance E. Brooks*, *K. Preston Oade, Jr.*, and *Casey Shpall;* for National Fuel Gas Distribution Corp. et al. by *Stanley W. Widger, Jr.*, *Richard N. George*, and *Thomas C. Hutton;* for Pacific Bell et al. by *Philip B. Kurland*, *John J. Coffey*, *Robert V. R. Dalenberg*, *Margaret deB. Brown*, *Thomas D. Clarke*, *Jeffrey E. Jackson*, and *Richard M. Cahill;* for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun* and *John H. Findley;* for Pacific Northwest Bell Telephone Co. et al. by *Robert F. Harrington* and *Thomas H. Nelson;* for Sierra Pacific Power Co. by *Boris H. Lakusta*, *John Madariaga*, and *James D. Salo;* for the Washington Legal Foundation by *Daniel C. Popeo* and *Paul D. Kamenar;* and for the Wisconsin State Telephone Association et al. by *Robert A. Christensen*, *Ray J. Riordan, Jr.*, *Philip L. Wettengel*, *Floyd S. Keene*, and *Renee M. Martin*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John Van de Kamp*, Attorney General of California, *Herschel T. Elkins*, Senior Assistant Attorney General, *Michael R. Botwin*, Deputy Attorney General, *Joseph I. Lieberman*, Attorney General of Connecticut, *William B. Gundling*, Assistant Attorney General, *Elliot F. Gerson*, Deputy Attorney General, *Linley E. Pearson*, Attorney General of Indiana, *William E. Daily*, Deputy Attorney General, *William J. Guste, Jr.*, Attorney General of Louisiana, *Kendall L. Vick*, Assistant Attorney General, *Mike Greely*, Attorney General of Montana, *Patricia*

JUSTICE POWELL announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE O'CONNOR joined.

The question in this case is whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees.

J. Schaeffer, Assistant Attorney General, *Robert M. Spire*, Attorney General of Nebraska, *John Boehm*, Assistant Attorney General, *Brian McKay*, Attorney General of Nevada, *William E. Isaeff*, Chief Deputy Attorney General, *Paul Bardacke*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *Jo Anne Sanford*, Special Deputy Attorney General, *Karen E. Long*, Assistant Attorney General, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Terry L. Adkins*, Assistant Attorney General, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Robert S. Tongren*, Assistant Attorney General, *Arlene Violet*, Attorney General of Rhode Island, *Constance L. Messore*, Special Assistant Attorney General, *Jim Mattox*, Attorney General of Texas, *Larry J. Laurent*, Assistant Attorney General, *Charlie Brown*, Attorney General of West Virginia, and *David L. Grubb*, Deputy Attorney General; for the State of Illinois et al. by *Neil F. Hartigan*, Attorney General, *Jill Wine-Banks*, Solicitor General, *John W. McCaffrey* and *Rosalyn B. Kaplan*, Assistant Attorneys General, *Robert L. Graham* and *Laura A. Kastor;* for the State of Oregon by *Dave Frohnmayer*, Attorney General, *William F. Gary*, Deputy Attorney General, and *James E. Mountain, Jr.*, Solicitor General; for the State of Wisconsin by *Bronson C. La Follette*, Attorney General, and *David T. Flanagan*, Assistant Attorney General; for the National League of Cities et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, and *Jonathan B. Sallet;* for the American Federation of Labor and Congress of Industrial Organizations by *Marsha Berzon* and *Laurence Gold;* for the Center for Public Interest Law of the University of San Diego School of Law by *Robert C. Fellmeth;* for the Legal Aid Society of New York City by *Helaine Barnett*, *John E. Kirklin*, and *Kalman Finkel;* for the National Association of State Utility Consumer Advocates et al. by *William Paul Rodgers, Jr.*, *Steven W. Hamm*, and *Raymon E. Lark, Jr.;* and for the New York Citizens' Utility Board, Inc., et al. by *John Cary Sims* and *Alan B. Morrison;* for the Public Service Commission of New York et al. by *David E. Blabey*, *Timothy P. Sheehan*, *Robert Abrams*, Attorney General of New York, and *Peter Bienstock;* for the Telecommunications Research and Action Center et al. by *Andrew J. Schwartzman;* and for the Wisconsin Citizens' Utility Board by *Lee Cullen*.

I

For the past 62 years, appellant Pacific Gas and Electric Company has distributed a newsletter in its monthly billing envelope. Appellant's newsletter, called *Progress*, reaches over three million customers. It has included political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills. App. to Juris. Statement A-66, A-183 to A-190.[1]

In 1980, appellee Toward Utility Rate Normalization (TURN), an intervenor in a ratemaking proceeding before California's Public Utilities Commission, another appellee,[2] urged the Commission to forbid appellant to use the billing envelopes to distribute political editorials, on the ground that the appellant's customers should not bear the expense of appellant's own political speech. *Id.*, at A-2. The Commission decided that the envelope space that appellant had used to disseminate *Progress* is the property of the ratepayers. *Id.*, at A-2 to A-3.[3] This "extra space" was defined as "the

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[1] For example, the December 1984 issue of *Progress* included a story on appellant's "automatic payment" and "balanced payment" plans, an article instructing ratepayers on how to weatherstrip their homes, recipes for holiday dishes, and a feature on appellant's efforts to help bald eagles in the Pit River area of California. App. to Juris. Statement A-183 to A-190. When the Commission first addressed the question whether appellant could continue to have exclusive access to its billing envelopes, it noted that *Progress* has previously discussed the merits of recently passed and pending legislation in Congress. *Id.*, at A-66.

[2] In addition to TURN and the Commission, there are five other appellees: Consumers Union, Consumer Federation of California, Common Cause of California, California Public Interest Research Group, and California Association of Utility Shareholders. Only TURN claims a direct interest in the outcome of this case; the other appellees appear to be intervenors concerned only with this case's precedential effects.

[3] The Commission summarized its reasoning as follows:

"[E]nvelope and postage costs and any other costs of mailing bills are a necessary part of providing utility service to the customer . . . . However, due to the nature of postal rates . . . extra space exists in these billing envelopes. . . . Mindful that the extra space is an artifact generated with

space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." *Ibid.*

In an effort to apportion this "extra space" between appellant and its customers, the Commission permitted TURN to use the "extra space" four times a year for the next two years. During these months, appellant may use any space not used by TURN, and it may include additional materials if it pays any extra postage. The Commission found that TURN has represented the interests of "a significant group" of appellant's residential customers, *id.*, at A–15, and has aided the Commission in performing its regulatory function, *id.*, at A–49 to A–50. Consequently, the Commission determined that ratepayers would benefit from permitting TURN to use the extra space in the billing envelopes to raise funds and to communicate with ratepayers: "Our goal . . . is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E." *Id.*, at A–17. The Commission concluded that appellant could have no interest in excluding TURN's message from the billing envelope since appellant does not own the space that message would fill. *Id.*, at A–23.[4] The Commis-

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ratepayer funds, and is not an intended or necessary item of rate base, and that the only alternative treatment would unjustly enrich PG&E and simultaneously deprive the ratepayers of the value of that space, we concluded that the extra space in the billing envelope 'is properly considered as ratepayer property.'" *Id.*, at A–3.

[4] Commissioners Bagley and Calvo dissented from the Commission's decision to grant TURN access to the billing envelopes. Commissioner Bagley argued that the Commission's order had potentially sweeping consequences for various kinds of property interests:

"The face of every utility-owned dam, the side of every building, the surface of every gas holder rising above our cities, and the bumpers of every utility vehicle—to name just a few relevant examples—have 'excess space'

sion placed no limitations on what TURN or appellant could say in the envelope, except that TURN is required to state that its messages are not those of appellant. *Id.*, at A–17 to A–18. The Commission reserved the right to grant other groups access to the envelopes in the future.[5] *Ibid.*

Appellant appealed the Commission's order to the California Supreme Court, arguing that it has a First Amendment right not to help spread a message with which it disagrees, see *Wooley* v. *Maynard*, 430 U. S. 705 (1977), and that the Commission's order infringes that right. The California Supreme Court denied discretionary review. We noted probable jurisdiction, 470 U. S. 1083 (1985), and now reverse.

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and 'economic advertising value.' Some utility corporations place bumper-strip messages on their vehicles. Buses and trucks regularly carry advertising messages. In the words of the majority at page 23 of the decision, 'It is reasonable to assume that the ratepayers will benefit from exposure to a variety of views. . . .' Is it the postulate of this Commission, flowing from the decision's stated premise . . . that ratepayers would benefit from exposure to some particular socially desirable message from some ratepayer group making use of any or all such areas of excess valuable space?" *Id.*, at A–40.

Commissioner Bagley also argued that the Commission's decision would require the Commission to make forbidden content-based distinctions in order to allocate the extra space among competing speakers. *Id.*, at A–41. Commissioner Calvo contended, first, that the order infringed appellant's First Amendment rights, and, second, that it was unnecessary because "TURN has other opportunities to reach its natural audience." *Id.*, at A–56. Commissioner Calvo noted that the Commission often awarded TURN and similar groups fees for their participation in ratemaking proceedings, funds that presumably could finance separate mailings. *Ibid.*

[5] The Commission has already *denied* access to at least one group based on the content of its speech. The Commission denied the application of a taxpayer group—the Committee of More than One Million Taxpayers to Save Proposition 13—on the ground that that group neither wished to participate in Commission proceedings nor alleged that its use of the billing envelope space would improve consumer participation in those proceedings. *Id.*, at A–157 to A–164. The record does not reveal whether any other groups have sought access to the billing envelopes.

II

The constitutional guarantee of free speech "serves significant societal interests" wholly apart from the speaker's interest in self-expression. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978). By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information. See *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the "discussion, debate, and the dissemination of information and ideas" that the First Amendment seeks to foster. *First National Bank of Boston* v. *Bellotti*, *supra*, at 783 (citations omitted). Thus, in *Bellotti*, we invalidated a state prohibition aimed at speech by corporations that sought to influence the outcome of a state referendum. *Id.*, at 795. Similarly, in *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 544 (1980), we invalidated a state order prohibiting a privately owned utility company from discussing controversial political issues in its billing envelopes. In both cases, the critical considerations were that the State sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed. *First National Bank of Boston* v. *Bellotti*, *supra*, at 776–778, 781–783; *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, *supra*, at 533–535.

There is no doubt that under these principles appellant's newsletter *Progress* receives the full protection of the First Amendment. *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938). In appearance no different from a small newspaper, *Progress*' contents range from energy-saving tips to stories about wildlife conservation, and from billing information to recipes. App. to Juris. Statement A–183 to A–190. *Progress* thus

extends well beyond speech that proposes a business transaction, see *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. 626, 637 (1985); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557, 561–563 (1980), and includes the kind of discussion of "matters of public concern" that the First Amendment both fully protects and implicitly encourages. *Thornhill* v. *Alabama*, *supra*, at 101.

The Commission recognized as much, but concluded that requiring appellant to disseminate TURN's views did not infringe upon First Amendment rights. It reasoned that appellant remains free to mail its own newsletter except for the four months in which TURN is given access. The Commission's conclusion necessarily rests on one of two premises: (i) compelling appellant to grant TURN access to a hitherto private forum does not infringe appellant's right to speak; or (ii) appellant has no property interest in the relevant forum and therefore has no constitutionally protected right in restricting access to it. We now examine those propositions.

III

Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set. These impermissible effects are not remedied by the Commission's definition of the relevant property rights.

A

This Court has previously considered the question whether compelling a private corporation to provide a forum for views other than its own may infringe the corporation's freedom of speech. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); see also *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 85–88 (1980); *id.*, at 98–100 (POWELL, J., joined by WHITE, J., concurring in part and in the judgment). *Tornillo* involved a challenge to Florida's right-of-

reply statute. The Florida law provided that, if a newspaper assailed a candidate's character or record, the candidate could demand that the newspaper print a reply of equal prominence and space. 418 U. S., at 244–245, and n. 2.

We found that the right-of-reply statute directly interfered with the newspaper's right to speak in two ways. *Id.*, at 256. First, the newspaper's expression of a particular viewpoint triggered an obligation to permit other speakers, with whom the newspaper disagreed, to use the newspaper's facilities to spread their own message. The statute purported to advance free discussion, but its effect was to deter newspapers from speaking out in the first instance: by forcing the newspaper to disseminate opponents' views, the statute penalized the newspaper's own expression. We therefore concluded that a "[g]overnment-enforced right of access *inescapably* 'dampens the vigor and limits the variety of public debate.'" *Id.*, at 257 (emphasis added) (quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279 (1963).[6]

Second, we noted that the newspaper's "treatment of public issues and public officials—whether fair or unfair—constitute[s] the exercise of editorial control and judgment." 418 U. S., at 258. Florida's statute interfered with this "editorial control and judgment" by forcing the newspaper to tailor its speech to an opponent's agenda, and to respond to candidates' arguments where the newspaper might prefer to be silent. Cf. *Wooley* v. *Maynard*, 430 U. S., at 714; *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 633–634

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[6] This Court has sustained a limited government-enforced right of access to broadcast media. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969). Cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94 (1973). Appellant's billing envelopes do not, however, present the same constraints that justify the result in *Red Lion:* "[A] broadcaster communicates through use of a scarce, publicly owned resource. No person can broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails." *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 543 (1980).

(1943). Since *all* speech inherently involves choices of what to say and what to leave unsaid, this effect was impermissible. As we stated last Term: "'The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.'" *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 524, 559 (1985) (quoting *Estate of Hemingway* v. *Random House*, 23 N. Y. 2d 341, 348, 244 N. E. 2d 250, 255 (1968)) (emphasis in original). See *PruneYard*, *supra*, at 99–100 (opinion of POWELL, J.).

The concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to appellant as well as to the institutional press.[7] See *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 782–784. Cf. *Lovell* v. *Griffin*, 303 U. S., at 452. Just as the State is not free to "tell a newspaper in advance what it can print and what it cannot," *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 400 (1973) (Stewart, J., dissenting); see also *PruneYard*, *supra*, at 88, the State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold. *Consolidated Edi-*

[7] Unlike the right-of-reply statute at issue in *Tornillo*, the Commission's order does not require appellant to place TURN's message in appellant's newsletter. Instead, the Commission ordered appellant to place TURN's message in appellant's envelope four months out of the year. Like the Miami Herald, however, appellant is still required to carry speech with which it disagreed, and might well feel compelled to reply or limit its own speech in response to TURN's.

The Court's opinion in *Tornillo* emphasizes that the right-of-reply statute impermissibly deterred protected speech. 418 U. S., at 256–257. In the last paragraph of the opinion, the Court concluded that an *independent* ground for invalidating the statute was its effect on editors' allocation of scarce newspaper space. *Id.*, at 258. See also *id.*, at 257, n. 22. That discussion in no way suggested that the State was free otherwise to burden the newspaper's speech as long as the actual paper on which the newspaper was printed was not invaded.

son Co. v. *Public Service Comm'n of N. Y.*, 447 U. S., at 533–535. See *PruneYard*, 447 U. S., at 100 (opinion of POWELL, J.); *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 241 (1977). Under *Tornillo* a forced access rule that would accomplish these purposes indirectly is similarly forbidden.

The Court's decision in *PruneYard Shopping Center* v. *Robins*, *supra*, is not to the contrary. In *PruneYard*, a shopping center owner sought to deny access to a group of students who wished to hand out pamphlets in the shopping center's common area. The California Supreme Court held that the students' access was protected by the State Constitution; the shopping center owner argued that this ruling violated *his* First Amendment rights. This Court held that the shopping center did not have a constitutionally protected right to exclude the pamphleteers from the area open to the public at large. *Id.*, at 88. Notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content-based. *PruneYard* thus does not undercut the proposition that forced associations that burden protected speech are impermissible.[8]

B

The Commission's order is inconsistent with these principles. The order does not simply award access to the public at large; rather, it discriminates on the basis of the viewpoints of the selected speakers. Two of the acknowledged purposes of the access order are to offer the public a greater variety of views in appellant's billing envelope, and to assist

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[8] In addition, the relevant forum in *PruneYard* was the open area of the shopping center into which the general public was invited. This area was, almost by definition, peculiarly public in nature. *PruneYard*, 447 U. S., at 83, 88. There is no correspondingly public aspect to appellant's billing envelopes. See *post*, at 22–23 (MARSHALL, J., concurring in judgment).

groups (such as TURN) that challenge appellant in the Commission's ratemaking proceedings in raising funds. App. to Juris. Statement A–16 to A–17. Access to the envelopes thus is not content-neutral. The variety of views that the Commission seeks to foster cannot be obtained by including speakers whose speech agrees with appellant's. Similarly, the perceived need to raise funds to finance participation in ratemaking proceedings exists only where the relevant groups represent interests that diverge from appellant's interests. Access is limited to persons or groups—such as TURN—who disagree with appellant's views as expressed in *Progress* and who oppose appellant in Commission proceedings.[9]

Such one-sidedness impermissibly burdens appellant's own expression. *Tornillo* illustrates the point. Access to the newspaper in that case was content-based in two senses: (i) it was triggered by a particular category of newspaper speech, and (ii) it was awarded only to those who disagreed with the newspaper's views. The Commission's order is not, in *Tornillo*'s words, a "content-based penalty" in the first sense, because TURN's access to appellant's envelopes is not condi-

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[9] This is fully borne out by the order that triggered this appeal. TURN, the only entity to receive access to appellant's billing envelope, purports to represent the interest of a group of appellant's customers: residential ratepayers. App. to Juris. Statement A–14. The Commission's opinion plausibly assumes that the interest of residential ratepayers will often conflict with appellant's interest. *Id.*, at A–50.

Nor does the fact that TURN will use the envelopes to make fundraising appeals lessen the burden on appellant's speech. Cf. *post*, at 36–37 (STEVENS, J., dissenting). The Commission has "disavowed any intention of looking at the way that TURN solicits funds," leaving TURN free to "speak and advocate its own position as best it can" in its billing envelope inserts. Tr. Oral Arg. 31–32, 39. Thus, while TURN's advocacy may be aimed at convincing ratepayers to make donations, that goal does not alter the open-ended nature of the access awarded in this case, because it does not restrict the scope or content of TURN's message. Cf. *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 647 (1981).

tioned on any particular expression by appellant. Cf. *Tornillo*, 418 U. S., at 256. But because access is awarded only to those who disagree with appellant's views and who are hostile to appellant's interests, appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced—at TURN's discretion—to help disseminate hostile views. Appellant "might well conclude" that, under these circumstances, "the safe course is to avoid controversy," thereby reducing the free flow of information and ideas that the First Amendment seeks to promote. *Id.*, at 257.

Appellant does not, of course, have the right to be free from vigorous debate. But it *does* have the right to be free from government restrictions that abridge its own rights in order to "enhance the relative voice" of its opponents. *Buckley* v. *Valeo*, 424 U. S. 1, 49, and n. 55 (1976). The Commission's order requires *appellant* to assist in disseminating *TURN*'s views; it does not equally constrain both sides of the debate about utility regulation.[10] This kind of favoritism goes well beyond the fundamentally content-

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[10] JUSTICE STEVENS analogizes this aspect of the Commission's order to Securities and Exchange Commission regulations that require management to transmit proposals of minority shareholders in shareholder mailings. *Post*, at 39–40. The analogy is inappropriate. The regulations JUSTICE STEVENS cites differ from the Commission's order in two important ways. First, they allocate shareholder property between management and certain groups of shareholders. Management has no interest in corporate property except such interest as derives from the shareholders; therefore, regulations that limit management's ability to exclude some shareholders' views from corporate communications do not infringe corporate First Amendment rights. Second, the regulations govern speech by a corporation *to itself*. *Bellotti* and *Consolidated Edison* establish that the Constitution protects corporations' right to speak to the public based on the informational value of corporate speech. *Supra*, at 8. Rules that define how corporations govern themselves do not limit the range of information that the corporation may contribute to the public debate. The Commission's order, by contrast, burdens appellant's right freely to speak to the public at large.

neutral subsidies that we sustained in *Buckley* and in *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540 (1983). See *Buckley*, *supra* at 97–105 (sustaining funding of general election campaign expenses of major party candidates); *Regan*, *supra*, at 546–550 (sustaining tax deduction for contributors to veterans' organizations). Unlike these permissible government subsidies of speech, the Commission's order identifies a favored speaker "based on the identity of the interests that [the speaker] may represent," *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 784, and forces the speaker's opponent—not the taxpaying public—to assist in disseminating the speaker's message. Such a requirement necessarily burdens the expression of the disfavored speaker.

The Commission's access order also impermissibly requires appellant to associate with speech with which appellant may disagree. The order on its face leaves TURN free to use the billing envelopes to discuss any issues it chooses.[11] Should TURN choose, for example, to urge appellant's customers to vote for a particular slate of legislative candidates, or to argue in favor of legislation that could seriously affect the utility business, appellant may be forced either to appear to agree with TURN's views or to respond. *PruneYard*, 447 U. S., at 98–100 (opinion of POWELL, J.).[12] This pressure to

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[11] The presence of a disclaimer on TURN's messages, see *supra*, at 7, does not suffice to eliminate the impermissible pressure on appellant to respond to TURN's speech. The disclaimer serves only to avoid giving readers the mistaken impression that TURN's words are really those of appellant. *PruneYard*, 447 U. S., at 99 (opinion of POWELL, J.). It does nothing to reduce the risk that appellant will be forced to respond when there is strong disagreement with the substance of TURN's message. *Ibid.*

[12] The Commission's order is thus readily distinguishable from orders requiring appellant to carry various legal notices, such as notices of upcoming Commission proceedings or of changes in the way rates are calculated. The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations. See

respond "is particularly apparent when the owner has taken a position opposed to the view being expressed on his property." *Id.*, at 100. Especially since TURN has been given access in part to create a multiplicity of views in the envelopes, there can be little doubt that appellant will feel compelled to respond to arguments and allegations made by TURN in its messages to appellant's customers.

That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. *Harper & Row*, 471 U. S., at 559. See also *Wooley* v. *Maynard*, 430 U. S., at 714.[13] For corporations as for individuals, the choice to speak includes within it the choice of what not to say. *Tornillo*, *supra*, at 258. And we have held that speech does not lose its protection because of the corporate identity of the speaker. *Bellotti*, *supra*, at 777; *Consolidated Edison*, 447 U. S., at 533. Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next. It is therefore incorrect to say, as do appellees, that our decisions do not limit the government's authority to compel speech by corporations. The danger that appellant will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude, because the message itself is protected under our decisions in *Bellotti* and *Consolidated Edison*. Where, as in this case, the danger is one that arises from a content-based grant

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Zauderer v. *Office of Disciplinary Counsel*, 471 U. S. 626, 651 (1985). Nothing in *Zauderer* suggests, however, that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views.

[13] As we stated in *Wooley*, "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." 430 U. S., at 714.

of access to private property, it is a danger that the government may not impose absent a compelling interest.

C

The Commission has emphasized that appellant's customers own the "extra space" in the billing envelopes. App. to Juris. Statement A–64 to A–66. According to appellees, it follows that appellant cannot have a constitutionally protected interest in restricting access to the envelopes. This argument misperceives both the relevant property rights and the nature of the State's First Amendment violation.[14]

The Commission expressly declined to hold that under California law appellant's customers own the entire billing envelopes and everything contained therein. *Id.*, at A–2 to A–3. It decided only that the ratepayers own the "extra space" in the envelope, defined as that space left over after including the bill and required notices, up to a weight of one ounce. *Ibid.* The envelopes themselves, the bills, and *Progress* all remain appellant's property. The Commission's access order thus clearly requires appellant to use *its* property as a vehicle for spreading a message with which it disagrees. In *Wooley* v. *Maynard*, we held that New Hampshire could not require two citizens to display a slogan on their license plates and thereby "use their private property as a 'mobile billboard' for the State's ideological message." 430 U. S., at 715. The "private property" that was used to spread the unwelcome message was the automobile, not the license plates. Similarly, the Commission's order requires appellant to use its property—the billing envelopes—to dis-

[14] Appellees also argue that appellant's status as a regulated utility company lessens its right to be free from state regulation that burdens its speech. We have previously rejected this argument. *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S., at 534, n. 1 ("Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters"). See also *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557, 566–568 (1980).

tribute the message of another. This is so whoever is deemed to own the "extra space."

A different conclusion would necessarily imply that our decision in *Tornillo* rested on the Miami Herald's ownership of the space that would have been used to print candidate replies. Nothing in *Tornillo* suggests that the result would have been different had the Florida Supreme Court decided that the newspaper space needed to print candidates' replies was the property of the newspaper's readers, or had the court ordered the Miami Herald to distribute inserts owned and prepared by the candidates together with its newspapers. The constitutional difficulty with the right-of-reply statute was that it required the newspaper to disseminate a message with which the newspaper disagreed. This difficulty did not depend on whether the particular paper on which the replies were printed belonged to the newspaper or to the candidate.

Appellees' argument suffers from the same constitutional defect. The Commission's order forces appellant to disseminate TURN's speech in envelopes that appellant owns and that bear appellant's return address. Such forced association with potentially hostile views burdens the expression of views different from TURN's and risks forcing appellant to speak where it would prefer to remain silent. Those effects do not depend on who "owns" the "extra space."[15]

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[15] As the dissenting Commissioners correctly noted, see n. 4, *supra*, appellees' argument logically implies that the State may compel appellant or any other regulated business to use many different kinds of property to advance views with which the business disagrees. "Extra space" exists not only in billing envelopes but also on billboards, bulletin boards, and sides of buildings and motor vehicles. Under the Commission's reasoning, a State could force business proprietors of such items to use the space for the dissemination of speech the proprietor opposes. At least where access to such fora is granted on the basis of the speakers' viewpoints, the public's ownership of the "extra space" does not nullify the First Amendment rights of the owner of the property from which that space derives.

IV

Notwithstanding that it burdens protected speech, the Commission's order could be valid if it were a narrowly tailored means of serving a compelling state interest. *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S., at 535; *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 786. Appellees argue that the access order does in fact further compelling state interests. In the alternative, appellees argue that the order is a permissible time, place, or manner restriction. We consider these arguments in turn.

A

Appellees identify two assertedly compelling state interests that the access order is said to advance. First, appellees argue that the order furthers the State's interest in effective ratemaking proceedings. TURN has been a regular participant in those proceedings, and the Commission found that TURN has aided the Commission in performing its regulatory task. Appellees argue that the access order permits TURN to continue to help the Commission by assisting TURN in raising funds from the ratepayers whose interest TURN seeks to serve.

The State's interest in fair and effective utility regulation may be compelling. The difficulty with appellees' argument is that the State can serve that interest through means that would not violate appellant's First Amendment rights, such as awarding costs and fees.[16] The State's interest may justify imposing on appellant the reasonable expenses of responsible groups that represent the public interest at ratemaking proceedings. But "we find 'no substantially relevant correlation between the governmental interest asserted and the State's effort'" to compel appellant to distribute TURN's speech in appellant's envelopes. *First National Bank of*

[16] Indeed, the Commission already does this. See n. 4, *supra* (discussing Commissioner Calvo's dissent).

Boston v. *Bellotti*, *supra*, at 795 (quoting *Shelton* v. *Tucker*, 364 U. S. 479, 485 (1960)).

Second, appellees argue that the order furthers the State's interest in promoting speech by making a variety of views available to appellant's customers. Cf. *Buckley* v. *Valeo*, 424 U. S., at 92–93, and n. 127. We have noted above that this interest is not furthered by an order that is not content-neutral. Moreover, the means chosen to advance variety tend to inhibit expression of appellant's views in order to promote TURN's. Our cases establish that the State cannot advance some points of view by burdening the expression of others. *First National Bank of Boston* v. *Bellotti*, *supra*, at 785–786; *Buckley* v. *Valeo*, *supra*, at 48–49. It follows that the Commission's order is not a narrowly tailored means of furthering this interest.

B

Appellees argue, finally, that the Commission's order is a permissible time, place, or manner regulation, since it "serve[s] a significant governmental interest and leave[s] ample alternative channels for communication." *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, *supra*, at 535; see also *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 771 (1976). For a time, place, or manner regulation to be valid, it must be neutral as to the content of the speech to be regulated. *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984); see also *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 210–212 (1975). As we have shown, the State's asserted interest in exposing appellant's customers to a variety of viewpoints is not—and does not purport to be—content-neutral.

V

We conclude that the Commission's order impermissibly burdens appellant's First Amendment rights because it forces appellant to associate with the views of other speakers, and because it selects the other speakers on the basis of

their viewpoints. The order is not a narrowly tailored means of furthering a compelling state interest, and it is not a valid time, place, or manner regulation.

For these reasons, the decision of the California Public Utilities Commission must be vacated. The case is remanded to the California Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN took no part in the consideration or decision of this case.

CHIEF JUSTICE BURGER, concurring.

I join JUSTICE POWELL's opinion, but think we need not go beyond the authority of *Wooley* v. *Maynard*, 430 U. S. 705 (1977), to decide this case. I would not go beyond the central question presented by this case, which is the infringement of Pacific's right to be free from forced association with views with which it disagrees. I would also rely on that part of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), holding that a forced right of reply violates a newspaper's right to be free from forced dissemination of views it would not voluntarily disseminate, just as we held that Maynard must be free from being forced by the State to disseminate views with which he disagreed. To compel Pacific to mail messages for others cannot be distinguished from compelling it to carry the messages of others on its trucks, its buildings, or other property used in the conduct of its business. For purposes of this case, those properties cannot be distinguished from property like the mailing envelopes acquired by Pacific from its income and resources.

JUSTICE MARSHALL, concurring in the judgment.

In *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), we held that a State could, consistently with the Federal Constitution, prohibit the private owner of a shopping center from using state trespass law to exclude peaceful ex-

pressive activity in the open areas of the shopping center. Concurring in *PruneYard*, I viewed the State's abrogation of the property owner's traditional right to exclude as raising the question of how the Federal Constitution limits a State's ability to redefine its common-law property rights. See *id.*, at 92–93 (MARSHALL, J., concurring). Today we face a similar question. In the present case, California has taken from appellant the right to deny access to its property—its billing envelope—to a group that wishes to use that envelope for expressive purposes. Two significant differences between the State's grant of access in this case and the grant of access in *PruneYard* lead me to find a constitutional barrier here that I did not find in the earlier case.

The first difference is the degree of intrusiveness of the permitted access. We noted in *PruneYard:* "[T]he shopping center by choice of its owner is not limited to the personal use of [its owner]. It is instead a business establishment that is open to the public to come and go as they please." *Id.*, at 87. The challenged rule did not permit a markedly greater intrusion onto the property than that which the owner had voluntarily encouraged, nor did it impair the commercial value of the property. *Id.*, at 83; see also *id.*, at 94 (MARSHALL, J., concurring).

In the present case, by contrast, appellant has never opened up its billing envelope to the use of the public.[1] Ap-

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[1] The State seizes upon appellant's status as a regulated monopoly in order to argue that the inclusion of postage and other billing costs in the utility's rate base demonstrates that these items "belong" to the public, which has paid for them. However, a consumer who purchases food in a grocery store is "paying" for the store's rent, heat, electricity, wages, etc., but no one would seriously argue that the consumer thereby acquires a property interest in the store. That the utility passes on its overhead costs to ratepayers at a rate fixed by law rather than the market cannot affect the utility's ownership of its property, nor its right to use that property for expressive purposes, see *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 534, n. 1 (1980). The State could have concluded that the public interest would be best served by state own-

pellant has not abandoned its right to exclude others from its property to the degree that the shopping center owner had done in *PruneYard*. Were appellant to use its billing envelope as a sort of community billboard, regularly carrying the messages of third parties, its desire to exclude a particular speaker would be deserving of lesser solicitude. As matters stand, however, appellant has issued no invitation to the general public to use its billing envelope for speech or for any other purpose.[2] Moreover, the shopping center in *PruneYard* bore a strong resemblance to the streets and parks that are traditional public forums. People routinely gathered there, at the owner's invitation, and engaged in a wide variety of activities. Adding speech to the list of those activities did not in any great way change the complexion of the property. The same is not true in this case.

The second difference between this case and *PruneYard* is that the State has chosen to give TURN a right to speak at the expense of appellant's ability to use the property in ques-

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ership of utilities. Having chosen to keep utilities in private hands, however, the State may not arbitrarily appropriate property for the use of third parties by stating that the public has "paid" for the property by paying utility bills.

I hasten to add that nothing in this opinion nor, as I understand it, the plurality's opinion, addresses the issue whether the State may exclude the cost of mailing *Progress* from appellant's rate base. See *id.*, at 544 (MARSHALL, J., concurring). Indeed, appellant concedes that the State may force its shareholders to bear those costs.

[2] The State also argues that it frequently requires appellant to carry messages concerning utility ratemaking and the rights of utility consumers. These messages, however, do not include political speech, and are directly relevant to commercial transactions between the ratepayer and the utility. The State's interest in requiring appellant to carry such messages is therefore particularly compelling. Cf. *infra*, at 24–25. Somewhat analogously, the State could not argue that, because it may demand access for the State's agents to a private home to monitor compliance with health or safety regulations, see *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), it may also grant access to third parties for nongovernmental purposes.

tion as a forum for the exercise of its own First Amendment rights. While the shopping center owner in *PruneYard* wished to be free of unwanted expression, he nowhere alleged that his own expression was hindered in the slightest. In contrast, the present case involves a forum of inherently limited scope. By appropriating, four times a year, the space in appellant's envelope that appellant would otherwise use for its own speech, the State has necessarily curtailed appellant's use of its own forum. The regulation in this case, therefore, goes beyond a mere infringement of appellant's desire to remain silent, see *post*, at 32–35 (REHNQUIST, J., dissenting).

While the interference with appellant's speech is, concededly, very slight, the State's justification—the subsidization of another speaker chosen by the State—is insufficient to sustain even that minor burden. We have held that the State may use its own resources for subsidization, *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540 (1983), but that interest, standing alone, cannot justify interference with the speech of others. See *Buckley* v. *Valeo*, 424 U. S. 1, 48–49 (1976) *(per curiam); First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 790–792 (1978).[3] In the

[3] JUSTICE REHNQUIST's dissent argues that a State may freely affect the mix of information available to the public, so long as it only "indirectly and remotely" affects a particular speaker's contribution to that mix. See *post*, at 27. Even if I were to accept that proposition, I disagree with its application to this case.

While the interference with appellant's speech is small, it is by no means indirect. TURN clearly has the first claim to the "extra space" during four months out of every year. Appellant may use its own—and physically limited—forum during those months only to the extent TURN chooses not to use it. This infringement differs from the limitation on campaign contributions in *Buckley* v. *Valeo* because the speech element of a contribution—the message of support for a candidate—was only indirectly related to the size of the contribution. 424 U. S., at 21. By definition, then, a limit on the size of contributions affected speech only indirectly. *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540 (1983), is likewise distinguishable. That case decided only that the

instant case, the only state interest identified by appellees is ensuring that ratepayers are "expos[ed] to a variety of views," App. to Juris. Statement A–17, in order to provide "the most complete understanding possible of energy-related issues," *id.*, at A–22. This is no different from the interest that we found insufficient to justify restraints on individual political expenditures in *Buckley* v. *Valeo*, *supra*. Even assuming that the State could assert a more compelling interest in, for example, curbing actual abuses of the ratemaking process, it has never demonstrated that its regulation is tailored to serve such an interest. Indeed, it disclaims any duty to make that showing, based on its conclusion that ratepayers "own" the extra space. See App. to Juris. Statement A–22. The regulation at issue here, therefore, differs significantly from the Securities and Exchange Commission proxy regulation cited by JUSTICE STEVENS, *post*, at 39.

In *PruneYard*, I recognized that the State may generally create or abrogate rights "'to attain a permissible legislative object.'" 447 U. S., at 92 (quoting *Silver* v. *Silver*, 280 U. S. 117, 122 (1929)). In the present case, the State has redefined a property right in the extra space in appellant's billing envelope in such a way as to achieve a result—burdening the speech of one party in order to enhance the speech of another—that the First Amendment disallows. In doing so, moreover, it has sanctioned an intrusion onto appellant's property that exceeds the slight incursion permitted in *PruneYard*. Under these circumstances, I believe that the State has crossed the boundary between constitutionally permissible and impermissible redefinitions of private property.

In reaching this conclusion, I do not mean to suggest that I would hold, contrary to our precedents, that the corporation's First Amendment rights are coextensive with those of individuals, or that commercial speech enjoys the same pro-

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Government could use its own funds to subsidize a preferred speaker. That subsidization caused *no* interference with anyone else's speech, much less indirect and remote interference.

tections as individual speech. In essentially all instances, the use of business property to carry out transactions with the general public will permit the State to restrict or mandate speech in order to prevent deception or otherwise protect the public's health and welfare. In many instances, such as in *PruneYard*, business property will be open to the public to such an extent that the public's expressive activities will not interfere with the owner's use of property to a degree that offends the Constitution. The regulation at issue in this case, I believe, falls on the other side of the line. Accordingly, I join the Court's judgment.

JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE STEVENS join as to Part I, dissenting.

The plurality concludes that a state-created, limited right of access to the extra space in a utility's billing envelopes unconstitutionally burdens the utility's right to speak if the utility has used the space itself to express political views to its customers. This is so even though the extra envelope space belongs to the customers as a matter of state property law. The plurality justifies its conclusion on grounds that the right of access may (1) deter the utility from saying things that might trigger an adverse response, or (2) induce it to respond to subjects about which it might prefer to remain silent, in violation of the principles established in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), and *Wooley* v. *Maynard*, 430 U. S. 705 (1977). I do not believe that the right of access here will have any noticeable deterrent effect. Nor do I believe that negative free speech rights, applicable to individuals and perhaps the print media, should be extended to corporations generally. I believe that the right of access here is constitutionally indistinguishable from the right of access approved in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), and therefore I dissent.[1]

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[1] This case does not involve the question whether the First Amendment provides a right of access to a private forum. See *Hudgens* v. *NLRB*, 424

I

This Court established in *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), that the First Amendment prohibits the government from *directly* suppressing the affirmative speech of corporations. A newspaper publishing corporation's right to express itself freely is also implicated by governmental action that penalizes speech, see *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, because the deterrent effect of a penalty is very much like direct suppression. Our cases cannot be squared, however, with the view that the First Amendment prohibits governmental action that only *indirectly* and *remotely* affects a speaker's contribution to the overall mix of information available to society.

Several cases illustrate this point. In *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, the Court upheld limits on political campaign contributions despite the argument that their likely effect would be "to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections." *Id.*, at 25–26. The Court explained that the potential effect on affluent speech of limiting access to this one forum was constitutionally insignificant because of the availability of other forums, *id.*, at 26, n. 26, and that the limitation protected the integrity of our representative democracy by limiting political *quid pro quos* and the appearance of corruption, *id.*, at 26–27. The Court also upheld a provision granting different levels of subsidies for Presidential campaigns depending upon whether the party receiving the subsidy is a major, minor, or new party. *Id.*, at 87–88. The Court reasoned that the effect of the provision was "not

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U. S. 507 (1976); *Marsh* v. *Alabama*, 326 U. S. 501 (1946). The right of access in this case was granted by state law. See *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969).

to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion." *Id.*, at 92–93. Similarly, in *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540 (1983), the Court upheld a governmental decision to grant a subsidy to certain expressive groups yet deny it to others, depending on whether the groups served the statutory definition of public interest, even though this had the undeniable effect of enhancing the speech of some groups over the speech of others. The Court explained that Congress is free to subsidize some but not all speech. *Id.*, at 548.

PruneYard Shopping Center v. *Robins*, *supra*, illustrates the point in a case that is very similar to the one decided today. The State of California interpreted its own Constitution to afford a right of access to private shopping centers for the reasonable exercise of speech and petitioning. *Id.*, at 78. While acknowledging that the First Amendment does not itself grant a right of access to private forums, *id.*, at 80–81, the Court upheld the state-created right against a First Amendment challenge. See *id.*, at 85–88. It reasoned that *Wooley* v. *Maynard*, *supra*, does not prohibit such a right of access because the views of those taking advantage of the right would not likely be identified with those of the owners, the State was not dictating any specific message, and the owners were free to disavow any connection to the message by posting disclaimers. 447 U. S., at 87. The Court similarly distinguished *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943), stating that the right of access did not compel the owners to affirm their belief in government orthodoxy, and left them free to publicly dissociate themselves from the views of the speakers. 447 U. S., at 87–88. Finally, it distinguished *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, on the ground that the right of access did not constitute a content-based penalty that would "'dampe[n] the vigor and limi[t] the variety of public debate.'" 447 U. S., at 88, quoting *Tornillo*, *supra*, at 257.

Of course, the First Amendment does prohibit governmental action affecting the mix of information available to the public if the effect of the action approximates that of direct content-based suppression of speech. Thus, while the Court in *Buckley* v. *Valeo*, *supra*, upheld limits on campaign contributions and allowed disparate governmental subsidies to various political parties, it struck down limitations on campaign expenditures because such limits "impose far greater restraints on the freedom of speech and association." *Id.*, at 44.[2] The Court reasoned that the Government's interest in equalizing the relative influence of individuals over election outcomes could not overcome the First Amendment, which was designed to encourage the widest dissemination of diverse views. *Id.*, at 44–45. Similarly, the Court suggested in *Regan* v. *Taxation With Representation of Washington*, *supra*, that governmental subsidies aimed at the suppression of dangerous ideas might not pass constitutional muster. *Id.*, at 550.

Miami Herald Publishing Co. v. *Tornillo*, 418 U. S. 241 (1974), held that a governmentally imposed "penalty" for the exercise of protected speech is sufficiently like direct suppression to trigger heightened First Amendment scrutiny. The Court in *Tornillo* struck down a statute granting political candidates a right to reply any time a private newspaper

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[2] This was the critical distinction between the contribution and expenditure limitations, and not the relative worth of the respective governmental interests. The Court in *Buckley* v. *Valeo* never suggested that the interest served by the campaign limitation provision was a "compelling" one, nor examined the provision to determine whether it was sufficiently tailored to the interest to survive "heightened scrutiny." The Court was satisfied that the provision had only an indirect and minimal effect on First Amendment interests, as well as a rational basis. Nor did the Court treat the expenditure limitations differently because the governmental justification was less important. Instead, the relatively greater effect of these limitations on affirmative speech triggered heightened scrutiny, and a rational basis was no longer sufficient to justify them. See *Buckley*, 424 U. S., at 44–45.

criticized them. See *id.*, at 244. The Court reasoned that the statute violated the First Amendment because it "exact[ed] a penalty on the basis of the content of a newspaper," *id.*, at 256, that would likely have the effect of "'dampe[ning] the vigor and limi[ting] the variety of public debate.'" *Id.*, at 257, quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279 (1964).

Although the plurality draws its deterrence rationale from *Tornillo*, it does not even attempt to characterize the right of access as a "penalty"; indeed, such a Procrustean effort would be doomed to failure. Instead, the plurality stretches *Tornillo* to stand for the general proposition that the First Amendment prohibits any regulation that deters a corporation from engaging in some expressive behavior. But the deterrent effect of any statute is an empirical question of degree. When the potential deterrent effect of a particular state law is remote and speculative, the law simply is not subject to heightened First Amendment scrutiny. See *supra*, at 27–29, and n. 2. The plurality does not adequately explain how the potential deterrent effect of the right of access here is sufficiently immediate and direct to warrant strict scrutiny. While a statutory penalty, like the right-of-reply statute in *Tornillo*, may sufficiently deter speech to trigger such heightened First Amendment scrutiny, the right of access here will not have such an effect on PG&E's incentives to speak.

The record does not support the inference that PUC issued its order to penalize PG&E because of the content of its inserts or because PG&E included the inserts in its billing envelopes in the first place. The order does not prevent PG&E from using the billing envelopes in the future to distribute inserts whenever it wishes. Nor does its vitality depend on whether PG&E includes inserts in any future billing envelopes. Moreover, the central reason for the access order—to provide for an effective ratepayer voice—would not vary in importance if PG&E had never distributed the inserts or

ceased distributing them tomorrow. The most that can be said about the connection between the inserts and the order is that the existence of the inserts quite probably brought to TURN's attention the possibility of requesting access.

Nor does the access order create any cognizable risk of deterring PG&E from expressing its views in the most candid fashion. Unlike the reply statute in *Tornillo*, which conditioned access upon discrete instances of certain expression, the right of access here bears no relationship to PG&E's future conduct. PG&E cannot prevent the access by remaining silent or avoiding discussion of controversial subjects. The plurality suggests, however, that the possibility of minimizing the undesirable content of TURN's speech may induce PG&E to adopt a strategy of avoiding certain topics in hopes that TURN will not think to address them on its own. But this is an extremely implausible prediction. The success of such a strategy would depend on any group given access being little more than a reactive organization. TURN or any other group eventually given access will likely address the controversial subjects in spite of PG&E's silence. I therefore believe that PG&E will have no incentive to adopt the conservative strategy. Accordingly, the right of access should not be held to trigger heightened First Amendment scrutiny on the ground that it somehow might deter PG&E's right to speak.

II

The plurality argues, however, that the right of access also implicates PG&E's right not to speak or to associate with the speech of others, thereby triggering heightened scrutiny. The thrust of the plurality's argument is that if TURN has access to the envelopes, its speech will have the effect of *forcing* PG&E to address topics about which it would prefer to remain silent. The plausibility of any such prediction depends upon the perceived ineffectiveness of a disclaimer or the absence of any effective alternative means for consumer groups like TURN to communicate to the ratepayers. In

The interest in remaining isolated from the expressive activity of others, and in declining to communicate at all, is for the most part divorced from this "broad public forum" purpose of the First Amendment. The right of access here constitutes an effort to facilitate and enlarge public discussion; it therefore furthers rather than abridges First Amendment values. See *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, *supra*, at 558; *Buckley* v. *Valeo*, 424 U. S., at 92–93. In *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. 626 (1985), this Court held that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, . . . [the] constitutionally protected interest in *not* providing any particular factual information in [a business'] advertising is minimal." *Id.*, at 651 (citation omitted). Likewise, because the interest on which the constitutional protection of corporate speech rests is the societal interest in receiving information and ideas, the constitutional interest of a corporation in not permitting the presentation of other distinct views clearly identified as those of the speaker is *de minimis*. This is especially true in the case of PG&E, which is after all a regulated public utility. Any claim it may have had to a sphere of corporate autonomy was largely surrendered to extensive regulatory authority when it was granted legal monopoly status.

This argument is bolstered by the fact that the two constitutional liberties most closely analogous to the right to refrain from speaking—the Fifth Amendment right to remain silent and the constitutional right of privacy—have been denied to corporations based on their corporate status. The Court in *Bellotti* recognized that some "'purely personal' guarantees . . . are unavailable to corporations and other organizations," 435 U. S., at 779, n. 14, and therefore declined to hold that "corporations have the full measure of

rights that individuals enjoy under the First Amendment." *Id.*, at 777.[3]

III

PG&E is not an individual or a newspaper publisher; it is a regulated utility. The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same. Because I think this case is governed by *PruneYard*, and not by *Tornillo* or *Wooley*, I would affirm the judgment of the Supreme Court of California.

JUSTICE STEVENS, dissenting.

Because the plurality opinion is largely concerned with questions that need not be answered in order to decide this case,[1] I believe it is important to identify the actual issue with some care. The narrow question we must address is whether a state public utility commission may require the fund-raising solicitation of a consumer advocacy group to be carried in a utility billing envelope. Since the utility concedes that *it* has no right to use the extra space in the billing envelope for its own newsletter, the question is limited to whether the Commission's requirement that it be the courier

[3] The extension of negative free speech rights to corporations would cast doubt upon the result in *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969), as well as the suggestion in *Hudgens* v. *NLRB*, 424 U. S. 507 (1976), that the Federal Government may grant employees a right of access to employer property for the purpose of picketing, even though the First Amendment does not guarantee such access. *Id.*, at 521–523.

[1] For the plurality, the question in this case is whether a public utility commission "may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees." *Ante*, at 4. The plurality seems concerned that the California Public Utilities Commission's decision may be the harbinger of future decisions requiring publicly regulated institutions to bear banners antithetical to their own self-interest. Henceforth, a company's buildings and vehicles might display signs and stickers proclaiming the benefits of conservation, lower rates, and perhaps even government ownership. See *ante*, at 6–7, n. 4.

for the message of a third party violates the First Amendment. In my view, this requirement differs little from regulations applied daily to a variety of commercial communications that have rarely been challenged—and to my knowledge never invalidated—on First Amendment grounds.

I

As the California Public Utilities Commission summarized its own ruling: "[T]his decision . . . grants, in modified form, the complaint of Toward Utility Rate Normalization (TURN) proposing access to the extra space in Pacific Gas and Electric Company's (PG&E) billing envelope by consumer representative organizations for the purpose of soliciting funds to be used for residential ratepayer representation in proceedings of this Commission involving PG&E." App. to Juris. Statement A–1. Accord, *id.*, at A–4.[2] The Commission did not select among competing advocacy groups yearning to reach residential ratepayers through the billing envelope; "no other ratepayer organizations . . . sought access to the extra space." *Id.*, at A–24.

In my view the propagandizing and sloganeering feared by the plurality is not authorized by paragraph 5(b) of the Commission's order, which provides that "PG&E and TURN shall each determine the content of [its] own material." *Id.*, at A–32. In context, it is clear that the limited editorial license afforded by that provision is confined to "a billing envelope extra space insert . . . which (1) explains the program, (2)

[2] The Commission's access order is plainly limited to TURN's fund-raising appeal: Subsections (f) through (i) of paragraph 5 of the order, which make provision for funds received in response to TURN's solicitation, make no sense if TURN is not required to solicit funds. See App. to Juris. Statement A–32, A–33.

That the Commission is serious about this limitation is borne out by its denial of access to a group which did not itself wish to participate in Commission proceedings and which failed to allege that its use of the billing envelope would enhance consumer participation in Commission proceedings. See *ante*, at 7, n. 5.

sets forth a list of pending and anticipated PG&E applications and other cases likely to have a significant effect on customers' rates and services, and (3) invites voluntary donations to support advocacy by [TURN] on behalf of PG&E's residential customers before the Commission. The insert would also include a return envelope for mailing donations to a central collection point for transmittal to [TURN]." *Id.*, at A-4, A-5. It is unrealistic to suppose that the Commission, after adopting a program so detailed as to prescribe the subject matter of the communication and even to require return envelopes, can be thought to have sanctioned the freewheeling political debate the plurality opinion presupposes. Far from creating the postal equivalent of the soapbox in the park, the Commission "order[ed] that proposal 3" of the "Consumer Advocacy Checkoff" alternatives listed in TURN's complaint "be implemented." *Id.*, at A-17. Accord, *id.*, at A-31. That proposal, in marked contrast to the typically broad prayers for relief found in most complaints, limited the requested insert to the three matters described above, see *id.*, at A-78, and even provided a full illustrative insert as an exhibit, see *id.*, at A-85, A-86. Simply as a matter of construing a decision by a regulatory agency I find it difficult to understand the plurality's preference for discussing issues in their most abstract form. And as a matter of constitutional law there is surely no warrant for presuming that the Commission acted indiscriminately, insensitively, and without regard to the First Amendment questions raised by its access requirement. If any presumption is invoked, it should be that in favor of the regularity and constitutionality of governmental action, and the Commission's order should be construed narrowly as a consequence.

II

I assume that the plurality would not object to a utility commission rule dictating the format of the bill, even as to required warnings and the type size of various provisos and

disclaimers.[3] Such regulation is not too different from that applicable to credit card bills, loan forms, and media advertising. See, *e. g.*, 15 U. S. C. §§ 1632(a), 1663; 12 CFR §§ 226.6–226.8, 226.10 (1985).[4] I assume also the plurality would permit the Commission to require the utility to disseminate legal notices of public hearings and ratemaking proceedings written by it. See *ante*, at 15–16, n. 12 (attempting to distinguish legal notices).[5] These compelled statements

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[3] Since 1919 the predecessor to the California Public Utilities Commission ordered that each electric bill reprint the regulations "regarding payment of bills, disputed bills and discontinuance of service." *Pacific Gas and Electric Co.*, 17 Decisions of the Railroad Comm'n 143, 147 (1919). Other States have similar requirements.

[4] "Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833 (CA2 1968), cert. denied, 394 U. S. 976 (1969), corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970), [and] the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States*, 257 U. S. 377 (1921)." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978).

[5] At various times the Commission has required that inserts be placed in billing envelopes to "explai[n] the reasons behind [a] gas rate increase," *Pacific Gas and Electric Co.*, 9 P. U. C. 2d 82, 94 (1982), and to "describ[e] the components of the utility's costs," *San Diego Gas and Electric Co.*, 8 P. U. C. 2d 410 (1982). See *Pacific Gas and Electric Co.*, 7 P. U. C. 2d 349, 518 (1981) ("By March 1, 1982, PG&E shall mail to all its customers a bill insert which describes the components of the utility's costs. The complete bill insert to be sent is given in Appendix G of this decision. Its size and form shall be approved by the Executive Director in writing prior to inclusion with any customer's bill").

California has also enacted legislation requiring that utilities notify their customers of rate increases. These notices, which by statute must be included in utility bill envelopes, "shall state the amount of the proposed increase expressed in both dollar and percentage terms, a brief statement of the reasons the increase is required or sought, and the mailing address of the commission to which any customer inquiries relative to the proposed increase . . . may be directed." Cal. Public Utilities Code Ann. § 454(a) (West 1975). Other States likewise require certain service-related communications to be carried in a utility company's billing envelope.

differ little from mandating disclosure of information in the bill itself, as the plurality recognizes.[6]

Given that the Commission can require the utility to make certain statements and to carry the Commission's own messages to its customers, it seems but a small step to acknowledge that the Commission can also require the utility to act as the conduit for a public interest group's message that bears a close relationship to the purpose of the billing envelope.[7] An analogue to this requirement appears in securities law: the Securities and Exchange Commission requires the incumbent board of directors to transmit proposals of dissident shareholders which it opposes.[8] Presumably the plurality does not doubt the constitutionality of the SEC's requirement

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[6] See *ante*, at 18 (the result in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), would not differ if the forced reply had appeared in a separate insert rather in the newspaper proper). See also *ante*, at 11, n. 7.

[7] Because TURN's purpose is to solicit funds to fight utility rate increases, the success of its appeal bears directly on the size of the bill which, after all, the billing envelope contains.

[8] 17 CFR § 240.14a–8 (1985). This regulation cannot be justified on the basis of the commercial character of the communication, because the Rule can and has been used to propagate purely political proposals. See, *e. g.*, *Medical Committee for Human Rights* v. *SEC*, 139 U. S. App. D. C. 226, 229, 432 F. 2d 659, 662 (1970) (shareholder proposal to stop sale of napalm in part because of use in Vietnam), vacated as moot, 401 U. S. 973 (1971). See generally Weiss, Proxy Voting on Social Issues: A Growth Industry, Bus. and Soc'y Rev. 16 (Autumn 1974).

Even if the SEC Rule were justified largely on the basis of the commercial character of the communication, that justification is not irrelevant in this case. The messages that the utility disseminates in its newsletter are unquestionably intended to advance the corporation's commercial interests, and its objections to the public interest groups messages are based on their potentially adverse impact on the utility's ability to obtain rate increases. These commercial factors do not justify an abridgment of the utility's constitutionally protected right to communicate in *its* newsletter, but they do provide a legitimate and an adequate justification for the Commission's action in giving TURN access to the same audience that receives the utility's newsletter.

under the First Amendment, and yet—although the analogy is far from perfect—it performs the same function as the Commission's rule by making accessible the relevant audience, whether it be shareholders investing in the corporation or consumers served by the utility, to individuals or groups with demonstrable interests in reaching that audience for certain limited and approved purposes.

If the California Public Utilities Commission had taken over company buildings and vehicles for propaganda purposes, or even engaged in viewpoint discrimination among speakers desirous of sending messages via the billing envelope, I would be concerned. But nothing in this case presents problems even remotely resembling or portending the ones just mentioned. Although the plurality's holding may wisely forestall serious constitutional problems that are likely to arise in the future, I am not convinced that the order under review today has crossed the threshold of unconstitutionality. Accordingly, I respectfully dissent.

CITY OF RENTON ET AL. v. PLAYTIME THEATRES, INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1360. Argued November 12, 1985—Decided February 25, 1986

Respondents purchased two theaters in Renton, Washington, with the intention of exhibiting adult films and, at about the same time, filed suit in Federal District Court, seeking injunctive relief and a declaratory judgment that the First and Fourteenth Amendments were violated by a city ordinance that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The District Court ultimately entered summary judgment in the city's favor, holding that the ordinance did not violate the First Amendment. The Court of Appeals reversed, holding that the ordinance constituted a substantial restriction on First Amendment interests, and remanded the case for reconsideration as to whether the city had substantial governmental interests to support the ordinance.

Held: The ordinance is a valid governmental response to the serious problems created by adult theaters and satisfies the dictates of the First Amendment. Cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50. Pp. 46–55.

(a) Since the ordinance does not ban adult theaters altogether, it is properly analyzed as a form of time, place, and manner regulation. "Content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. Pp. 46–47.

(b) The District Court found that the Renton City Council's "predominate" concerns were with the secondary effects of adult theaters on the surrounding community, not with the content of adult films themselves. This finding is more than adequate to establish that the city's pursuit of its zoning interests was unrelated to the suppression of free expression, and thus the ordinance is a "content-neutral" speech regulation. Pp. 47–50.

(c) The Renton ordinance is designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication. A city's interest in attempting to preserve the quality of urban life, as here, must be accorded high respect. Although the ordinance was enacted without the benefit of studies specifically relating to

Renton's particular problems, Renton was entitled to rely on the experiences of, and studies produced by, the nearby city of Seattle and other cities. Nor was there any constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, or by effectively concentrating them, as in Renton. Moreover, the ordinance is not "underinclusive" for failing to regulate other kinds of adult businesses, since there was no evidence that, at the time the ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton. Pp. 50–53.

(d) As required by the First Amendment, the ordinance allows for reasonable alternative avenues of communication. Although respondents argue that in general there are no "commercially viable" adult theater sites within the limited area of land left open for such theaters by the ordinance, the fact that respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a violation of the First Amendment, which does not compel the Government to ensure that adult theaters, or any other kinds of speech-related businesses, will be able to obtain sites at bargain prices. Pp. 53–54.

748 F. 2d 527, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., concurred in the result. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 55.

E. Barrett Prettyman, Jr., argued the cause for appellants. With him on the briefs were *David W. Burgett*, *Lawrence J. Warren*, *Daniel Kellogg*, *Mark E. Barber*, and *Zanetta L. Fontes*.

Jack R. Burns argued the cause for appellees. With him on the briefs was *Robert E. Smith*.*

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*Briefs of *amici curiae* urging reversal were filed for Jackson County, Missouri, by *Russell D. Jacobson;* for the Freedom Council Foundation by *Wendell R. Bird* and *Robert K. Skolrood;* for the National Institute of Municipal Law Officers by *George Agnost*, *Roy D. Bates*, *Benjamin L. Brown*, *J. Lamar Shelley*, *John W. Witt*, *Roger F. Cutler*, *Robert J. Alfton*, *James K. Baker*, *Barbara Mather*, *James D. Montgomery*, *Clifford D. Pierce, Jr.*, *William H. Taube*, *William I. Thornton, Jr.*, and *Charles S. Rhyne;* and for the National League of Cities et al. by *Benna*

JUSTICE REHNQUIST delivered the opinion of the Court.

This case involves a constitutional challenge to a zoning ordinance, enacted by appellant city of Renton, Washington, that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Appellees, Playtime Theatres, Inc., and Sea-First Properties, Inc., filed an action in the United States District Court for the Western District of Washington seeking a declaratory judgment that the Renton ordinance violated the First and Fourteenth Amendments and a permanent injunction against its enforcement. The District Court ruled in favor of Renton and denied the permanent injunction, but the Court of Appeals for the Ninth Circuit reversed and remanded for reconsideration. 748 F. 2d 527 (1984). We noted probable jurisdiction, 471 U. S. 1013 (1985), and now reverse the judgment of the Ninth Circuit.[1]

Ruth Solomon, Joyce Holmes Benjamin, Beate Bloch, and *Lawrence R. Velvel.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *David Utevsky, Jack D. Novik*, and *Burt Neuborne;* and for the American Booksellers Association, Inc., et al. by *Michael A. Bamberger.*

Eric M. Rubin and *Walter E. Diercks* filed a brief for the Outdoor Advertising Association of America, Inc., et al. as *amici curiae.*

[1] This appeal was taken under 28 U. S. C. § 1254(2), which provides this Court with appellate jurisdiction at the behest of a party relying on a state statute or local ordinance held unconstitutional by a court of appeals. As we have previously noted, there is some question whether jurisdiction under § 1254(2) is available to review a nonfinal judgment. See *South Carolina Electric & Gas Co.* v. *Flemming*, 351 U. S. 901 (1956); *Slaker* v. *O'Connor*, 278 U. S. 188 (1929). But see *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 82–83 (1958).

The present appeal seeks review of a judgment remanding the case to the District Court. We need not resolve whether this appeal is proper under § 1254(2), however, because in any event we have certiorari jurisdiction under 28 U. S. C. § 2103. As we have previously done in equiva-

In May 1980, the Mayor of Renton, a city of approximately 32,000 people located just south of Seattle, suggested to the Renton City Council that it consider the advisability of enacting zoning legislation dealing with adult entertainment uses. No such uses existed in the city at that time. Upon the Mayor's suggestion, the City Council referred the matter to the city's Planning and Development Committee. The Committee held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities. The City Council, meanwhile, adopted Resolution No. 2368, which imposed a moratorium on the licensing of "any business . . . which . . . has as its primary purpose the selling, renting or showing of sexually explicit materials." App. 43. The resolution contained a clause explaining that such businesses "would have a severe impact upon surrounding businesses and residences." *Id.*, at 42.

In April 1981, acting on the basis of the Planning and Development Committee's recommendation, the City Council enacted Ordinance No. 3526. The ordinance prohibited any "adult motion picture theater" from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school. App. to Juris. Statement 79a. The term "adult motion picture theater" was defined as "[a]n enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[zed] by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein." *Id.*, at 78a.

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lent situations, see *El Paso* v. *Simmons*, 379 U. S. 497, 502–503 (1965); *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 927 (1975), we dismiss the appeal and, treating the papers as a petition for certiorari, grant the writ of certiorari. Henceforth, we shall refer to the parties as "petitioners" and "respondents."

In early 1982, respondents acquired two existing theaters in downtown Renton, with the intention of using them to exhibit feature-length adult films. The theaters were located within the area proscribed by Ordinance No. 3526. At about the same time, respondents filed the previously mentioned lawsuit challenging the ordinance on First and Fourteenth Amendment grounds, and seeking declaratory and injunctive relief. While the federal action was pending, the City Council amended the ordinance in several respects, adding a statement of reasons for its enactment and reducing the minimum distance from any school to 1,000 feet.

In November 1982, the Federal Magistrate to whom respondents' action had been referred recommended the entry of a preliminary injunction against enforcement of the Renton ordinance and the denial of Renton's motions to dismiss and for summary judgment. The District Court adopted the Magistrate's recommendations and entered the preliminary injunction, and respondents began showing adult films at their two theaters in Renton. Shortly thereafter, the parties agreed to submit the case for a final decision on whether a permanent injunction should issue on the basis of the record as already developed.

The District Court then vacated the preliminary injunction, denied respondents' requested permanent injunction, and entered summary judgment in favor of Renton. The court found that the Renton ordinance did not substantially restrict First Amendment interests, that Renton was not required to show specific adverse impact on Renton from the operation of adult theaters but could rely on the experiences of other cities, that the purposes of the ordinance were unrelated to the suppression of speech, and that the restrictions on speech imposed by the ordinance were no greater than necessary to further the governmental interests involved. Relying on *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976), and *United States* v. *O'Brien*, 391 U. S. 367 (1968), the court held that the Renton ordinance did not violate the First Amendment.

The Court of Appeals for the Ninth Circuit reversed. The Court of Appeals first concluded, contrary to the finding of the District Court, that the Renton ordinance constituted a substantial restriction on First Amendment interests. Then, using the standards set forth in *United States* v. *O'Brien*, *supra*, the Court of Appeals held that Renton had improperly relied on the experiences of other cities in lieu of evidence about the effects of adult theaters on Renton, that Renton had thus failed to establish adequately the existence of a substantial governmental interest in support of its ordinance, and that in any event Renton's asserted interests had not been shown to be unrelated to the suppression of expression. The Court of Appeals remanded the case to the District Court for reconsideration of Renton's asserted interests.

In our view, the resolution of this case is largely dictated by our decision in *Young* v. *American Mini Theatres, Inc.*, *supra*. There, although five Members of the Court did not agree on a single rationale for the decision, we held that the city of Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments. *Id.*, at 72–73 (plurality opinion of STEVENS, J., joined by BURGER, C. J., and WHITE and REHNQUIST, JJ.); *id.*, at 84 (POWELL, J., concurring). The Renton ordinance, like the one in *American Mini Theatres*, does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation. *Id.*, at 63, and n. 18; *id.*, at 78–79 (POWELL, J., concurring).

Describing the ordinance as a time, place, and manner regulation is, of course, only the first step in our inquiry. This Court has long held that regulations enacted for the

purpose of restraining speech on the basis of its content presumptively violate the First Amendment. See *Carey* v. *Brown*, 447 U. S. 455, 462–463, and n. 7 (1980); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95, 98–99 (1972). On the other hand, so-called "content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984); *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 807 (1984); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 647, 648 (1981).

At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at "adult motion picture theatres," but rather at the *secondary effects* of such theaters on the surrounding community. The District Court found that the City Council's "*predominate* concerns" were with the secondary effects of adult theaters, and not with the content of adult films themselves. App. to Juris. Statement 31a (emphasis added). But the Court of Appeals, relying on its decision in *Tovar* v. *Billmeyer*, 721 F. 2d 1260, 1266 (CA9 1983), held that this was not enough to sustain the ordinance. According to the Court of Appeals, if "*a motivating factor*" in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision. 748 F. 2d, at 537 (emphasis in original). This view of the law was rejected in *United States* v. *O'Brien*, 391 U. S., at 382–386, the very case that the Court of Appeals said it was applying:

> "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . .
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> . . . . .
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> ". . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *Id.*, at 383–384.

The District Court's finding as to "predominate" intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views. See App. to Juris. Statement 90a. As JUSTICE POWELL observed in *American Mini Theatres*, "[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." 427 U. S., at 82, n. 4.

In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976) (emphasis added); *Community for Creative Non-Violence, supra*, at 293; *International Society for Krishna Consciousness, supra*, at 648. The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express

less favored or more controversial views." *Mosley*, *supra*, at 95–96.

It was with this understanding in mind that, in *American Mini Theatres*, a majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials,[2] zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to "content-neutral" time, place, and manner regulations. JUSTICE STEVENS, writing for the plurality, concluded that the city of Detroit was entitled to draw a distinction between adult theaters and other kinds of theaters "without violating the government's paramount obligation of neutrality in its regulation of protected communication," 427 U. S., at 70, noting that "[i]t is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech," *id.*, at 71, n. 34. JUSTICE POWELL, in concurrence, elaborated:

> "[The] dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings. . . . Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated.

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[2] See *American Mini Theatres*, 427 U. S., at 70 (plurality opinion) ("[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . .").

See, *e. g.*, *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 509–511 (1969); *Procunier* v. *Martinez*, 416 U. S. 396, 413–414 (1974); *Greer* v. *Spock*, 424 U. S. 828, 842–844 (1976) (POWELL, J., concurring); cf. *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973)." *Id.*, at 82, n. 6.

The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. See *Community for Creative Non-Violence*, 468 U. S., at 293; *International Society for Krishna Consciousness*, 452 U. S., at 649, 654. It is clear that the ordinance meets such a standard. As a majority of this Court recognized in *American Mini Theatres*, a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." 427 U. S., at 71 (plurality opinion); see *id.*, at 80 (POWELL, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial"). Exactly the same vital governmental interests are at stake here.

The Court of Appeals ruled, however, that because the Renton ordinance was enacted without the benefit of studies specifically relating to "the particular problems or needs of Renton," the city's justifications for the ordinance were "conclusory and speculative." 748 F. 2d, at 537. We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof. The record in this case reveals that Renton relied heavily on the experience of, and studies produced by, the city of Seattle. In Seattle, as in Renton, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood. See *Northend Cinema, Inc.* v. *Seattle*, 90 Wash. 2d 709, 585 P. 2d 1153 (1978). The opinion of the Supreme Court of Washington in *Northend Cinema*, which

was before the Renton City Council when it enacted the ordinance in question here, described Seattle's experience as follows:

> "The amendments to the City's zoning code which are at issue here are the culmination of a long period of study and discussion of the problems of adult movie theaters in residential areas of the City. . . . [T]he City's Department of Community Development made a study of the need for zoning controls of adult theaters . . . . The study analyzed the City's zoning scheme, comprehensive plan, and land uses around existing adult motion picture theaters. . . ." *Id.*, at 711, 585 P. 2d, at 1155.
>
> "[T]he [trial] court heard extensive testimony regarding the history and purpose of these ordinances. It heard expert testimony on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts. The court's detailed findings, which include a finding that the location of adult theaters has a harmful effect on the area and contribute to neighborhood blight, are supported by substantial evidence in the record." *Id.*, at 713, 585 P. 2d, at 1156.
>
> "The record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods." *Id.*, at 719, 585 P. 2d, at 1159.

We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the

problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.

We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *American Mini Theatres*, 427 U. S., at 71 (plurality opinion). Moreover, the Renton ordinance is "narrowly tailored" to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad* v. *Mount Ephraim*, 452 U. S. 61 (1981), and *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975).

Respondents contend that the Renton ordinance is "underinclusive," in that it fails to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theaters. On this record the contention must fail. There is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton. In fact, Resolution No. 2368, enacted in October 1980, states that "the City of Renton does not, at the present time, have any business whose primary purpose is the sale, rental, or showing of sexually explicit materials." App. 42. That Renton chose first to address the potential problems created

by one particular kind of adult business in no way suggests that the city has "singled out" adult theaters for discriminatory treatment. We simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters. See *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488–489 (1955).

Finally, turning to the question whether the Renton ordinance allows for reasonable alternative avenues of communication, we note that the ordinance leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of "[a]mple, accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads." App. to Juris. Statement 28a.

Respondents argue, however, that some of the land in question is already occupied by existing businesses, that "practically none" of the undeveloped land is currently for sale or lease, and that in general there are no "commercially viable" adult theater sites within the 520 acres left open by the Renton ordinance. Brief for Appellees 34–37. The Court of Appeals accepted these arguments,[3] concluded that

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[3] The Court of Appeals' rejection of the District Court's findings on this issue may have stemmed in part from the belief, expressed elsewhere in the Court of Appeals' opinion, that, under *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485 (1984), appellate courts have a duty to review *de novo* all mixed findings of law and fact relevant to the application of First Amendment principles. See 748 F. 2d 527, 535 (1984). We need not review the correctness of the Court of Appeals' interpretation of *Bose Corp.*, since we determine that, under any standard of review, the District Court's findings should not have been disturbed.

the 520 acres was not truly "available" land, and therefore held that the Renton ordinance "would result in a substantial restriction" on speech. 748 F. 2d, at 534.

We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," *American Mini Theatres*, 427 U. S., at 71, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See *id.*, at 78 (POWELL, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact"). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

In sum, we find that the Renton ordinance represents a valid governmental response to the "admittedly serious problems" created by adult theaters. See *id.*, at 71 (plurality opinion). Renton has not used "the power to zone as a pretext for suppressing expression," *id.*, at 84 (POWELL, J., concurring), but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning. Here, as in *American Mini Theatres*, the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the

First Amendment.[4] The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE BLACKMUN concurs in the result.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Renton's zoning ordinance selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there. The constitutionality of the ordinance is therefore not correctly analyzed under standards applied to content-neutral time, place, and manner restrictions. But even assuming that the ordinance may fairly be characterized as content-neutral, it is plainly unconstitutional under the standards established by the decisions of this Court. Although the Court's analysis is limited to

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[4] Respondents argue, as an "alternative basis" for affirming the decision of the Court of Appeals, that the Renton ordinance violates their rights under the Equal Protection Clause of the Fourteenth Amendment. As should be apparent from our preceding discussion, respondents can fare no better under the Equal Protection Clause than under the First Amendment itself. See *Young* v. *American Mini Theatres, Inc.*, 427 U. S., at 63–73.

Respondents also argue that the Renton ordinance is unconstitutionally vague. More particularly, respondents challenge the ordinance's application to buildings "used" for presenting sexually explicit films, where the term "used" describes "a continuing course of conduct of exhibiting [sexually explicit films] in a manner which appeals to a prurient interest." App. to Juris. Statement 96a. We reject respondents' "vagueness" argument for the same reasons that led us to reject a similar challenge in *American Mini Theatres, supra*. There, the Detroit ordinance applied to theaters "used to present material distinguished or characterized by an emphasis on [sexually explicit matter]." *Id.*, at 53. We held that "even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents." *Id.*, at 58–59. We also held that the Detroit ordinance created no "significant deterrent effect" that might justify invocation of the First Amendment "overbreadth" doctrine. *Id.*, at 59–61.

cases involving "businesses that purvey sexually explicit materials," *ante*, at 49, and n. 2, and thus does not affect our holdings in cases involving state regulation of other kinds of speech, I dissent.

I

"[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 536 (1980). The Court asserts that the ordinance is "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community," *ante*, at 47 (emphasis in original), and thus is simply a time, place, and manner regulation.[1] This analysis is misguided.

The fact that adult movie theaters may cause harmful "secondary" land-use effects may arguably give Renton a compelling reason to regulate such establishments; it does not mean, however, that such regulations are content-neutral.

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[1] The Court apparently finds comfort in the fact that the ordinance does not "deny use to those wishing to express less favored or more controversial views." *Ante*, at 48–49. However, content-based discrimination is not rendered "any less odious" because it distinguishes "among entire classes of ideas, rather than among points of view within a particular class." *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 316 (1974) (BRENNAN, J., dissenting); see also *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic"). Moreover, the Court's conclusion that the restrictions imposed here were viewpoint-neutral is patently flawed. "As a practical matter, the speech suppressed by restrictions such as those involved [here] will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores. Such restrictions, in other words, have a potent viewpoint-differential impact. . . . To treat such restrictions as viewpoint-neutral seems simply to ignore reality." Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81, 111–112 (1978).

Because the ordinance imposes special restrictions on certain kinds of speech on the basis of *content*, I cannot simply accept, as the Court does, Renton's claim that the ordinance was not designed to suppress the content of adult movies. "[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'" *Consolidated Edison Co., supra*, at 536 (quoting *Niemotko* v. *Maryland*, 340 U. S. 268, 282 (1951) (Frankfurter, J., concurring in result)). "[B]efore deferring to [Renton's] judgment, [we] must be convinced that the city is seriously and comprehensively addressing" secondary land-use effects associated with adult movie theaters. *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 531 (1981) (BRENNAN, J., concurring in judgment). In this case, both the language of the ordinance and its dubious legislative history belie the Court's conclusion that "the city's pursuit of its zoning interests here was unrelated to the suppression of free expression." *Ante*, at 48.

A

The ordinance discriminates on its face against certain forms of speech based on content. Movie theaters specializing in "adult motion pictures" may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Other motion picture theaters, and other forms of "adult entertainment," such as bars, massage parlors, and adult bookstores, are not subject to the same restrictions. This selective treatment strongly suggests that Renton was interested not in controlling the "secondary effects" associated with adult businesses, but in discriminating against adult theaters based on the content of the films they exhibit. The Court ignores this discriminatory treatment, declaring that Renton is free "to address the potential problems created by one particular kind of adult business," *ante*, at 52–53, and to amend the ordinance in the

future to include other adult enterprises. *Ante*, at 53 (citing *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488–489 (1955)).[2] However, because of the First Amendment interests at stake here, this one-step-at-a-time analysis is wholly inappropriate.

> "This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. See *e. g.*, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488–489 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' *Police Dept. of Chicago* v. *Mosley*, 408 U. S., at 95." *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 215 (1975).

In this case, the city has not justified treating adult movie theaters differently from other adult entertainment businesses. The ordinance's underinclusiveness is cogent evidence that it was aimed at the *content* of the films shown in adult movie theaters.

B

Shortly *after* this lawsuit commenced, the Renton City Council amended the ordinance, adding a provision explaining that its intention in adopting the ordinance had been "to promote the City of Renton's great interest in protecting and preserving the quality of its neighborhoods, commercial districts, and the quality of urban life through effective land

[2] The Court also explains that "[t]here is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton." *Ante*, at 52. However, at the time the ordinance was enacted, there was no evidence that any *adult movie theaters* were located in, or considering moving to, Renton. Thus, there was no legitimate reason for the city to treat adult movie theaters differently from other adult businesses.

use planning." App. to Juris. Statement 81a. The amended ordinance also lists certain conclusory "findings" concerning adult entertainment land uses that the Council purportedly relied upon in adopting the ordinance. *Id.*, at 81a–86a. The city points to these provisions as evidence that the ordinance was designed to control the secondary effects associated with adult movie theaters, rather than to suppress the content of the films they exhibit. However, the "legislative history" of the ordinance strongly suggests otherwise.

Prior to the amendment, there was no indication that the ordinance was designed to address any "secondary effects" a single adult theater might create. In addition to the suspiciously coincidental timing of the amendment, many of the City Council's "findings" do not relate to legitimate land-use concerns. As the Court of Appeals observed, "[b]oth the magistrate and the district court recognized that many of the stated reasons for the ordinance were no more than expressions of dislike for the subject matter." 748 F. 2d 527, 537 (CA9 1984).[4] That some residents may be offended by the *content* of the films shown at adult movie theaters cannot form the basis for state regulation of speech. See *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

Some of the "findings" added by the City Council do relate to supposed "secondary effects" associated with adult movie

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[4] For example, "finding" number 2 states that

"[l]ocation of adult entertainment land uses on the main commercial thoroughfares of the City gives an impression of legitimacy to, and causes a loss of sensitivity to the adverse effect of pornography upon children, established family relations, respect for marital relationship and for the sanctity of marriage relations of others, and the concept of non-aggressive, consensual sexual relations." App. to Juris. Statement 86a.

"Finding" number 6 states that

"[l]ocation of adult land uses in close proximity to residential uses, churches, parks, and other public facilities, and schools, will cause a degradation of the community standard of morality. Pornographic material has a degrading effect upon the relationship between spouses." *Ibid.*

theaters.[4] However, the Court cannot, as it does, merely accept these *post-hoc* statements at face value. "[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." *Schad* v. *Mount Ephraim*, 452 U. S. 61, 77 (1981) (BLACKMUN, J., concurring). As the Court of Appeals concluded, "[t]he record presented by Renton to support its asserted interest in enacting the zoning ordinance is very thin." 748 F. 2d, at 536.

The amended ordinance states that its "findings" summarize testimony received by the City Council at certain public hearings. While none of this testimony was ever recorded or preserved, a city official reported that residents had objected to having adult movie theaters located in their community. However, the official was unable to recount any testimony as to how adult movie theaters would specifically affect the schools, churches, parks, or residences "protected" by the ordinance. See App. 190–192. The City Council conducted no studies, and heard no expert testimony, on how the protected uses would be affected by the presence of an adult movie theater, and never considered whether residents' concerns could be met by "restrictions that are less intrusive on protected forms of expression." *Schad*, *supra*, at 74. As a result, any "findings" regarding "secondary effects" caused by adult movie theaters, or the need to adopt specific locational requirements to combat such effects, were not "findings" at all, but purely speculative conclusions. Such "findings" were not such as are required to justify the bur-

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[4] For example, "finding" number 12 states that

"[l]ocation of adult entertainment land uses in proximity to residential uses, churches, parks and other public facilities, and schools, may lead to increased levels of criminal activities, including prostitution, rape, incest and assaults in the vicinity of such adult entertainment land uses." *Id.*, at 83a.

dens the ordinance imposed upon constitutionally protected expression.

The Court holds that Renton was entitled to rely on the experiences of cities like Detroit and Seattle, which had enacted special zoning regulations for adult entertainment businesses after studying the adverse effects caused by such establishments. However, even assuming that Renton was concerned with the same problems as Seattle and Detroit, it never actually reviewed any of the studies conducted by those cities. Renton had no basis for determining if any of the "findings" made by these cities were relevant to *Renton's* problems or needs.[5] Moreover, since Renton ultimately adopted zoning regulations different from either Detroit or Seattle, these "studies" provide no basis for assessing the effectiveness of the particular restrictions adopted under the ordinance.[6] Renton cannot merely rely on the general ex-

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[5] As part of the amendment passed after this lawsuit commenced, the City Council added a statement that it had intended to rely on the Washington Supreme Court's opinion in *Northend Cinema, Inc.* v. *Seattle*, 90 Wash. 2d 709, 585 P. 2d 1153 (1978), cert. denied *sub nom. Apple Theatre, Inc.* v. *Seattle*, 441 U. S. 946 (1979), which upheld Seattle's zoning regulations against constitutional attack. Again, despite the suspicious coincidental timing of the amendment, the Court holds that "Renton was entitled to rely . . . on the 'detailed findings' summarized in the . . . *Northend Cinema* opinion." *Ante*, at 51. In *Northend Cinema*, the court noted that "[t]he record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods." 90 Wash. 2d, at 719, 585 P. 2d, at 1159. The opinion however, does not explain the evidence it purports to summarize, and provided no basis for determining whether Seattle's experience is relevant to Renton's.

[6] As the Court of Appeals observed:

"Although the Renton ordinance *purports* to copy Detroit's and Seattle's, it does not solve the same problem in the same manner. The Detroit ordinance was intended to disperse adult theaters throughout the city so that no one district would deteriorate due to a concentration of such theaters. The Seattle ordinance, by contrast, was intended to *concentrate* the theaters in one place so that the whole city would not bear the effects of them. The Renton Ordinance is allegedly aimed at protecting certain uses—schools, parks, churches and residential areas—from the perceived

periences of Seattle or Detroit, for it must "justify its ordinance in the context of *Renton's* problems—not Seattle's or Detroit's problems." 748 F. 2d, at 536 (emphasis in original).

In sum, the circumstances here strongly suggest that the ordinance was designed to suppress expression, even that constitutionally protected, and thus was not to be analyzed as a content-neutral time, place, and manner restriction. The Court allows Renton to conceal its illicit motives, however, by reliance on the fact that other communities adopted similar restrictions. The Court's approach largely immunizes such measures from judicial scrutiny, since a municipality can readily find other municipal ordinances to rely upon, thus always retrospectively justifying special zoning regulations for adult theaters.[7] Rather than speculate about Renton's motives for adopting such measures, our cases require that the ordinance, like any other content-based restriction on speech, is constitutional "only if the [city] can show that [it] is a precisely drawn means of serving a compelling [governmental] interest." *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S., at 540; see also *Carey* v. *Brown*, 447 U. S. 455, 461–462 (1980); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 99 (1972). Only this strict approach can insure that cities will not use their zoning powers as a pretext for suppressing constitutionally protected expression.

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unfavorable effects of an adult theater." 748 F. 2d, at 536 (emphasis in original).

[7] As one commentator has noted:

"[A]nyone with any knowledge of human nature should naturally assume that the decision to adopt almost any content-based restriction might have been affected by an antipathy on the part of at least some legislators to the ideas or information being suppressed. The logical assumption, in other words, is not that there is not improper motivation but, rather, because legislators are only human, that there is a substantial risk that an impermissible consideration has in fact colored the deliberative process." Stone, *supra* n. 1, at 106.

Applying this standard to the facts of this case, the ordinance is patently unconstitutional. Renton has not shown that locating adult movie theaters in proximity to its churches, schools, parks, and residences will necessarily result in undesirable "secondary effects," or that these problems could not be effectively addressed by less intrusive restrictions.

II

Even assuming that the ordinance should be treated like a content-neutral time, place, and manner restriction, I would still find it unconstitutional. "[R]estrictions of this kind are valid provided . . . that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 648 (1981). In applying this standard, the Court "fails to subject the alleged interests of the [city] to the degree of scrutiny required to ensure that expressive activity protected by the First Amendment remains free of unnecessary limitations." *Community for Creative Non-Violence*, 468 U. S., at 301 (MARSHALL, J., dissenting). The Court "evidently [and wrongly] assumes that the balance struck by [Renton] officials is deserving of deference so long as it does not appear to be tainted by content discrimination." *Id.*, at 315. Under a *proper* application of the relevant standards, the ordinance is clearly unconstitutional.

A

The Court finds that the ordinance was designed to further Renton's substantial interest in "preserv[ing] the quality of urban life." *Ante*, at 50. As explained above, the record here is simply insufficient to support this assertion. The city made no showing as to how uses "protected" by the ordinance would be affected by the presence of an adult movie theater. Thus, the Renton ordinance is clearly distinguishable from

the Detroit zoning ordinance upheld in *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976). The Detroit ordinance, which was designed to disperse adult theaters throughout the city, was supported by the testimony of urban planners and real estate experts regarding the adverse effects of locating several such businesses in the same neighborhood. *Id.*, at 55; see also *Northend Cinema Inc.* v. *Seattle*, 90 Wash. 2d 709, 711, 585 P. 2d 1153, 1154–1155 (1978), cert. denied *sub nom. Apple Theatre, Inc.* v. *Seattle*, 441 U. S. 946 (1979) (Seattle zoning ordinance was the "culmination of a long period of study and discussion"). Here, the Renton Council was aware only that some residents had complained about adult movie theaters, and that other localities had adopted special zoning restrictions for such establishments. These are not "facts" sufficient to justify the burdens the ordinance imposed upon constitutionally protected expression.

B

Finally, the ordinance is invalid because it does not provide for reasonable alternative avenues of communication. The District Court found that the ordinance left 520 acres in Renton available for adult theater sites, an area comprising about five percent of the city. However, the Court of Appeals found that because much of this land was already occupied, "[l]imiting adult theater uses to these areas is a substantial restriction on speech." 748 F. 2d, at 534. Many "available" sites are also largely unsuited for use by movie theaters. See App. 231, 241. Again, these facts serve to distinguish this case from *American Mini Theatres*, where there was no indication that the Detroit zoning ordinance seriously limited the locations available for adult businesses. See *American Mini Theatres*, *supra*, at 71, n. 35 (plurality opinion) ("The situation would be quite different if the ordinance had the effect of . . . greatly restricting access to, lawful speech"); see also *Basiardanes* v. *City of Galveston*, 682 F. 2d 1203, 1214 (CA5 1982) (ordinance effectively banned adult theaters

by restricting them to "'the most unattractive, inaccessible, and inconvenient areas of a city'"); *Purple Onion, Inc.* v. *Jackson*, 511 F. Supp. 1207, 1217 (ND Ga. 1981) (proposed sites for adult entertainment uses were either "unavailable, unusable, or so inaccessible to the public that . . . they amount to no locations").

Despite the evidence in the record, the Court reasons that the fact "[t]hat respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Ante*, at 54. However, respondents are not on equal footing with other prospective purchasers and lessees, but must conduct business under severe restrictions not imposed upon other establishments. The Court also argues that the First Amendment does not compel "the government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." *Ibid.* However, respondents do not ask Renton to guarantee low-price sites for their businesses, but seek only a reasonable opportunity to operate adult theaters in the city. By denying them this opportunity, Renton can effectively ban a form of protected speech from its borders. The ordinance "greatly restrict[s] access to, lawful speech," *American Mini Theatres, supra*, at 71, n. 35 (plurality opinion), and is plainly unconstitutional.

UNITED STATES *v.* MECHANIK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1640. Argued December 2, 1985—Decided February 25, 1986*

A federal grand jury returned an indictment charging respondents and cross-petitioners (hereafter defendants) with drug-related offenses and conspiracy, and later returned a superseding indictment expanding the conspiracy charge. Two law enforcement agents testified in tandem before the grand jury in support of the superseding indictment. The defendants did not learn about this until the second week of their trial when the Government furnished them with a transcript of the grand jury testimony. The defendants were found guilty after a jury trial, and the District Court denied their motion to dismiss the superseding indictment on the ground that the two agents' simultaneous presence before the grand jury violated Federal Rule of Criminal Procedure 6(d), which provides that only specified persons including "the witness under examination" may be present at a grand jury proceeding. The Court of Appeals reversed the conspiracy convictions and dismissed the conspiracy portion of the indictment, holding that although Rule 6(d) was violated, the violation tainted only that portion of the indictment.

Held: However diligent the defendants may have been in seeking to discover the basis for the claimed violation of Rule 6(d), the petit jury's guilty verdict rendered harmless any error in the grand jury's charging decision that may have flowed from the violation. In such case, the societal costs of retrial are far too substantial to justify setting aside the verdict simply because of an error in the grand jury proceeding. Pp. 69-73.

756 F. 2d 994, affirmed in part and reversed in part.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 73. O'CONNOR, J., filed an opinion concurring in the judgment, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 73. MARSHALL, J., filed a dissenting opinion, *post*, p. 80.

Bruce J. Rosen argued the cause for petitioners in Nos. 84-1700 and 84-1704 and respondents in No. 84-1640.

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*Together with No. 84-1700, *Lill* v. *United States*, and No. 84-1704, *Mechanik* v. *United States*, also on certiorari to the same court.

With him on the briefs were *Michael D. Graves* and *Stephen J. Rogers*.

Mark I. Levy argued the cause for the United States. With him on the brief were *Acting Solicitor General Fried*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Vincent L. Gambale*.

JUSTICE REHNQUIST delivered the opinion of the Court.

Federal Rule of Criminal Procedure 6(d) states that only specified persons including "the witness under examination" may be present at a grand jury proceeding. In this case, two Government witnesses testified in tandem before the grand jury, which indicted respondents and cross-petitioners (hereafter defendants) Mechanik and Lill for various drug-related offenses and conspiracy to commit such offenses. The Court of Appeals for the Fourth Circuit held that the simultaneous presence of these two witnesses violated Rule 6(d), and that even though the petit jury subsequently returned a verdict of guilty against defendants, the verdict must be set aside on any count that corresponds to a "tainted" portion of the indictment. We believe that the petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted. Therefore, the convictions must stand despite the rule violation.

A fairly detailed summary of the District Court proceedings will help to illustrate the nature and extent of our holding. A grand jury returned an indictment charging defendants with drug-related offenses and conspiracy. This indictment was concededly free from any claim of error. The grand jury then returned a superseding indictment in which the conspiracy charge was expanded. In support of this superseding indictment, the United States Attorney presented the testimony of two law enforcement agents who were sworn together and questioned in tandem before the grand jury.

The defendants did not learn about this joint testimony until after trial began. Before trial, they filed an omnibus motion requesting, *inter alia*, the names of all the people who appeared before the grand jury. The Government responded that there were no unauthorized persons appearing before the grand jury, and the District Court denied the motion. Trial began in February 1980, and concluded in early July of the same year. During the second week of trial, one Jerry Rinehart, an agent of the Drug Enforcement Administration, testified as a Government witness. At the time of his testimony, the Government furnished the defendants with a portion of the transcript of his grand jury testimony as required by the Jencks Act, 18 U. S. C. § 3500. The transcript disclosed that Rinehart and his fellow agent, Randolph James, had testified in tandem before the grand jury.

The defendants moved for dismissal of the indictment on the ground that the simultaneous presence of the two agents had violated Federal Rule of Criminal Procedure 6(d). Chief Judge Knapp, presiding over the trial, concluded that the presence and testimony of the two agents had not violated Rule 6(d), and he denied the motion. In May 1980, however, Chief Judge Knapp was unexpectedly hospitalized, and Judge Copenhaver took over as the trial judge. The defendants then moved for a rehearing of their motion to dismiss the indictment. Judge Copenhaver took the motion under advisement until the conclusion of trial.

In August 1980, after the jury had returned its guilty verdict, Judge Copenhaver ruled upon and denied the defendants' motion for dismissal of the indictment. 511 F. Supp. 50 (SD W. Va. 1980). He first decided, contrary to Chief Judge Knapp's earlier ruling, that the joint testimony of Agents Rinehart and James *did* constitute a violation of Rule 6(d). *Id.*, at 53–58. But he declined to set aside the defendants' indictment and convictions because, on the basis of a comparison between the two indictments and the evidence on which the indictments rested, the violation of Rule 6(d) had

not harmed the defendants. *Id.*, at 58–61. He justified this conclusion with respect to the substantive counts on the ground that they were materially unchanged from the valid initial indictment to the superseding indictment. *Id.*, at 58–59. With respect to the conspiracy count, which had been expanded by the superseding indictment, he justified his conclusion on the ground that the grand jury "had before it ample independent evidence [apart from the joint testimony] to support a probable cause finding of the charges." *Id.*, at 61. In light of these conclusions, Judge Copenhaver determined that a post-trial dismissal of the indictment would simply confer a windfall benefit on the defendants "who stand convicted after a three-month trial conducted at enormous expense to the United States and the defendants." *Ibid.* The judge nevertheless undertook to ensure future compliance with the one-witness rule by directing the Government to keep the court advised concerning compliance with Rule 6(d) in future criminal cases. *Ibid.*

A divided Court of Appeals reversed the conspiracy convictions, affirmed the others, and dismissed the conspiracy portion of the indictment. 735 F. 2d 136 (1984). It reasoned that the language of Rule 6(d) is so "plain and unequivocal in limiting who may appear before a grand jury," *id.*, at 139, that its transgression requires automatic reversal of any subsequent conviction regardless of the lack of prejudice. *Id.*, at 139–140. But the court reversed only the conspiracy convictions because it found that the violation of Rule 6(d) tainted only the portion of the superseding indictment that related to them. *Id.*, at 140. A divided en banc decision agreed. 756 F. 2d 994 (1985) *(per curiam)*.

We assume for the sake of argument that the simultaneous presence and testimony of the two Government witnesses before the grand jury violated Rule 6(d), and that the District Court would have been justified in dismissing portions of the indictment on that basis had there been actual prejudice and had the matter been called to its attention before the com-

mencement of the trial. But although the defendants appear to have been reasonably diligent in attempting to discover any error at the grand jury proceeding, they did not acquire the transcript showing that the two agents had appeared jointly in the grand jury proceeding until the second week of trial. Nor is there any suggestion that the Government designedly withheld the information. When the defendants made their motion to dismiss the indictment based on the joint testimony, Chief Judge Knapp denied the motion because of his view that there had been no violation of Rule 6(d). Judge Copenhaver eventually issued a contrary ruling on the resubmitted motion, but not until after the long and costly trial had been brought to its conclusion. Although we do not believe that the defendants can be faulted for any lack of diligence, we nonetheless hold that the supervening jury verdict made reversal of the conviction and dismissal of the indictment inappropriate.

Both the District Court and the Court of Appeals observed that Rule 6(d) was designed, in part, "to ensure that grand jurors, sitting without the direct supervision of a judge, are not subject to undue influence that may come with the presence of an unauthorized person." 735 F. 2d, at 139. The Rule protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty. The error involving Rule 6(d) in these cases had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged. But the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.[1]

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[1] In *Vasquez* v. *Hillery*, 474 U. S. 254 (1986), the Court set aside a final judgment of conviction because of racial discrimination in the composition

It might be argued in some literal sense that because the Rule was designed to protect against an erroneous charging decision by the *grand jury*, the indictment should not be compared to the evidence produced by the Government at *trial*, but to the evidence produced before the *grand jury*. But even if this argument were accepted, there is no simple way after the verdict to restore the defendant to the position in which he would have been had the indictment been dismissed before trial. He will already have suffered whatever inconvenience, expense, and opprobrium that a proper indictment may have spared him. In courtroom proceedings as elsewhere, "the moving finger writes; and, having writ, moves on." Thus reversal of a conviction after a trial free from reversible error cannot restore to the defendant whatever benefit might have accrued to him from a trial on an indictment returned in conformity with Rule 6(d).

We cannot accept the Court of Appeals' view that a violation of Rule 6(d) requires automatic reversal of a subsequent conviction regardless of the lack of prejudice. Federal Rule of Criminal Procedure 52(a) provides that errors not affecting substantial rights shall be disregarded. We see no reason not to apply this provision to "errors, defects, irregularities, or variances" occurring before a grand jury just as we have

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of the grand jury that indicted the defendant. It found this result to be compelled by precedent directly applicable to the special problem of racial discrimination. *Id.*, at 260–262. It also reasoned that racial discrimination in the selection of grand jurors is so pernicious, and other remedies so impractical, that the remedy of automatic reversal was necessary as a prophylactic means of deterring grand jury discrimination in the future, *id.*, at 262, and that one could presume that a discriminatorily selected grand jury would treat defendants of excluded races unfairly. *Id.*, at 263–264.

We think that these considerations have little force outside the context of racial discrimination in the composition of the grand jury. No long line of precedent requires the setting aside of a conviction based on a rule violation in the antecedent grand jury proceedings, and the societal interest in deterring this sort of error does not rise to the level of the interest in deterring racial discrimination. See, *e. g.*, *Gerstein* v. *Pugh*, 420 U. S. 103, 119–123 (1975); *Coleman* v. *Alabama*, 399 U. S. 1, 10–11 (1970); *Chapman* v. *California*, 386 U. S. 18 (1967).

applied it to such error occurring in the criminal trial itself. See *United States* v. *Hasting*, 461 U. S. 499, 509 (1983); *Chapman* v. *California*, 386 U. S. 18, 21–24 (1967); *United States* v. *Lane*, 474 U. S. 438 (1986).

The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. See *Morris* v. *Slappy*, 461 U. S. 1, 14 (1983). The "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle* v. *Isaac*, 456 U. S. 107, 127–128 (1982). Thus, while reversal "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution," *id.*, at 128, and thereby "cost society the right to punish admitted offenders." *Id.*, at 127. Even if a defendant is convicted in a second trial, the intervening delay may compromise society's "interest in the prompt administration of justice," *United States* v. *Hasting*, *supra*, at 509, and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.

We express no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of trial.[2] We hold only

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[2] The Government argues that it was improper to reverse the conspiracy convictions because "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Costello* v. *United States*, 350 U. S. 359, 363 (1956). We need not reach

that however diligent the defendants may have been in seeking to discover the basis for the claimed violation of Rule 6(d), the petit jury's verdict rendered harmless any conceivable error in the charging decision that might have flowed from the violation. In such a case, the societal costs of retrial after a jury verdict of guilty are far too substantial to justify setting aside the verdict simply because of an error in the earlier grand jury proceedings. The judgment of the Court of Appeals is therefore reversed to the extent it set aside the conspiracy convictions and dismissed the indictment, but is otherwise affirmed.

It is so ordered.

CHIEF JUSTICE BURGER, concurring.

I concur in JUSTICE REHNQUIST's opinion for the Court. I write separately only to state my view that this case is controlled by Justice Black's opinion for the Court in *Costello* v. *United States*, 350 U. S. 359 (1956).

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, concurring in the judgment.

I agree with the Court that the convictions obtained in the trial court against defendants Mechanik and Lill should not have been set aside. I write separately because I believe that the analysis adopted by the Court for determining the effect of a violation of the rules governing the conduct of grand juries effectively renders those rules a dead letter, thereby seriously undermining the grand jury's traditional function of protecting the innocent from unwarranted public accusation.

The grand jury has two principal functions. First, it bears the weighty responsibility of investigating crime and determining whether there is probable cause to believe that a crime has been committed. *United States* v. *Calandra*, 414

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this argument of the Government because of the narrower ground upon which we rest our decision.

U. S. 338, 343 (1974). The second, and no less important, task of the grand jury is to "serv[e] the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia*, 370 U. S. 375, 390 (1962). To further the grand jury's investigative function, the grand jury traditionally has been given "wide latitude" in its inquiries. *Calandra*, *supra*, at 343. See also *United States* v. *Dionisio*, 410 U. S. 1, 17–18 (1973). Prosecutors have been accorded similar leeway in presenting their cases to the grand jury, see, *e. g.*, *United States* v. *Adamo*, 742 F. 2d 927, 936–938 (CA6 1984), cert. denied, 469 U. S. 1193 (1985), but they are bound by a few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions.

Federal Rule of Criminal Procedure 6(d) is one such rule; it is designed to guard the secrecy of the grand jury proceedings, prevent intimidation of jurors, and guarantee that the grand jury is given the opportunity to make an independent examination of the evidence and render its probable cause and charging determinations free of undue prosecutorial influence. See, *e. g.*, *United States* v. *Echols*, 542 F. 2d 948, 951 (CA5 1976), cert. denied, 431 U. S. 904 (1977); *United States* v. *Lill*, 511 F. Supp. 50, 55–57 (SD W. Va. 1980); 1 C. Wright, Federal Practice & Procedure § 105, p. 237, and n. 1 (2d ed. 1982). For example, if the Government, in violation of Rule 6(d), were to have all witnesses remain in the courtroom while the grand jury investigation was going on to ensure that all testified in a consistent manner, it cannot seriously be doubted that this practice would hinder the grand jury in its task of uncovering the truth. Similarly, if the prosecuting attorney were to remain in the jury room during the jury's deliberations in contravention of the Rule, a very real possibility would arise that the jury's delibera-

tions or vote would be unduly influenced by the prosecutor's presence.

The Federal Rules clearly envision that dismissal of the indictment may be an appropriate remedy for such violations of Rule 6(d). See, *e. g.*, Fed. Rule Crim. Proc. 12(b)(2). Indeed, courts have consistently employed the remedy of dismissal of the indictment for deviations from Rule 6(d) which may imperil the grand jury's independence. See, *e. g.*, *Lill*, *supra*, at 58 (collecting federal cases). See also Nadel, Presence of Unauthorized Persons During State Grand Jury Proceedings as Affecting Indictment, 23 A.L.R. 4th 397 (1983) (hereinafter Nadel) (collecting state cases dealing with similar violations of state rules). To be sure, a violation must be clearly established before dismissal may be contemplated. The grand jury proceeding is accorded a presumption of regularity, which generally may be dispelled only upon particularized proof of irregularities in the grand jury process. See, *e. g.*, *United States* v. *Johnson*, 319 U. S. 503, 512–513 (1943). And not every violation of Rule 6(d) will create such a likelihood of prejudice as to warrant the drastic remedy of dismissal. The Federal Rules dictate that dismissal is appropriate only when a violation has impaired the substantial rights of the accused. See Fed. Rule Crim. Proc. 52.

Rule 52(a) provides that its harmless error inquiry extends to "[a]ny error, defect, irregularity or variance." The Advisory Committee's notes to Rule 52 state that "[t]his rule is a restatement of existing law," which specifically provided for a harmless error analysis of objections going to the validity of the indictment in 18 U. S. C. § 556 (1946 ed.). See 18 U. S. C. App., p. 657. The language of Rule 6 does not exempt the Rule from a harmless error scrutiny. In fact, the commentary accompanying it states that the Rule "generally continues existing law" and expressly refers to the harmless error rule of 18 U. S. C. § 556 (1946 ed.), thereby confirming the rulemakers' intent that violations of Rule 6(d) would be among those errors subject to harmless error review. See

Advisory Committee's Notes on Fed. Rule Crim. Proc. 6(d), 18 U. S. C. App., p. 568.

A Rule 6(d) violation is one affecting the grand jury proceeding and is not in any sense a trial error. Accordingly, the logical focus of the harmless error inquiry is an examination of the influence of the error on the charging decision. Indeed, in most Rule 6(d) cases, a court conducting a harmless error inquiry will of necessity focus on the effect of the alleged error on the grand jury's charging decision, rather than the verdict, because the rules governing the disclosure of grand jury materials to defendants and the waiver provision of Rule 12(f) virtually ensure that all claims of violations of Rule 6(d) will be made before or during trial. See, *e. g.*, 18 U. S. C. § 3500; Fed. Rules Crim. Proc. 6(e)(3)(C)(i), (ii); *Dennis* v. *United States*, 384 U. S. 855, 868–875 (1966); 8 J. Moore, Federal Practice ¶ 6.05[3] (2d ed. 1985) (discussing defendants' access to grand jury materials under the above cited authorities). See also *Lill*, *supra*, at 58, 61 (most reported Rule 6(d) claims raised and disposed of before trial).

In my view, when, as in these cases, a court decides to reserve the ruling on a timely raised and diligently pursued motion to dismiss based on an alleged violation of Rule 6(d) until after a verdict is returned, the focus of the court's inquiry should remain on the grand jury's charging decision. Yet the Court shifts the focus of the harmless error analysis in such circumstances from an examination of the violation's effect on the indictment to an assessment of the violation's effect on the trial verdict, without regard to the timing of the defendants' objection. See *ante*, at 70–71. The Court then concludes that a conviction automatically renders harmless any violation of Rule 6(d). This holding is not justified by the applicable rules, nor can it be reconciled with precedent.

A number of federal courts have employed a rule directly in conflict with that adopted by the Court: they presume the existence of prejudice from the presence of unauthorized per-

sons in the grand jury room and apply a rule of automatic dismissal of the tainted indictment. See, *e. g.*, *United States* v. *Fulmer*, 722 F. 2d 1192, 1195, n. 5 (CA5 1983); *Echols*, 542 F. 2d, at 951; *Latham* v. *United States*, 226 F. 420 (CA5 1915); *Lill*, 511 F. Supp., at 58 (collecting lower federal cases). See also Nadel § 4 (collecting state cases); 2 W. LaFave & J. Israel, Criminal Procedure § 15.6 (1984). Other courts have applied a harmless error test to Rule 6(d) violations, but have uniformly evaluated the prejudice to the defendant by looking to the violation's likely effect on the grand jury's deliberations, not merely to its significance in light of the trial verdict. See, *e. g.*, *United States* v. *Condo*, 741 F. 2d 238, 239 (CA9 1984) *(per curiam)*, cert. denied, 469 U. S. 1164 (1985); *United States* v. *Computer Sciences Corp.*, 689 F. 2d 1181, 1185–1186 (CA4 1982), cert. denied, 459 U. S. 1105 (1983); *United States* v. *Kahan & Lessin Co.*, 695 F. 2d 1122, 1124 (CA9 1982) *(per curiam)*; *United States* v. *Rath*, 406 F. 2d 757, 757 (CA6), cert. denied, 394 U. S. 920 (1969). I have found no Rule 6(d) cases in which a *per se* rule based on the ultimate verdict at trial has been applied. Cf. also *United States* v. *Lane*, 474 U. S. 438, 447–448 (1986) (disapproving use of *per se* rules in harmless error analysis).

The Court's focus on the effect of the verdict, in combination with its *per se* rule, gives judges and prosecutors a powerful incentive to delay consideration of motions to dismiss based on an alleged defect in the indictment until the jury has spoken. If the jury convicts, the motion is denied; if the jury acquits, the matter is mooted. The Court's approach thus undermines the authority of Rule 6(d), exposes to the ordeal of trial any defendants who would otherwise have a right to dismissal of the indictment, and undermines adherence to the very measures that this Court proposed and Congress implemented to guarantee that the grand jury is able to perform properly its screening function.

In my view, when a defendant makes a timely objection to the grand jury indictment based on a violation of Rule 6(d), the remedy of dismissal of the indictment is appropriate if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt as to whether it had such effect. See *Lane*, *supra*, at 449; *Kotteakos* v. *United States*, 328 U. S. 750, 765 (1946). The focus of the prejudice inquiry should be on the effect of the alleged error on the grand jury's decision to indict even if the court postpones its decision until the conclusion of the trial.

This approach would not impose unwarranted costs on the criminal justice system. The prosecution has it within its power to avoid dismissals by adhering to the simple dictates of Rule 6(d), and to remedy any violation of the Rule by obtaining a superseding indictment so as to avoid the risks of subsequent dismissals. Even where an unremedied violation is proved, the trial judge must still be satisfied that the violation resulted in grand jury intimidation or improper influence on important witnesses' testimony and thus had a "substantial influence" on the indictment returned, or that there is grave doubt as to whether it had such effect. *Kotteakos*, *supra*, at 765. See also *Lane*, *supra*, at 449.

In these cases, the District Court found, after a scrupulous examination of the record, that the violation was harmless, a finding which was not found wanting on appeal. The District Court preliminarily observed:

> "It is especially significant to note that the two indictments were returned by the same grand jury. The court's review of the attendance and voting records of that grand jury reveals that each of these indictments was returned by a unanimous vote. A nucleus of the same seventeen grand jurors voted for each indictment. In addition, one other grand juror voted for the first indictment but did not vote on the second, while two others voted for the second indictment but did not vote on the first." 511 F. Supp., at 58–59.

Both agents had testified separately before the same grand jury in support of the first, untainted indictment, giving the jury ample opportunity to weigh the credibility of each agent prior to their joint appearance. Moreover, both agents had access to all grand jury materials in the case pursuant to Rule 6(e)(3)(A)(ii), and thus the likelihood that their joint testimony created a potential for collusion not already available is minute.

Turning to an examination of the indictment itself, the District Court found that the substantive counts of which the defendants were convicted were "identical or virtually so" to the counts returned in the superseded indictment and that those counts had "a probable cause basis entirely independent of the testimony presented to the grand jury after the return of the [superseded] first indictment." *Id.*, at 59. It concluded that as to the substantive counts, "there was neither prejudice nor potential for prejudice." *Ibid.* Thus, the only count upon which the defendants could have been prejudiced by the objectionable joint testimony of the DEA agents was the conspiracy count.

Although the District Court conducted its post-trial harmless error review in part with an eye to the effect of the error on the verdicts, its findings also make clear that the effect of the joint testimony on the grand jury's decision to indict on the conspiracy count was negligible. The District Court carefully isolated the alterations and additions to that count which were the subject of the joint testimony. After examining the testimony given by other grand jury witnesses, the trial judge concluded that "the grand jury would, in my view, undoubtedly have returned the very same second indictment even had [the] Agents . . . testified separately." *Id.*, at 61. Accordingly, I would reverse the judgment of the Court of Appeals insofar as it set aside the defendants' conspiracy convictions and affirm the Court of Appeals' judgment regarding the defendants' cross-petitions.

JUSTICE MARSHALL, dissenting.

The Court concedes that federal prosecutors violated Rule 6(d) of the Federal Rules of Criminal Procedure in presenting their case against defendants Mechanik and Lill to the grand jury. The Court holds, however, that because defendants were ultimately convicted of some of the counts against them, "any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *Ante*, at 70. Because I believe that the majority's rule misconceives the role both of the grand jury and of the harmless-error doctrine, I dissent.

I

The Court's decision today renders Rule 6(d) almost unenforceable. As the facts of this litigation demonstrate, Rule 6(d) violations are difficult for defendants to uncover. The grand jury conducts its investigation in secret, aided only by the prosecutors and witnesses. *United States* v. *Calandra*, 414 U. S. 338, 343 (1974). Defendants are not entitled to grand jury transcripts before trial; due to the strictly enforced tradition of grand jury secrecy, defendants generally have access to no information whatsoever regarding the conduct of the grand jury proceedings. See M. Frankel & G. Naftalis, The Grand Jury 81–89 (1977). Requests by defendants pursuant to Rule 6(e)(3)(C)(ii) for disclosure of grand jury materials, "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury," are rarely granted; a defendant often can make the necessary showing only with the aid of the materials he seeks to discover. See 1 C. Wright, Federal Practice and Procedure § 108, pp. 263–265 (2d ed. 1982). Defendants' only access to grand jury materials is likely to be through the medium of the Jencks Act, 18 U. S. C. § 3500, which requires the prosecutor, after direct examination of a Government witness, to produce the witness' prior statements. That disclosure, however, does not

take place until after trial has begun, and then only on a piecemeal and incomplete basis.

There is thus little likelihood that a defendant can raise a substantial claim under Rule 6(d) before his trial begins. After the start of trial, overwork and the press of events may prevent the district judge from disposing of a newly raised Rule 6(d) claim. The most attractive course for the district judge will be to defer a ruling until the close of trial, the course ultimately followed in this case. Indeed, the district judge may not have the opportunity to rule until that time. Under today's decision, however, deferring a meritorious Rule 6(d) claim until the close of trial disposes of it permanently. If the movant is acquitted, then his Rule 6(d) motion is moot; if the movant is convicted, under the majority's reasoning, then any error was harmless. The Court's decision thus offers busy district judges a new and unique way to reduce their workload; one need not believe in a judicial conspiracy against the assertion of Rule 6(d) rights to suspect that district judges, faced with Rule 6(d) motions necessarily raised in the middle of trial, will follow the Court's invitation.

Should a district judge decide a Rule 6(d) motion during trial, the majority's scheme insulates that ruling from appellate review. Appeal before judgment is unlikely; the Court has never allowed immediate appeal of an order issued after the start of a criminal trial. See *Flanagan* v. *United States*, 465 U. S. 259, 269 (1984).[1] And under the decision today,

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[1] Denial of a Rule 6(d) motion could conceivably be subject to interlocutory appeal under the collateral-order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). Such an order may be both collateral to the main action and, as a result of today's opinion, wholly unreviewable after final judgment. Cf. *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 267 (1982) (claim that indictment should be dismissed on grounds of prosecutorial vindictiveness not subject to interlocutory appeal because reviewable after conviction); *United States* v. *Garner*, 632 F. 2d 758 (CA9 1980) (claim that indictment should be dismissed on grounds of grand jury irregularities not subject to interlocutory appeal be-

such rulings cannot be appealed after judgment. Enforcement of Rule 6(d) is thus left to the unreviewable largesse of the district court.

II

A

We have no reason to believe that Congress intended Rule 6(d) to have so little practical meaning. The legislative history of Rule 6, indeed, belies that approach. In 1933, Congress was faced with "a conflict of legal decision as to the right, under existing law, to permit stenographers in grand jury rooms without invalidating the subsequent conviction of defendant." S. Rep. No. 64, 73d Cong., 1st Sess., 1 (1933). It responded by adding a narrow clause to the harmless-error statute, Rev. Stat. § 1025 (later codified as 18 U. S. C. § 556 (1946 ed.)), providing that no indictment should be found insufficient, or conviction be reversed, because of the presence of stenographers in the grand jury room. But Congress nowhere expressed disagreement with the general proposition that the presence of an unauthorized person in the grand jury room invalidates a subsequent conviction. *E. g.*, *United States* v. *Fall*, 56 App. D. C. 83, 84, 10 F. 2d 648, 649 (1925); *Latham* v. *United States*, 226 F. 420, 424 (CA5 1915).

More recently, Congress amended Rule 6 in 1972 to incorporate by reference the provisions of the Jury Selection and Service Act of 1968; it provided that a defendant may move to dismiss the indictment based on the Government's failure to comply with that Act in the selection of the grand jury array or of individual grand jurors. Fed. Rule Crim. Proc. 6(b)(2). The advisory notes expressly state that the district judge may rule on such a challenge to the grand jury either before or after the verdict. Advisory Committee Notes on Fed. Rule Crim. Proc. 6, 18 U. S. C. App., p. 568 (1972 amendment). There is no hint that Congress, in providing for a

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cause reviewable after conviction); *United States* v. *Bird*, 709 F. 2d 388, 391, and n. 17 (CA5 1983) (collecting cases).

ruling after the verdict, intended that ruling to be a mere intellectual exercise.

B

The majority's opinion misconceives the role of harmless-error analysis. We have recognized that harmless-error doctrine, denying any remedy in cases of clear prosecutorial misconduct, "can work very unfair and mischievous results." *Chapman* v. *California*, 386 U. S. 18, 22 (1967). Denying defendants relief for clear violations of their procedural rights reduces the law to "'pretend-rules,'" *United States* v. *Borello*, 766 F. 2d 46, 58 (CA2 1985), quoting *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 661 (CA2) (Frank, J., dissenting), cert. denied, 329 U. S. 742 (1946); it means that prosecutors are free to engage in prohibited conduct subject only to "purely ceremonial" words of appellate displeasure. 155 F. 2d, at 661.

The Court's rule that all grand jury misconduct becomes harmless after conviction, however, is especially pernicious. Contrary to the majority's suggestion that reversal is too costly a remedy for grand jury misconduct, *ante*, at 72, it is the majority's refusal to reverse convictions for demonstrated grand jury misconduct that imposes unacceptable costs. There are few limitations on the conduct of the prosecutor before the grand jury. Those limitations are found only in Federal Rule of Criminal Procedure 6, the text of which takes up little more than a page in the official compilation of United States laws. Violations of even those isolated restrictions, in by far the majority of cases, will go undetected by defendants. The only way to allow even minimally effective enforcement of those rules is to reverse the convictions of defendants whose indictments were tainted by Rule 6 violations.

Such an approach would not hamper the enforcement of the criminal law. Violations of Rule 6(d) will be nonexistent if the prosecutor exercises proper control over access to the grand jury chambers. The substantive law is not onerous or

ambiguous, and most violations are the product of the prosecutor's failure to adopt safeguards to ensure compliance. See 2 W. LaFave & J. Israel, Criminal Procedure § 15.6, p. 333 (1984). There is no danger of a prosecutor slipping into an inadvertent Rule 6(d) violation comparable to that, say, of making an ill-worded remark in the heat of trial. Courts would not often have cause to reverse convictions because of Rule 6(d) violations.

The majority's goal of upholding criminal convictions not marred by substantial defect does not justify reducing Congress' command regarding the proper conduct of grand jury proceedings to a mere form of words, without practical effect. Respect for the rule of law demands that improperly procured indictments be quashed even after conviction, because "only by upsetting convictions so obtained can the ardor of prosecuting officials be kept within legal bounds and justice be secured; for in modern times all prosecution is in the hands of officials." *United States* v. *Remington*, 208 F. 2d 567, 574 (CA2 1953) (L. Hand, J., dissenting).[2]

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[2] Our case law, further, is inconsistent with the majority's broad holding that *any* error in the grand jury proceedings, no matter how egregious, is rendered harmless beyond a reasonable doubt by a petit jury's subsequent guilty verdict. *Vasquez* v. *Hillery*, 474 U. S. 254 (1986), involving the "grave constitutional trespass" of racial discrimination, *id.*, at 262, belies that holding. The Court's assessment of the nature of the grand jury process refutes the rationale articulated by the majority today:

"Nor are we persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions. The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts. Moreover, '[t]he grand jury is not bound to indict in every case where a conviction can be obtained.' *United States* v. *Ciambrone*, 601 F. 2d 616, 629 (CA2 1979) (Friendly, J., dissenting). *Thus, even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests*

III

The opinion concurring in the judgment suggests that the Rule 6(d) violation in this litigation should be viewed as harmless on the theory that the grand jury would have returned the same indictment regardless of the prosecutor's misconduct. Under that approach, a district court faced with a Rule 6(d) violation should examine the grand jury transcripts in an attempt to divine the effect of the violation on the jury's charging decision, and allow the indictment or conviction to stand only if it finds that there was no such effect. Such a rule would be contrary to the traditional black-letter law that "[a]ny violation of Rule 6(d) is *per se* prejudicial to the defendant and will result in dismissal of the indictment," 8 J. Moore, Federal Practice ¶6.04[7], p. 6–91 (2d ed. 1985).[3] I believe that such an approach would be unworkable and would undermine the limits Congress imposed on the conduct of grand jury investigations.

Many of the reasons given above for rejecting the majority's view that grand jury impropriety is *always* harmless

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that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Vasquez* v. *Hillery*, *supra*, at 263 (emphasis added).

[3] See also 2 W. LaFave & J. Israel, Criminal Procedure § 15.6, p. 332 (1984) ("Most federal courts . . . treat unauthorized presence as a per se ground for dismissal, requiring no showing of prejudice"). Cases cited by the Solicitor General as requiring harmless-error analysis are distinguishable. Those cases involved only brief, inadvertent interruptions of the grand jury, during which the grand jury proceedings came to an immediate halt, *United States* v. *Computer Sciences Corp.*, 689 F. 2d 1181, 1185–1186 (CA4 1982), cert. denied, 459 U. S. 1105 (1983); *United States* v. *Kahan & Lessin Co.*, 695 F. 2d 1122, 1124 (CA9 1982); *United States* v. *Rath*, 406 F. 2d 757 (CA6), cert. denied, 394 U. S. 920 (1969), or a "fleeting" appearance in the grand jury room by a person assisting in the movement of bulky documents, *United States* v. *Condo*, 741 F. 2d 238, 239 (CA9 1984), cert. denied, 469 U. S. 1164 (1985). Indeed, the Fourth Circuit panel, whose reasoning was adopted by the en banc court, saw no inconsistency between *Computer Sciences*, *supra*, and the *per se* rule of the instant case. 735 F. 2d 136, 139–140 (1984).

once a verdict is reached, apply in this context as well. Given defendants' difficulty in discovering Rule 6 violations, it is all the more important that dismissal of the indictment be certain when violations of the Rule are found. Only such a sanction can come close to providing prosecutors with an incentive to obey the Rule's commands. See *United States* v. *Pignatiello*, 582 F. Supp. 251, 255 (Colo. 1984).

Such harmless-error analysis, moreover, overlooks the practical impossibility of determining the effect of a Rule 6(d) violation. The prejudicial impact of the unauthorized presence of persons in the grand jury room will often be impossible to quantify, and may not be apparent from the grand jury transcript. As one court wrote:

> "'A change in expression, a pressure on the hand or a warning glance would not be shown upon the minutes but might well influence, suppress or alter testimony to the prejudice of the defendant. There may have been prior expressions or conversations between the two witnesses which the one then giving testimony might well hesitate to repudiate or modify in the presence of the other. The District Attorney here contends . . . that defendant suffered no prejudice by the joint presence of the two sisters, but . . . "[t]he court cannot know that this suggestion represents the fact." We think the practice offers too great a possibility for the exercise of undue influence to be condoned.'" *State* v. *Revere*, 232 La. 184, 207, 94 So. 2d 25, 34 (1957) (emphasis and citations omitted).

Any case-by-case analysis to determine whether the defendant was actually prejudiced is simply too speculative to afford defendants meaningful protection, and imposes a difficult burden on the courts that outweighs the benefits to be derived. The distinction between the truly harmless error and the more dangerous one is not "such a pronounced one that the Court can cloak the one with the mantle of legality and

yet recognize the dangers of the other and prohibit it." *United States* v. *Carper*, 116 F. Supp. 817, 821 (DC 1953).

That approach, finally, is likely to require a detailed inquiry that will frustrate and undermine the secrecy of grand jury inquiry. See *United States* v. *Treadway*, 445 F. Supp. 959 (ND Tex. 1978). The district court may have to discuss the testimony of grand jury witnesses who did not appear at trial. The goals of grand jury secrecy, however, counsel that such analysis should not be spread across the public record. See *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418, 424–425 (1983).[4]

IV

This litigation illustrates the extent to which the Court is willing to reduce the substantive law to "pretend-rules," *Borello*, 766 F. 2d, at 58, in order to affirm a criminal conviction. But by denigrating Congress' commands and eviscerating enforcement of Rule 6, the Court creates "a greater danger to a free people than the escape of some criminals from punishment." *United States* v. *Di Re*, 332 U. S. 581, 595 (1948). I believe that the District Court in this case

[4] JUSTICE O'CONNOR suggests, noting the reference to 18 U. S. C. § 556 (1946 ed.) in the Advisory Committee Notes to Rule 6, that the rulemakers intended violations of Rule 6 to be subject to the harmless-error rule. *Ante*, at 75–76. The legislative history of former § 556 does not support that view. The section, as first enacted in 1872, provided that "[n]o indictment . . . shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection *in matter of form only*, which which shall not tend to the prejudice of the defendant." Rev. Stat. § 1025 (emphasis added). There is no indication that this law was meant to disturb the settled law regarding unauthorized persons in the grand jury room, see *United States* v. *Edgerton*, 80 F. 374 (Mont. 1897); rather, it seems likely that the statute was directed at technical defects in the *wording* of the indictment, see, *e. g.*, *People* v. *St. Clair*, 56 Cal. 406 (1880) (reversing conviction because word "larceny" in indictment was misspelled); *People* v. *Vice*, 21 Cal. 344 (1864) (reversing conviction because indictment, while alleging that defendant took certain property by threats and force, failed to allege that the property did not belong to defendant). See also *supra*, at 82.

should have reversed defendants' conspiracy convictions without inquiry into the prejudice done to defendants by the Rule 6(d) violation. I therefore would affirm the judgment of the Court of Appeals.

UNITED STATES v. MAINE ET AL.

ON EXCEPTION TO REPORT OF SPECIAL MASTER

No. 35, Orig. Argued December 12, 1985—Decided February 25, 1986

This case, which was instituted by the United States to quiet title to the seabed along the coast of the Atlantic Ocean, presents the question whether Nantucket Sound qualifies as "internal waters" of Massachusetts rather than partly territorial sea and partly high seas as the United States contends. Massachusetts has excepted to the portion of the Special Master's report that concludes that Nantucket Sound is not a part of Massachusetts' inland waters under the doctrine of "ancient title." Massachusetts contends that, under such doctrine, the English Crown acquired title to Nantucket Sound as a result of discovery and occupation by colonists in the early 17th century, and that Massachusetts has succeeded to the Crown's title.

Held: Massachusetts cannot prevail under the doctrine of "ancient title." Pp. 93–105.

(a) Principles of international law have been followed consistently in fixing the United States' coastline. Massachusetts contends that the doctrine of "ancient title" is a sufficient basis for identifying a "historic bay," under Article 7(6) of the Convention on the Territorial Sea and Contiguous Zone, so as to constitute "internal waters" of the sovereign. To claim "ancient title" to waters that would otherwise constitute high seas or territorial sea, a sovereign must base its title on "occupation," that is, a title based on "clear original title" which is fortified "by long usage." The parties agree that effective "occupation" must have taken place before the freedom of the seas became a part of international law—no later than the latter half of the 18th century. Pp. 93–96.

(b) The pertinent exhibits and transcripts show that Massachusetts did not effectively "occupy" Nantucket Sound so as to obtain "clear original title" and fortify that title "by long usage" before the seas were recognized to be free. For purposes of the "ancient title" doctrine, "occupation" requires, at a minimum, the existence of acts, attributable to the sovereign, manifesting an assertion of exclusive authority over the waters claimed. The historical evidence introduced by Massachusetts does not show occupation by the colonists of Nantucket Sound as a whole. Massachusetts' evidence of occupation is also deficient because it does not warrant a finding that the colonists asserted any exclusive right to the waters. Moreover, Massachusetts has not established any linkage between the colonists' activities and the English Crown. Thus, Great

Britain did not obtain title which could devolve upon Massachusetts. Pp. 97–103.

(c) The determination that Massachusetts had not established clear title prior to freedom of the seas is corroborated by its consistent failure to assert dominion over Nantucket Sound since that time. Rather, during the 18th and 19th centuries Massachusetts continued to treat Nantucket Sound in a manner inconsistent with its recent characterization of that body as internal waters. Pp. 103–105.

Exception overruled.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except MARSHALL, J., who took no part in the consideration or decision of the case.

Henry Herrmann, Special Assistant Attorney General of Massachusetts, argued the cause for defendant Commonwealth of Massachusetts. With him on the briefs were *Francis X. Bellotti*, Attorney General, and *William L. Pardee*, Assistant Attorney General.

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the brief were *Acting Solicitor General Fried*, *Assistant Attorney General Habicht*, and *Michael W. Reed*.

JUSTICE STEVENS delivered the opinion of the Court.

The question now before the Court is whether Nantucket Sound qualifies as "internal waters" of the Commonwealth of Massachusetts rather than partly territorial sea and partly high seas as the United States contends. We agree with the Special Master's conclusion that the Commonwealth's claim should be rejected.

I

Pursuant to an earlier decree of this Court,[1] the United States and Massachusetts in 1977 filed a joint motion for sup-

[1] In 1968 the United States invoked our original jurisdiction to quiet title to the seabed along the coast of the Atlantic Ocean. In 1975 we entered a decree affirming the title of the United States to the seabed more than three geographic miles seaward of the coastline, and of the States to the seabed within the 3-geographic-mile zone. *United States* v. *Maine*, 423 U. S. 1 (1975). See also *United States* v. *Maine*, 420 U. S. 515 (1975). In

plemental proceedings to determine the location of the Massachusetts coastline. After our appointment of a Special Master, 433 U. S. 917 (1977), the parties agreed on a partial settlement, which we approved in 1981. 452 U. S. 429. Left unresolved was the status of Vineyard Sound and Nantucket Sound, a dispute which gave rise to extensive hearings before the Special Master. The Master concluded that Vineyard Sound is a "historic bay" and therefore a part of the inland waters of Massachusetts. However, he reached a contrary conclusion concerning Nantucket Sound. Explaining that the decision concerning Vineyard Sound has only minimal practical significance,[2] the United States has taken no exception to the Master's report. Massachusetts, however, has excepted to that part of the report concerning Nantucket Sound. Specifically, although Massachusetts acquiesces in the determination that the doctrine of "historic title" does not support its claim, it continues to maintain that it has "ancient title" to Nantucket Sound.

Nantucket Sound is a relatively shallow body of water south of Cape Cod, northeast of the island of Martha's Vineyard, and northwest of the island of Nantucket. Massachusetts contends that the English Crown acquired title to this territory as a result of discovery and occupation by colonists in the early 17th century and that it succeeded to the Crown's title by virtue of various Royal Charters or by the Treaty of Paris, which ended the Revolutionary War.[3]

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that decree we reserved jurisdiction which either the "United States or any defendant State [could] invoke . . . by filing a motion in this Court for supplemental proceedings." 423 U. S., at 2.

[2] According to the Solicitor General, all but 1,000 acres of the submerged lands of Vineyard Sound belong to the Commonwealth of Massachusetts as underlying territorial waters, even under its view that those waters are not inland.

[3] In particular, the Commonwealth points to the charter granted in 1664 by King Charles II to the Duke of York conveying title to New York, New Jersey, and most of New England, cf. *Martin* v. *Waddell*, 16 Pet. 367, 413–414 (1842); *Mahler* v. *Norwich & N. Y. Transp. Co.*, 35 N. Y. 352, 355

To prove that Great Britain acquired title to Nantucket Sound which it could pass to Massachusetts, much of the evidence presented to the Special Master concerned whether Nantucket Sound would have been considered "county waters" under English law in the 17th century. Under the "county waters" doctrine, waters "*inter fauces terrae*" or landward of an opening "between the jaws of the land" could be subject to the jurisdiction of the littoral county rather than the Admiral if the jaws were close enough to each other to satisfy a somewhat ambiguous line-of-sight test. Under Lord Coke's version of the test a person standing on one jaw must be able to "see what is done" on the other jaw;[4] under Lord Hale's more expansive version, it is merely necessary that "a man may reasonably discern between shore and shore."[5]

(1866), and to the charter granted in 1691 by the English monarchs William and Mary to the colonists of Massachusetts consolidating into "one reall Province by the Name of Our Province of the Massachusetts Bay in New England" the territories and colonies that were then commonly known as Massachusetts Bay, New Plymouth, "the Province of Main," and the territory called Accadia or Nova Scotia, see Mass. Ex. 45, p. 8. Alternatively, Massachusetts asserts that it acquired sovereignty over the area by virtue of the Treaty of Paris signed in 1783. Cf. *Manchester* v. *Massachusetts*, 139 U. S. 240, 256–257 (1891); *Mahler* v. *Norwich & N. Y. Transp. Co.*, 35 N. Y., at 356.

[4] 4 E. Coke, Institutes 140 (6th ed. 1681) ("It is no part of the Sea, where one may see what is done of the one part of the water, and of the other, as to see from one Land to the other, that the Coroner shall exercise his office in this case, and of this the Country may have knowledge; whereby it appeareth that things done there are triable by the Country (that is, by Jury) and consequently not in the Admiral Court").

[5] M. Hale, De Jure Maris et Brachiorum ejusdem, cap. iv (1667), reprinted in R. Hall, Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm, App. vii (2d ed. 1875) ("That arm or branch of the sea, which lies within the *fauces terrae*, where a man may reasonably discerne between shore and shore, is or at least may be within the body of a county, and therefore within the jurisdiction of the sheriff or coroner").

The relevant jaws of land in this case are the southern tip of Monomoy Island, which extends south from the elbow of Cape Cod, and the northern tip of Nantucket Island. At the present time, those two jaws are 9.2 nautical miles apart, but the distance may have been greater in colonial times. In any event, the parties agree that the distance was too great to satisfy Lord Coke's version of the test. Whether it would meet Lord Hale's test depends, in the opinion of the Master, on whether the Commonwealth's burden of proof is merely to persuade by a preponderance of the evidence or by evidence that is "clear beyond doubt." For purposes of our decision, we put to one side the parties' argument about the burden and assume that Lord Hale's test is satisfied.[6] On the assumption that Nantucket Sound could have been considered "county waters" under the common law of England in the 17th century, we nevertheless conclude that Massachusetts cannot prevail under the doctrine of "ancient title" on which it relies.

II

This Court has consistently followed principles of international law in fixing the coastline of the United States.[7] We

[6] The Special Master rested his conclusion that Massachusetts had to prove its claim "clear beyond doubt" on two cases of this Court and three reports of Special Masters in original jurisdiction cases. See *Louisiana Boundary Case*, 394 U. S. 11, 77 (1969); *United States* v. *California*, 381 U. S. 139, 175 (1965); Report of the Special Master, O. T. 1983, No. 35 Orig., p. 11; Report of the Special Master, O. T. 1974, No. 9 Orig., pp. 18–19; Report of the Special Master, O. T. 1973, No. 52 Orig., p. 42. Cf. *United States* v. *Louisiana (Alabama and Mississippi Boundary Case)*, 470 U. S. 93, 111 (1985).

Although the Master's conclusion regarding the burden of proof was the focus of the Commonwealth's opening brief, we find it unnecessary to address the issue given our disposition of the case. Whatever the measure of proof, Massachusetts concedes that it bears the risk of nonpersuasion. See Brief for Defendant Massachusetts 7.

[7] See *United States* v. *California*, 381 U. S., at 161–167. See also *Alabama and Mississippi Boundary Case*, 470 U. S., at 98; *United States* v. *Maine (Rhode Island and New York Boundary Case)*, 469 U. S. 504, 513

have relied in particular on the Convention on the Territorial Sea and Contiguous Zone, [1958] 15 U. S. T. 1607, T. I. A. S. No. 5639.[8] The Convention provides that the sovereignty of a state extends to "internal waters." Art. 1. The Convention also contains a set of rules delimiting those waters. Generally speaking, Article 5(1) defines "internal waters" as those waters landward of a baseline which Article 3 in turn defines as "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." Of importance to this case, the Convention also includes as a state's "internal waters" those waters enclosed in "bays" as defined in Article 7. Most of the rules in this Article identify the criteria for defining "juridical bays," but Article 7(6) further includes as "bays" "so-called 'historic' bays" and waters landward of baselines marked when "the straight baseline system provided for in Article 4 is applied."

In this case, Massachusetts relies exclusively on the provision recognizing "historic bays," for it is agreed both that the United States has legitimately eschewed the straight baseline method for determining its boundaries,[9] and that Nantucket Sound does not qualify as a juridical bay. Because "historic bay" is not defined in the Convention, we have previously relied on a United Nations study authored by the U. N. Secretariat and entitled Juridical Regime of Historic Waters, Including Historical Bays, [1962] 2 Y. B. Int'l L. Comm'n 1, U. N. Doc. A/CN.4/143 (1962) (hereinafter Juridical Regime). See *United States* v. *Louisiana (Alabama and*

(1985); *United States* v. *Alaska*, 422 U. S. 184, 188–189 (1975); *Louisiana Boundary Case*, 394 U. S., at 35.

[8] See *Louisiana Boundary Case*, *id.*, at 21 (Convention contains "'the best and most workable definitions available'" (quoting *United States* v. *California*, 381 U. S., at 165)).

[9] We have previously held that the decision to use the straight baseline system provided for in Article 4 of the Convention rests with the Federal Government. See *Alabama and Mississippi Boundary Case*, 470 U. S., at 99; *Louisiana Boundary Case*, 394 U. S., at 72–73; *United States* v. *California*, 381 U. S., at 167–168.

Mississippi Boundary Case), 470 U. S. 93, 101–102 (1985). That study prescribes the three factors of dominion, continuity, and international acquiescence recognized in our own cases for identifying a "historic bay."[10] The Commonwealth submits that the three-part test is actually the standard for finding "historic *title*" and that a different doctrine—the doctrine of "ancient title"—is also a sufficient basis for identifying a "historic *bay*" under Article 7(6) of the Convention. According to Massachusetts, "historic title" is the maritime counterpart of title acquired by adverse possession. It is prescriptive in character because it arises as a result of a state's exercise of dominion over water that would otherwise constitute either high seas or territorial sea in which all ships enjoy the right of innocent passage. Before this Court, Massachusetts no longer claims "historic title" as it uses the term. Brief for Defendant Massachusetts 4; Reply Brief for Defendant Massachusetts 22.

The Commonwealth instead relies entirely on a claim of "ancient title." This is the first case in which we have been

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[10] "The term 'historic bay' is not defined in the Convention, and there is no complete accord as to its meaning. The Court has stated that a historic bay is a bay 'over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations.' *United States* v. *California*, 381 U. S., at 172. See also *United States* v. *Alaska*, 422 U. S., at 189; *Louisiana Boundary Case*, 394 U. S., at 23. The Court also has noted that there appears to be general agreement that at least three factors are to be taken into consideration in determining whether a body of water is a historic bay: (1) the exercise of authority over the area by the claiming nation; (2) the continuity of this exercise of authority; and (3) the acquiescence of foreign nations. See *United States* v. *Alaska*, 422 U. S., at 189; *Louisiana Boundary Case*, 394 U. S., at 23–24, n. 27. An authoritative United Nations study concludes that these three factors require that 'the coastal State must have effectively exercised sovereignty over the area continuously during a time sufficient to create a usage and have done so under the general toleration of the community of States.' Juridical Regime of Historic Waters, Including Historic Bays 56, U. N. Doc. A/CN.4/143 (1962)." *Alabama and Mississippi Boundary Case*, 470 U. S., at 101–102 (footnotes omitted).

asked to evaluate such a claim to coastal waters. According to the Juridical Regime, an "ancient title" is based on a state's discovery and occupation of territory unclaimed by any other sovereign when it was first acquired. To claim "ancient title" to waters that would otherwise constitute high seas or territorial sea, a state must

> "affir[m] that the occupation took place before the freedom of the high seas became part of international law. In that case, the State would claim acquisition of the area by an occupation which took place long ago. Strictly speaking, the State would, however, not assert a historic title, but rather an ancient title based on occupation as an original mode of acquisition of territory. The difference may be subtle but should in the interest of clarity not be overlooked: to base the title on occupation is to base it on a *clear original title which is fortified by long usage.*" Juridical Regime, at 12 (¶71) (emphasis added).

Assuming, *arguendo*, that waters that would otherwise be considered high seas or territorial sea may be claimed under a theory of "ancient title," both parties agree that effective "occupation" must have taken place before the freedom of the high seas became a part of international law. Tr. of Oral Arg. 16–17, 34; Brief for Defendant Massachusetts 4. By this analysis, the title must have been perfected no later than the latter half of the 18th century.[11]

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[11] One cannot, as a historical matter, point to a precise date on which the international community would have rejected an assertion of sovereignty over Nantucket Sound as contrary to international law. It is clear, however, that such a claim would have become progressively less tenable throughout the 18th century:

"The seventeenth century marked the heyday of the *mare clausum* (closed sea) with claims by England, Denmark, Spain, Portugal, Genoa, Tuscany, the Papacy, Turkey, and Venice.

"In the eighteenth century the position changed completely. Dutch policies had favoured freedom of navigation and fishing in the previous cen-

III

Although the Special Master discussed "the history of [Nantucket Sound], especially [its] role in the development of the colonial economy of Martha's Vineyard and Nantucket Island," Report 27, his discussion leaves us in doubt whether he felt that "the colonists' exploitation of the marine resources of the soun[d] was equivalent to a formal assumption of sovereignty over" it *before* freedom of the seas became generally recognized. *Id.*, at 58.[12] Because the Commonwealth relied on the same historical evidence to establish

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tury, and the great publicist Grotius had written against the Portuguese monopoly of navigation and commerce in the East Indies. After the accession of William of Orange to the English throne in 1689 English disputes with Holland over fisheries ceased. However, sovereignty of the sea was still asserted against France, and in general the formal requirement of the salute to the flag was maintained. By the late eighteenth century the claim to sovereignty was obsolete and the requirement of the flag ceremony was ended in 1805. After 1691 extensive Danish claims were reduced by stages to narrow fixed limits. By the late eighteenth century the cannon-shot rule predominated, and claims to large areas of sea faded away." L. Brownlie, Principles of Public International Law 233–234 (2d ed. 1973) (footnotes omitted).

"[I]t is an undeniable fact that, since the days of Grotius, the principle of the freedom of the high seas found an ever wider currency and that, after a gradual evolution, it gained the upper hand towards the beginning of the nineteenth century, when it crystallized into a universally accepted principle of international law." Y. Blum, Historic Titles in International Law § 61, pp. 242–243 (1965).

We find it unnecessary to select a "critical date" upon which the community of states would have rejected a British claim to Nantucket Sound. Because the colonists' activities changed gradually in character and intensity over time, we need say only that effective "occupation" must have ripened into "clear original title," "fortified by long usage," no later than the latter half of the 1700's.

[12] The Special Master discussed this history only as regards "historic" title, see Report 27, even though he recognized that "[e]ffective occupation, from a time prior to the victory of the doctrine of freedom of the seas" is necessary "to establish a valid claim to a body of water under ancient title," *id.*, at 25–26.

both "historic" and "ancient" title, and because "the ultimate responsibility for deciding what are correct findings of fact remains with us" in any event,[13] we have examined for ourselves the pertinent exhibits and transcripts. Our independent review leads us to conclude that the Commonwealth did not effectively "occupy" Nantucket Sound so as to obtain "clear original title" and fortify that title "by long usage" before the seas were recognized to be free.

Massachusetts relies on the colonists' "intensive and exclusive exploitation" of the marine resources of Nantucket Sound to establish occupation. Reply Brief for Defendant Massachusetts 17. At the outset, we have some difficulty appraising the Commonwealth's historical evidence because the cases and publications cited to us uniformly discuss occupation in the context of "historic" rather than "ancient" title. Assuming that the parties are correct in their unspoken assumption that occupation sufficient to establish "historic title" resembles that necessary to acquire "ancient title" as well, and further assuming that such title extends to the whole of the waters of the Sound and is not merely a right to exploit its resources, we believe that occupation requires, at a minimum, the existence of acts, attributable to the sovereign, manifesting an assertion of exclusive authority over the waters claimed.[14] The history of the two most publicized cases conveys the international understanding of occupation.

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[13] *Colorado* v. *New Mexico*, 467 U. S. 310, 317 (1984). See *Alabama and Mississippi Boundary Case*, 470 U. S., at 101, and cases cited therein.

[14] The Juridical Regime quotes two definitions of "occupation":

"[Occupation] is defined by Oppenheim as follows:

"'Occupation is the act of appropriation by a State by which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State.'

"A similar definition is given by Fauchille:

"'Generally speaking, occupation is the taking by a State, with the intention of acting as the owner, of something which does not belong to any

In the *Fisheries Case (United Kingdom* v. *Norway)*, 1951 I. C. J. 116, the Permanent International Court of Justice upheld Norway's use of straight baselines (now approved expressly by Article 7(6) of the Convention), in part because Norway had proved a historic claim to the "comparatively shallow" waters between the mainland and the fringing islands known as the Skjaergaard, or "rock rampart." The court acknowledged that Norwegian fishermen had exploited fishing grounds in this region "from time immemorial," *id.*, at 127, and that the King of Denmark and Norway had excluded fishermen from other states "for a long period, from 1616–1618 until 1906." *Id.*, at 124; see *id.*, at 142.

Of similar effect is the case of *Annakumaru Pillai* v. *Muthupayal*, 27 Indian L. R. Madras 551 (1903). The complainant in that case was a lessee of the Rajah of Ramnad who accused the defendant of stealing chanks (mollusks) from the seabed five miles off the Ramnad coast. The Indian High Court upheld its own jurisdiction and the liability of the defendant "upon the immemorial claim of the land sovereign over this body of water." P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 16 (1927) (footnote omitted). The Officiating Chief Judge, relying on historical evidence dating from the 6th century B.C. and explaining the concessions under which chanks and pearls were historically gathered by the state's licensees, declared that "it would be impossible to ignore the fact that for ages in this country, chanks and pearl oysters have been owned and enjoyed by the sovereign as belonging by prerogative right exclusively to him." 27 Indian L. R. Madras, at 557. "And [because] chanks as well as pearl oysters while still in the beds have always been taken to be the exclusive property of the sover-

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other State but which is susceptible of sovereignty.'" Juridical Regime, at 12 (¶ 70).

On the possible difference between occupation as a mode of original acquisition of territory as contrasted to occupation eventuating in prescriptive acquisition, see M. Strohl, The International Law of Bays 328, n. 27 (1963).

eign, . . . the fishery operations connected therewith have always been carried on under State control and have formed a source of revenue to the exchequer." *Id.*, at 554. The Officiating Chief Judge concluded that this history demonstrated "exclusive occupation" of "the fisheries in question." *Id.*, at 566.[15]

We have encountered additional examples of claims to title based on exploitation of marine resources—the pearl fisheries in Australia, Mexico, and Columbia, the oyster beds in the Bay of Granville and off the Irish Coast, the coral beds off the coasts of Algeria, Sardinia, and Sicily, and various grounds in which herring, among other fishes, are found. See T. Fulton, The Sovereignty of the Sea 696–698 (1976 reprint of 1911 ed.). The continuation of apparently longstanding state regulation over these fisheries does not contradict, and is indeed perfectly consistent with, the understanding of occupation reflected in the Norwegian and Indian cases just discussed.

In contrast, the historical evidence introduced by Massachusetts does not show effective occupation of Nantucket Sound. To be sure, the Commonwealth's expert witness on the history of the Sound, Dr. Louis DeVorsey, a historical geographer, did conclude that Nantucket Sound was part of an "amphibious resource region" because of the "intimate relationship" between the inhabitants of the area and the surrounding waters.[16] By this Dr. DeVorsey meant essentially

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[15] Because of a division of opinion between the Officiating Chief Judge and the second judge on the two-judge panel, the case was subsequently heard by a three-judge panel. The later panel unanimously agreed with the judgment of the Officiating Chief Judge and with his historical analysis. See *Annakumaru Pillai* v. *Muthupayal*, 27 Indian L. R. Madras, at 572.

[16] Dr. DeVorsey inferred this intimate relationship in part from 17th- and 18th-century maps naming prominent features and attempting to chart the depths of Nantucket Sound. As Dr. DeVorsey acknowledged, however, none of these maps identified Nantucket Sound as a separate body of water even though they did identify other bodies of water such as Cape Cod Bay, Buzzard's Bay, and, in two instances, Vineyard Sound. These

that the residents took their livelihood from the sea. Although fascinating from a historical geographer's point of interest, the testimony of Dr. DeVorsey and the exhibits introduced through him do not satisfy the legal threshold for occupation of a coastal water body.

To begin with, the opinion that Nantucket Sound formed part of an "amphibious resource region" does not prove occupation of the entirety of Nantucket Sound. That conclusion was based largely on activity which undoubtedly took place either within territorial waters or on dry land. For example, to evidence the colonists' close relationship with the sea, Dr. DeVorsey pointed to the use of sand for glassmaking, stone polishing, and farming. Other activities, such as the building of mills powered by the tide, the making of salt from sea water, and the gathering of seaweed for fertilizer and insulation, also fail to establish occupation of Nantucket Sound. Even considering this evidence together with the more water-based pursuits of harvesting oysters and clams and hunting whales, we do not find sufficient evidence of occupation of Nantucket Sound as a whole. Massachusetts concedes that oysters were dug mainly in the harbors, and for decades the colonists' exploitation of whales was restricted to those that had drifted onto the beach. Although the residents by the mid-18th century had developed a technique for driving whales onto beaches by pursuing them in modified four- to five-man Indian canoes, and they certainly caught shellfish and clams outside the shallow water near shore, there is no satisfactory evidence that these activities occurred over the entirety of Nantucket Sound, and in particular over the portion of the Sound which the United States contends is high seas.

The evidence of occupation adduced by Massachusetts is also deficient because it does not warrant a finding that the

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early maps do not support Massachusetts' contention that the area's inhabitants established a special relationship with the protected waters of Nantucket Sound as opposed to the surrounding waters and ocean in general.

colonists asserted any exclusive right to the waters of Nantucket Sound. The closest the Commonwealth comes is a 1672 contract by which the town of Nantucket attempted to engage a whaler by the name of Lopar to "follow the trade of whaling on the island" for two years in exchange for, *inter alia*, an exclusive license to hunt whales and 10 acres of land. There is no evidence that the contract was carried out (and in particular no record of a conveyance of real property), and no suggestion in the contract that the license was limited, or even especially concerned with, whaling in Nantucket Sound. Indeed, the contract does not clearly reflect an exclusive proprietary interest in whales anywhere: it may simply represent a covenant on the part of the Nantucket islanders not to compete with the whaling company or companies chartered under the proposed contract. The only other evidence of an assertion of exclusive control was a 1692 Colonial Resolve to build a vessel to protect coastal ships in Vineyard Sound against the depredations of New Yorkers, with whom a dispute was brewing at the time.[17] But this evidence concerning Vineyard Sound merely highlights the lack of any comparable evidence concerning Nantucket Sound. In the absence of evidence limiting use of Nantucket Sound to the inhabitants of its shores, there is no reason to exempt these waters from such rights as innocent passage traditionally enjoyed in common by all members of the international polity.

Even if Massachusetts had introduced evidence of intensive and exclusive exploitation of the entirety of Nantucket Sound, we would still be troubled by the lack of any linkage between these activities and the English Crown. Cf. *United States* v. *Alaska*, 422 U. S. 184, 190–191, 203 (1975). Unless we are to believe that the self-interested endeavors of every seafaring community suffices to establish "ancient title" to

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[17] The dispute was resolved peacefully, there is no evidence that the vessel was built, and the only other patrol vessel about which Dr. DeVorsey testified was engaged in convoying merchantmen, not in protecting Nantucket Sound.

the waters containing the fisheries and resources it exploits, without regard to continuity of usage or international acquiescence necessary to establish "historic title," solely because exploitation predated the freedom of the seas, then the Commonwealth's claim cannot be recognized. Accordingly, we find that the colonists of Nantucket Sound did not effectively occupy that body of water; as a consequence, Great Britain did not obtain title which could devolve upon Massachusetts.

IV

Our determination that Massachusetts had not established clear title prior to freedom of the seas is corroborated by the Commonwealth's consistent failure to assert dominion over Nantucket Sound since that time.[18] Three examples should suffice to demonstrate that during the 18th and 19th centuries Massachusetts continued to treat Nantucket Sound in a manner inconsistent with its recent characterization of that body as internal waters.

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[18] See *Temple of Preah Vihear*, 1962 I. C. J. 6, 61 (separate opinion of Sir Gerald Fitzmaurice) ("It is a general principle of law . . . that a party's attitude, state of mind or intentions at a later date can be regarded as good evidence—in relation to the same or a closely connected matter—of his attitude, state of mind or intentions at an earlier date also; . . . the existence of a state of fact, or of a situation, at a later date, may furnish good presumptive evidence of its existence at an earlier date also, even where the later situation or state of affairs has in other respects to be excluded from consideration" (citations omitted)).

While the position of Massachusetts is discussed in text, it bears mention that the United States did not assert sovereignty over Nantucket Sound either. In 1789 the First Congress established a customs enforcement system, which included a number of separate districts in Massachusetts. The statutory definition of the district of Nantucket included "the island of Nantucket" without any reference to adjacent waters, whereas the district of Edgartown, which included Martha's Vineyard and the Elizabeth Islands, expressly incorporated "all the waters and shores" within Duke's County. Act of July 31, 1789, 1 Stat. 31. This distinction was repeated in subsequent legislation in 1790, Act of Aug. 4, 1790, 1 Stat. 146, and in 1799, Act of Mar. 2, 1799, 1 Stat. 629.

First, in 1847, the Supreme Judicial Court of Massachusetts issued an opinion which is generally understood as having adopted Lord Coke's more demanding version of the line-of-sight test for determining whether jaws of land enclosed inland waters.[19] Since it is agreed that Nantucket Sound could not qualify as inland waters under the Coke test, the Court's decision that that test was part of the common law of Massachusetts supports the further conclusion that the Sound was not part of the internal waters of the Commonwealth.

This conclusion was confirmed in 1859 when the Massachusetts Legislature enacted a statute defining the seaward boundary of the Commonwealth at one marine league (or three nautical miles) from the coast. See Acts of 1859, Ch. 289, Mass. Ex. 53. In accordance with this measure, the statute treated arms of the sea as part of the Commonwealth if the distance between their headlands did not exceed two marine leagues. Thus, the statute replaced the ambiguous line-of-sight test for applying the *inter fauces terrae* doctrine

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[19] In *Commonwealth* v. *Peters*, 53 Mass. 387, 392 (1847), the Massachusetts high court held:

"All creeks, havens, coves, and inlets lying within projecting headlands and islands, and all bays and arms of the sea lying within and between lands not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side, are taken to be within the body of the county."

Chief Judge Shaw's adoption of the Coke test in *Peters* is consistent with Judge Story's earlier exposition in *United States* v. *Grush*, 26 F. Cas. 48, 52 (No. 15,268) (CC Mass. 1829):

"I do not understand by this expression, that it is necessary, that the shores should be so near, that all that is done on one shore could be discerned, and testified to with certainty, by persons standing on the opposite shore; but that objects on the opposite shore might be reasonably discerned, that is, might be distinctly seen with the naked eye, and clearly distinguished from each other."

The parties do not disagree with the Master's conclusion that the American view of the proper test, which followed Coke, differed from the British view, which followed Hale.

with a fixed standard of six nautical miles. Since the distance between Monomoy Point and Nantucket Island is admittedly more than six nautical miles, Massachusett's statutory definition of its own coastline excluded Nantucket Sound.

Finally, in 1881, the Massachusetts Legislature enacted a statute directing its Harbor and Land Commission to prepare charts identifying the boundaries that had been established by the 1859 law. Official charts prepared pursuant to that legislation are consistent with the Master's conclusion that Vineyard Sound was considered part of the Commonwealth, but that Nantucket Sound was not.

It was not until 1971 that Massachusetts first asserted its claim to jurisdiction over Nantucket Sound. There is simply no evidence that the English Crown or its colonists had obtained "clear original title" to the Sound in the 17th century, or that such title was "fortified by long usage." Without such evidence, we are surely not prepared to enlarge the exception in Article 7(6) of the Convention for historic bays to embrace a claim of "ancient title" like that advanced in this case.[20]

The parties are directed to prepare and submit a decree conforming to the recommendations of the Special Master.

It is so ordered.

JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[20] The validity of and any limits to the "ancient title" theory are accordingly reserved for an appropriate case. In view of our decision that the history of Nantucket Sound does not support the acquisition of "ancient title" by Massachusetts, we similarly decline to address the question whether the Commonwealth abandoned or renounced that title, and the antecedent issue of under what standard that judgment should be made.

NEW YORK *v.* CLASS

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 84–1181. Argued November 4, 1985—Decided February 25, 1986

When two New York City police officers observed respondent driving above the speed limit in a car with a cracked windshield, both traffic violations under New York law, they stopped him. He then emerged from the car and approached one of the officers. The other officer opened the car door to look for the Vehicle Identification Number (VIN), which is located on the left door jamb in pre-1969 automobiles. When the officer did not find the VIN on the door jamb, he reached into the car's interior to move some papers obscuring the area of the dashboard where the VIN is located on later-model automobiles. In doing so, the officer saw the handle of a gun protruding from underneath the driver's seat and seized the gun. Respondent was then arrested. After the state trial court denied a motion to suppress the gun as evidence, respondent was convicted of criminal possession of a weapon. The Appellate Division of the New York Supreme Court upheld the conviction, but the New York Court of Appeals reversed, holding that in the absence of any justification for the search of respondent's car besides the traffic violations, the search was prohibited and the gun must accordingly be excluded from evidence.

Held:

1. The New York Court of Appeals' decision did not rest on an adequate and independent state ground so as to deprive this Court of jurisdiction. The Court of Appeals' opinion, which mentions the New York Constitution only once and then in direct conjunction with the Federal Constitution and which makes use of both federal and New York cases in its analysis, lacks the requisite "plain statement" that it rests on state grounds. Moreover, in determining that the search in question was prohibited, the court looked to the Federal Constitution and not to a state statute that authorizes officers to demand that drivers reveal their VIN, merely holding that that statute provided no justification for a search. Pp. 109–110.

2. The police officer's action in searching respondent's car did not violate the Fourth Amendment. Pp. 111–119.

(a) Because of the important role played by the VIN in the pervasive governmental regulation of automobiles and the efforts by the Federal Government through regulations to assure that the VIN is placed in plain view, respondent had no reasonable expectation of privacy in the

VIN. The placement of the papers obscuring the VIN was insufficient to create a privacy interest in the VIN. Pp. 111–114.

(b) The officer's search was sufficiently unintrusive to be constitutionally permissible in light of respondent's lack of a reasonable expectation of privacy in the VIN, the fact that the officers observed respondent commit two traffic violations, and concerns for the officers' safety. Pp. 114–119.

63 N. Y. 2d 491, 472 N. E. 2d 1009, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in Part II of which BRENNAN, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 120. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 122. WHITE, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 131.

Steven R. Kartagener argued the cause for petitioner. With him on the briefs was *Mario Merola*.

Marc C. Cogan argued the cause *pro hac vice* for respondent. With him on the brief was *William E. Hellerstein*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case, we must decide whether, in order to observe a Vehicle Identification Number (VIN) generally visible from outside an automobile, a police officer may reach into the passenger compartment of a vehicle to move papers obscuring the VIN after its driver has been stopped for a traffic violation and has exited the car. We hold that, in these circumstances, the police officer's action does not violate the Fourth Amendment.

I

On the afternoon of May 11, 1981, New York City police officers Lawrence Meyer and William McNamee observed re-

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**Fred E. Inbau, Wayne W. Schmidt, James P. Manak, David Crump, Daniel B. Hales, James Murphy*, and *Francis B. Looney* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

spondent Benigno Class driving above the speed limit in a car with a cracked windshield. Both driving with a cracked windshield and speeding are traffic violations under New York law. See N. Y. Veh. & Traf. Law §§ 375(22), 1180(d) (McKinney 1970). Respondent followed the officers' ensuing directive to pull over. Respondent then emerged from his car and approached Officer Meyer. Officer McNamee went directly to respondent's vehicle. Respondent provided Officer Meyer with a registration certificate and proof of insurance, but stated that he had no driver's license.

Meanwhile, Officer McNamee opened the door of respondent's car to look for the VIN, which is located on the left door jamb in automobiles manufactured before 1969. When the officer did not find the VIN on the door jamb, he reached into the interior of respondent's car to move some papers obscuring the area of the dashboard where the VIN is located in later-model automobiles. In doing so, Officer McNamee saw the handle of a gun protruding about one inch from underneath the driver's seat. The officer seized the gun, and respondent was promptly arrested. Respondent was also issued summonses for his traffic violations.

It is undisputed that the police officers had no reason to suspect that respondent's car was stolen, that it contained contraband, or that respondent had committed an offense other than the traffic violations. Nor is it disputed that respondent committed the traffic violations with which he was charged, and that, as of the day of the arrest, he had not been issued a valid driver's license.

After the state trial court denied a motion to suppress the gun as evidence, respondent was convicted of criminal possession of a weapon in the third degree. See N. Y. Penal Law § 265.02(4) (McKinney 1980). The Appellate Division of the New York Supreme Court upheld the conviction without opinion. 97 App. Div. 2d 741, 468 N. Y. S. 2d 892 (1983). The New York Court of Appeals reversed. It reasoned that the police officer's "intrusion . . . was undertaken to obtain

information and it exposed . . . hidden areas" of the car, and "therefore constituted a search." 63 N. Y. 2d 491, 495, 472 N. E. 2d 1009, 1011 (1984). Although it recognized that a search for a VIN generally involves a minimal intrusion because of its limited potential locations, and agreed that there is a compelling law enforcement interest in positively identifying vehicles involved in accidents or automobile thefts, the court thought it decisive that the facts of this case "reveal no reason for the officer to suspect other criminal activity [besides the traffic infraction] or to act to protect his own safety." *Id.*, at 495–496, 472 N. E. 2d, at 1012. The state statutory provision that authorizes officers to demand that drivers reveal their VIN "provided no justification for the officer's entry of [respondent's] car." *Id.*, at 497, 472 N. E. 2d, at 1013. If the officer had taken advantage of that statute and asked to see the VIN, respondent could have moved the papers away himself and no intrusion would have occurred. In the absence of any justification for the search besides the traffic infraction, the New York Court of Appeals ruled that the gun must be excluded from evidence.

We granted certiorari, 471 U. S. 1003 (1985), and now reverse.

II

Respondent asserts that this Court is without jurisdiction to hear this case because the decision of the New York Court of Appeals rests on an adequate and independent state ground. We disagree.

The opinion of the New York Court of Appeals mentions the New York Constitution but once, and then only in direct conjunction with the United States Constitution. 63 N. Y. 2d, at 493, 472 N. E. 2d, at 1010. Cf. *Michigan* v. *Long*, 463 U. S. 1032, 1043 (1983). The opinion below makes use of both federal and New York cases in its analysis, generally citing both for the same proposition. See, *e. g.*, 63 N. Y. 2d, at 494, 495, 472 N. E. 2d, at 1011. The opinion lacks the requisite "plain statement" that it rests on state grounds.

Michigan v. *Long*, *supra*, at 1042, 1044. Accordingly, our holding in *Michigan* v. *Long* is directly applicable here:

> "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." 463 U. S., at 1040–1041.

See also *California* v. *Carney*, 471 U. S. 386, 389, n. 1 (1985).

Respondent's claim that the opinion below rested on independent and adequate state *statutory* grounds is also without merit. The New York Court of Appeals did not hold that § 401 of New York's Vehicle and Traffic Law prohibited the search at issue here, but, in rejecting an assertion of petitioner, merely held that § 401 "provided no *justification*" for a search. 63 N. Y. 2d, at 497, 472 N. E. 2d, at 1013 (emphasis added). In determining that the police officer's action was prohibited, the court below looked to the Federal Constitution, not the State's statute. Moreover, New York adheres to the general rule that, when statutory construction can resolve a case, courts should not decide constitutional issues. See *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring); *In re Peters* v. *New York City Housing Authority*, 307 N. Y. 519, 527, 121 N. E. 2d 529, 531 (1954). Since the New York Court of Appeals discussed both statutory and constitutional grounds, we may infer that the court believed the statutory issue insufficient to resolve the case. The discussion of the statute therefore could not have constituted an independent and adequate state ground.

III

A

The officer here, after observing respondent commit two traffic violations and exit the car, attempted to determine the VIN of respondent's automobile. In reaching to remove papers obscuring the VIN, the officer intruded into the passenger compartment of the vehicle.

The VIN consists of more than a dozen digits, unique to each vehicle and required on all cars and trucks. See 49 CFR § 571.115 (1984). The VIN is roughly analogous to a serial number, but it can be deciphered to reveal not only the place of the automobile in the manufacturer's production run, but the make, model, engine type, and place of manufacture of the vehicle. See § 565.4.

The VIN is a significant thread in the web of regulation of the automobile. See generally 43 Fed. Reg. 2189 (1978). The ease with which the VIN allows identification of a particular vehicle assists the various levels of government in many ways. For the Federal Government, the VIN improves the efficacy of recall campaigns, and assists researchers in determining the risks of driving various makes and models of automobiles. In combination with state insurance laws, the VIN reduces the number of those injured in accidents who go uncompensated for lack of insurance. In conjunction with the State's registration requirements and safety inspections, the VIN helps to ensure that automobile operators are driving safe vehicles. By making automobile theft more difficult, the VIN safeguards not only property but also life and limb. See 33 Fed. Reg. 10207 (1968) (noting that stolen vehicles are disproportionately likely to be involved in automobile accidents).

To facilitate the VIN's usefulness for these laudable governmental purposes, federal law requires that the VIN be placed in the plain view of someone *outside* the automobile:

> "The VIN for passenger cars [manufactured after 1969] shall be located inside the passenger compartment. It shall be readable, without moving any part of the vehicle, through the vehicle glazing under daylight lighting conditions by an observer having 20/20 vision (Snellen) whose eye point is located *outside the vehicle* adjacent to the left windshield pillar. Each character in the VIN subject to this paragraph shall have a minimum height of 4 mm." 49 CFR § 571.115 (S4.6) (1984) (emphasis added).

In *Delaware* v. *Prouse*, 440 U. S. 648, 658 (1979), we recognized the "vital interest" in highway safety and the various programs that contribute to that interest. In light of the important interests served by the VIN, the Federal and State Governments are amply justified in making it a part of the web of pervasive regulation that surrounds the automobile, and in requiring its placement in an area ordinarily in plain view from outside the passenger compartment.

B

A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile. See *Delaware* v. *Prouse*, *supra*, at 663; *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 269 (1973). Nonetheless, the State's intrusion into a particular area, whether in an automobile or elsewhere, cannot result in a Fourth Amendment violation unless the area is one in which there is a "constitutionally protected reasonable expectation of privacy." *Katz* v. *United States*, 389 U. S. 347, 360 (1967) (Harlan, J., concurring). See *Oliver* v. *United States*, 466 U. S. 170, 177–180 (1984); *Maryland* v. *Macon*, 472 U. S. 463, 469 (1985).

The Court has recognized that the physical characteristics of an automobile and its use result in a lessened expectation of privacy therein:

> "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom

> serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell* v. *Lewis*, 417 U. S. 583, 590 (1974) (plurality opinion).

Moreover, automobiles are justifiably the subject of pervasive regulation by the State. Every operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy:

> "Automobiles, unlike homes, are subject to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order." *South Dakota* v. *Opperman*, 428 U. S. 364, 368 (1976).

See also *Cady* v. *Dombrowski*, 413 U. S. 433, 441–442 (1973); *California* v. *Carney*, 471 U. S., at 392.

The factors that generally diminish the reasonable expectation of privacy in automobiles are applicable *a fortiori* to the VIN. As we have discussed above, the VIN plays an important part in the pervasive regulation by the government of the automobile. A motorist must surely expect that such regulation will on occasion require the State to determine the VIN of his or her vehicle, and the individual's reasonable expectation of privacy in the VIN is thereby diminished. This is especially true in the case of a driver who has committed a traffic violation. See *Delaware* v. *Prouse*, *supra*, at 659 ("The foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations. *Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be as-*

certained") (emphasis added). In addition, it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile. The VIN's mandated visibility makes it more similar to the exterior of the car than to the trunk or glove compartment. The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a "search." See *Cardwell* v. *Lewis*, *supra*, at 588–589. In sum, because of the important role played by the VIN in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the VIN is placed in plain view, we hold that there was no reasonable expectation of privacy in the VIN.

We think it makes no difference that the papers in respondent's car obscured the VIN from the plain view of the officer. We have recently emphasized that efforts to restrict access to an area do not generate a reasonable expectation of privacy where none would otherwise exist. See *Oliver* v. *United States*, *supra*, at 182–184 (placement of "No Trespassing" signs on secluded property does not create "legitimate privacy interest" in marihuana fields). Here, where the object at issue is an identification number behind the transparent windshield of an automobile driven upon the public roads, we believe that the placement of the obscuring papers was insufficient to create a privacy interest in the VIN. The mere viewing of the formerly obscured VIN was not, therefore, a violation of the Fourth Amendment.

C

The evidence that respondent sought to have suppressed was not the VIN, however, but a gun, the handle of which the officer saw from the interior of the car while reaching for the papers that covered the VIN. While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protec-

tion from unreasonable intrusions by the police. We agree with the New York Court of Appeals that the intrusion into that space constituted a "search." 63 N. Y. 2d, at 495, 472 N. E. 2d, at 1011. Cf. *Delaware* v. *Prouse*, 440 U. S., at 653 ("stopping an automobile and detaining its occupants constitute a 'seizure' . . . even though the purpose of the stop is limited and the resulting detention quite brief"). We must decide, therefore, whether this search was constitutionally permissible.

If respondent had remained in the car, the police would have been justified in asking him to move the papers obscuring the VIN. New York law authorizes a demand by officers to see the VIN, see 63 N. Y. 2d, at 496–497, 472 N. E. 2d, at 1012–1013, and even if the state law were not explicit on this point we have no difficulty in concluding that a demand to inspect the VIN, like a demand to see license and registration papers, is within the scope of police authority pursuant to a traffic violation stop. See *Prouse, supra*, at 659. If respondent had stayed in his vehicle and acceded to such a request from the officer, the officer would not have needed to intrude into the passenger compartment. Respondent chose, however, to exit the vehicle without removing the papers that covered the VIN; the officer chose to conduct his search without asking respondent to return to the car. We must therefore decide whether the officer acted within the bounds of the Fourth Amendment in conducting the search. We hold that he did.

Keeping the driver of a vehicle in the car during a routine traffic stop is probably the typical police practice. See D. Schultz & D. Hunt, Traffic Investigation and Enforcement 17 (1983). Nonetheless, out of a concern for the safety of the police, the Court has held that officers may, consistent with the Fourth Amendment, exercise their discretion to require a driver who commits a traffic violation to exit the vehicle even though they lack any particularized reason for believing the driver possesses a weapon. *Pennsylvania* v. *Mimms*, 434

U. S. 106, 108–111 (1977) *(per curiam)*. While we impute to respondent no propensity for violence, and while we are conscious of the fact that respondent here voluntarily left the vehicle, the facts of this case may be used to illustrate one of the principal justifications for the discretion given police officers by *Pennsylvania* v. *Mimms:* while in the driver's seat, respondent had a loaded pistol at hand. *Mimms* allows an officer to guard against that possibility by requiring the driver to exit the car briefly. Clearly, *Mimms* also allowed the officers here to detain respondent briefly outside the car that he voluntarily exited while they completed their investigation.

The question remains, however, as to whether the officers could not only effect the seizure of respondent necessary to detain him briefly outside the vehicle, but also effect a search for the VIN that may have been necessary only because of that detention. The pistol beneath the seat did not, of course, disappear when respondent closed the car door behind him. To have returned respondent immediately to the automobile would have placed the officers in the same situation that the holding in *Mimms* allows officers to avoid—permitting an individual being detained to have possible access to a dangerous weapon and the benefit of the partial concealment provided by the car's exterior. See *Pennsylvania* v. *Mimms, supra*, at 110. In light of the danger to the officers' safety that would have been presented by returning respondent immediately to his car, we think the search to obtain the VIN was not prohibited by the Fourth Amendment.

The Fourth Amendment by its terms prohibits "unreasonable" searches and seizures. We have noted:

> "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' *Camara* v. *Municipal Court*, 387 U. S. 523, 534–535, 536–537 (1967). And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with

> rational inferences from those facts, justifiably warrant that intrusion." *Terry* v. *Ohio*, 392 U. S. 1, 21 (1968) (footnote omitted) (brackets as in *Terry*).

This test generally means that searches must be conducted pursuant to a warrant backed by probable cause. See *United States* v. *Ventresca*, 380 U. S. 102, 105–109 (1965); *United States* v. *Karo*, 468 U. S. 705, 714–715 (1984). When a search or seizure has as its immediate object a search for a weapon, however, we have struck the balance to allow the weighty interest in the safety of police officers to justify warrantless searches based only on a reasonable suspicion of criminal activity. See *Terry* v. *Ohio*, *supra*; *Adams* v. *Williams*, 407 U. S. 143 (1972). Such searches are permissible despite their substantial intrusiveness. See *Terry* v. *Ohio*, *supra*, at 24–25 (search was "a severe, though brief, intrusion upon cherished personal security, and . . . must surely [have] b[een] an annoying, frightening, and perhaps humiliating experience").

When the officer's safety is less directly served by the detention, something more than objectively justifiable suspicion is necessary to justify the intrusion if the balance is to tip in favor of the legality of the governmental intrusion. In *Pennsylvania* v. *Mimms*, *supra*, at 107, the officers had personally observed the seized individual in the commission of a traffic offense before requesting that he exit his vehicle. In *Michigan* v. *Summers*, 452 U. S. 692, 693 (1981), the officers had obtained a warrant to search the house that the person seized was leaving when they came upon him. While the facts in *Pennsylvania* v. *Mimms* and *Michigan* v. *Summers* differ in some respects from the facts of this case, the similarities are strong enough that the balancing of governmental interests against governmental intrusion undertaken in those cases is also appropriate here. All three of the factors involved in *Mimms* and *Summers* are present in this case: the safety of the officers was served by the governmental intrusion; the intrusion was minimal; and the search stemmed

from some probable cause focusing suspicion on the individual affected by the search. Indeed, here the officer's probable cause stemmed from directly observing respondent commit a violation of the law.

When we undertake the necessary balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion," *United States* v. *Place*, 462 U. S. 696, 703 (1983), the conclusion that the search here was permissible follows. As we recognized in *Delaware* v. *Prouse*, 440 U. S., at 658, the governmental interest in highway safety served by obtaining the VIN is of the first order, and the particular method of obtaining the VIN here was justified by a concern for the officer's safety. The "critical" issue of the intrusiveness of the government's action, *United States* v. *Place*, *supra*, at 722 (BLACKMUN, J., concurring in judgment), also here weighs in favor of allowing the search. The search was focused in its objective and no more intrusive than necessary to fulfill that objective. The search was far less intrusive than a formal arrest, which would have been permissible for a traffic offense under New York law, see N. Y. Veh. & Traf. Law § 155 (McKinney Supp. 1986); N. Y. Crim. Proc. Law § 140.10(1) (McKinney 1981), and little more intrusive than a demand that the respondent—under the eyes of the officers—move the papers himself. The VIN, which was the clear initial objective of the officer, is by law present in one of two locations—either inside the door jamb, or atop the dashboard and thus ordinarily in plain view of someone outside the automobile. Neither of those locations is subject to a reasonable expectation of privacy. The officer here checked both those locations, and only those two locations. The officer did not root about the interior of the respondent's automobile before proceeding to examine the VIN. He did not reach into any compartments or open any containers. He did not even intrude into the interior at all until after he had checked the door jamb for

the VIN. When he did intrude, the officer simply reached directly for the unprotected space where the VIN was located to move the offending papers. We hold that this search was sufficiently unintrusive to be constitutionally permissible in light of the lack of a reasonable expectation of privacy in the VIN and the fact that the officers observed respondent commit two traffic violations. Any other conclusion would expose police officers to potentially grave risks without significantly reducing the intrusiveness of the ultimate conduct—viewing the VIN—which, as we have said, the officers were entitled to do as part of an undoubtedly justified traffic stop.

We note that our holding today does not authorize police officers to enter a vehicle to obtain a dashboard-mounted VIN when the VIN is visible from outside the automobile. If the VIN is in the plain view of someone outside the vehicle, there is no justification for governmental intrusion into the passenger compartment to see it.*

The judgment of the New York Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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*Petitioner invites us to hold that respondent's status as an unlicensed driver deprived him of any reasonable expectations of privacy in the vehicle, because the officers would have been within their discretion to have prohibited respondent from driving the car away, to have impounded the car, and to have later conducted an inventory search thereof. Cf. *South Dakota* v. *Opperman*, 428 U. S. 364 (1976) (police may conduct inventory search of car impounded for multiple parking violations); *Nix* v. *Williams*, 467 U. S. 431 (1984) (discussing the "inevitable discovery" exception to the exclusionary rule). Petitioner also argues that there can be no Fourth Amendment violation here because the police could have arrested respondent, see N. Y. Veh. & Traf. Law § 155 (McKinney Supp. 1986); N. Y. Crim. Proc. Law § 140.10(1) (McKinney 1981), and could then have searched the passenger compartment at the time of arrest, cf. *New York* v. *Belton*, 453 U. S. 454 (1981), or arrested respondent and searched the car after impounding it pursuant to the arrest, see *Cady* v. *Dombrowski*, 413 U. S. 433 (1973). We do not, however, reach those questions here.

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring.

I join the Court's opinion but write to emphasize that, because of the unique and important governmental interests served by inspection of the Vehicle Identification Number (VIN), an officer making a lawful stop of a vehicle has the right and duty to inspect the VIN. Where the VIN is not visible from outside the vehicle or voluntarily disclosed by the driver, the officer may enter the vehicle to the extent necessary to read the VIN.

As the Court explains, the VIN essentially is a serial number that, by identifying certain features of the vehicle to which it is affixed, provides an effective and reliable means for positive identification of the vehicle. The VIN occupies a central position in the elaborate federal and state regulation of automobiles, which frequently depends on such positive identification. Federal regulations now direct manufacturers to place the VIN in a location where it is in the plain view of an observer standing outside the vehicle. 49 CFR § 571.115 (S4.6) (1984).

The Court has answered correctly the question presented in this case by applying conventional Fourth Amendment analysis. I believe, however, that an officer's efforts to observe the VIN need not be subjected to the same scrutiny that courts properly apply when police have intruded into a vehicle to arrest or to search for evidence of crime. When an officer lawfully has stopped a motor vehicle for a traffic infraction, the officer is entitled to inspect license and registration documents. See *Delaware* v. *Prouse*, 440 U. S. 648 (1979); *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) *(per curiam)*. Unquestionably, the officer also may look through the windshield, observe the VIN, and record it without implicating any Fourth Amendment concerns. Respondent does not contend, nor could it reasonably be contended, that such action violates the Federal Constitution. The question raised on the facts of this case, therefore, is whether the

Fourth Amendment was offended by the incremental intrusion resulting from the officer's efforts to observe this VIN once respondent's vehicle lawfully was stopped. Cf. *Pennsylvania* v. *Mimms*, *supra*, at 109.

The problem for the officer was that the VIN, located on the dashboard just behind the windshield, was obscured by papers. The sequence of events that transpired is well stated in the Court's opinion. Suffice it to say here that, when respondent left his vehicle to talk to one of the officers, the other officer sought to determine the VIN of the automobile. This officer did what his duty required. Because he could not see the VIN from outside the car, and because the driver had exited the vehicle, the officer entered the car to the extent necessary to move the papers covering the VIN. It was only then that he observed a handgun protruding from beneath the front seat. The Court of Appeals of New York held that this intrusion was an unlawful search. While agreeing that a search occurred, this Court today sustains the officer's action on reasoning familiar in cases applying Fourth Amendment principles to automobiles.

In my view, the Fourth Amendment question may be stated simply as whether the officer's efforts to inspect the VIN were reasonable. There is no finding in this case that the officer's entry into respondent's vehicle—opening the door and reaching his hand to the dashboard—was not reasonably necessary to achieve his lawful purpose. If respondent had remained in his seat, as the Court observes, the officer properly should have requested him to remove the papers obstructing the VIN. In the absence of compliance with such a request, an arrest would have been lawful. Cf. *People* v. *Ellis*, 62 N. Y. 2d 393, 465 N. E. 2d 826 (1984) (on lawful traffic stop, officers properly arrested driver for failure to produce license or other identification).

In view of the important public purposes served by the VIN system and the minimal expectation of privacy in the VIN, I would hold that where a police officer lawfully stops a

motor vehicle, he may inspect the VIN, and remove any obstruction preventing such inspection, where the driver of the vehicle either is unwilling or unable to cooperate.*

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, concurring in part and dissenting in part.

I agree that the decision of the New York Court of Appeals does not rest on an adequate and independent state ground, see *Michigan* v. *Long*, 463 U. S. 1032, 1043 (1983), and therefore join Part II of the Court's opinion. I also agree that the police conducted a *search* of respondent's vehicle to inspect the Vehicle Identification Number (VIN). *Ante*, at 114–115. However, I disagree that this *search* was constitutionally permissible, and to that extent respectfully dissent.

I

The facts bear repetition. Officers Meyer and McNamee pulled respondent over after observing him commit minor traffic violations. Respondent emerged from his car, closed the door, and joined Officer Meyer at the rear of the vehicle. Respondent gave Officer Meyer his car registration certificate and proof of insurance, but did not have a driver's license. Meanwhile, without first examining the documents, and unaware that respondent had no driver's license, Officer McNamee opened the door of the car to look for the VIN on the door jamb and, not finding it there, reached inside to remove papers obstructing his view of the VIN on the dashboard. While doing so, McNamee saw a gun handle protruding from underneath the driver's seat. Respondent was arrested, and eventually convicted, for criminal possession

*I do not suggest, of course, that the Fourth Amendment is inapplicable in this context. An officer may not use VIN inspection as a pretext for searching a vehicle for contraband or weapons. Nor may the officer undertake an entry more extensive than reasonably necessary to remove any obstruction and read the VIN.

of a weapon. He was issued summonses for his traffic violations.

McNamee conducted the search even though "[i]t is undisputed that the police officers had no reason to suspect that respondent's car was stolen, that it contained contraband, or that respondent had committed an offense other than the traffic violations." *Ante*, at 108.

II

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." "This fundamental right is preserved by a requirement that searches be conducted pursuant to a warrant issued by an independent judicial officer." *California* v. *Carney*, 471 U. S. 386, 390 (1985). While we have found no Fourth Amendment violation in certain warrantless police searches of cars, see, *e. g.*, *Carroll* v. *United States*, 267 U. S. 132 (1925), this narrow exception "applies only to searches of vehicles that are supported by probable cause." *United States* v. *Ross*, 456 U. S. 798, 809 (1982).

Officer McNamee's *search* of respondent's car was clearly without probable cause and was therefore patently unconstitutional. The Court's contrary holding rests not on any reasoning or logic grounded in Fourth Amendment jurisprudence, but rather on a strained and irrelevant analysis. To substitute for the absence of probable cause, the Court struggles to balance "the governmental interest in highway safety served by obtaining the VIN" and a "concern for the officer's safety" against the "nature and quality" of the intrusion that took place. *Ante*, at 118. Once again, the Court "takes a long step . . . toward 'balancing' into oblivion the protections the Fourth Amendment affords." *Michigan* v. *Long*, *supra*, at 1065 (BRENNAN, J., dissenting). The police had no justification whatever, let alone probable cause, to *search* for the

VIN, and therefore no amount of "balancing" can make the *search* of respondent's car constitutional.

A

The Court says much about the "important role played by the VIN in the pervasive governmental regulation of the automobile," and holds that respondent had no "reasonable expectation of privacy in the VIN." *Ante*, at 114. This aspect of the Court's analysis is particularly baffling. Of course, the VIN plays a significant part in federal and state schemes for regulating automobiles, and federal regulations require vehicle manufacturers to install VINs that may be read from outside the passenger compartment. See 49 CFR § 571.115 (S4.6) (1984). However, even assuming that respondent had no reasonable expectation of privacy in the VIN, why is this relevant to the question we decide? Officer McNamee did not look for the VIN from outside of respondent's vehicle, but *searched* the car without respondent's consent in order to locate the VIN. By focusing on the object of the search—the VIN—the Court misses the issue we must decide: whether an interior *search* of the car to discover that object was constitutional. Regardless of whether he had a reasonable expectation of privacy in the VIN, respondent clearly retained a reasonable expectation of privacy with respect to the area searched by the police—the car's interior. As the court below noted, "[t]he fact that certain information must be kept, or that it may be of a public nature, does not automatically sanction police intrusion into private space in order to obtain it." 63 N. Y. 2d 491, 495, 472 N. E. 2d 1009, 1011 (1984); cf. *id.*, at 496–497, 472 N. E. 2d, at 1012–1013 (noting that state law only requires drivers to furnish police with vehicle identification).

B

Because vehicles are mobile and subject to pervasive government regulation, an individual's justifiable expectation of privacy in a vehicle is less than in his home. *California* v.

Carney, supra. This is why the Court has held that warrantless searches of cars may sometimes not violate the Fourth Amendment, but only if the searches are supported by probable cause. See, *e. g., Carroll* v. *United States, supra; United States* v. *Ross, supra.* For "[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." *Delaware* v. *Prouse,* 440 U. S. 648, 662 (1979); see also *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 269 (1973) ("[T]he *Carroll* doctrine does not declare a field day for the police in searching automobiles"). Because the Fourth Amendment constrains the State's authority to *search* automobiles under the guise of "regulation," the fact that the Government uses the VIN as part of its scheme for regulating automobiles is insufficient to justify a *search* of the passenger compartment to retrieve such information. Rather, as is ordinarily the case with any car search, a VIN search must be supported by probable cause. See *Almeida-Sanchez* v. *United States, supra,* at 269 ("Automobile or no automobile, there must be probable cause for the search"). "[T]o eliminate any requirement that an officer be able to explain the reasons for his actions . . . leaves police discretion utterly without limits." *Pennsylvania* v. *Mimms,* 434 U. S. 106, 122 (1977) (STEVENS, J., dissenting). In this case, the police clearly lacked probable cause to search for the VIN.

The Court suggests that respondent's traffic infractions provided the requisite probable cause, this on the ground that there was "probable cause focusing suspicion on the individual affected by the search." *Ante,* at 118. This analysis makes a mockery of the Fourth Amendment. There can be no question that respondent's traffic offenses gave the police probable cause to stop the car and to demand some form of vehicle identification. *Delaware* v. *Prouse, supra,* at 663. Too, this sort of routine traffic stop generally gives police an *opportunity* to inspect the VIN through the car windshield.

But Fourth Amendment protections evaporate if this supplies the requisite probable cause to *search* for a VIN not visible from the exterior of the car. Plainly the search of the interior for the VIN was unnecessary since respondent had supplied his car registration certificate, and there is no suggestion that it was inadequate.[1]

C

The Court supplies not an iota of reasoning to support the holding that respondent's traffic infractions gave the police probable cause to search for the VIN. The Court is content simply to conclude that "the governmental interest in highway safety served by obtaining the VIN is of the first order." *Ante*, at 118. Although I agree that the government has a strong interest in promoting highway safety, see *Delaware* v. *Prouse*, *supra*, at 658, I fail to see just how the VIN search conducted here advanced that interest. Despite the Court's lengthy exposition on the variety of safety-related purposes served by the VIN,[2] respondent's car was not searched to further any of the identified interests. If the officers intended to identify what they considered to be an "unsafe" vehicle, that could have been done without searching respondent's car. Thus, the mere fact that the State utilizes the VIN in conjunction with regulations designed to promote

[1] Indeed, the facts of this case belie any suggestion that the VIN search was needed positively to identify respondent's vehicle. Officer McNamee did not wait to see respondent's vehicle registration certificate before he started to search respondent's car, and did not record the VIN he found in order to compare it with other identifying documents.

[2] The Court notes that "[t]he ease with which the VIN allows identification of a particular vehicle assists the various levels of government in many ways." *Ante*, at 111. As examples, the Court explains that "the VIN improves the efficacy of recall campaigns," "assists researchers in determining the risks of driving various makes and models of automobiles," helps to "reduc[e] the number of those injured in accidents who go uncompensated for lack of insurance," ensures "that automobile operators are driving safe vehicles," and "[b]y making automobile theft more difficult . . . safeguards not only property but also life and limb." *Ibid.*

highway safety does not give the police a reason to *search* for such information every time a motorist violates a traffic law.[3] Absent some reason to search for the VIN, the government's admittedly strong interest in promoting highway safety cannot validate the intrusion resulting from the *search* of respondent's vehicle.

III

The Court, relying on *Pennsylvania* v. *Mimms*, *supra*, and *Michigan* v. *Summers*, 452 U. S. 692 (1981), next attempts to support its holding on the ground that "[i]n light of the danger to the officers' safety [that would be] presented by returning respondent immediately to his car [to uncover the VIN,] the search to obtain the VIN was not prohibited by the Fourth Amendment." *Ante*, at 116. Neither cited decision supports this argument.

In *Summers*, police detained the occupant of a home being searched pursuant to a valid warrant. The Court held that this seizure was constitutional because it served several important law enforcement interests, including officer safety, and because the search warrant provided a reasonable basis for the police to determine that the occupant was engaged in criminal activity and should therefore be detained. 452 U. S., at 702–704. By contrast, here there was no reason for the officers to search the car to inspect the VIN. The officers knew only that respondent had committed minor traffic violations, and while this may have given them an *opportunity* to inspect the VIN, it did not provide a reason to *search* the interior of the car for it.

In *Mimms*, police stopped an automobile for a traffic infraction, and ordered the driver to step outside the vehicle. As the driver emerged, the officers noticed a large bulge

[3] By analogy, had respondent emerged from his car without his vehicle registration certificate or driver's license, I do not read the Court's opinion to hold that the police could have searched the passenger compartment in order to locate these documents, even though they also play important roles in the State's regulation of automobiles.

under his jacket, and after frisking him, discovered a loaded revolver. The Court held that because such actions protected officer safety, the police could legitimately order a driver out of his car when they made a lawful traffic stop. Unlike the situation in *Mimms*, the intrusion in this case—the search of respondent's vehicle—did not directly serve officer safety. Nevertheless, the Court finds that "[t]o have returned respondent immediately to the automobile [to clear the papers on the dashboard obscuring the VIN] would have placed the officers in the same situation that the holding in *Mimms* allows officers to avoid." *Ante*, at 116. Again, the Court forgets that the police, with *no reason* to search the interior, had *no reason* to return respondent to his car. Thus, the State's interest in protecting officer safety cannot validate the search.

Of course, if the officers had reasonable grounds to suspect that the traffic stop presented a threat to their safety, they would have been authorized to search respondent's vehicle for weapons. See *Michigan* v. *Long*, 463 U. S., at 1051. However, neither officer ever suggested that the situation posed any danger, and the court below specifically found that the facts "reveal no reason for the officer[s] . . . to act to protect [their] own safety." 63 N. Y. 2d, at 496, 472 N. E. 2d, at 1012. In the absence of even the slightest suspicion of danger, the search of respondent's car cannot be justified on grounds of officer safety.

IV

Finally, the Court finds that "[t]he 'critical' issue of the intrusiveness of the Government's action . . . also here weighs in favor of allowing the search." *Ante*, at 118. The Court's effort to minimize the extent of the intrusion, see *ante*, at 118–119, won't wash. Officer McNamee clearly *searched* respondent's car by opening the door and reaching into the passenger compartment to remove papers from the dashboard. Even if he did not engage in a full-scale excavation, this *search* exposed areas of the passenger compartment not visi-

ble from outside the vehicle. "The narrow intrusions involved in [*Terry* v. *Ohio*, 392 U. S. 1 (1968), and its progeny] were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the 'long-prevailing standards' of probable cause . . . only because these intrusions fell far short of the kind of intrusion associated with an arrest." *Dunaway* v. *New York*, 442 U. S. 200, 212 (1979). That the search conducted here was substantially more intrusive than an ordinary traffic stop starkly exposes the impropriety of the Court's strained effort to sanction McNamee's patently illegal search by the balancing approach. In *United States* v. *Place*, 462 U. S. 696, 721 (1983), JUSTICE BLACKMUN too noted his concern over the "emerging tendency on the part of the Court to convert the *Terry* decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable." Cf. 462 U. S., at 718 (BRENNAN, J., concurring in result); *Kolender* v. *Lawson*, 461 U. S. 352, 363 (1983) (BRENNAN, J., concurring); *Florida* v. *Royer*, 460 U. S. 491, 509 (1983) (BRENNAN, J., concurring in result).[4]

In any event, even if there had been only a limited search here that justified the Court in balancing the extent of the intrusion against the importance of the governmental interests allegedly served, this alone cannot legalize the *search* of respondent's car. In situations where the Court has approved of very limited intrusions on less than probable cause, the Court has always required that "the police officer . . . be

[4] "There are important reasons why balancing inquiries should not be conducted except in the most limited circumstances." *United States* v. *Place*, 462 U. S., at 718 (BRENNAN, J., concurring in result). "[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases." *Dunaway* v. *New York*, 442 U. S. 200, 213 (1979). As a general rule, "the Framers of the [Fourth] Amendment balanced the interests involved and decided that a seizure is reasonable only if supported by a judicial warrant based on probable cause." *United States* v. *Place*, *supra*, at 722 (BLACKMUN, J., concurring in judgment).

able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* v. *Ohio*, 392 U. S. 1, 21 (1968); see *Michigan* v. *Long*, *supra*, at 1049 (police must have reasonable belief that suspect is dangerous and may gain immediate control of weapons to search areas of passenger compartment where weapons may be placed or hidden); *Delaware* v. *Prouse*, 440 U. S., at 663 (police must have reasonable suspicion that motorist is unlicensed, that car is unregistered, or that either the vehicle or an occupant is otherwise subject to seizure, to stop automobile and detain driver); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881–882 (1975) (police must have reasonable suspicion that vehicle contains illegal aliens in order to stop the car and question occupants about citizenship). In this case, respondent's traffic infractions did not give the police a reason to search for the VIN, and the police offered no other justification that would reasonably warrant such an intrusion.

In sum, the Court's decision today is still another of its steps on the road to evisceration of the protections of the Fourth Amendment. The Court's willingness to sanction a car search that the police had no probable cause to conduct highlights this trend. However, I find the Court's holding particularly disturbing because none of the factors the Court relies upon—the lack of reasonable expectation of privacy in the VIN, the officers' observing respondent commit minor traffic violations, the government's interest both in promoting highway safety and in shielding officers from danger, and the allegedly limited nature of the search that took place—gave the police *any reason* to search for the VIN. The Court once again disregards the admonition of Justice Jackson:

> "[Fourth Amendment rights] are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the

individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar* v. *United States*, 338 U. S. 160, 180 (1949) (dissenting opinion).[5]

JUSTICE WHITE, with whom JUSTICE STEVENS joins, dissenting.

The police officer involved in this case entered the interior of respondent's automobile, an area protected by the Fourth Amendment against unreasonable searches and seizures. A car may be searched without a warrant if there is probable cause to do so, but no one suggests that this precondition for a search existed here. The entry was solely to remove an obstruction that prevented the VIN from being seen from outside the car. The issue is whether the governmental interest in obtaining the VIN by entering a protected area is sufficient to outweigh the owner's privacy interest in the interior of the car. I am unprepared, at least for the reasons the Court gives, to conclude that it is.

Had Class remained in his car and refused an officer's order (1) to turn over his registration certificate and (2) to remove the article obscuring the VIN, there would have been no more justification for entering the interior of the car and doing what was necessary to read the VIN than there would have been to enter and search for the registration certificate in the glove compartment. It may be that under our cases, Class could have been sanctioned for his refusal in such a case, but we have never held that his refusal would permit a search of the glove compartment. Even if it did, it would be different if there was no refusal at all, but just an entry to

[5] JUSTICE POWELL, in a concurring opinion joined by THE CHIEF JUSTICE, would find that "[w]here the VIN is not visible from outside the vehicle or voluntarily disclosed by the driver, the officer may enter the vehicle to the extent necessary to read the VIN." *Ante*, at 120. Even were I to agree with this standard, in this case Officer McNamee searched respondent's car without ever asking him voluntarily to disclose the VIN's location.

find a registration certificate. If that is the case, this one is no different in kind: there was no refusal and nothing but a nonconsensual entry to search without probable cause and without emergent circumstances.

It makes no difference that the law requires the VIN to be visible from outside the car. Otherwise, a requirement that the VIN be carried in a prominent location in the trunk of the car would justify searches of that area whenever there was a stop for a traffic violation. I thus do not join the Court's opinion, which in effect holds that a search of a car for the VIN is permissible whenever there is a legal stop, whether or not the driver is even asked to consent.

Nevertheless, Class was unlicensed and the police were not constitutionally required merely to give him a citation and let his unlicensed driving continue. Arguably, one of the officers legally could have driven the car away himself and in the process noticed the gun; the car could have been towed and inspected at the station; or Class could have been arrested for driving without a license and the entire car searched. But the Court eschews these possible alternative rationales and rests its judgment on grounds that I do not accept.

UNITED STATES v. KOECHER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84-1922. Argued January 15, 1986—Decided February 25, 1986

755 F. 2d 1022, vacated and remanded.

Christopher J. Wright argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Andrew J. Pincus*.

Gerard E. Lynch argued the cause for respondent. With him on the brief were *George Kannar* and *Charles S. Sims*.

PER CURIAM.

The judgment of the United States Court of Appeals for the Second Circuit is vacated, and the case is remanded to the United States District Court for the Southern District of New York with instructions to dismiss the cause as moot.

TEXAS *v.* McCULLOUGH

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 84-1198. Argued December 10, 1985—Decided February 26, 1986

Respondent was tried before a jury in a Texas District Court and convicted of murder. He elected to be sentenced by the jury, as was his right under Texas law, and the jury imposed a 20-year sentence. The trial judge then granted respondent's motion for a new trial on the basis of prosecutorial misconduct. Respondent was retried before a jury, with the same trial judge presiding, and again was found guilty. This time he elected to have the judge fix his sentence, and she imposed a 50-year sentence. To justify the longer sentence, the judge entered the following findings of fact: the testimony of two state witnesses who had not testified at the first trial added to the credibility of the State's key witness and detracted from the credibility of respondent and a defense witness; the two new witnesses' testimony directly implicated respondent in the commission of the murder and shed new light upon his life and conduct; and it was learned for the first time on retrial that respondent had been released from prison only four months before the murder. The Texas Court of Appeals reversed and sentenced respondent to 20 years' imprisonment, considering itself bound by *North Carolina* v. *Pearce*, 395 U. S. 711, wherein it was held that the Due Process Clause of the Fourteenth Amendment prevented increased sentences on retrial when the increase was motivated by the sentencing judge's vindictiveness, and that to show the absence of vindictiveness the reasons for imposing the increased sentence must affirmatively appear. The Texas Court of Criminal Appeals, while holding that, as a matter of procedure, the case should have been remanded to the trial judge for resentencing, also held that under *Pearce* vindictiveness must be presumed even though a jury had fixed punishment at the first trial and a judge had fixed it at the second trial.

Held: The Due Process Clause was not violated by the trial judge's imposition of a greater sentence on retrial. Pp. 137-144.

(a) The facts of this case provide no basis for a *Pearce* presumption of vindictiveness. In contrast to *Pearce*, respondent's second trial came about because the trial judge herself concluded that the prosecutor's misconduct required it. Granting respondent's motion for new trial hardly suggests any vindictiveness on the judge's part toward him. The presumption is also inapplicable because different sentencers assessed the

varying sentences, the second sentencer providing an on-the-record, logical, nonvindictive reason for the longer sentence. Pp. 137–140.

(b) Even if the *Pearce* presumption were to apply here, the trial judge's findings on imposing the longer sentence overcame that presumption. Those findings clearly constituted "objective information justifying the increased sentence," *United States* v. *Goodwin*, 457 U. S. 368, 375. Pp. 141–144.

720 S. W. 2d 89, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 144. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 145.

Randall L. Sherrod argued the cause for petitioner. With him on the brief was *Deane C. Watson*.

Jeff Blackburn argued the cause *pro hac vice* for respondent. With him on the brief were *Michael B. Charlton* and *John Manr*.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Due Process Clause of the Fourteenth Amendment was violated when the defendant in a state court received a greater sentence on retrial where the earlier sentence was imposed by the jury, the trial judge granted the defendant's motion for a new trial, the defendant requested that in the second trial the judge fix the sentence, and the judge entered findings of fact justifying the longer sentence.

I

In 1980, Sanford James McCullough was tried before a jury in the Randall County, Texas, District Court and convicted of murder. McCullough elected to be sentenced by the jury, as

**Acting Solicitor General Fried, Assistant Attorney General Trott, Deputy Solicitor General Frey, Alan I. Horowitz,* and *Patty Merkamp Stemler* filed a brief for the United States as *amicus curiae* urging reversal.

was his right under Texas law. Tex. Code Crim. Proc. Ann., Art. 37.07 (Vernon 1981). The jury imposed a 20-year sentence. Judge Naomi Harney, the trial judge, then granted McCullough's motion for a new trial on the basis of prosecutorial misconduct.

Three months later, McCullough was retried before a jury, with Judge Harney again presiding. At this trial, the State presented testimony from two witnesses who had not testified at the first trial that McCullough rather than his accomplices had slashed the throat of the victim. McCullough was again found guilty by a jury. This time, he elected to have his sentence fixed by the trial judge. Judge Harney sentenced McCullough to 50 years in prison and, upon his motion, made findings of fact as to why the sentence was longer than that fixed by the jury in the first trial. She found that in fixing the sentence she relied on new evidence about the murder that was not presented at the first trial and hence never made known to the sentencing jury. The findings focused specifically on the testimony of two new witnesses, Carolyn Hollison McCullough and Willie Lee Brown, which "had a direct effect upon the strength of the State's case at both the guilt and punishment phases of the trial." App. to Pet. for Cert. A–23. In addition, Judge Harney explained that she learned for the first time on retrial McCullough had been released from prison only four months before the later crime had been committed. *Ibid.* Finally, the judge candidly stated that, had she fixed the first sentence, she would have imposed more than 20 years. *Id.*, at A–24.[1]

On appeal, the Texas Court of Appeals reversed and resentenced McCullough to 20 years' imprisonment. 680 S. W. 2d 493 (1983). That court considered itself bound by this Court's decision in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), and held that a longer sentence upon retrial could be

[1] Later Judge Harney sentenced two other defendants for their role in the same murder. She gave both defendants 50-year sentences identical to McCullough's.

imposed only if it was based upon conduct of the defendant occurring after the original trial.[2] Petitioner sought review in the Texas Court of Criminal Appeals, and that court limited its review to whether the Texas Court of Appeals had authority to limit respondent's sentence to 20 years. 720 S. W. 2d 89 (1983). The court concluded that, as a matter of procedure, the case should have been remanded to the trial judge for resentencing. On petitioner's motion for rehearing, the court concluded that under *Pearce* vindictiveness must be presumed even though a jury had fixed punishment at the first trial and a judge had fixed it at the second trial. We granted certiorari. 472 U. S. 1007 (1985). We reverse.

II

In *North Carolina* v. *Pearce, supra,* the Court placed a limitation on the power of a sentencing authority to increase a sentence after reconviction following a new trial. It held that the Due Process Clause of the Fourteenth Amendment prevented increased sentences when that increase was motivated by vindictiveness on the part of the sentencing judge. The Court stated:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a de-

[2] The Texas Court of Appeals in applying *Pearce* observed:

"This case demonstrates the excessive scope of *Pearce*. The trial judge filed detailed and valid reasons for the heavier punishment and there is nothing in the record to indicate that the increased punishment resulted from vindictiveness. However, the reasons affirmatively supported by evidence are based on events occurring during or after the crime but before the first trial. Although those matters were not brought out at the first trial, they cannot be used [under *Pearce*] to increase punishment because none occurred *after* the first trial." 680 S. W. 2d, at 496, n. 2.

> fendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
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> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, *the reasons for his doing so must affirmatively appear.*" *Id.*, at 725–726 (emphasis added).

Beyond doubt, vindictiveness of a sentencing judge is the evil the Court sought to prevent rather than simply enlarged sentences after a new trial. The *Pearce* requirements thus do not apply in every case where a convicted defendant receives a higher sentence on retrial. Like other "judicially created means of effectuating the rights secured by the [Constitution]," *Stone* v. *Powell*, 428 U. S. 465, 482 (1976), we have restricted application of *Pearce* to areas where its "objectives are thought most efficaciously served," 428 U. S., at 487. Accordingly, in each case, we look to the need, under the circumstances, to "guard against vindictiveness in the resentencing process." *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 25 (1973) (emphasis omitted). For example, in *Moon* v. *Maryland*, 398 U. S. 319 (1970), we held that *Pearce* did not apply when the defendant conceded and it was clear that vindictiveness had played no part in the enlarged sentence. In *Colten* v. *Kentucky*, 407 U. S. 104 (1972), we saw no need for applying the presumption when the second court in a two-tier trial system imposed a longer sentence. In *Chaffin*, *supra*, we held *Pearce* not applicable where a *jury* imposed the increased sentence on retrial. Where the prophylactic rule of *Pearce* does not apply, the defendant may still obtain relief if he can show actual vindictiveness upon resentencing. *Wasman* v. *United States*, 468 U. S. 559, 569 (1984).

The facts of this case provide no basis for a presumption of vindictiveness. In contrast to *Pearce*, McCullough's second trial came about because the trial judge herself concluded that the prosecutor's misconduct required it. Granting

McCullough's motion for a new trial hardly suggests any vindictiveness on the part of the judge towards him. "[U]nlike the judge who has been reversed," the trial judge here had "no motivation to engage in self-vindication." *Chaffin*, 412 U. S., at 27. In such circumstances, there is also no justifiable concern about "institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals." *Ibid.* In granting McCullough's new trial motion, Judge Harney went on record as agreeing that his "claims" had merit. Presuming vindictiveness on this basis alone would be tantamount to presuming that a judge will be vindictive towards a defendant merely because he seeks an acquittal. Thus, in support of its position, the dissent conjures up visions of judges who view defendants as temerarious for filing motions for new trials, *post*, at 151, and who are "annoyed" at being forced "to sit through . . . trial[s] whose result[s] [are] foregone conclusion[s]," *post*, at 150. We decline to adopt the view that the judicial temperament of our Nation's trial judges will suddenly change upon the filing of a successful post-trial motion. The presumption of *Pearce* does not apply in situations where the possibility of vindictiveness is this speculative, particularly since the presumption may often "operate in the absence of any proof of an improper motive and thus . . . block a legitimate response to criminal conduct," *United States* v. *Goodwin*, 457 U. S. 368, 373 (1982). Indeed, not even "apprehension of such a retaliatory motivation on the part of the sentencing judge," *Pearce*, 395 U. S., at 725, could be present in this case. McCullough was entitled by law to choose to be sentenced by either a judge or a jury. Faced with that choice, on retrial McCullough chose to be sentenced by Judge Harney. There can hardly be more emphatic affirmation of his appraisal of Judge Harney's fairness than this choice. Because there was no realistic motive for vindictive sentencing, the *Pearce* presumption was inappropriate.

The presumption is also inapplicable because different sentencers assessed the varying sentences that McCullough received. In such circumstances, a sentence "increase" cannot truly be said to have taken place. In *Colten* v. *Kentucky*, *supra*, which bears directly on this case, we recognized that when different sentencers are involved,

> "[i]t may often be that the [second sentencer] will impose a punishment more severe than that received from the [first]. But it no more follows that such a sentence is a vindictive penalty for seeking a [new] trial than that the [first sentencer] imposed a lenient penalty." *Id.*, at 117.

Here, the second sentencer provides an on-the-record, wholly logical, nonvindictive reason for the sentence. We read *Pearce* to require no more, particularly since trial judges must be accorded broad discretion in sentencing, see *Wasman*, *supra*, at 563–564.

In this case, the trial judge stated candidly her belief that the 20-year sentence respondent received initially was unduly lenient in light of significant evidence not before the sentencing jury in the first trial. On this record, that appraisal cannot be faulted. In any event, nothing in the Constitution prohibits a state from permitting such discretion to play a role in sentencing.[3]

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[3] *Pearce* itself apparently involved different judges presiding over the two trials, a fact that has led some courts to conclude by implication that the presumption of vindictiveness applies even where different sentencing judges are involved. See, *e. g.*, *United States* v. *Hawthorne*, 532 F. 2d 318, 323 (CA3), cert. denied, 429 U. S. 894 (1976). That fact, however, may not have been drawn to the Court's attention and does not appear anywhere in the Court's opinion in *Pearce*. Clearly the Court did not focus on it as a consideration for its holding. See *Hardwick* v. *Doolittle*, 558 F. 2d 292, 299 (CA5 1977), cert. denied, 434 U. S. 1049 (1978). Subsequent opinions have also elucidated the basis for the *Pearce* presumption. We held in *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973), for instance, that the presumption derives from the judge's "personal stake in the prior conviction," *id.*, at 27, a statement clearly at odds with reading *Pearce* to answer

III

Even if the *Pearce* presumption were to apply here, we hold that the findings of the trial judge overcome that presumption. Nothing in *Pearce* is to be read as precluding a rebuttal of intimations of vindictiveness. As we have explained, *Pearce* permits "a sentencing authority [to] justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings." *Wasman*, 468 U. S., at 572; see also *id.*, at 573 (POWELL, J., concurring in part and concurring in judgment). This language, however, was never intended to describe exhaustively all of the possible circumstances in which a sentence increase could be justified. Restricting justifications for a sentence increase to *only* "events that occurred subsequent to the original sentencing proceedings" could in some circumstances lead to absurd results. The Solicitor General provides the following hypothetical example:

> "Suppose . . . that a defendant is convicted of burglary, a non-violent, and apparently first, offense. He is sentenced to a short prison term or perhaps placed on probation. Following a successful appeal and a conviction on retrial, it is learned that the defendant has been using an alias and in fact has a long criminal record that includes other burglaries, several armed robbery convictions, and a conviction for murder committed in the course of a burglary. None of the reasons underlying *Pearce* in any way justifies the perverse result that the defendant receive no greater sentence in light of this information than he originally received when he was thought to be a first offender." Brief for United States as *Amicus Curiae* 26.

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the two-sentencer issue. We therefore decline to read *Pearce* as governing this issue. See also n. 4, *infra*.

We agree with the Solicitor General and find nothing in *Pearce* that would require such a bizarre conclusion.[4] Perhaps then the reach of *Pearce* is best captured in our statement in *United States* v. *Goodwin*, 457 U. S., at 374:

> "In sum, the Court [in *Pearce*] applied a presumption of vindictiveness, which may be overcome only by objective information . . . justifying the increased sentence."

Nothing in the Constitution requires a judge to ignore "objective information . . . justifying the increased sentence." In refusing to apply *Pearce* retroactively we observed that "the *Pearce* prophylactic rules assist in guaranteeing the propriety of the sentencing phase of the criminal process." *Michigan* v. *Payne*, 412 U. S. 47, 52–53 (1973). Realistically, if anything this focus would *require* rather than *forbid* the consideration of the relevant evidence bearing on sentence since

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[4] The dissent contends that this objection "was considered in *Pearce* and rejected there." *Post*, at 155. In fact, the issue, like the two-sentencer issue just discussed, was not before the Court because in neither *Pearce* nor its companion case did the State offer "any reason or justification" for the increased sentence. 395 U. S., at 726. Moreover, *Pearce* was argued on the assumption that the Constitution either absolutely forbade or permitted increased sentences on retrial. None of the briefs advanced the intermediate position ultimately relied upon by the Court that the Constitution permits increased sentences only in certain circumstances. Cf. Brief for American Civil Liberties Union et al. as *Amici Curiae* in *North Carolina* v. *Pearce*, O. T. 1968, No. 413, pp. 8–10 (quoted *post*, at 155–156) (arguing that "[t]o subject an accused to the risk of harsher punishment . . . as a condition of appeal . . . is an unconstitutional condition which violates the Due Process Clauses of the Fifth and Fourteenth Amendments"). Thus, as the Solicitor General points out, "in formulating the standard set forth in *Pearce*, the Court was completely without the 'sharpen[ing of] the presentation of issues' provided by the adversary process, 'upon which the court so largely depends for illumination of difficult constitutional issues.'" Brief for United States as *Amicus Curiae* 22–23 (quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962)). But even if *Pearce* could be read to speak definitively to this situation, we are not reluctant to tailor judicially created rules to implement constitutional guarantees, like the *Pearce* rule, see *Michigan* v. *Payne*, 412 U. S. 47, 51 (1973), when the need to do so becomes apparent. Cf. *United States* v. *Leon*, 468 U. S. 897 (1984).

"'[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.'" *Wasman*, *supra*, at 564 (quoting *Williams* v. *New York*, 337 U. S. 241, 247 (1949)).

To be sure, a defendant may be more reluctant to appeal if there is a risk that new, probative evidence supporting a longer sentence may be revealed on retrial. But this Court has never recognized this "chilling effect" as sufficient reason to create a constitutional prohibition against considering relevant information in assessing sentences. We explained in *Chaffin* v. *Stynchcombe*, 412 U. S., at 29, that "the Court [in *Pearce*] intimated no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they might have on the right to appeal." We see no reason to depart from this conclusion.

It is clear that the careful explanation by the trial judge for the sentence imposed here fits well within our prior holdings. Judge Harney relied on the testimony of two new witnesses which she concluded "had a direct effect upon the strength of the State's case at both the guilt and punishment phases of the trial." App. to Pet. for Cert. A-23. The judge supported this conclusion with specific findings, noting that "[t]he testimony [of the two new witnesses] added to the credibility of the State's key witness . . . and detracted from the credibility of Dennis McCullough and [respondent] who both testified for the defense." *Ibid.* The judge also found that "[t]he testimony of these two witnesses directly implicated the defendant in the commission of the murder in question and showed what part he played in committing the offense." *Id.*, at A-22. Finally, the judge concluded that their testimony "shed new light upon [McCullough's] life, conduct, and his mental and moral propensities." *Id.*, at A-23. These findings clearly constitute "objective information . . . justifying the increased sentence."

Judge Harney also found that McCullough had been leased from confinement only four months before the mur *ibid.*, another obviously relevant fact not before the sent ing jury in the first trial. We have recognized the state' gitimate interest "in dealing in a harsher manner with t who by repeated criminal acts have shown that they are ply incapable of conforming to the norms of society as es lished by its criminal law." *Rummel* v. *Estelle*, 445 U 263, 276 (1980). A defendant who commits new cri within four months of his release from prison clearly pos greater danger to society than one who commits crimes often. To foreclose reliance on the kind of pertinent information developed in the second trial would be wl incompatible with modern sentencing standards. This objective information also amply justified McCullough' creased sentence.

In setting aside the second sentence, the Texas Cou Appeals recognized that the new information bore le mately on the appropriate sentence to impose, but conclu reluctantly, that *Pearce* precluded reliance on this infor tion. It is appropriate that we clarify the scope and thru *Pearce*, and we do so here.

The case is remanded to the Texas Court of Criminal peals for further proceedings not inconsistent with opinion.

Reversed and reman

JUSTICE BRENNAN, concurring in the judgment.

After respondent was sentenced to 20 years' imprisonn upon his conviction for murder, Judge Harney grantec spondent's motion for a new trial based on prosecut misconduct. Under these circumstances, I believe that possibility that an increased sentence upon retrial resu from judicial vindictiveness is sufficiently remote that presumption established in *North Carolina* v. *Pearce*, U. S. 711 (1969), should not apply here. Because resp ent has not shown that the 50-year sentence imposec

Judge Harney after respondent's retrial resulted from actual vindictiveness for having successfully attacked his first conviction, I would reverse the judgment below.

I emphasize, however, that were I able to find that vindictiveness should be presumed here, I would agree with JUSTICE MARSHALL that "the reasons offered by Judge Harney [were] far from adequate to rebut any presumption of vindictiveness." *Post*, at 152. The Court's dictum to the contrary, see *ante*, at 141–144, serves in my view only to distort the holding of *Pearce*.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

With little more than a passing nod to the considerations that prompted this Court, in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), to safeguard due process rights by establishing a prophylactic rule of presumptive vindictiveness, the majority first refuses to apply that rule in a case where those considerations are clearly relevant, and then proceeds to rob that rule of any vitality even in cases in which it will be applied. Because I believe that under the rationale of *Pearce* we must presume vindictiveness here and that the findings of the trial judge with respect to respondent's second sentence should not be permitted to defeat that presumption, I must dissent.

I

After the jury in Sanford James McCullough's first trial imposed a sentence of 20 years' imprisonment, the Randall County Criminal District Attorney thought McCullough had been treated much too leniently. A local newspaper quoted the prosecutor as commenting: "A guy's life ought to be worth more than that." Amarillo Globe-Times, Sept. 24, 1980, p. 25, col. 1; Record, Defendant's Exhibit 5. Luckily for the District Attorney, McCullough was not satisfied with the results of his first trial either. McCullough filed a mo-

tion with the trial court requesting a new trial and raising two challenges to Judge Harney's conduct of the first trial:

> "I.
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> "The Trial Court erred in not granting Defendant's Motion for Mistrial subsequent to the prosecutor's improper jury argument concerning the fact that the jury, if they only gave the Defendant ten to fifteen years in the penitentiary, would look outside their window at the end of that period of time and wonder if the criminal out there was the Defendant.
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> "II.
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> "The Trial Court erred in overruling Defendant's Motion for Mistrial subsequent to the prosecutor's cross-examination of the witness, DENNIS McCULLOUGH, as to a purported 'confession' given by a Co-Defendant, KENNETH McCULLOUGH. Such conduct constituted error in light of *Bruton vs. United States*[, 391 U. S. 123 (1968)]." Defendant's Motion for a New Trial, App. 17.

When Judge Harney entertained this motion on October 6, 1980, there was no argument to be heard. The Assistant District Attorney noted the State's full agreement to a retrial. 2 Tr. 432–433 (Oct. 6, 1980). The next day's newspaper made the prosecutor's motives clear.

> "In a rare occurrence, the Randall County Criminal District Attorney Randy Sherrod said yesterday he has joined a defense motion calling for a new trial in the case of Sanford James McCullough, who was found guilty Sept. 24 of the murder of George Preston Small and sentenced to 20 years in the penitentiary.
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> "Sherrod said it was the first time in his experience that he had been in agreement with a defense attorney in granting a new trial.
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> "He said one of the biggest factors influencing his decision to join the defense motion was the possibility of a

> *[sic]* getting a harsher sentence in a new trial." Amarillo Daily News, Oct. 7, 1980, p. C–1, col. 1; Record, Defendant's Exhibit 2.

See also Amarillo Globe-Times, Oct. 7, 1980, p. 21, cols. 1–6 ("DA Agrees to New Trial for Man Convicted in Murder Case"); Record, Defendant's Exhibit 1.

In the face of this publicity, the defense moved for a change of venue, but its motion was denied. 2 Tr. 518 (Nov. 7, 1980). Having failed in this attempt to ensure that McCullough's second jury had no knowledge of his conviction and sentence in the first trial, the defense postponed its election of sentencer until it could hear the results of *voir dire*. 3 Tr. 7–8 (Dec. 10–12, 1980). During *voir dire* at least 13 prospective jurors were excused after indicating that their knowledge of the first trial's results would affect their ability to give McCullough a fair trial. *Id.*, at 17–33. Immediately after the close of *voir dire*, the defendant elected to be sentenced by the trial judge if convicted. *Id.*, at 122; App. 25–26. McCullough's election likely was affected by his counsel's belief that while *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973), had made the rule of *North Carolina* v. *Pearce*, *supra*, inapplicable to resentencing by a different jury, that rule would still bar Judge Harney from imposing a sentence greater than the 20 years defendant had received in his first trial. But fears that *voir dire* had not been sufficient to purge the jury of all knowledge of McCullough's first trial could well have played as great a part in that decision.

After McCullough was convicted a second time, Judge Harney heard argument on sentencing. Defense counsel urged that "there being no additional evidence on the part of the conduct or action of the Defendant subsequent to the prior conviction," the court was bound by *North Carolina* v. *Pearce*, *supra*, to impose a sentence of not more than 20 years. 2 Tr. 273–274 (Dec. 10–12, 1980). The prosecution replied that because defendant had elected to be sentenced by the trial judge, *North Carolina* v. *Pearce* would not bar

the court "from assessing a range of punishment greater than what was received by a jury." 2 Tr. 277 (Dec. 10–12, 1980). Judge Harney sentenced McCullough to 50 years' imprisonment. In response to defendant's motion, she later filed an order in which, while holding the rule of *North Carolina* v. *Pearce* inapplicable, she gave her reasons for imposing a heavier sentence in order to make remand unnecessary should the Court of Criminal Appeals hold the rule applicable. App. 33. She found that the testimony of two new witnesses, Carolyn Sue Hollison McCullough and Willie Lee Brown, implicated defendant in the crime, added to the credibility of certain prosecution witnesses, and detracted from that of certain defense witnesses. The testimony also "shed new light upon the defendant's life, conduct, and his mental and moral propensities," especially his "propensity to commit brutal crimes against persons and to constitute a future threat to society." *Id.*, at 34. Judge Harney noted further that had defendant "elected to have the court set his punishment at the first trial, the court would have assessed more than the twenty (20) year sentence imposed by the jury." *Ibid.* Finally, the court found:

> "Upon retrial after having been found guilty of murder for a second time by a jury and after having made known to the court that he had been involved in numerous criminal offenses and had served time in the penitentiary, the defendant never produced, or even attempted to produce, any evidence that he intended to change his life style, habits, or conduct, or that he had made any effort whatsoever toward rehabilitating himself. Again upon retrial, the [sic] failed to show this court any sign or indication of refraining from criminal conduct in the future, nor did he give any indication upon retrial that he no longer posed a violent and continuing threat to our society." *Id.*, at 35.

II

A

At the outset, one must reject the majority's suggestion, *ante*, at 139, that the fact that McCullough elected to be sentenced by Judge Harney has any relevance to the question whether *Pearce* requires us to presume that the increase in his sentence was the product of the judge's vindictiveness. The message of *Pearce* is not that a defendant should be given a chance to choose the sentencing agency least likely to increase his sentence as a price for his decision to pursue an appeal. Rather, *Pearce* held that under the Due Process Clause, "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." 395 U. S., at 725. Thus, in *Chaffin* v. *Stynchcombe*, *supra*, where the defendant had been tried and sentenced by a jury at his first trial, the Court assumed that if the defendant had elected to be tried and sentenced by a judge at his retrial, *Pearce* would circumscribe the sentence the judge could impose should defendant be convicted again. See 412 U. S., at 33, n. 21.

Had McCullough's first conviction been overturned on appeal, rather than nullified by Judge Harney's order for a retrial, it would make no sense to allow McCullough's decision to be sentenced by the court to deprive him of the safeguards against judicial vindictiveness established in *Pearce*. Whether or not that judge had been the sentencing authority in the first proceeding, we would fear that the judge would have had a "personal stake in the prior conviction" and a "motivation to engage in self-vindication," as well as a wish to "discourag[e] what [s]he regards as meritless appeals." *Chaffin*, *supra*, at 27. Moreover, it would not be appropriate to find a waiver of McCullough's due process right in his exercise of his statutory right to elect his sentencer, especially in a case where defendant's choice might have been influenced by a desire to avoid being sentenced by a jury from a

community that had been exposed to the considerable publicity surrounding his first trial.

B

In *Pearce*, recognition of the possibility that personal animosity and institutional prejudices might infect a trial judge's resentencing of a defendant after a successful appeal led this Court to establish a rule of presumptive vindictiveness. The question here is whether these same personal and institutional prejudices may infect a judge's sentencing following a retrial that the judge herself ordered.

The majority reasons that "[i]n contrast to *Pearce*, McCullough's second trial came about because the trial judge herself concluded that the prosecutor's misconduct required it. Granting McCullough's motion for a new trial hardly suggests any vindictiveness on the part of the judge towards him." *Ante*, at 138–139. Such an observation betrays not only an insensitivity to the motives that might underlie any trial judge's decision to grant a motion for a new trial, but also a blindness to the peculiar circumstances surrounding the decision to grant a retrial in this case.

The mere grant of a new trial motion can in no way be considered a guarantee, or even an indication, that the judge will harbor no resentment toward defendant as a result of his decision to exercise his statutory right to make such a motion. Even where a trial judge believes that the assignments of error are valid, she may still resent being given a choice between publicly conceding such errors and waiting for her judgment to be put to the test on appeal. This will be especially true when the errors alleged, however substantial as a matter of constitutional or statutory law, are considered by the judge not to cast doubt on the defendant's guilt. In such a case, the judge might well come to defendant's sentencing annoyed at having been forced to sit through a trial whose result was a foregone conclusion, and quite ready to vent that annoyance by giving the defendant a sentence stiffer than he

otherwise would have received. Even if a trial judge is confident that her conduct of a trial was error-free, she may still grant a new trial if she has any doubts as to whether the courts reviewing her ruling will agree. In this situation, the feelings of resentment already alluded to might be augmented by the judge's annoyance with the courts that review her judgments.

Turning to the facts here, I believe the possibility of vindictiveness is even greater in this case than in the general run of cases in which a trial judge has granted a retrial. It is far from clear that Judge Harney's decision to grant a new trial was made out of either solicitude for McCullough or recognition of the merits of his claims. Defendant's motion was uncontested and, if the press coverage is any indication, the judge's decision to grant it was at least as much a boon to the prosecution as it was to defendant. Indeed, the most cynical might even harbor suspicions that the judge shared the District Attorney's hope that a retrial would permit the imposition of a sentence more commensurate with the prosecution's view of the heinousness of the crime for which McCullough had been brought to bar. At any rate, one can imagine that when it fell to Judge Harney to sentence McCullough after his second conviction, his decision to seek a retrial after receiving such a comparatively light sentence from his first jury was counted against him.

Whether any of these considerations actually played any part in Judge Harney's decision to give McCullough a harsher sentence after his retrial is not the issue here, just as it was not the issue in *Pearce*. The point is that the possibility they did play such a part is sufficiently real, and proving actual prejudice, sufficiently difficult, that a presumption of vindictiveness is as appropriate here as it was in *Pearce*. See Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606, 612, and n. 22 (1965) (noting difficulties faced by defendant seeking to show actual vindictiveness).

III

The majority holds that "[e]ven if the *Pearce* presumption were to apply here, . . . the findings of the trial judge overcome that presumption." *Ante*, at 141. I find the reasons offered by Judge Harney far from adequate to rebut any presumption of vindictiveness. Moreover, I believe that by holding those reasons sufficient, the Court effectively eviscerates the effort made in *Pearce* to ensure both that vindictiveness against a defendant for having successfully attacked his first conviction "play no part in the sentence he receives after a new trial," 395 U. S., at 725, and that the "defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Ibid.*

A

The presumption of vindictiveness established in *Pearce* was made rebuttable. The Court there held that where a judge decides to impose a more severe sentence on a defendant after a new trial,

> "the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.*, at 726.

Whether this formulation allowed a sentencing judge to rely on any event occurring after a defendant's first sentencing or only on actual "conduct" by the defendant since that time might have been open to some speculation, at least until *Wasman* v. *United States*, 468 U. S. 559 (1984), resolved that "matter of semantics," *id.*, at 573 (POWELL, J., concurring in part and concurring in judgment). But the Court was quite clear that the conduct or event used to justify an in-

creased sentence must have taken place after the original sentencing proceeding. Indeed, the majority's insistence upon this restriction led to the refusal of JUSTICE WHITE to subscribe to one part of the Court's opinion. He wrote:

> "I join the Court's opinion except that in my view Part II–C should authorize an increased sentence on retrial based on any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding." *Pearce*, 395 U. S., at 751 (concurring in part).

The Court's rejection of the standard proposed by JUSTICE WHITE is no doubt explained by the majority's desire to "protect against reasonable apprehension of vindictiveness that could deter a defendant from appealing a first conviction." *Wasman*, 468 U. S., at 574 (POWELL, J., concurring in part and concurring in judgment). As a majority of the Court recently recognized, the need to eliminate this apprehension was as much a concern of the Court in *Pearce* as actual vindictiveness. See 468 U. S., at 574; *id.*, at 574 (BRENNAN, J., concurring in judgment); *id.*, at 574 (STEVENS, J., concurring in judgment). Recognizing that in the course of any retrial, or merely by virtue of the passage of time, new information relating to events prior to a defendant's original sentencing would become available to a sentencer after retrial, the Court decided that allowing this information to justify a harsher sentence would make the intended guarantee of fairness sound quite hollow to the defendant deciding whether to pursue his statutory right of appeal.

B

By finding the reasons given by Judge Harney adequate to rebut a presumption of vindictiveness, the majority not only disregards the clear rule in *Pearce*. It announces a new regime in which the "chill" that plagued defendants in the days before *Pearce* will once again be felt by those deciding whether to contest their convictions.

I do not doubt Judge Harney's assertions that the testimony of Carolyn Sue Hollison McCullough and Willie Lee Brown strengthened the prosecution's case against McCullough by corroborating evidence and testimony that had already been produced at his first trial and by adding a few brush strokes to the portrayal in the first proceeding of McCullough's role in the crime and of his character. However, "[i]n the natural course of events upon the retrial of a case, one might normally expect the Government to have available additional testimony and evidence of a defendant's guilt if for no other reason than that the Government has had additional time to prepare and refine its presentation." *United States* v. *Tucker*, 581 F. 2d 602, 606, n. 8 (CA7 1978). That such new evidence will be available to a trial judge sentencing a defendant after a retrial is thus inevitable. And if that judge wishes to punish defendant for having asserted his right to a fair trial, she will always be able to point to that new information as the basis for any increase in defendant's sentence the second time around. As one authority has noted: "If a court on retrial could justify an increased sentence on the ground that it now had additional knowledge concerning the defendant's participation in the offense, then the *Pearce* limitation could be evaded in almost every case." 3 W. LaFave & J. Israel, Criminal Procedure 176 (1984). This limitation would be even more easily avoided if a trial judge could rebut a presumption of vindictiveness merely by indicating that she would have given defendant a harsher sentence at his first trial had she been given the chance. That leaves, as the only "new" information to support 30 additional years' imprisonment, the fact that between his two trials, McCullough did not evince a desire to rehabilitate himself. Surely something more is required.

There is neither any reason nor any need for us to believe that dishonest and unconstitutionally vindictive judges actually hold sway in American courtrooms, and even less call for us to doubt the integrity of Judge Harney. The message of

Pearce is that the fear of such vindictiveness is real enough. And a defendant plagued by such an apprehension is likely to take small comfort in any presumption of vindictiveness established for his benefit if the means of rebutting that presumption will always be within the easy reach of the judge who will sentence him should the challenge to his conviction prove unsuccessful. As far as defendants are concerned, today's decision, by permitting references to new, often cumulative, information about the crime charged to satisfy *Pearce*'s demand for "objective information concerning identifiable conduct on the part of the defendant," 395 U. S., at 726, nullifies the guarantee held out in *Pearce*.

Persuaded by the Solicitor General's hypothetical involving a defendant whose prior convictions are not apparant to the trial judge until after defendant's appeal and retrial, the majority concludes that "[r]estricting justifications for a sentence increase to *only* 'events that occurred subsequent to the original sentencing proceedings' could in some circumstances lead to absurd results." *Ante*, at 141. However, this objection to such a restriction was considered in *Pearce* and rejected there, as it should be here. As one *amici curiae* brief advised the *Pearce* Court:

> "In the unlikely event that some prior offense escaped the notice of the court when the accused was under consideration for sentencing, moreover, the government is free to bring a separate proceeding under its habitual offender (recidivism) acts. To the little extent that states may be concerned that sentences generally tend to be imposed in some instances without due consideration of the nature of the offense or the character of the accused, moreover, each state is constitutionally free to make ample provision for staffing and presentence reports to guard against unduly lenient sentencing to whatever extent that government feels to be appropriate. Indeed, each state presumably has done this to the precise extent that it has been genuinely concerned with the secur-

ing of sentences which are both fair to the accused and adequate for the public safety." Brief for American Civil Liberties Union et al. as *Amici Curiae* in *North Carolina* v. *Pearce*, O. T. 1968, No. 413, pp. 9–10.

IV

A lot has happened since the final day of the October 1968 Term, the day *North Carolina* v. *Pearce* was handed down. But nothing has happened since then that casts any doubt on the need for the guarantee of fairness that this Court held out to defendants in *Pearce*. The majority today begins by denying respondent the promise of that guarantee even though his case clearly calls for its application. The Court then reaches out to render the guarantee of little value to all defendants, even to those whose plight was the explicit concern of the *Pearce* Court in 1969. To renege on the guarantee of *Pearce* is wrong. To do so while pretending not to is a shame. I dissent.

NIX, WARDEN v. WHITESIDE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1321. Argued November 5, 1985—Decided February 26, 1986

In preparing for his Iowa state-court trial on a murder charge, respondent consistently told his attorney that although he had not actually seen a gun in the victim's hand when he stabbed the victim, he was convinced that the victim had a gun. Respondent's companions who were present during the stabbing told counsel that they had not seen a gun, and no gun was found. Counsel advised respondent that the existence of a gun was not necessary to establish a claim of self-defense, and that only a reasonable belief that the victim had a gun nearby was necessary even though no gun was actually present. However, during preparation for direct examination shortly before trial, respondent for the first time told counsel that he had seen "something metallic" in the victim's hand. When asked about this, respondent said: "If I don't say I saw a gun, I'm dead." On respondent's insisting that he would testify that he saw "something metallic," counsel told him that if he testified falsely, it would be counsel's duty to advise the court that he felt respondent was committing perjury, and that counsel probably would be allowed to impeach that testimony and would seek to withdraw from representation if respondent insisted on committing perjury. Respondent ultimately testified as originally contemplated, admitting on cross-examination that he had not actually seen a gun in the victim's hand. After the jury found respondent guilty, respondent moved for a new trial, claiming that he had been deprived of a fair trial by counsel's admonitions not to state that he saw a gun or "something metallic." The court denied the motion after a hearing, and the Iowa Supreme Court affirmed the conviction, holding that counsel's actions were not only permissible, but were required under Iowa law. Respondent then sought federal habeas corpus relief, alleging that he had been denied effective assistance of counsel by his attorney's refusal to allow him to testify as he proposed. The District Court denied relief, but the Court of Appeals reversed, concluding that an intent to commit perjury, communicated to counsel, does not alter a defendant's right to effective assistance of counsel, and that counsel's threatened violation of his client's confidences violated the "effective representation" standards set forth in *Strickland* v. *Washington*, 466 U. S. 668.

Held: The Sixth Amendment right of a criminal defendant to assistance of counsel is not violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial. Pp. 164–176.

(a) *Strickland* v. *Washington*, *supra*, held that to obtain relief by way of federal habeas corpus on a claim of a deprivation of effective assistance of counsel under the Sixth Amendment, the movant must establish both serious attorney error and prejudice. The Sixth Amendment inquiry is into whether the attorney's conduct was "reasonably effective." A court must be careful not to narrow the wide range of attorney conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into a state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts. Pp. 164–166.

(b) Counsel's conduct here fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment. Counsel's duty of loyalty to, and advocacy of, the defendant's cause is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain his client's objectives, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. Moreover, accepted norms require that a lawyer disclose his client's perjury and frauds upon the court. Iowa's Code also expressly permits withdrawal from representation as an appropriate response of an attorney when the client threatens to commit perjury. Pp. 166–171.

(c) The Court of Appeals' holding is not supported by the record since counsel's action, at most, deprived respondent of his contemplated perjury. Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely, and the right to counsel includes no right to have a lawyer who will cooperate with planned perjury. There was no breach of professional duty in counsel's admonition to respondent that he would disclose respondent's perjury to the court. Pp. 171–175.

(d) As a matter of law, counsel's conduct here cannot establish the prejudice required for relief under the *Strickland* inquiry. The "conflict of interests" involved was one imposed on the attorney by the client's proposal to commit the crime of fabricating testimony. This is not the kind of conflict of interest that would render the representation constitutionally infirm. Pp. 175–176.

744 F. 2d 1323, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 176. BLACKMUN, J., filed an opinion concurring in the judgment, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 177. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 190.

Brent R. Appel, Deputy Attorney General of Iowa, argued the cause for petitioner. With him on the briefs were *Thomas J. Miller*, Attorney General, and *Thomas D. McGrane*, Assistant Attorney General.

Patrick Reilly Grady, by appointment of the Court, 471 U. S. 1097, argued the cause and filed a brief for respondent.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Sixth Amendment right of a criminal defendant to assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial.[1]

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*Briefs of *amici curiae* urging reversal were filed for the Legal Foundation of America by *Jean Fleming Powers* and *David Crump*; and for the National Association of Criminal Defense Lawyers by *Michael L. Bender* and *Bruce M. Lyons*.

John C. Shepherd, *Michael Franck*, and *George Kuhlman* filed a brief for the American Bar Association as *amicus curiae*.

[1] Although courts universally condemn an attorney's assisting in presenting perjury, Courts of Appeals have taken varying approaches on how to deal with a client's insistence on presenting perjured testimony. The Seventh Circuit, for example, has held that an attorney's refusal to call the defendant as a witness did not render the conviction constitutionally infirm where the refusal to call the defendant was based on the attorney's belief that the defendant would commit perjury. *United States* v. *Curtis*, 742 F. 2d 1070 (1984). The Third Circuit found a violation of the Sixth Amendment where the attorney could not state any basis for her belief that defendant's proposed alibi testimony was perjured. *United States ex rel. Wilcox* v. *Johnson*, 555 F. 2d 115 (1977). See also *Lowery* v. *Cardwell*, 575 F. 2d 727 (CA9 1978) (withdrawal request in the middle of a bench trial, immediately following defendant's testimony).

I

A

Whiteside was convicted of second-degree murder by a jury verdict which was affirmed by the Iowa courts. The killing took place on February 8, 1977, in Cedar Rapids, Iowa. Whiteside and two others went to one Calvin Love's apartment late that night, seeking marihuana. Love was in bed when Whiteside and his companions arrived; an argument between Whiteside and Love over the marihuana ensued. At one point, Love directed his girlfriend to get his "piece," and at another point got up, then returned to his bed. According to Whiteside's testimony, Love then started to reach under his pillow and moved toward Whiteside. Whiteside stabbed Love in the chest, inflicting a fatal wound.

Whiteside was charged with murder, and when counsel was appointed he objected to the lawyer initially appointed, claiming that he felt uncomfortable with a lawyer who had formerly been a prosecutor. Gary L. Robinson was then appointed and immediately began an investigation. Whiteside gave him a statement that he had stabbed Love as the latter "was pulling a pistol from underneath the pillow on the bed." Upon questioning by Robinson, however, Whiteside indicated that he had not actually seen a gun, but that he was convinced that Love had a gun. No pistol was found on the premises; shortly after the police search following the stabbing, which had revealed no weapon, the victim's family had removed all of the victim's possessions from the apartment. Robinson interviewed Whiteside's companions who were present during the stabbing, and none had seen a gun during the incident. Robinson advised Whiteside that the existence of a gun was not necessary to establish the claim of self-defense, and that only a reasonable belief that the victim had a gun nearby was necessary even though no gun was actually present.

Until shortly before trial, Whiteside consistently stated to Robinson that he had not actually seen a gun, but that he was

convinced that Love had a gun in his hand. About a week before trial, during preparation for direct examination, Whiteside for the first time told Robinson and his associate Donna Paulsen that he had seen something "metallic" in Love's hand. When asked about this, Whiteside responded:

> "[I]n Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead."

Robinson told Whiteside that such testimony would be perjury and repeated that it was not necessary to prove that a gun was available but only that Whiteside reasonably believed that he was in danger. On Whiteside's insisting that he would testify that he saw "something metallic" Robinson told him, according to Robinson's testimony:

> "[W]e could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it; . . . I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony." App. to Pet. for Cert. A-85.

Robinson also indicated he would seek to withdraw from the representation if Whiteside insisted on committing perjury.[2]

Whiteside testified in his own defense at trial and stated that he "knew" that Love had a gun and that he believed Love was reaching for a gun and he had acted swiftly in self-defense. On cross-examination, he admitted that he had not

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[2] Whiteside's version of the events at this pretrial meeting is considerably more cryptic:

"Q. And as you went over the questions, did the two of you come into conflict with regard to whether or not there was a weapon?

"A. I couldn't—I couldn't say a conflict. But I got the impression at one time that maybe if I didn't go along with—with what was happening, that it was no gun being involved, maybe that he will pull out of my trial." App. to Pet. for Cert. A-70.

actually seen a gun in Love's hand. Robinson presented evidence that Love had been seen with a sawed-off shotgun on other occasions, that the police search of the apartment may have been careless, and that the victim's family had removed everything from the apartment shortly after the crime. Robinson presented this evidence to show a basis for Whiteside's asserted fear that Love had a gun.

The jury returned a verdict of second-degree murder, and Whiteside moved for a new trial, claiming that he had been deprived of a fair trial by Robinson's admonitions not to state that he saw a gun or "something metallic." The trial court held a hearing, heard testimony by Whiteside and Robinson, and denied the motion. The trial court made specific findings that the facts were as related by Robinson.

The Supreme Court of Iowa affirmed respondent's conviction. *State* v. *Whiteside*, 272 N. W. 2d 468 (1978). That court held that the right to have counsel present all appropriate defenses does not extend to using perjury, and that an attorney's duty to a client does not extend to assisting a client in committing perjury. Relying on DR 7–102(A)(4) of the Iowa Code of Professional Responsibility for Lawyers, which expressly prohibits an attorney from using perjured testimony, and Iowa Code § 721.2 (now Iowa Code § 720.3 (1985)), which criminalizes subornation of perjury, the Iowa court concluded that not only were Robinson's actions permissible, but were required. The court commended "both Mr. Robinson and Ms. Paulsen for the high ethical manner in which this matter was handled."

B

Whiteside then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. In that petition Whiteside alleged that he had been denied effective assistance of counsel and of his right to present a defense by Robinson's refusal to allow him to testify as he had proposed. The District Court denied the writ. Accepting the state trial court's factual finding that

Whiteside's intended testimony would have been perjurious, it concluded that there could be no grounds for habeas relief since there is no constitutional right to present a perjured defense.

The United States Court of Appeals for the Eighth Circuit reversed and directed that the writ of habeas corpus be granted. *Whiteside* v. *Scurr*, 744 F. 2d 1323 (1984). The Court of Appeals accepted the findings of the trial judge, affirmed by the Iowa Supreme Court, that trial counsel believed with good cause that Whiteside would testify falsely and acknowledged that under *Harris* v. *New York*, 401 U. S. 222 (1971), a criminal defendant's privilege to testify in his own behalf does not include a right to commit perjury. Nevertheless, the court reasoned that an intent to commit perjury, communicated to counsel, does not alter a defendant's right to effective assistance of counsel and that Robinson's admonition to Whiteside that he would inform the court of Whiteside's perjury constituted a threat to violate the attorney's duty to preserve client confidences.[3] According to the Court of Appeals, this threatened violation of client confidences breached the standards of effective representation set down in *Strickland* v. *Washington*, 466 U. S. 668 (1984). The court also concluded that *Strickland*'s prejudice requirement was satisfied by an implication of prejudice from the conflict between Robinson's duty of loyalty to his client and his ethical duties. A petition for rehearing en banc was denied, with Judges Gibson, Ross, Fagg, and Bowman dissenting. *Whiteside* v. *Scurr*, 750 F. 2d 713 (1984). We granted certiorari, 471 U. S. 1014 (1985), and we reverse.

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[3] The Court of Appeals agreed with the District Court's finding that respondent properly exhausted his claims in state court. Although respondent had pressed his claim before the Supreme Court of Iowa as a denial of his due process right to a fair trial, and not as a denial of his Sixth Amendment right to counsel, the Court of Appeals accepted the District Court's conclusion that the Sixth Amendment claim was exhausted, since further proceedings would be futile.

II

A

The right of an accused to testify in his defense is of relatively recent origin. Until the latter part of the preceding century, criminal defendants in this country, as at common law, were considered to be disqualified from giving sworn testimony at their own trial by reason of their interest as a party to the case. See, *e. g.*, *Ferguson* v. *Georgia*, 365 U. S. 570 (1961); R. Morris, Studies in the History of American Law 59–60 (2d ed. 1959). Iowa was among the states that adhered to this rule of disqualification. *State* v. *Laffer*, 38 Iowa 422 (1874).

By the end of the 19th century, however, the disqualification was finally abolished by statute in most states and in the federal courts. Act of Mar. 16, 1878, ch. 37, 20 Stat. 30–31; see Thayer, A Chapter of Legal History in Massachusetts, 9 Harv. L. Rev. 1, 12 (1895). Although this Court has never explicitly held that a criminal defendant has a due process right to testify in his own behalf, cases in several Circuits have so held, and the right has long been assumed. See, *e. g.*, *United States* v. *Curtis*, 742 F. 2d. 1070, 1076 (CA7 1984); *United States* v. *Bifield*, 702 F. 2d 342, 349 (CA2), cert. denied, 461 U. S. 931 (1983). We have also suggested that such a right exists as a corollary to the Fifth Amendment privilege against compelled testimony, see *Harris* v. *New York*, *supra*, at 225. See also *Ferguson*, 365 U. S., at 598–601 (concurring opinion of Frankfurter, J.); *id.*, at 601–603 (concurring opinion of Clark, J.).

B

In *Strickland* v. *Washington*, we held that to obtain relief by way of federal habeas corpus on a claim of a deprivation of effective assistance of counsel under the Sixth Amendment, the movant must establish both serious attorney error and prejudice. To show such error, it must be established that the assistance rendered by counsel was constitutionally defi-

cient in that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U. S., at 687. To show prejudice, it must be established that the claimed lapses in counsel's performance rendered the trial unfair so as to "undermine confidence in the outcome" of the trial. *Id.*, at 694.

In *Strickland*, we acknowledged that the Sixth Amendment does not require any particular response by counsel to a problem that may arise. Rather, the Sixth Amendment inquiry is into whether the attorney's conduct was "reasonably effective." To counteract the natural tendency to fault an unsuccessful defense, a court reviewing a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at 689. In giving shape to the perimeters of this range of reasonable professional assistance, *Strickland* mandates that

> "[p]revailing norms of practice as reflected in American Bar Association Standards and the like, . . . are guides to determining what is reasonable, but they are only guides." *Id.*, at 688.

Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel. When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts. In some future case challenging attorney conduct in the course of a state-court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment,

in defining the proper scope and limits on that conduct. Here we need not face that question, since virtually all of the sources speak with one voice.

C

We turn next to the question presented: the definition of the range of "reasonable professional" responses to a criminal defendant client who informs counsel that he will perjure himself on the stand. We must determine whether, in this setting, Robinson's conduct fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment.

In *Strickland*, we recognized counsel's duty of loyalty and his "overarching duty to advocate the defendant's cause," *Ibid.* Plainly, that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. This principle has consistently been recognized in most unequivocal terms by expositors of the norms of professional conduct since the first Canons of Professional Ethics were adopted by the American Bar Association in 1908. The 1908 Canon 32 provided:

> "No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. . . . He must . . . observe and advise his client to observe the statute law . . . ."

Of course, this Canon did no more than articulate centuries of accepted standards of conduct. Similarly, Canon 37, adopted in 1928, explicitly acknowledges as an exception to the attorney's duty of confidentiality a client's announced intention to commit a crime:

> "The announced intention of a client to commit a crime is not included within the confidences which [the attorney] is bound to respect."

These principles have been carried through to contemporary codifications[4] of an attorney's professional responsibility. Disciplinary Rule 7–102 of the Model Code of Professional Responsibility (1980), entitled "Representing a Client Within the Bounds of the Law," provides:

> "(A) In his representation of a client, a lawyer shall not:
>
> . . . . .
>
> "(4) Knowingly use perjured testimony or false evidence.
>
> . . . . .
>
> "(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

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[4] There currently exist two different codifications of uniform standards of professional conduct. The Model Code of Professional Responsibility was originally adopted by the American Bar Association in 1969, and was subsequently adopted (in many cases with modification) by nearly every state. The more recent Model Rules of Professional Conduct were adopted by the American Bar Association in 1983. Since their promulgation by the American Bar Association, the Model Rules have been adopted by 11 States: Arizona, Arkansas, Delaware, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, and Washington. See 1 ABA/BNA Lawyers' Manual on Professional Conduct 334 (1984–1985) (New Jersey); *id.*, at 445 (Arizona); *id.*, at 855 (Montana, Minnesota); *id.*, at 924 (Missouri); *id.*, at 961 (Delaware, Washington); *id.*, at 1026 (North Carolina); *id.*, at 1127 (Arkansas); 2 *id.*, at 14 (1986) (New Hampshire, Nevada). Iowa is one of the States that adopted a form of the Model Code of Professional Responsibility, but has yet to adopt the Model Rules. See Iowa Code of Professional Responsibility for Lawyers (1985).

This provision has been adopted by Iowa, and is binding on all lawyers who appear in its courts. See Iowa Code of Professional Responsibility for Lawyers (1985). The more recent Model Rules of Professional Conduct (1983) similarly admonish attorneys to obey all laws in the course of representing a client:

> "*RULE 1.2* Scope of Representation
>
> . . . . .
>
> "(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."

Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct also adopt the specific exception from the attorney-client privilege for disclosure of perjury that his client intends to commit or has committed. DR 4–101(C)(3) (intention of client to commit a crime); Rule 3.3 (lawyer has duty to disclose falsity of evidence even if disclosure compromises client confidences). Indeed, both the Model Code and the Model Rules do not merely *authorize* disclosure by counsel of client perjury; they *require* such disclosure. See Rule 3.3(a)(4); DR 7–102(B)(1); *Committee on Professional Ethics and Conduct of Iowa State Bar Assn.* v. *Crary*, 245 N. W. 2d 298 (Iowa 1976).

These standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence.[5] This special duty of an attorney to prevent and dis-

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[5] The brief of *amicus* American Bar Association, which supports petitioner, makes this point, referring to the history of codes of professional conduct which it has promulgated. The preamble to the most current version of the ethical standards recognizes the difficult choices that may confront an attorney who is sensitive to his concurrent duties to his client and to the legal system:

close frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice. See 1 W. Burdick, Law of Crime §§ 293, 300, 318–336 (1946).

The offense of perjury was a crime recognized at common law, *id.*, at p. 475, and has been made a felony in most states by statute, including Iowa. Iowa Code § 720.2 (1985). See generally 4 C. Torcia, Wharton's Criminal Law § 631 (14th ed. 1981). An attorney who aids false testimony by questioning a witness when perjurious responses can be anticipated, risks prosecution for subornation of perjury under Iowa Code § 720.3 (1985).

It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct. Model Rules of Professional Conduct, Rule 3.3, Comment; Wolfram, Client Perjury, 50 S. Cal. L. Rev. 809, 846 (1977). A statement directly in point is found in the commentary to the Model Rules of Professional Conduct under the heading "False Evidence":

> "When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer *should seek to persuade the client that the evidence should not be offered* or, if it has been offered, that its false character should immediately be disclosed." Model Rules of Professional Conduct, Rule 3.3, Comment (1983) (emphasis added).

"Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules." Preamble, Model Rules of Professional Conduct, p. 10 (1983).

The commentary thus also suggests that an attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response to the conduct of a client who has actually given perjured testimony. Similarly, the Model Rules and the commentary, as well as the Code of Professional Responsibility adopted in Iowa expressly permit withdrawal from representation as an appropriate response of an attorney when the client threatens to commit perjury. Model Rules of Professional Conduct, Rule 1.16(a)(1), Rule 1.6, Comment (1983); Code of Professional Responsibility, DR 2-110(B), (C) (1980). Withdrawal of counsel when this situation arises at trial gives rise to many difficult questions including possible mistrial and claims of double jeopardy.[6]

The essence of the brief *amicus* of the American Bar Association reviewing practices long accepted by ethical lawyers,

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[6] In the evolution of the contemporary standards promulgated by the American Bar Association, an early draft reflects a compromise suggesting that when the disclosure of intended perjury is made during the course of trial, when withdrawal of counsel would raise difficult questions of a mistrial holding, counsel had the option to let the defendant take the stand but decline to affirmatively assist the presentation of perjury by traditional direct examination. Instead, counsel would stand mute while the defendant undertook to present the false version in narrative form in his own words unaided by any direct examination. This conduct was thought to be a signal at least to the presiding judge that the attorney considered the testimony to be false and was seeking to disassociate himself from that course. Additionally, counsel would not be permitted to discuss the known false testimony in closing arguments. See ABA Standards for Criminal Justice, Proposed Standard 4-7.7 (2d ed. 1980). Most courts treating the subject rejected this approach and insisted on a more rigorous standard, see, *e. g.*, *United States* v. *Curtis*, 742 F. 2d 1070 (CA7 1984); *McKissick* v. *United States*, 379 F. 2d 754 (CA5 1967); *Dodd* v. *Florida Bar*, 118 So. 2d 17, 19 (Fla. 1960). The Eighth Circuit in this case and the Ninth Circuit have expressed approval of the "free narrative" standards. *Whiteside* v. *Scurr*, 744 F. 2d 1323, 1331 (CA8 1984); *Lowery* v. *Cardwell*, 575 F. 2d 727 (CA9 1978).

The Rule finally promulgated in the current Model Rules of Professional Conduct rejects any participation or passive role whatever by counsel in allowing perjury to be presented without challenge.

is that under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony. This, of course, is consistent with the governance of trial conduct in what we have long called "a search for truth." The suggestion sometimes made that "a lawyer must believe his client not judge him" in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury.

D

Considering Robinson's representation of respondent in light of these accepted norms of professional conduct, we discern no failure to adhere to reasonable professional standards that would in any sense make out a deprivation of the Sixth Amendment right to counsel. Whether Robinson's conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a "threat" to withdraw from representation and disclose the illegal scheme, Robinson's representation of Whiteside falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland*.

The Court of Appeals assumed for the purpose of the decision that Whiteside would have given false testimony had counsel not intervened; its opinion denying a rehearing en banc states:

> "[W]e presume that appellant would have testified falsely.
>
> . . . . .
>
> ". . . Counsel's actions prevented [Whiteside] from testifying falsely. We hold that counsel's action deprived appellant of due process and effective assistance of counsel.
>
> . . . . .
>
> "Counsel's actions also impermissibly compromised appellant's right to testify in his own defense by conditioning continued representation by counsel and confidential-

> ity upon appellant's restricted testimony." 750 F. 2d., at 714–715.

While purporting to follow the Iowa's highest court "on all questions of state law," 744 F. 2d., at 1330, the Court of Appeals reached its conclusions on the basis of federal constitutional due process and right to counsel.

The Court of Appeals' holding that Robinson's "action deprived [Whiteside] of due process and effective assistance of counsel" is not supported by the record since Robinson's action, at most, deprived Whiteside of his contemplated perjury. Nothing counsel did in any way undermined Whiteside's claim that he believed the victim was reaching for a gun. Similarly, the record gives no support for holding that Robinson's action "also impermissibly compromised [Whiteside's] right to testify in his own defense by conditioning continued representation . . . and confidentiality upon [Whiteside's] *restricted* testimony." The record in fact shows the contrary: (a) that Whiteside did testify, and (b) he was "restricted" or restrained only from testifying falsely and was aided by Robinson in developing the basis for the fear that Love was reaching for a gun. Robinson divulged no client communications until he was compelled to do so in response to Whiteside's post-trial challenge to the quality of his performance. We see this as a case in which the attorney successfully dissuaded the client from committing the crime of perjury.

Paradoxically, even while accepting the conclusion of the Iowa trial court that Whiteside's proposed testimony would have been a criminal act, the Court of Appeals held that Robinson's efforts to persuade Whiteside not to commit that crime were improper, *first*, as forcing an impermissible choice between the right to counsel and the right to testify; and, *second*, as compromising client confidences because of Robinson's threat to disclose the contemplated perjury.[7]

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[7] The Court of Appeals also determined that Robinson's efforts to persuade Whiteside to testify truthfully constituted an impermissible threat to testify against his own client. We find no support for a threat to testify

Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*. In *Harris* v. *New York*, we assumed the right of an accused to testify "in his own defense, or to refuse to do so" and went on to hold:

> "[T]hat privilege cannot be construed to include the right to commit perjury. See *United States* v. *Knox*, 396 U. S. 77 (1969); cf. *Dennis* v. *United States*, 384 U. S. 855 (1966). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully . . . ." 401 U. S., at 225.

In *Harris* we held the defendant could be impeached by prior contrary statements which had been ruled inadmissible under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Harris* and other cases make it crystal clear that there is no right whatever—constitutional or otherwise—for a defendant to use false evidence. See also *United States* v. *Havens*, 446 U. S. 620, 626–627 (1980).

The paucity of authority on the subject of any such "right" may be explained by the fact that such a notion has never been responsibly advanced; the right to counsel includes no right to have a lawyer who will cooperate with planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment.

Robinson's admonitions to his client can in no sense be said to have forced respondent into an *impermissible* choice between his right to counsel and his right to testify as he proposed for there was no *permissible* choice to testify falsely. For defense counsel to take steps to persuade a criminal defendant to testify truthfully, or to withdraw, deprives the defendant of neither his right to counsel nor the right to

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against Whiteside while he was acting as counsel. The record reflects testimony by Robinson that he had admonished Whiteside that if he withdrew he "probably would be allowed to attempt to impeach that particular testimony," if Whiteside testified falsely. The trial court accepted this version of the conversation as true.

testify truthfully. In *United States* v. *Havens*, *supra*, we made clear that "when defendants testify, they must testify truthfully or suffer the consequences." *Id.*, at 626. When an accused proposes to resort to perjury or to produce false evidence, one consequence is the risk of withdrawal of counsel.

On this record, the accused enjoyed continued representation within the bounds of reasonable professional conduct and did in fact exercise his right to testify; at most he was denied the right to have the assistance of counsel in the presentation of false testimony. Similarly, we can discern no breach of professional duty in Robinson's admonition to respondent that he would disclose respondent's perjury to the court. The crime of perjury in this setting is indistinguishable in substance from the crime of threatening or tampering with a witness or a juror. A defendant who informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury would have no "right" to insist on counsel's assistance or silence. Counsel would not be limited to advising against that conduct. An attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct. See *Clark* v. *United States*, 289 U. S. 1, 15 (1933). In short, the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. No system of justice worthy of the name can tolerate a lesser standard.

The rule adopted by the Court of Appeals, which seemingly would require an attorney to remain silent while his client committed perjury, is wholly incompatible with the established standards of ethical conduct and the laws of Iowa and contrary to professional standards promulgated by that State. The position advocated by petitioner, on the con-

trary, is wholly consistent with the Iowa standards of professional conduct and law, with the overwhelming majority of courts,[8] and with codes of professional ethics. Since there has been no breach of any recognized professional duty, it follows that there can be no deprivation of the right to assistance of counsel under the *Strickland* standard.

E

We hold that, as a matter of law, counsel's conduct complained of here cannot establish the prejudice required for relief under the second strand of the *Strickland* inquiry. Although a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U. S., at 694. According to *Strickland*, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.* The *Strickland* Court noted that the "benchmark" of an ineffective-assistance claim is the fairness of the adversary proceeding, and that in judging prejudice and the likelihood of a different outcome, "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Id.*, at 695.

Whether he was persuaded or compelled to desist from perjury, Whiteside has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury. Even if we were to assume that

[8] See *United States* v. *Curtis*, 742 F. 2d 1070 (CA7 1984); *Committee on Professional Ethics* v. *Crary*, 245 N. W. 2d 298 (Iowa 1976); *State* v. *Robson*, 290 N. C. 56, 224 S. E. 2d 174 (1976); *Thornton* v. *United States*, 357 A. 2d 429 (D. C. 1976); *State* v. *Henderson*, 205 Kan. 231, 468 P. 2d 136 (1970); *McKissick* v. *United States*, 379 F. 2d 754 (CA5 1967); *In re King*, 7 Utah 2d 258, 322 P. 2d 1095 (1958); *In re Carroll*, 244 S. W. 2d 474 (Ky. 1951); *Hinds* v. *State Bar*, 19 Cal. 2d 87, 119 P. 2d 134 (1941). Contra, *Whiteside* v. *Scurr*, 744 F. 2d 1323 (CA8 1984); *Lowery* v. *Cardwell*, 575 F. 2d 727 (CA9 1978).

the jury might have believed his perjury, it does not follow that Whiteside was prejudiced.

In his attempt to evade the prejudice requirement of *Strickland*, Whiteside relies on cases involving conflicting loyalties of counsel. In *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), we held that a defendant could obtain relief without pointing to a specific prejudicial default on the part of his counsel, provided it is established that the attorney was "actively represent[ing] conflicting interests." *Id.*, at 350.

Here, there was indeed a "conflict," but of a quite different kind; it was one imposed on the attorney by the client's proposal to commit the crime of fabricating testimony without which, as he put it, "I'm dead." This is not remotely the kind of conflict of interests dealt with in *Cuyler* v. *Sullivan*. Even in that case we did not suggest that all multiple representations necessarily resulted in an active conflict rendering the representation constitutionally infirm. If a "conflict" between a client's proposal and counsel's ethical obligation gives rise to a presumption that counsel's assistance was prejudicially ineffective, every guilty criminal's conviction would be suspect if the defendant had sought to obtain an acquittal by illegal means. Can anyone doubt what practices and problems would be spawned by such a rule and what volumes of litigation it would generate?

Whiteside's attorney treated Whiteside's proposed perjury in accord with professional standards, and since Whiteside's truthful testimony could not have prejudiced the result of his trial, the Court of Appeals was in error to direct the issuance of a writ of habeas corpus and must be reversed.

Reversed.

JUSTICE BRENNAN, concurring in the judgment.

This Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics.

Accordingly, it is not surprising that the Court emphasizes that it "must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." *Ante*, at 165. I read this as saying in another way that the Court *cannot* tell the States or the lawyers in the States how to behave in their courts, unless and until federal rights are violated.

Unfortunately, the Court seems unable to resist the temptation of sharing with the legal community its vision of ethical conduct. But let there be no mistake: the Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law. As JUSTICE BLACKMUN observes, *that* issue is a thorny one, *post*, at 177–178, but it is not an issue presented by this case. Lawyers, judges, bar associations, students, and others should understand that the problem has not now been "decided."

I join JUSTICE BLACKMUN's concurrence because I agree that respondent has failed to prove the kind of prejudice necessary to make out a claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984).

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, concurring in the judgment.

How a defense attorney ought to act when faced with a client who intends to commit perjury at trial has long been a controversial issue.[1] But I do not believe that a federal

[1] See, *e. g.*, Callan & David, Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System, 29 Rutgers L. Rev. 332 (1976); Rieger, Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues, 70 Minn. L. Rev. 121 (1985); compare, *e. g.*, Freedman, Professional Responsibility of the Criminal De-

habeas corpus case challenging a state criminal conviction is an appropriate vehicle for attempting to resolve this thorny problem. When a defendant argues that he was denied effective assistance of counsel because his lawyer dissuaded him from committing perjury, the only question properly presented to this Court is whether the lawyer's actions deprived the defendant of the fair trial which the Sixth Amendment is meant to guarantee. Since I believe that the respondent in this case suffered no injury justifying federal habeas relief, I concur in the Court's judgment.

I

On February 7, 1977, Emmanual Charles Whiteside stabbed Calvin Love to death. At trial, Whiteside claimed self-defense. On direct examination, he testified that Love's bedroom, where the stabbing had occurred, was "[v]ery much dark," App. 48, and that he had stabbed Love during an argument because he believed that Love was about to attack him with a weapon:

> "Q. Did you think that Calvin had a gun?
> "A. Most definitely I thought that.
> "Q. Why did you think that?
> "A. Because of Calvin's reputation, his brother's reputation, because of the prior conversation that Calvin and I had, I didn't have no other choice but to think he had a gun. And when he told his girl friend to give him his piece, I couldn't retreat." *Id.*, at 50.

Whiteside's testimony was consistent with that of other witnesses who testified that the room was dark, and that Love

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fense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966), and ABA Standards for Criminal Justice, Proposed Standard 4–7.7 (2d ed. 1980) (approved by the Standing Committee on Association Standards for Criminal Justice, but not yet submitted to the House of Delegates), with Noonan, The Purposes of Advocacy and the Limits of Confidentiality, 64 Mich. L. Rev. 1485 (1966), and ABA Model Rules of Professional Conduct, Rule 3.3 and comment, at 66–67 (1983).

had asked his girlfriend to get his "piece" (which they all believed referred to a weapon). See, *e. g.*, *id.*, at 17–18, 20, 36–37, and 42–45. No gun, however, was ever found.

Whiteside, who had been charged with first-degree murder, was convicted of second-degree murder, and sentenced to 40 years' imprisonment. He moved for a new trial, contending that his court-appointed attorneys, Gary Robinson and Donna Paulsen, had improperly coerced his testimony. Whiteside now claimed that he had seen a gun, but had been prevented from testifying to this fact.

At an evidentiary hearing on this motion, Whiteside testified that he had told Robinson at their first meeting that he had seen a weapon in Love's hand. Some weeks later, Robinson informed Whiteside that the weapon could not be found and, according to Whiteside, told him to say only that he thought he had seen a gun, rather than that he in fact had seen one. Whiteside "got the impression at one time that maybe if I didn't go along with—with what was happening, that it was no gun being involved, maybe that he will pull out of my trial." App. to Pet. for Cert. A70.

Robinson's testimony contradicted Whiteside's. According to Robinson, Whiteside did not initially claim to have seen a gun, but rather claimed only that he was convinced Love had had one. Roughly a week before the trial, however, in the course of reviewing Whiteside's testimony, Whiteside "made reference to seeing something 'metallic' . . . . I don't think he ever did say a gun." *Id.*, at A85:

> "And at the end Donna asked him about that, because that was the first time it had ever been mentioned either to her or to myself. His response to that was, 'in Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead.' I explained to him at that time that it was not necessary that the gun be physically present for self-defense, one; two, that to say that would be perjury on his part because he had never at any time indicated that there was a gun . . . ; three, that we could not allow

him to do that . . . ; four, I advised him that if he did do that it would be my duty to advise the Court of what he was doing . . . ; also, that I probably would be allowed to attempt to impeach that particular testimony. I told him that there was no need for him to lie about what had happened, that he had a good and valid defense on the facts as he had related them to us, and we felt we could present a good self-defense case on the facts he had stated to us." *Ibid.*

Robinson acknowledged that Whiteside's claim of self-defense would have been stronger had the gun been found, but explained that at trial "we tried to create a gun," through testimony from people who had seen Love carrying a gun on other occasions, through a stipulation that Love had been convicted of possession of a weapon, and through suggestions made during cross-examination of the State's witnesses that the initial police search had been too cursory to discover the weapon and that Love's girlfriend had removed it from the apartment prior to a second, more thorough, search. *Id.*, at A87–A88.

The trial court rejected Whiteside's motion for a new trial, "find[ing] the facts to be as testified to by Ms. Paulsen and Mr. Robinson." App. 57. The Iowa Supreme Court affirmed. *State* v. *Whiteside*, 272 N. W. 2d 468 (1978).

Whiteside then sought federal habeas relief in the United States District Court for the Southern District of Iowa. The parties agreed to rest on the record made in the state-court proceedings. Chief Judge Stuart held that the trial judge's factual finding that Whiteside would have committed perjury had he testified at trial actually to having seen a gun was fairly supported by the record and thus entitled to a presumption of correctness. See 28 U. S. C. § 2254(d). Since Whiteside had no constitutional right to perjure himself, he had been denied neither a fair trial nor effective assistance of counsel. App. to Pet. for Cert. A41.

The Court of Appeals for the Eighth Circuit reversed. *Whiteside* v. *Scurr*, 744 F. 2d 1323 (1984). The court recognized that the issue before it was not whether Robinson had behaved ethically,[2] but rather whether Whiteside had been deprived of effective assistance of counsel. *Id.*, at 1330. In the Court of Appeals' view, Robinson had breached the obligations of confidentiality and zealous advocacy imposed on defense counsel by the Sixth Amendment. In addition, the Court of Appeals concluded that Robinson's actions impermissibly compromised Whiteside's constitutional right to testify in his own behalf by conditioning continued representation and confidentiality on Whiteside's limiting his testimony.

The court recognized that, under *Strickland* v. *Washington*, 466 U. S. 668 (1984), a defendant must normally demonstrate both that his attorney's behavior was professionally unreasonable and that he was prejudiced by his attorney's unprofessional behavior. But it noted that *Strickland* v. *Washington* had recognized a "limited" presumption of prejudice when counsel is burdened by an actual conflict of interest that adversely affects his performance, see *id.*, at 692, quoting *Cuyler* v. *Sullivan*, 446 U. S. 335, 348, 350 (1980). Here, Whiteside had shown that Robinson's obligations under the Iowa Code of Professional Responsibility conflicted with his client's wishes, and his threat to testify against Whiteside had adversely affected Whiteside by "undermin[ing] the fun-

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[2] The court stated:

"That question is governed solely by the Iowa Code of Professional Responsibility, as it was in effect at the time of the trial in this case, and as it has been authoritatively interpreted by the Supreme Court of Iowa. The Supreme Court of Iowa is the last word on all questions of state law, and the Code of Professional Responsibility is a species of state law." 744 F. 2d, at 1330.

Thus, the court declined to address the question whether Robinson's actions were either compelled or condoned by Iowa law.

damental trust between lawyer and client" necessary for effective representation. 744 F. 2d, at 1330.

Petitioner's motion for rehearing en banc was denied by a vote of 5 to 4. *Whiteside* v. *Scurr*, 750 F. 2d 713 (CA8 1984). In dissent, Judge John R. Gibson, joined by Judges Ross, Fagg, and Bowman, argued that Whiteside had failed to show cognizable prejudice. *Cuyler* v. *Sullivan* was inapposite, both because finding a conflict of interest required making the untenable assumption that Whiteside possessed the right to testify falsely and because Robinson's threat had had no adverse effect on the trial since Whiteside testified fully in his defense. Moreover, the result of the proceeding should not have been different had Whiteside been permitted to testify as he wished.

A separate dissent by Judge Fagg, joined by Judges Ross, John R. Gibson, and Bowman, addressed the performance prong of *Strickland*. Robinson's admonition to Whiteside to testify truthfully simply could not be viewed as creating a conflict of interest; Robinson presented a full and zealous defense at trial; and, although Robinson's warning to Whiteside may have been "strident," 750 F. 2d, at 718, he had communicated with his client in a manner the client understood.

II

A

The District Court found that the trial judge's statement that "I find the facts to be as testified to by Ms. Paulsen and Mr. Robinson" was a factual finding that Whiteside "would have perjured himself if he had testified at trial that he actually saw a gun in his victim's hand." App. to Pet. for Cert. A42. This factual finding by the state court is entitled to a presumption of correctness under 28 U. S. C. § 2254(d), which Whiteside has not overcome.

Respondent has never attempted to rebut the presumption by claiming that the factfinding procedure employed by Iowa in considering new trial motions in any sense deprived him of

a full and fair hearing or failed to provide a sufficient basis for denying his motion.[3] Although respondent's argument to this Court in large part assumes that the precluded testimony would have been false, see Brief for Respondent 10–11, he contends, first, that the record does not fairly support the conclusion that he intended to perjure himself because he claimed in his first written statement that Love had been pulling a pistol from under a pillow at the time of the stabbing, see App. 55, and, second, that whether Robinson had sufficient knowledge to conclude he was going to commit perjury was a mixed question of law and fact to which the presumption of correctness does not apply.

Neither contention overcomes the presumption of correctness due the state court's finding. First, the trial judge's implicit decision not to credit the written statement is fairly supported by Robinson's testimony that the written statement had not been prepared by Whiteside alone and that, from the time of their initial meeting until the week before trial, Whiteside never again claimed to have seen a gun. See App. to Pet. for Cert. A78–A79. Second, the finding properly accorded a presumption of correctness by the courts below was that Whiteside's "proposed testimony would [have

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[3] Whiteside's motion for a new trial rested on his recantation of his testimony at trial. As a matter of Iowa law, when a trial judge is faced with a motion for a new trial based on a witness' recantation of his trial testimony, the judge must decide whether the recantation is believable:

"The trial court is not required to believe the recantation, but must make its decision on the basis of the whole trial and the matters presented on the hearing on the motion. Premised thereon, if it believes the [post conviction] statements . . . are false, and is not reasonably well satisfied that the testimony given by the witness on the trial was false, it should deny the motion, and it is not at liberty to shift upon the shoulders of another jury the responsibility to seek out the truth of that matter." *State* v. *Compiano*, 261 Iowa 509, 517, 154 N. W. 2d 845, 849 (1967).

See also, *e. g.*, *State* v. *Taylor*, 287 N. W. 2d 576, 578 (Iowa 1980); *State* v. *McGhee*, 280 N. W. 2d 436, 442 (Iowa 1979), cert. denied, 444 U. S. 1039 (1980); cf. *United States* v. *Johnson*, 327 U. S. 106, 110–111 (1946).

been] deliberately untruthful." *State* v. *Whiteside*, 272 N. W. 2d, at 471. The lower courts did not purport to presume the correctness of the Iowa Supreme Court's holding concerning the mixed question respondent identifies—whether Robinson's response to Whiteside's proposed testimony deprived Whiteside of effective representation.

B

The Court approaches this case as if the performance-and-prejudice standard requires us in every case to determine "the perimeters of [the] range of reasonable professional assistance," *ante*, at 165, but *Strickland* v. *Washington* explicitly contemplates a different course:

> "Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." 466 U. S., at 697.

See also *Hill* v. *Lockhart*, 474 U. S. 52, 60 (1985). In this case, respondent has failed to show any legally cognizable prejudice. Nor, as is discussed below, is this a case in which prejudice should be presumed.

The touchstone of a claim of prejudice is an allegation that counsel's behavior did something "to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland* v. *Washington*, 466 U. S., at 687. The only effect Robinson's threat had on Whiteside's trial is that Whiteside did not

testify, falsely, that he saw a gun in Love's hand.[4] Thus, this Court must ask whether its confidence in the outcome of Whiteside's trial is in any way undermined by the knowledge that he refrained from presenting false testimony. See *id.*, at 694.

This Court long ago noted: "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial." *In re Michael*, 326 U. S. 224, 227 (1945). When the Court has been faced with a claim by a defendant concerning prosecutorial use of such evidence, it has "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury" (footnote omitted). *United States* v. *Agurs*, 427 U. S. 97, 103 (1976). See also, *e. g.*, *Napue* v. *Illinois*, 360 U. S. 264, 269 (1959); *Pyle* v. *Kansas*, 317 U. S. 213, 216 (1942); *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935). Similarly, the Court has viewed a defendant's use of such testimony as so antithetical to our system of justice that it has permitted the prosecution to introduce otherwise inadmissible evidence to combat it. See, *e. g.*, *United States* v. *Havens*, 446 U. S. 620, 626–627 (1980); *Oregon* v. *Hass*, 420 U. S. 714, 720–723 (1975); *Harris* v. *New York*, 401 U. S. 222, 225–226 (1971); *Walder* v. *United States*, 347 U. S. 62, 65 (1954). The proposition that presenting false evidence could contribute to (or that withholding such evidence could detract from) the reliability of a criminal trial is simply untenable.

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[4] This is not to say that a lawyer's threat to reveal his client's confidences may never have other effects on a defendant's trial. Cf. *United States ex rel. Wilcox* v. *Johnson*, 555 F. 2d 115 (CA3 1977) (finding a violation of Sixth Amendment when an attorney's threat to reveal client's purported perjury caused defendant not to take the stand at all).

It is no doubt true that juries sometimes have acquitted defendants who should have been convicted, and sometimes have based their decisions to acquit on the testimony of defendants who lied on the witness stand. It is also true that the Double Jeopardy Clause bars the reprosecution of such acquitted defendants, although on occasion they can be prosecuted for perjury. See, *e. g.*, *United States* v. *Williams*, 341 U. S. 58, 63–65 (1951). But the privilege every criminal defendant has to testify in his own defense "cannot be construed to include the right to commit perjury." *Harris* v. *New York*, 401 U. S., at 225.[5] To the extent that Whiteside's claim rests on the assertion that he would have been acquitted had he been able to testify falsely, Whiteside claims a right the law simply does not recognize. "A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." *Strickland* v. *Washington*, 466 U. S., at 695. Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional

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[5] Whiteside was not deprived of the right to testify in his own defense, since no suggestion has been made that Whiteside's testimony was restricted in any way beyond the fact that he did not claim, falsely, to have seen a gun in Love's hand.

I must confess that I am somewhat puzzled by the Court's implicit suggestion that whether a defendant has a constitutional right to testify in his own defense remains an open question. *Ante*, at 164. It is true that in *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), the Court expressly declined to address the question of a defendant's constitutional right to testify, but that was because the case did not properly raise the issue. *Id.*, at 572, n. 1. Since then, the Court repeatedly has referred to the existence of such a right. See, *e. g.*, *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983) (the defendant has the "ultimate authority to make certain fundamental decisions regarding the case, [such as] . . . whether to . . . testify in his or her own behalf"); *Brooks* v. *Tennessee*, 406 U. S. 605, 612 (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right"); *Harris* v. *New York*. I cannot imagine that if we were presented with a state statute that prohibited a defendant from testifying at his own trial, we would not rule that it violates both the Sixth and Fourteenth Amendments, as well as, perhaps, the Fifth.

rights designed to guarantee a fair trial, he has suffered no prejudice.

The Court of Appeals erred in concluding that prejudice should have been presumed. *Strickland* v. *Washington* found such a presumption appropriate in a case where an attorney labored under "'an actual conflict of interest [that] adversely affected his . . . performance,'" *id.*, at 692, quoting *Cuyler* v. *Sullivan*, 446 U. S., at 348. In this case, however, no actual conflict existed. I have already discussed why Whiteside had no right to Robinson's help in presenting perjured testimony. Moreover, Whiteside has identified no right to insist that Robinson keep confidential a plan to commit perjury. See *Committee on Professional Ethics and Conduct of Iowa State Bar Assn.* v. *Crary*, 245 N. W. 2d 298, 306 (Iowa 1976). The prior cases where this Court has reversed convictions involved conflicts that infringed a defendant's legitimate interest in vigorous protection of his constitutional rights. See, *e. g.*, *Wood* v. *Georgia*, 450 U. S. 261, 268–271 (1981) (defense attorney paid by defendants' employer might have pursued employer's interest in litigating a test case rather than obtaining leniency for his clients by cooperating with prosecution); *Glasser* v. *United States*, 315 U. S. 60, 72–75 (1942) (defense attorney who simultaneously represented two defendants failed to object to certain potentially inadmissible evidence or to cross-examine a prosecution witness in an apparent attempt to minimize one codefendant's guilt). Here, Whiteside had no legitimate interest that conflicted with Robinson's obligations not to suborn perjury and to adhere to the Iowa Code of Professional Responsibility.

In addition, the lawyer's interest in not presenting perjured testimony was entirely consistent with Whiteside's best interest. If Whiteside had lied on the stand, he would have risked a future perjury prosecution. Moreover, his testimony would have been contradicted by the testimony of other eyewitnesses and by the fact that no gun was ever found. In light of that impeachment, the jury might have

concluded that Whiteside lied as well about his lack of premeditation and thus might have convicted him of first-degree murder. And if the judge believed that Whiteside had lied, he could have taken Whiteside's perjury into account in setting the sentence. *United States* v. *Grayson*, 438 U. S. 41, 52–54 (1978).[6] In the face of these dangers, an attorney could reasonably conclude that dissuading his client from committing perjury was in the client's best interest and comported with standards of professional responsibility.[7] In short, Whiteside failed to show the kind of conflict that poses a danger to the values of zealous and loyal representation embodied in the Sixth Amendment. A presumption of prejudice is therefore unwarranted.

C

In light of respondent's failure to show any cognizable prejudice, I see no need to "grade counsel's performance." *Strickland* v. *Washington*, 466 U. S., at 697. The only federal issue in this case is whether Robinson's behavior deprived Whiteside of the effective assistance of counsel; it is not whether Robinson's behavior conformed to any particular code of legal ethics.

Whether an attorney's response to what he sees as a client's plan to commit perjury violates a defendant's Sixth Amendment rights may depend on many factors: how certain the attorney is that the proposed testimony is false, the stage

[6] In fact, the State apparently asked the trial court to impose a sentence of 75 years, see Tr. 4 (Aug. 26, 1977), but the judge sentenced Whiteside to 40 years' imprisonment instead.

[7] This is not to say that an attorney's ethical obligations will never conflict with a defendant's right to effective assistance. For example, an attorney who has previously represented one of the State's witnesses has a continuing obligation to that former client not to reveal confidential information received during the course of the prior representation. That continuing duty could conflict with his obligation to his present client, the defendant, to cross-examine the State's witnesses zealously. See Lowenthal, Successive Representation by Criminal Lawyers, 93 Yale L. J. 1 (1983).

of the proceedings at which the attorney discovers the plan, or the ways in which the attorney may be able to dissuade his client, to name just three. The complex interaction of factors, which is likely to vary from case to case, makes inappropriate a blanket rule that defense attorneys must reveal, or threaten to reveal, a client's anticipated perjury to the court. Except in the rarest of cases, attorneys who adopt "the role of the judge or jury to determine the facts," *United States ex rel. Wilcox* v. *Johnson*, 555 F. 2d 115, 122 (CA3 1977), pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment.[8]

I therefore am troubled by the Court's implicit adoption of a set of standards of professional responsibility for attorneys in state criminal proceedings. See *ante*, at 168–171. The States, of course, do have a compelling interest in the integrity of their criminal trials that can justify regulating the length to which an attorney may go in seeking his client's acquittal. But the American Bar Association's implicit suggestion in its brief *amicus curiae* that the Court find that the Association's Model Rules of Professional Conduct should govern an attorney's responsibilities is addressed to the wrong audience. It is for the States to decide how attorneys should conduct themselves in state criminal proceedings, and

[8] A comparison of this case with *Wilcox* is illustrative. Here, Robinson testified in detail to the factors that led him to conclude that respondent's assertion he had seen a gun was false. See, *e. g.*, Tr. 38–39, 43, 59 (July 29, 1977). The Iowa Supreme Court found "good cause" and "strong support" for Robinson's conclusion. *State* v. *Whiteside*, 272 N. W. 2d 468, 471 (1978). Moreover, Robinson gave credence to those parts of Whiteside's account which, although he found them implausible and unsubstantiated, were not clearly false. See Tr. 52–53 (July 29, 1977). By contrast, in *Wilcox*, where defense counsel actually informed the judge that she believed her client intended to lie and where her threat to withdraw in the middle of the trial led the defendant not to take the stand at all, the Court of Appeals found "no evidence on the record of this case indicating that Mr. Wilcox intended to perjure himself," and characterized counsel's beliefs as "private conjectures about the guilt or innocence of [her] client." 555 F. 2d, at 122.

this Court's responsibility extends only to ensuring that the restrictions a State enacts do not infringe a defendant's federal constitutional rights. Thus, I would follow the suggestion made in the joint brief *amici curiae* filed by 37 States at the certiorari stage that we allow the States to maintain their "differing approaches" to a complex ethical question. Brief for State of Indiana et al. as *Amici Curiae* 5. The signal merit of asking first whether a defendant has shown any adverse prejudicial effect before inquiring into his attorney's performance is that it avoids unnecessary federal interference in a State's regulation of its bar. Because I conclude that the respondent in this case failed to show such an effect, I join the Court's judgment that he is not entitled to federal habeas relief.

JUSTICE STEVENS, concurring in the judgment.

Justice Holmes taught us that a word is but the skin of a living thought. A "fact" may also have a life of its own. From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel.

As we view this case, it appears perfectly clear that respondent intended to commit perjury, that his lawyer knew it, and that the lawyer had a duty—both to the court and to his client, for perjured testimony can ruin an otherwise meritorious case—to take extreme measures to prevent the perjury from occurring. The lawyer was successful and, from our unanimous and remote perspective, it is now pellucidly clear that the client suffered no "legally cognizable prejudice."

Nevertheless, beneath the surface of this case there are areas of uncertainty that cannot be resolved today. A lawyer's certainty that a change in his client's recollection is a

harbinger of intended perjury—as well as judicial review of such apparent certainty—should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked. Similarly, the post-trial review of a lawyer's pretrial threat to expose perjury that had not yet been committed—and, indeed, may have been prevented by the threat—is by no means the same as review of the way in which such a threat may actually have been carried out. Thus, one can be convinced—as I am—that this lawyer's actions were a proper way to provide his client with effective representation without confronting the much more difficult questions of what a lawyer must, should, or may do after his client has given testimony that the lawyer does not believe. The answer to such questions may well be colored by the particular circumstances attending the actual event and its aftermath.

Because JUSTICE BLACKMUN has preserved such questions for another day, and because I do not understand him to imply any adverse criticism of this lawyer's representation of his client, I join his opinion concurring in the judgment.

NATIONAL LABOR RELATIONS BOARD *v.* FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–1493. Argued December 4, 1985—Decided February 26, 1986*

In 1970, the National Labor Relations Board (Board) certified the Firstbank Independent Employees Association (Firstbank) as the collective-bargaining representative of a bargaining unit consisting of the employees of Seattle-First National Bank (SeaFirst), and successive collective-bargaining agreements were negotiated. In 1978, in an election in which only union members were allowed to vote, Firstbank voted to affiliate with an international union and changed its name to the Financial Institution Employees of America, Local 1182 (FIEA). FIEA then petitioned the Board to amend its certification to reflect this change. After initially granting the petition and holding that SeaFirst had committed an unfair labor practice by refusing to recognize the amended certification or to bargain with FIEA, the Board, on reconsideration, held that, because nonunion employees were not allowed to vote in the affiliation election, the election did not meet minimal "due process" standards and that therefore the affiliation was invalid. Accordingly, the Board dismissed FIEA's unfair labor practice charge and vacated the amended certification. The Court of Appeals granted FIEA's petition for review of the Board's decision and remanded the case, holding that the Board's requirement that nonunion employees be allowed to vote on affiliation questions was irrational and inconsistent with the National Labor Relations Act (Act).

Held: The Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union. Pp. 198–209.

(a) Such requirement dramatically changes the scheme under which the Board's practice has been to grant an independent union's petition to

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*Together with No. 84–1509, *Seattle-First National Bank* v. *Financial Institution Employees of America, Local 1182, Chartered by United Food*

amend the union's certification to reflect a name change resulting from affiliation with a national or international union if the Board found that union members had an adequate opportunity to vote on affiliation and that there was substantial "continuity" between the preaffiliation and postaffiliation union. Pp. 198–201.

(b) Under the Act, the certified union must be recognized as the exclusive bargaining representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the affiliation of that union with another union raises a question of representation and, if so, conducting an election to decide whether the certified union is still the choice of a majority of the unit. Here, by refusing either to amend FIEA's certification or to order SeaFirst to bargain, the Board effectively circumvented the decertification procedures provided for by the Act. Moreover, the Board's requirement that nonunion employees be allowed to vote in the affiliation election violated the policy Congress incorporated into the Act against outside interference in union decisionmaking. Pp. 201–204.

(c) Employees' dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote on union matters like affiliation. Rather, the Act allows union members to control the shape and direction of the union. Dissatisfaction with the decision union members make may be tested by a Board-conducted representation election only if it is unclear whether the recognized union retains majority support. Any distinction between affiliation and other changes in a union's organization and structure does not justify the Board's meddling in the union's internal affairs. Pp. 205–208.

(d) The Board's new rule contravenes the Act's assumption that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation. Such rule effectively gives the employer the power to veto an independent union's decision to affiliate, thereby allowing the employer to interfere directly with union decisionmaking that Congress intended to insulate from outside interference. Pp. 208–209.

752 F. 2d 356, affirmed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ.,

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& *Commercial Workers International Union, AFL–CIO, et al.*, also on certiorari to the same court.

joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 210.

Norton J. Come argued the cause for petitioner in No. 84–1493. With him on the briefs were *Solicitor General Fried*, *Linda Sher*, and *Patrick J. Szymanski*.

Mark A. Hutcheson argued the cause for petitioner in No. 84–1509. With him on the briefs was *Stephen M. Rummage*.

Laurence Gold argued the cause for respondents in both cases. With him on the brief were *George Murphy*, *Marsha S. Berzon*, *Michael Rubin*, and *David Silberman*.†

JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision in these cases is whether a rule of the National Labor Relations Board that requires that non-union employees be permitted to vote in a certified union's decision whether to affiliate with another union is consistent with the National Labor Relations Act.

I

In 1970, the Board certified the Firstbank Independent Employees Association (Firstbank) as the collective-bargaining representative of a bargaining unit consisting of the employees of petitioner Seattle-First National Bank (SeaFirst). Firstbank and SeaFirst subsequently negotiated successive collective-bargaining agreements, the most recent of which expired in 1977. In 1978, Firstbank voted to affiliate with the Retail Clerks International Union, AFL–CIO. Under Firstbank's constitution, only union members in good standing could vote in the election. The union members voted in

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†Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States by *Edward B. Miller* and *Stephen A. Bokat;* for the National Right to Work Legal Defense Foundation by *Raymond J. LaJeunesse, Jr.;* and for the Legal Foundation of America by *Jean Fleming Powers* and *David Crump*.

favor of affiliation by a margin of 1,206–774. Upon affiliation, Firstbank changed its name to the Financial Institution Employees of America, Local 1182 (FIEA), chartered by the Retail Clerks International Union, AFL–CIO. FIEA then petitioned the Board to amend its certification to reflect this change. SeaFirst challenged the petition, arguing that affiliation with the Retail Clerks had substantially changed the union, that nonunion employees should have been allowed to vote on whether to affiliate, and that the union had not followed its own constitution in establishing voter eligibility standards. The Board rejected these arguments and amended Firstbank's certification to name FIEA as the employees' bargaining representative. *Seattle-First National Bank*, 241 N. L. R. B. 751 (1979).[1]

SeaFirst refused to recognize the amended certification or to bargain with FIEA. The Board sustained FIEA's charges and held that SeaFirst had committed an unfair labor practice in violation of §§ 8(a)(1) and 8(a)(5) of the Act, 29 U. S. C. §§ 158(a)(1) and 158(a)(5), and ordered it to bargain.[2] *Seattle-First National Bank*, 245 N. L. R. B. 700 (1979). SeaFirst petitioned the Court of Appeals for the Ninth Circuit for review of the Board's order, and the Board cross-applied for enforcement. Before the Court of Appeals

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[1] After the Board amended FIEA's certification, the Retail Clerks International Union merged with the Amalgamated Meat Cutters and Butcher Workmen of North America to become the United Food and Commercial Workers International Union, AFL–CIO. The Board granted FIEA's motion to amend the name of the charging party in this case to reflect this change. *Seattle First National Bank*, 245 N. L. R. B. 700, 700, n. 1 (1979).

[2] Under § 8(a) of the Act, as set forth in 29 U. S. C. § 158(a), "[i]t shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

rendered its decision, the Board moved for remand of the case to it, and the court granted the motion. *Seattle-First National Bank* v. *NLRB*, Nos. 79–7515, 80–7004 (June 27, 1980); see n. 4, *infra*.

On remand, the Board notified the parties of its decision on its own motion to reconsider its earlier decision. On reconsideration, the Board held that, because nonunion employees were not allowed to vote in the affiliation election, the election did not meet minimal "due process" standards, and therefore that the affiliation was invalid. Accordingly, the Board dismissed FIEA's unfair labor practice charge and vacated the amended certification. *Seattle-First National Bank*, 265 N. L. R. B. 426 (1982).

FIEA petitioned the Court of Appeals for the Ninth Circuit for review of the Board's decision. The Court of Appeals, in a 2–1 decision, granted the petition and remanded the case. 752 F. 2d 356 (1984). The court held that the Board's requirement that nonunion employees be allowed to vote on affiliation questions was irrational and inconsistent with the Act for three reasons. First, the Board's rule intruded upon the union's internal affairs—here a totally unjustified intrusion because the Board had not determined that affiliation had substantially changed the union or eroded its majority support—and violated the "longstanding federal labor policy of avoiding unnecessary interference in internal union affairs." *Id.*, at 362. Second, the Board's rule was "inconsistent with the strong national policy of maintaining stability in the bargaining representative." *Id.*, at 364. Pursuant to that policy, Congress and the Board had restricted the opportunities for employers and employees to challenge a certified union's status as bargaining representative,[3] and the Board's new rule did not further but breached

[3] The court cited three examples of Board rules designed to maintain stable bargaining relationships. 752 F. 2d, at 365. First, in cases in which the employer is charged with refusing to bargain with a certified union, the union enjoys a presumption of majority status. For the first

the policy, since it effectively decertified the union without a Board determination that affiliation had undermined the union's majority support. Finally, the Board's rule was irrational, because the interests of nonunion employees were adequately protected under existing procedures, and because the Board's reasoning did not support the rule.

The holding of the Court of Appeals conflicts with contrary holdings of the Courts of Appeals for the Fifth and Seventh Circuits upholding the Board's rule. *Local Union No. 4-14* v. *NLRB*, 721 F. 2d 150, 152-153 (CA5 1983); *United Retail Workers Union, Local 881* v. *NLRB*, 774 F. 2d 752 (CA7 1985).[4] We granted both petitions in this case to to resolve the conflict. 471 U. S. 1098 (1985). We affirm.

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year after certification, this presumption is irrebuttable. See *Brooks* v. *NLRB*, 348 U. S. 96, 103 (1954). Second, the Board will consider "decertifying" a union only if at least 30% of the employees present a petition, or in "extreme cases." See 29 CFR § 101.18 (1985); R. Gorman, Basic Text on Labor Law 49-50 (1976). Third, under its contract-bar rule, the Board ordinarily refuses to conduct decertification elections for a certain period of time while the collective-bargaining agreement remains in effect. See 1 C. Morris, The Developing Labor Law 361-376 (2d ed. 1983).

[4]The procedural history of the Fifth Circuit's decision is closely intertwined with this case. In that case, the employer refused to bargain with an affiliated union because only union members had been allowed to vote on affiliation. The Board ordered the employer to bargain. *Amoco Production Co.*, 220 N. L. R. B. 861 (1975), aff'd, 239 N. L. R. B. 1195 (1979). The Board relied on its *Amoco* decision when it originally amended FIEA's certification in this case. *Amoco* was then appealed to the Court of Appeals for the Fifth Circuit, which remanded the case for the Board to determine whether affiliation had substantially changed the union. *Amoco Production Co.* v. *NLRB*, 613 F. 2d 107, 112 (1980). In light of the strong similarity between the two cases, the Board asked the Ninth Circuit to remand this case as well. On remand from the Fifth Circuit, the Board did not address whether affiliation had substantially changed the union. Rather, the Board reversed itself and concluded that the affiliation was invalid because only union members had been allowed to vote. *Amoco Production Co.*, 262 N. L. R. B. 1240 (1982). The Board in turn relied on this decision in dismissing FIEA's unfair labor practice charge and revoking its amended certification.

II

Section 7 of the Act guarantees employees the right "to bargain collectively through representatives of their own choosing," 29 U. S. C. § 157, and the Board is empowered to determine representation on petition of employees or the employer. 29 U. S. C. §§ 159(c)(1)(A)(i), 159(c)(1)(B). In either case, the Board investigates the petition and holds a hearing if it has reasonable cause to believe that a "question of representation" exists, 29 U. S. C. § 159(c), and directs a representation election by secret ballot to settle the question. *Ibid.* The Board certifies the winning union as the bargaining representative of all of the employees in the bargaining unit. The employer commits an unfair labor practice by refusing to bargain with the employees' certified bargaining representative. 29 U. S. C. § 158(a)(5).

The Act recognizes that employee support for a certified bargaining representative may be eroded by changed circumstances. In such cases, employees may petition the Board for another election, alleging that the certified representative no longer enjoys majority support. 29 U. S. C. § 159(c)(1)(A)(ii); 29 CFR §§ 101.17, 102.60(a) (1985). Similarly, an employer who questions whether a majority of employees continue to support a certified union may petition for another election. 29 U. S. C. § 159(c)(1)(B); 29 CFR §§ 101.17, 102.60(a) (1985); see 1 C. Morris, The Developing Labor Law 349 (2d ed. 1983). The employer, however, must "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." *United States Gypsum Co.*, 157 N. L. R. B. 652, 656 (1966); 29 CFR § 101.17 (1985); see 1 Morris, *supra*. Again, if the Board determines, after investigation and hearing, that a question of representation exists, it directs an election by secret ballot and certifies the result. 29 U. S. C. § 159(c).

One such change in circumstances is, as here, where an independent union decides to affiliate with a national or inter-

national organization.[5] In many such cases, the union may also change its name to reflect its new affiliation, and will petition the Board to amend its certification to reflect this name change. 29 CFR §§101.17, 102.60(b) (1985). The Board's practice has been to grant such petitions if the Board found that the affiliation satisfied two conditions. First, that union members have had an adequate opportunity to vote on affiliation. *North Electric Co.*, 165 N. L. R. B. 942, 943 (1967). The Board ordinarily required that the affiliation election be conducted with adequate "due process" safeguards, including notice of the election to all members, an adequate opportunity for members to discuss the election, and reasonable precautions to maintain ballot secrecy. *E. g.*, *Newspapers Inc.*, 210 N. L. R. B. 8, 9 (1974), enf'd, 515 F. 2d 334 (CA5 1975).[6] Second, that there was substantial "continuity" between the pre- and post-affiliation union. The focus of this inquiry was whether the affiliation had substantially changed the union; the Board considered such factors as whether the union retained local autonomy and local officers, and continued to follow established procedures.

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[5] A local union may seek to affiliate with a larger organization for a variety of reasons. The larger organization may provide bargaining expertise or financial support, or may compensate for a lack of leadership within the local union. *Amoco Production Co.*, 239 N. L. R. B., at 1195; Hale, Union Affiliations: Examination of Governing NLRA Standards, 1983 Det. C. L. Rev. 709. Affiliation "is but one of many ways in which labor organizations alter their structures and alignments in response to changing economic and political conditions." Note, Union Affiliations and Collective Bargaining, 128 U. Pa. L. Rev. 430, 431 (1979). The Board has recognized that a union "must remain largely unfettered in its organizational quest for financial stability and aid in the negotiating process." *The Williamson Co.*, 244 N. L. R. B. 953, 955 (1979).

[6] The union suggests that it may even be inappropriate for the Board to impose due process safeguards with respect to union members. Brief for FIEA 28–29. While we note that the NLRA does not require unions to follow specified procedures in deciding matters such as affiliations, we need not assess the propriety of the Board's past procedures.

See Note, *supra* n. 5, at 445, and nn. 74–82.[7] If the organizational changes accompanying affiliation were substantial enough to create a different entity, the affiliation raised a "question concerning representation" which could only be resolved through the Board's election procedure. 1 Morris, *supra*, at 690; 29 CFR §§ 101.17, 102.60(b) (1985). However, as long as continuity of representation and due process were satisfied, affiliation was considered an internal matter that did not affect the union's status as the employees' bargaining representative, and the employer was obligated to continue bargaining with the reorganized union. 1 Morris, *supra*, at 690–691; *Universal Tool & Stamping Co.*, 182 N. L. R. B. 254, 259 (1970).[8]

The Board's new rule dramatically changes this scheme.[9] The Board now takes the position that all employees in the

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[7] The parties disagree over whether affiliation substantially changed the union in this case. See Brief for NLRB 4, and n. 2; Brief for FIEA 4. However, the Board did not make a continuity determination but simply dismissed FIEA's unfair labor practice charge and vacated its amended certification. The Court of Appeals therefore declined to address the continuity issue. 752 F. 2d, 356, 359, n. 4 (1984). We also decline to address it.

[8] In some cases, the affiliated union will not petition the Board to amend its certification, but will instead wait to see whether the employer will continue to bargain. If the employer refuses to bargain, the union may then file an unfair labor practice charge with the Board. In the past, the Board required the employer to bargain if the affiliation satisfied its two-prong due process and continuity test. In other words, the Board used the same standards to examine affiliations whether the issue arose as a defense to an unfair labor practice charge or in a petition to amend a certification. *Independent Drug Store Owners of Santa Clara County*, 211 N. L. R. B. 701, 701, n. 2 (1974), enf'd, 528 F. 2d 1225 (CA9 1975); Hale, *supra* n. 5, at 710, and n. 8; Note, *supra* n. 5, at 432.

[9] The Board's assertion that it actually adopted its "new" rule in its decision in *Jasper Seating Co.*, 231 N. L. R. B. 1025 (1977), may be questioned. *Jasper* was a 3–2 decision in which only two members took the position that nonunion employees should be allowed to vote in affiliation elections. While suggesting that he could adopt this position under other circumstances, Member Penello concurred in the decision "based upon the

bargaining unit—not merely union members—must have the opportunity to participate in the affiliation decision. See *Amoco Production Co.*, 262 N. L. R. B. 1240, 1241 (1982). Unless they are allowed to do so, the Board will not amend the union's certification or require the employer to bargain with the reorganized union. The Board applies this rule even though the organizational changes resulting from the affiliation are not substantial enough to raise a question of representation. See Brief for NLRB 16–17. The Board does not contend that the Act requires that all employees of the bargaining unit, union and nonunion, must be allowed to participate in the affiliation election or that the Act expressly authorizes the Board to impose such requirements. Rather, the Board and the employer defend the Board's new rule on two grounds. First, they assert that the Board's rule is a reasonable means of protecting the bargaining unit employees' right to select a bargaining representative under § 7 of the Act. Second, they argue that the rule minimizes industrial strife. We address each argument in turn.

III

A

Petitioners argue that the Board should be afforded "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees," *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330 (1946); see also 29 U. S. C. § 156; *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759, 767 (1969); *NLRB* v. *Waterman S.S. Corp.* 309 U. S. 206, 226 (1940), and contend that a requirement that all employees be allowed to vote on affiliation is a reasonable means of insuring that a majority of employees consent to representation by the postaffiliation union, and ultimately of protecting the right of

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application of [different] principles." *Id.*, at 1026. He found that the affiliation had raised a question of representation which could only be resolved through a Board-conducted representation election. *Id.*, at 1027.

all employees to select a bargaining representative. Our cases have previously recognized the Board's broad authority to construe provisions of the Act, and have deferred to Board decisions that are not irrational or inconsistent with the Act. *Ford Motor Co.* v. *NLRB*, 441 U. S. 488, 495, 497 (1979); *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 501 (1978); *NLRB* v. *Iron Workers*, 434 U. S. 335, 350 (1978). However, the question here is whether the Board's new rule exceeds the Board's statutory authority. Cf. *NLRB* v. *Longshoreman*, 473 U. S. 61 (1985); *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513 (1984). Deference to the Board "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress." *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318 (1965); see also *NLRB* v. *Insurance Agents*, 361 U. S. 477, 499 (1960). We hold that the Board's new rule exceeds its authority under the Act.

Under the Act, the certified union must be recognized as the exclusive bargaining representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the affiliation raises a question of representation and, if so, conducting an election to decide whether the certified union still is the choice of a majority of the unit. 29 U. S. C. § 159(c). Of course, as is the case with any organizational and structural change, a new affiliation may substantially change a certified union's relationship with the employees it represents. These changed circumstances may in turn raise a "question of representation," if it is unclear whether a majority of employees continue to support the reorganized union. Thus, in these situations, the affiliation implicates the employees' right to select a bargaining representative, and to protect the employees' interests, the situation may require that the Board exercise its authority to conduct a representation election. 29 U. S. C. § 159(c)(1). However, the Board's decision must take into account that "[t]he industrial stability sought by the

Act would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship." *Canton Sign Co.*, 174 N. L. R. B. 906, 909 (1969), enf. denied on other grounds, 457 F. 2d 832 (CA6 1972). In many cases, a majority of employees will continue to support the union despite any changes precipitated by affiliation.[10] In such situations, affiliation does not necessarily implicate the "selection" of a new bargaining representative. The reorganized union may legitimately claim to succeed as the employees' duly selected bargaining representative, and in that case retains a legitimate interest in continuing to bargain collectively with the employer. The Act balances these competing concerns by authorizing the Board to conduct a representation election *only* where affiliation raises a question of representation. 29 U. S. C. § 159(c). Conversely, where affiliation does not raise a question of representation, the statute gives the Board no authority to act. The Board's new rule upsets the accommodation drawn by the statute by effectively decertifying the reorganized union even where affiliation does not raise a question of representation.

Turning to the record in these cases, the Board revoked FIEA's certification and relieved SeaFirst of its obligation to bargain despite the fact, as the Board acknowledges, that it was not sufficient to raise a question of representation that nonunion employees were not allowed to vote in the affiliation election. Brief for NLRB 16–17. Absent a question of

[10] The Board has recognized that "affiliation does not directly involve the employment relation. The status of wages, working conditions, benefits, and grievance procedures is unaffected by the affiliation vote; the collective-bargaining agreement between the union and the employer remains effective until the stated expiration date." *Amoco Production Co.*, 239 N. L. R. B., at 1195. Affiliation "has no probative value concerning the employees' choice of the [union] as their collective bargaining representative." *American Range Lines, Inc.*, 13 N. L. R. B. 139, 154 (1939); see also Brief for NLRB 16, n. 10 ("The Board has in general found that affiliations do not destroy continuity of representation").

representation, FIEA continued to function, as it was entitled to do, as the bargaining representative of the unit, and SeaFirst was obligated to continue bargaining with it. By refusing either to amend FIEA's certification or to order SeaFirst to bargain, the Board effectively circumvented the decertification procedures provided for by statute. Moreover, the Board exceeded its statutory authority by requiring that nonunion employees be allowed to vote in the union's affiliation election. This violated the policy Congress incorporated into the Act against outside interference in union decisionmaking. See *Steelworkers* v. *Sadlowski*, 457 U. S. 102, 117 (1982); *NLRB* v. *Boeing Co.*, 412 U. S. 67, 71 (1973); *Scofield* v. *NLRB*, 394 U. S. 423, 428 (1969); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 195 (1967). Petitioners maintain that this policy must give way to the right of the employees to select a bargaining representative. Cf. *Pattern Makers* v. *NLRB*, 473 U. S. 95 (1985) (union rule barring resignations during a strike contrary to statutory policy of voluntary unionism); *NLRB* v. *Marine Workers*, 391 U. S. 418 (1968) (union rule requiring exhaustion of internal grievance procedures does not preclude Board review). But the Act establishes a specific election procedure to decide whether the employees desire a change in a certified union's representative status. While the Board is charged with responsibility to administer this procedure, the Act gives the Board no authority to require unions to follow other procedures in adopting organizational changes.[11]

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[11] Congress has expressly declined to prescribe procedures for union decisionmaking in matters such as affiliation. When the NLRA was amended by the Labor Management Relations Act of 1947, the House passed a proposal that would have regulated union procedures for electing officers, assessing dues, disciplining members, and deciding to strike. H. R. 3020, § 8(c), 80th Cong., 1st Sess. (1947), 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, pp. 179–183 (Legis. Hist.). These provisions were deleted from the final legislation. See 93 Cong. Rec. 6443 (1947), 2 Legis. Hist. 1540 ("The Senate conferees . . . felt that it was unwise to authorize [the NLRB] to undertake such elaborate

B

Petitioners contend that this statutory scheme does not adequately protect the interests of nonunion employees, and that this justifies the Board's new rule. They argue that an affiliation may affect a union's representation of the bargaining unit even if it does not raise a question of representation, but that argument overlooks the fact that a union makes many decisions that "affect" its representation of nonmember employees. It may decide to call a strike, ratify a collective-bargaining agreement, or select union officers and bargaining representatives. Under the Act, dissatisfied employees may petition the Board to hold a representation election, but the Board has no authority to conduct an election unless the effects complained of raise a question of representation. In any event, dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote on union matters like affiliation. Rather, the Act allows union members to control the shape and direction of their organization, and "[n]on-union employees have no voice in the affairs of the union." *Allis-Chalmers*, 388 U. S., at 191. We repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation

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policing of the internal affairs of unions"). In 1959, Congress adopted the Labor-Management Reporting and Disclosure Act, which regulated union procedures for assessing dues, disciplining employees, and electing officers. 29 U. S. C. §§ 411–415, 481. Senators Knowland and McClellan both advanced proposals to regulate other sorts of union decisions. See 104 Cong. Rec. 11184 (1958) (constitutional amendments and recall of officers); *id.*, at 11461 (waiver of right to strike); S. 1137, § 102(5), 86th Cong., 1st Sess. (1959), 1 Legislative History of the Labor-Management Reporting and Disclosure Act 272–273 (1959) (creation of affiliated organizations or funds), § 103(4), *id.*, at 277 (mergers and transfers between local unions). None of these proposals was incorporated into the statute. See *Steelworkers* v. *Sadlowski*, 457 U. S. 102, 117 (1982) ("Congress was guided by the general principle that unions should be left free to 'operate their own affairs, as far as possible.' It believed that only essential standards should be imposed by legislation" (citation omitted)).

election only if it is unclear whether the reorganized union retains majority support.

Petitioners concede that a union's organizational and structural changes would not ordinarily justify the Board's meddling in a union's internal affairs, but argue that affiliation is different from other changes because affiliation necessarily changes the union's identity, and because initiation of the change is by the certified union seeking the Board's approval for the affiliation by amendment of its certification or an order on the employer to bargain after affiliation. Neither distinction is persuasive.

First, petitioners argue that affiliation differs from other organizational changes because it results in employees being represented by a different organization. See *Hamilton Tool Co.*, 190 N. L. R. B. 571, 576 (1971) (Miller, concurring). But many organizational or structural changes may operate to alter a union's "identity." This would be the case where the union amends its constitution or bylaws, restructures its financial obligations and resources, or alters its jurisdiction. The fact that an affiliation is often accompanied by a formal name change does not serve to distinguish it from other organizational developments. As the Board has recognized, "an affiliation does not create a new organization, nor does it result in the dissolution of an already existing organization." *Amoco Production Co.*, 239 N. L. R. B. 1195 (1979). Rather, the union will determine "whether any administrative or organizational changes are necessary in the affiliating organization." *Ibid.* If these changes are sufficiently dramatic to alter the union's identity, affiliation may raise a question of representation, and the Board may then conduct a representation election. Otherwise, the statute gives the Board no authority to interfere in the union's affairs.

Petitioners next contend that affiliation involves the union's asking the Board to amend its certification or to order

the employer to bargain.[12] Petitioners assert that the Board therefore has a strong interest in insuring that its own election procedures have not been circumvented before placing its imprimatur on the union's affiliation election. This argument mischaracterizes the nature of the relevant procedures. In amending the union's certification or ordering the employer to bargain, the Board does not "sanction" the union's affiliation. Rather, it signifies only that the reorganized union continues as an ongoing entity that the employer should continue to recognize. By analogy, the fact that the Board may order the employer to bargain with a union that has amended its constitution does not mean that the Board has "sanctioned" the constitutional amendment. In any event, the Board's interest in insuring the integrity of its procedures does not empower it to adopt measures exceeding its statutory authority. If the Board finds that affiliation raises a question of representation "undermining . . . the Board's own election and certification procedures," *Amoco Production Co.*, 262 N. L. R. B., at 1241, it can refuse to consider the union's unfair labor practice charge, and is authorized tc conduct a representation election. However, it may not condone an employer's refusal to bargain in the absence of a question of representation, and has no authority to

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[12] In its *amicus* brief, the Chamber of Commerce notes that the statute does not explicitly provide for petitions to amend a union's certification, and argues that the Board therefore has broad authority to refuse to grant such requests. However, because the union's request to amend its certification is a mere formality, it cannot give the Board additional authority to police the affiliation. A union could simply decide not to change its name upon affiliation, and would not have to ask the Board to amend its certification. The employer might then challenge the affiliation as a defense to an unfair labor practice charge. Unless the Board finds that the affiliation raised a question of representation, the affiliated union would continue as the employees' bargaining representative, and the employer would be required to bargain with the reorganized union. Thus, the amended certification procedure cannot broaden the Board's authority to interfere in the union's affairs.

prescribe internal procedures for the union to follow in order to invoke the Act's protections.

IV

The basic purpose of the National Labor Relations Act is to preserve industrial peace. 29 U. S. C. § 151. The Act includes several provisions designed to encourage stable bargaining relationships, *e. g.*, § 8(b)(7)(A), 29 U. S. C. § 158 (b)(7)(A) (prohibiting recognitional picketing by employees represented by recognized union); § 8(b)(7)(B), 29 U. S. C. § 158(b)(7)(B) (prohibiting recognitional picketing for one year after election); § 9(c)(3), 29 U. S. C. § 159(c)(3) (prohibiting second representation election within one year), and the Board has devised rules to achieve the same ends. See n. 3, *supra*. Petitioners argue that the Board's new rule furthers this policy by introducing a measure of certainty into the bargaining relationship that protects both the employer and the union. By having all employees vote for affiliation, so the argument goes, the employer avoids the possibility of having to bargain with a union that may not represent a majority of the employees. Petitioners submit that the union also benefits from having all employees vote, since it avoids the disruption that would occur if the Board eventually determines that it must hold a new election because the affiliation raises a question of representation. If the employees vote for affiliation, the union can continue to bargain with confidence, since the employer is less likely to challenge the affiliation, and the Board is less likely to find a question of representation. If the employees vote against affiliation, the incumbent union can forgo affiliation and continue to represent the bargaining unit.

Absent any statutory framework, the Board's rule might well be a rational means of preserving industrial stability. However, as the Ninth Circuit noted, Congress has already determined "as a matter of national labor policy that bargaining stability and the principle of majority rule may limit the timing of employee challenges to their certified bargaining

representative's majority status." 752 F. 2d, at 366. The Act assumes that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation. The Board's rule contravenes this assumption, since an employer may invoke a perceived procedural defect to cease bargaining even though the union succeeds the organization the employees chose, the employees have made no effort to decertify the union, and the employer presents no evidence to challenge the union's majority status. Any uncertainty on the employer's part does not relieve him of his obligation to bargain collectively. "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief . . . . To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace]." *Brooks* v. *NLRB*, 348 U. S. 96, 103 (1954). The Board's rule effectively gives the employer the power to veto an independent union's decision to affiliate, thereby allowing the employer to directly interfere with union decisionmaking Congress intended to insulate from outside interference.

We hold that the Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union.[13] The judgment of the Court of Appeals is affirmed. The cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

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[13] We do not suggest, however, that other Board representation procedures, such as its continuity determination, exceed its statutory authority.

Respondents argue that the Board's rule is irrational because it assumes that affiliation involves the selection of a new bargaining representative absent any indication that the affiliation has significantly changed the union. Because we conclude that the Board has exceeded its authority under the statute, we need not address this issue.

CHIEF JUSTICE BURGER, concurring in the judgment.

I write separately to note that the Court's action today striking down a Board action is one of those rare departures from this Court's long history of special deference to the Board's decisions concerning the selection of an exclusive bargaining unit representative by employees. See, *e. g.*, *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330 (1946); see also *NLRB* v. *Action Automotive, Inc.*, 469 U. S. 490 (1985).

CONNOLLY ET AL., TRUSTEES OF THE OPERATING ENGINEERS PENSION TRUST v. PENSION BENEFIT GUARANTY CORPORATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 84-1555. Argued December 2, 1985—Decided February 26, 1986*

The Employee Retirement Income Security Act (ERISA), enacted in 1974, established a pension plan termination insurance program whereby the Pension Benefit Guaranty Corporation (PBGC), a wholly owned Government corporation, collects insurance premiums from covered private retirement plans and provides benefits to participants if their plan terminates with insufficient assets to support the guaranteed benefits. The program covers both single-employer and multiemployer pension plans. With respect to the latter plans, ERISA delayed mandatory payment of guaranteed benefits until January 1, 1978, prior to which date the PBGC had discretionary authority to pay benefits upon the termination of a pension plan. As that date approached, Congress became concerned that a significant number of multiemployer plans were experiencing extreme financial hardship, and that implementation of mandatory guarantees might induce several large plans to terminate, thus subjecting the insurance system to liability beyond its means. After further delaying the effective date for the mandatory guarantees, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) requiring an employer withdrawing from a multiemployer pension plan to pay a fixed and certain debt to the plan amounting to the employer's proportionate share of the plan's "unfunded vested benefits." Appellant trustees administer a multiemployer pension plan for employers under collective-bargaining agreements covering employees in the construction industry in California and Nevada. Under the trust agreement and the plan, the employer's sole obligation is to pay the contributions required by the collective-bargaining agreements, and the employer's obligation for pension benefits is ended when the employer pays the contribution to the pension trust. Prior to enactment of the MPPAA, the trustees filed suit against the PBGC in Federal District Court, claiming, *inter alia*, that ERISA was unconstitutional as depriving the trustees, the employers, and the plan participants of property

*Together with No. 84-1567, *Woodward Sand Co., Inc.* v. *Pension Benefit Guaranty Corporation et al.*, also on appeal from the same court.

without proper compensation. During the course of the litigation, the MPPAA was enacted, and the District Court permitted the trustees to file an amended complaint to include a challenge to that Act. Ultimately, the District Court granted summary judgment in the PBGC's favor, rejecting appellants' argument that imposition of withdrawal liability under the MPPAA violates the Taking Clause of the Fifth Amendment.

Held: The withdrawal liability provisions of the MPPAA do not violate the Taking Clause. Pp. 221–228.

(a) In these cases, the United States under the MPPAA has taken nothing for its own use and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within Congress' power to impose. That the statutory withdrawal liability will operate in this manner and will redound to the benefit of the pension trust does not justify a holding that the withdrawal liability provisions violate the Taking Clause. Pp. 221–224.

(b) In identifying a "taking" forbidden by the Taking Clause, three factors should be considered: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124. Examining the MPPAA in light of these factors supports the conclusion that the imposition of withdrawal liability does not constitute a compensable taking under the Taking Clause. The interference with an employer's property rights resulting from requiring the employer to fund its share of the pension plan obligation arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and does not constitute a taking requiring Government compensation. As to the severity of the MPPAA's economic impact, there is nothing to show that the withdrawal liability imposed on an employer will always be out of proportion to its experience with the pension plan. And as to interference with reasonable investment-backed expectations, employers had more than sufficient notice not only that pension plans were being regulated at the time the MPPAA was enacted but also that withdrawal itself might trigger additional financial obligations. Pp. 224–228.

631 F. Supp. 640, affirmed.

WHITE, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, in which POWELL, J., joined, *post*, p. 228.

Wayne Jett argued the cause and filed briefs for appellants in No. 84–1555. *Richard M. Freeman* argued the cause for

appellant in No. 84-1567. With him on the brief was *Michael L. Jensen.*

Baruch A. Fellner argued the cause for appellees. With him on the brief were *Edward R. Mackiewicz, Mitchell L. Strickler, J. Stephen Caflisch, Peter H. Gould, David F. Power, Nathan Lewin,* and *Seth P. Waxman.*†

JUSTICE WHITE delivered the opinion of the Court.

In *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717 (1984), the Court held that retroactive application of the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 did not violate the Due Process Clause of the Fifth Amendment. In these cases, we address the question whether the withdrawal liability provisions of the Act are valid under the Clause of the Fifth Amendment that forbids the taking of private property for public use without just compensation.

I

A

The background and legislative history of both the Employee Retirement Income Security Act (ERISA), 88 Stat. 829, 29 U. S. C. § 1001 *et seq.*, and the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA or Act), 94 Stat. 1208, 29 U. S. C. §§ 1381–1461, are set forth in detail in *Gray, supra*, at 720–725. We therefore only summarize the

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†Briefs of *amici curiae* urging reversal were filed for the American Trucking Associations, Inc., by *Carl L. Taylor, Glenn Summers, Daniel R. Barney,* and *Kenneth E. Siegel;* and for the National Association of Manufacturers by *Chester W. Nosal, John R. Keys, Jr., Columbus R. Gangemi, Jan S. Amundson,* and *Gary D. Lipkin.*

Briefs of *amici curiae* urging affirmance were filed for the National Coordinating Committee for Multiemployer Plans by *Gerald M. Feder;* and for Trustees of the United Mine Workers of America 1950 and 1974 Pension Plans by *William F. Hanrahan* and *Israel Goldowitz.*

William H. Towle filed a brief for the American Warehousemen's Association as *amicus curiae.*

relevant portions of that description for purposes of our discussion here.

Congress enacted ERISA in 1974 to provide comprehensive regulation for private pension plans. In addition to prescribing standards for the funding, management, and benefit provisions of these plans, ERISA also established a system of pension benefit insurance. This "comprehensive and reticulated statute" was designed "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans. . . . Congress wanted to guarantee that 'if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he will actually receive it.'" 467 U. S., at 720, quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 361–362, 374–375 (1980) (citations omitted).

To achieve this goal of protecting "anticipated retirement benefits," Congress created the Pension Benefit Guaranty Corporation (PBGC), a wholly owned Government corporation, to administer an insurance program for participants in both single-employer and multiemployer pension plans. 29 U. S. C. § 1302 (1976 ed.). For single-employer plans that were in default, ERISA immediately obligated the PBGC to pay benefits. § 1381. With respect to multiemployer plans, ERISA delayed mandatory payment of guaranteed benefits until January 1, 1978. Until that date, Congress gave the PBGC discretionary authority to pay benefits upon the termination of multiemployer pension plans. §§ 1381(c)(2)–(4). As with single-employer plans, all contributors to covered multiemployer plans were assessed insurance premiums payable to the PBGC. If the PBGC exercised its discretion to pay benefits upon a plan's termination, all employers that had contributed to the plan during the five years preceding its termination were liable to the PBGC in amounts proportional

to their shares of the plan's contributions during that period, subject to the limitation that any individual employer's liability could not exceed 30% of the employer's net worth. § 1362(b)(2).

During the period between the enactment of ERISA and 1978, when mandatory multiemployer guarantees were due to go into effect, the PBGC extended coverage to numerous plans. "Congress became concerned that a significant number of plans were experiencing extreme financial hardship," *Gray, supra*, at 721, and that implementation of mandatory guarantees for multiemployer plans might induce several large plans to terminate, thus subjecting the insurance system to liability beyond its means. As a result, Congress delayed the effective date for the mandatory guarantees for 18 months, Pub. L. 95-214, 91 Stat. 1501, and directed the PBGC to prepare a report analyzing the problems of multiemployer plans and recommending possible solutions. See S. Rep. No. 95-570, pp. 1-4 (1977); H. R. Rep. No. 95-706, p. 1 (1977).

The PBGC's Report found, *inter alia*, that "ERISA did not adequately protect plans from the adverse consequences that resulted when individual employers terminate their participation in, or withdraw from, multiemployer plans." *Gray, supra*, at 722. The "basic problem," the Report found, was the threat to the solvency and stability of multiemployer plans caused by employer withdrawals, which existing law actually encouraged. Pension Benefit Guaranty Corporation, Multiemployer Study Required by P. L. 95-214, pp. 96-97 (1978) (PBGC Report).[1] As the PBGC's Executive Director explained:

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[1] The inadequacy of existing law was demonstrated by the Report's finding that roughly 10% of all multiemployer plans, covering 1.3 million participants, were experiencing financial difficulties. PBGC Report, at 1. Funding of all plan benefits under these plans, if they terminated, would cost the insurance system approximately $4.8 billion and necessitate an increase in premiums to unacceptable levels. *Id.*, at 2, 16, 139. See also

> "A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue." Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2nd Sess., 22 (1978) (statement of Matthew M. Lind) (hereinafter 1978 Hearings).

"To alleviate the problem of employer withdrawals, the PBGC suggested new rules under which a withdrawing employer would be required to pay whatever share of the plan's unfunded liabilities was attributable to that employer's participation." *Gray*, 467 U. S., at 723, citing PBGC Report, at 97–114 (footnote omitted). Again, the PBGC Executive Director explained:

> "To deal with this problem, our report considers an approach under which an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities. In

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Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 96th Cong., 1st Sess. 1156, 1170, 1291 (1980). See also Brief for National Coordinating Committee for Multiemployer Plans as *Amicus Curiae* 12–14; Brief of Trustees for United Mine Workers of America 1950 and 1974 Pension Plans as *Amici Curiae* 7.

other words, the plan would have a claim against the employer for the inherited liabilities which would otherwise fall upon the remaining employers as a result of the withdrawal. . . .

"We think that such withdrawal liability would, first of all, discourage voluntary withdrawals and curtail the current incentives to flee the plan. Where such withdrawals nonetheless occur, we think that withdrawal liability would cushion the financial impact on the plan." 1978 Hearings, at 23 (statement of Matthew M. Lind).

After 17 months of discussion, Congress agreed with the analysis put forward in the PBGC Report, and drafted legislation which implemented the Report's recommendations. "As enacted, the Act requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of the vested benefits and the current value of the plan's assets." *Gray, supra*, at 725, quoting 29 U. S. C. §§ 1381, 1391.

B

Appellant Trustees administer the Operating Engineers Pension Plan according to a written Agreement Establishing the Operating Engineers Pension Trust, executed in 1960, pursuant to § 302(c)(5) of the Labor Management Relations Act, 1947, 29 U. S. C. § 186(c)(5). App. 29. The Trust receives contributions from several thousand employers under written collective-bargaining agreements covering employees in the construction industry throughout southern California and southern Nevada. Under these collective-bargaining agreements, the employers agree to contribute a certain amount to the Pension Plan, with the actual amount contributed by each employer determined by multiplying their employees' hours of service by a rate specified in the current agreement. See *id.*, at 33–35.

By the express terms of the Trust Agreement, *id.*, at 30–31, and the Plan, *id.*, at 31–32, the employer's sole obligation to the Pension Trust is to pay the contributions required by the collective-bargaining agreement. The Trust Agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the Pension Trust.[2] This is true even though the contributions agreed upon are insufficient to pay the benefits under the Plan.[3]

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[2] Article II, § 7, of the Trust Agreement provides as follows:

"Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements." App. 30–31.

[3] Article VII, § 4, of the Plan provides as follows:

"This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obliging any Individual Employer to make benefit payments or contributions (other than the con-

In 1975, the Trustees filed suit, seeking declaratory and injunctive relief, claiming that the Pension Plan is a "defined contribution plan" as defined by ERISA, and thus not subject to the jurisdiction of the PBGC.[4] Alternatively, the Trustees argued that if the Plan was subject to the provisions of ERISA requiring premium payments and imposing contingent termination liability, the statute was unconstitutional, as it deprived the Trustees, the employers, and the plan participants of property without due process and without proper compensation.

The District Court granted summary judgment to the Trustees, finding that the Plan was a "defined contribution plan," and enjoining the PBGC from treating it in any other manner. *Connolly* v. *Pension Benefit Guaranty Corporation*, 419 F. Supp. 737 (CD Cal. 1976). The Ninth Circuit reversed and remanded for consideration of the constitutional issues. *Connolly* v. *Pension Benefit Guaranty Corporation*, 581 F. 2d 729 (1978), cert. denied, 440 U. S. 935 (1979). On remand, the District Court denied the Trustees' motion to convene a three-judge court on the ground that the Trustees' constitutional challenges were insubstantial. App. 55–56. The Trustees sought a petition of mandamus on the issue, but their petition was denied by both the Ninth Circuit and this Court. *Connolly* v. *Williams*, No. 79–7580 (CA9, Jan. 14,

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tributions for which the Individual Employer may be obliged by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments." *Id.*, at 31–32.

[4] Title 29 U. S. C. § 1002(34) describes a "defined contribution plan" as "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." The Plan Termination Insurance provisions of ERISA do not apply to such plans. § 1321(b)(1).

1980); *Connolly* v. *United States District Court*, 445 U. S. 959 (1980).

On the merits, the District Court granted summary judgment to the PBGC, but the Ninth Circuit reversed. 673 F. 2d 1110 (1982). The court could not agree with the District Court that the constitutional claims raised by the Trustees were so "insubstantial" that a three-judge panel could be summarily denied. *Id.*, at 1114. The Ninth Circuit remanded the case with directions to convene a three-judge court.

During the course of the litigation to convene the three-judge court, Congress enacted the MPPAA. The District Court permitted the Trustees to file an amended complaint to include a challenge to the constitutionality of the new Act. The court also permitted appellant Woodward Sand Co., an employer that had been assessed withdrawal liability by the Trustees, to intervene in the action. App. 82.[5]

After oral argument, the three-judge panel granted summary judgment in favor of the PBGC. The court rejected the appellants' argument that the Act violated the Taking Clause of the Fifth Amendment, holding that "the contractual right which insulates employers from further liability to the pension plans in which they participate is not 'property' within the meaning of the takings clause." 631 F. Supp. 640, 645 (1984). Because the court resolved this issue "on the basis that no 'property' is affected by the MPPAA," it did not discuss whether a "taking" had occurred, or whether the taking would have been for a "public purpose." *Ibid.*[6]

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[5] Penfield & Smith, Inc., Roy L. Klema Engineers, Inc., and Municipal Engineers, Inc., also intervened in the proceedings before the District Court. These employers are not parties to this appeal, however, as the Trustees have determined that they have incurred no liability under the Act. Brief for Appellant in No. 84–1567, p. ii.

[6] The three-judge court also rejected appellants' arguments that the MPPAA violated due process, the Contract Clause, and several other constitutional provisions. See App. to Juris. Statement in No. 84–1555, pp. 8–14.

Both the Trustees and Woodward Sand Co. invoked the appellate jurisdiction of this Court under 28 U. S. C. § 1253. We noted probable jurisdiction, 472 U. S. 1006 (1985), and now affirm.

II

Appellants challenge the District Court's conclusion that the Act does not effect a taking of "property" within the meaning of the Taking Clause of the Fifth Amendment. Rather than specifically asserting that the contractual limitation of liability is property, however, appellants argue that the imposition of noncontractual withdrawal liability violates the Taking Clause by requiring employers to transfer their assets for the private use of pension trusts and, in any event, by requiring an uncompensated transfer.[7]

The panel's decision upholding the constitutionality of the MPPAA is consistent with the result reached by every other court to have considered the issue. *Keith Fulton & Sons, Inc.* v. *New England Teamsters and Trucking Industry Pension Fund*, 762 F. 2d 1124 (CA1 1984), modified on other grounds, 762 F. 2d 1137 (1985); *Board of Trustees of Western Conference of Teamsters Pension Trust Fund* v. *Thompson Building Materials, Inc.*, 749 F. 2d 1396 (CA9 1984), cert. denied, 471 U. S. 1054 (1985); *Terson Co.* v. *Bakery Drivers and Salesmen Local 194*, 739 F. 2d 118 (CA3 1984); *Washington Star Co.* v. *International Typographical Union Negotiated Pension Plan*, 235 U. S. App. D. C. 1, 729 F. 2d 1502 (1984); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 725 F. 2d 843 (CA2), cert. denied *sub nom. Sibley, Lindsay & Curr Co.* v. *Bakery Workers*, 467 U. S. 1259 (1984); *Peick* v. *Pension Benefit Guaranty Corporation*, 724 F. 2d 1247 (CA7 1983), cert. denied, 467 U. S. 1259 (1984); *Republic Industries, Inc.* v. *Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F. 2d 628 (CA4 1983), cert. denied, 467 U. S. 1259 (1984); *Dorn's Transportation, Inc.* v. *I. A. M. National Pension Fund Benefit Plan*, 578 F. Supp. 1222 (DC 1984), aff'd, 243 U. S. App. D. C. 348, 753 F. 2d 166 (1985); *Speckmann* v. *Paddock Chrysler Plymouth, Inc.*, 565 F. Supp. 469 (ED Mo. 1983). In *Keith Fulton*, *Thompson Building Materials*, *Terson*, *Peick*, *Republic Industries*, *Dorn*, and *Speckmann*, the Taking Clause claim was directly at issue.

[7] Appellant Trustees make two additional arguments as well. First, they argue that if the imposition of withdrawal liability is invalid under the Taking Clause, then the related provisions of the MPPAA requiring multi-

We agree that an employer subject to withdrawal liability is permanently deprived of those assets necessary to satisfy its statutory obligation, not to the Government, but to a pension trust. If liability is assessed under the Act, it constitutes a real debt that the employer must satisfy, and it is not an obligation which can be considered insubstantial. In the present litigation, for example, appellant Woodward Sand Co.'s withdrawal liability, after the Trustees' assessment was reduced by an arbitrator, was approximately $200,000, or nearly 25% of the firm's net worth. Juris. Statement in No. 84-1567, p. 7, n. 7.

But appellants' submission—that such a statutory liability to a private party always constitutes an uncompensated taking prohibited by the Fifth Amendment—if accepted, would

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employer plans to pay premiums to the PBGC are also invalid, as they are inseverable from the overall statutory scheme. Second, the Trustees contend that the statutory provisions requiring multiemployer plans to pay premiums to the PBGC and authorizing the PBGC to use the funds "in its discretion" to pay benefits to participants of a terminated multiemployer plan violate the principle of separation of powers by delegating legislative authority to the PBGC.

Because we find that the withdrawal liability provisions of the Act are valid under the Taking Clause, we need not address the Trustees' first assertion. As to the Trustees' separation-of-powers contention, we find little merit in this argument. Title 29 U. S. C. § 1381(c)(2)(B) (1976 ed.) stated that the PBGC was to pay benefits if it determined that "the payment . . . of benefits guaranteed under [ERISA] with respect to that plan [would] not jeopardize the payments the [PBGC] anticipate[d] it may be required to make in connection with [the mandatory guarantee program]." Congress delegated discretionary, rather than mandatory, coverage for multiemployer plans prior to 1980 because it needed "time for thorough consideration of the complex issues posed by the termination of multiemployer pension plans." *Pension Benefit Guaranty Corporation* v. *Gray*, 467 U. S. 717, 721, n. 1 (1984). In these circumstances, the delegation of discretionary authority was a reasonable means of achieving congressional aims, and we are not persuaded that Congress failed to provide a clear "intelligible principle" to guide the PBGC in the exercise of this authority under the Act. See *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 409 (1928).

prove too much. In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another. In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1 (1976), we sustained a statute requiring coal mine operators to compensate former employees disabled by pneumoconiosis, even though the operators had never contracted for such liability, and the employees involved had long since terminated their connection with the industry. We said: "[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Id.*, at 15–16 (citations omitted).

Relying on *Turner Elkhorn*, we also rejected a due process attack on the imposition, under the statute now before us, of withdrawal liability on employers who withdrew before the effective date of the 1978 amendments. We held that Congress had acted within its powers and for sound reasons. *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717 (1984). Although both *Gray* and *Turner Elkhorn* were due process cases, it would be surprising indeed to discover now that in both cases Congress unconstitutionally had taken the assets of the employers there involved.

Appellants' claim of an illegal taking gains nothing from the fact that the employer in the present litigation was protected by the terms of its contract from any liability beyond the specified contributions to which it had agreed. See nn. 2, 3, *supra*. "Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject

matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 307–308 (1935).

If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking. *Bowles* v. *Willingham*, 321 U. S. 503, 517 (1944); *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, 508–510 (1923). This is not to say that contractual rights are never property rights or that the Government may always take them for its own benefit without compensation. But here, the United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose. That the statutory withdrawal liability will operate in this manner and will redound to the benefit of pension trusts does not justify a holding that the provision violates the Taking Clause and is invalid on its face.

This conclusion is not inconsistent with our prior Taking Clause cases. See, *e. g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982); *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U. S. 264 (1981); *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978). In all of these cases, we have eschewed the development of any set formula for identifying a "taking" forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. *Monsanto Co.*, *supra*, at 1005; *Kaiser Aetna*, *supra*, at 175. To aid in this determination, however, we have identified

three factors which have "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central Transportation Co.*, *supra*, at 124. Accord, *Monsanto Co.*, *supra*, at 1005; *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 82–83 (1980). Examining the MPPAA in light of these factors reinforces our belief that the imposition of withdrawal liability does not constitute a compensable taking under the Fifth Amendment.

First, with respect to the nature of the governmental action, we already have noted that, under the Act, the Government does not physically invade or permanently appropriate any of the employer's assets for its own use. Instead, the Act safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation. *Penn Central Transportation Co.*, *supra*, at 124; *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, at 15, 16. See *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413 (1922).

Next, as to the severity of the economic impact of the MPPAA, there is no doubt that the Act completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability. The assessment of withdrawal liability is not made in a vacuum, however, but directly depends on the relationship between the employer and the plan to which it had made contributions. Moreover, there are a significant number of provisions in the Act that moderate and mitigate the economic impact of an individual

employer's liability.[8] There is nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan, and the mere fact that the employer must pay money to comply with the Act is but a necessary consequence of the MPPAA's regulatory scheme.

The final inquiry suggested for determining whether the Act constitutes a "taking" under the Fifth Amendment is whether the MPPAA has interfered with reasonable investment-backed expectations. Appellants argue that the only monetary obligations incurred by each employer involved in the Operating Engineers Pension Plan arose from the specific terms of the Plan and Trust Agreement between the employers and the union, and that the imposition of withdrawal liability upsets those reasonable expectations. Pension plans, however, were the objects of legislative concern long before the passage of ERISA in 1974, and

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[8] Several sections of the Act moderate the impact of a withdrawing employer's liability by exempting certain transactions from being characterized as "withdrawals." See, *e. g.*, 29 U. S. C. §§ 1383(b), (c) (applying special definitions for determining whether there has been a complete or partial withdrawal from a pension plan in the building and construction industry and in the entertainment industry); § 1384 (cessation or reduction of contribution obligations as a result of an employer's sale of its assets does not result in a withdrawal, provided certain other conditions are met); § 1398(1) (change of corporate structure where successor continues to contribute to plan is not a withdrawal); § 1398(2) (withdrawal does not occur where employer suspends contributions to plan during labor dispute involving its employees).

Other sections reduce the size of the financial liability in various instances. See, *e. g.*, 29 U. S. C. § 1389(a) (creating a *de minimis* rule which eliminates withdrawal liability entirely for an employer whose obligation would be equal to or less than the smaller of (1) ¾ of 1% of the plan's unfunded vested obligations; or (2) $50,000); § 1405(a)(1) (limiting withdrawal liability for employer who liquidates his business); § 1390(a)(2) (establishing a "free look" provision, whereby new employers may withdraw without liability if they had an obligation to contribute for no more than six consecutive plan years, or, if shorter, the number of years required for vesting under the plan).

surely as of that time, it was clear that if the PBGC exercised its discretion to pay benefits upon the termination of a multiemployer pension plan, employers who had contributed to the plan during the preceeding five years were liable for their proportionate share of the plan's contributions during that period. 29 U. S. C. § 1364. It was also plain enough that the purpose of imposing withdrawal liability was to ensure that employees would receive the benefits promised them. When it became evident that ERISA fell short of achieving this end, Congress adopted the 1980 Amendments. Prudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations. See *Gray*, 467 U. S., at 732. "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *FHA* v. *The Darlington, Inc.*, 358 U. S. 84, 91 (1958). See also *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S., at 15–16 and cases cited therein.

The purpose of forbidding uncompensated takings of private property for public use is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960). We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble. The employers in the present litigation voluntarily negotiated and maintained a pension plan which was determined to be within the strictures of ERISA. We do not know, as a fact, whether this plan was underfunded, but Congress determined that unregulated withdrawals from multiemployer plans could endanger their financial vitality and deprive workers of the vested rights they were entitled to anticipate would be theirs upon retirement. For this reason, Congress

imposed withdrawal liability as one part of an overall statutory scheme to safeguard the solvency of private pension plans. We see no constitutionally compelled reason to require the Treasury to assume the financial burden of attaining this goal.

The judgment of the three-judge court is

Affirmed.

JUSTICE O'CONNOR, with whom JUSTICE POWELL joins, concurring.

Today the Court upholds the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) against a facial challenge to their validity based on the Taking Clause of the Fifth Amendment. I join the Court's opinion and agree with its reasoning and its result, but I write separately to emphasize some of the issues the Court does *not* decide today. Specifically, the Court does not decide today, and has left open in previous cases, whether the imposition of withdrawal liability under the MPPAA and of plan termination liability under the Employee Retirement Income Security Act of 1974 (ERISA) may in some circumstances be so arbitrary and irrational as to violate the Due Process Clause of the Fifth Amendment. See *Pension Benefit Retirement Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 728, n. 7 (1984); *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 367–368 (1980). The Court also has no occasion to decide whether the MPPAA may violate the Taking Clause as applied in particular cases, or whether the pension plan in this case is a defined benefit plan rather than a defined contribution plan within the meaning of ERISA.

As the Court indicates, the mere fact that "legislation requires one person to use his or her assets for the benefit of another," *ante*, at 223, will not establish either a violation of the Taking Clause or the Due Process Clause. With regard to the latter provision, it is settled that in the field of economic legislation "the burden is on one complaining of a due

process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 15 (1976). Nonetheless, the Court has never intimated that Congress possesses unlimited power to "readjus[t] rights and burdens . . . [and] upse[t] otherwise settled expectations." *Turner Elkhorn*, *supra*, at 16. Our recent cases leave open the possibility that the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee. See *Turner Elkhorn*, *supra*, at 19, 24–26; *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, *supra*, at 733 (discussing *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935)).

Insofar as the application of the provisions of the MPPAA and of ERISA to pension benefits that accrue in the future is concerned, there can be little doubt of Congress' power to override contractual provisions limiting employer liability for unfunded benefits promised to employees under the plan. But both statutes impose liability under certain circumstances on contributing employers for unfunded benefits that accrued in the past under a pension plan whether or not the employers had agreed to ensure that benefits would be fully funded. In my view, imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility.

In enacting ERISA, Congress distinguished between two types of employee retirement benefit plans: "defined benefit plan[s]" and "defined contribution plan[s]," also known as "individual account plan[s]." See 29 U. S. C. §§ 1002(34), (35). An employer is subject to plan termination liability under ERISA only if the employee benefit plan to which the employer has contributed is covered by ERISA's plan termination insurance program, which applies to defined benefit

plans but not to defined contribution plans. 29 U. S. C. § 1321(b)(1). See *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, *supra*, at 363, n. 5. Congress exempted defined contribution plans from ERISA's termination insurance program because a defined contribution plan does not specify benefits to be paid, but instead establishes an individual account for each participant to which employer contributions are made. 29 U. S. C. § 1002(34). "[U]nder such plans, by definition, there can never be an insufficiency of funds in the plan to cover promised benefits." *Nachman Corp.*, *supra*, at 364, n. 5.

By contrast, whenever a plan defines the benefits payable thereunder, the possibility exists that at a given time plan assets will fall short of the present value of vested plan benefits. Congress therefore subjected defined benefit plans to ERISA's plan termination insurance program, and did so by broadly defining a defined benefit plan as "a pension plan other than an individual account plan." 29 U. S. C. § 1002(35). We have no occasion today to decide whether this definition sweeps in all plans in which the benefits to be received by employees are fixed by the terms of the plan, even if the plan also provides that the employer's contributions shall be fixed and shall not be adjusted to whatever level would be required to provide those benefits. Indeed, this litigation began in part as a challenge by the Trustees of the Operating Engineers Pension Plan to a determination by the Pension Benefit Guaranty Corporation (hereinafter PBGC) that the Pension Plan is a defined benefit plan. See *ante*, at 219. That challenge was resolved against the Trustees and is not presented here.

ERISA's broad definition of defined benefit plan may well mean that Congress imposed contingent liability on contributing employers without regard to the extent of a particular employer's actual responsibility for the existence of a plan's promise of fixed benefits to employees and without regard to the extent to which any such promise was conditioned—and

understood by employees to be conditioned—by plan provisions limiting the employer's obligations to make contributions to the plan. If so, the application of ERISA may in some circumstances raise constitutional doubts under the Taking Clause or the Due Process Clause.

The same doubts arise with respect to the imposition of withdrawal liability under the MPPAA, which is properly seen as a prophylactic extension of the liability initially imposed by ERISA. Withdrawal liability is intended to ensure that "'an employer withdrawing from a multiemployer plan w[ill] . . . complete funding its fair share of the plan's unfunded liabilities,'" *R. A. Gray & Co.*, 467 U. S., at 723, n. 3 (quoting Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2d Sess., 23 (1978) (statement of Matthew M. Lind, Executive Director of PBGC), and thus presupposes that employers can be made liable for those unfunded liabilities in the first instance. Although the MPPAA substitutes liability to the plan for liability to PBGC, the withdrawal liability it imposes on employers who contribute to multiemployer plans reflects the same apparent determination to treat all definite benefits as promises for which the employer can be held liable that underlies termination liability under ERISA. PBGC coverage of a multiemployer plan continues to turn on whether it is a defined benefit plan, and the MPPAA defines the withdrawing employer's liability to the plan in terms of "unfunded vested benefits," 29 U. S. C. § 1391, thereby making withdrawal liability turn on the presence of fixed benefits. The MPPAA's termination liability provisions are complex, but their overall effect is also to hold employers liable for underfunding of vested fixed benefits. See 29 U. S. C. § 1341a. Thus, it is evident that the MPPAA expands on Congress' decision in ERISA to exempt only defined contribution plans, narrowly defined, from PBGC coverage and employer liability. Whether the employer's liability is to

PBGC or to the plan, the thrust of both statutes is to enforce the plan's promise of fixed benefits against the employer with respect to benefits already accrued.

The degree to which an employer can be said to be responsible for the promise of benefits made by a plan varies dramatically across the spectrum of plans. Where a single employer has unilaterally adopted and maintained a pension plan for its employees, the employer's responsibility for the presence of a promise to pay defined benefits is direct and substantial. The employer can nominate all the plan's trustees and enjoys wide discretion in designing the plan and determining the level of benefits. Where such a plan holds out to employees a promise of definite benefits, and where employees have rendered the years of service required for benefits to accrue and vest, it seems entirely rational to hold the employer liable for any shortfall in the plan's assets, even if the plan's provisions purport to limit the employer's liability in the event of underfunding upon plan termination.

Where a pension plan is established through collective bargaining between one or more employers and a union, matters may be different. Such plans, commonly known as "Taft-Hartley" plans, were authorized by § 302(c)(5) of the Labor Management Relations Act of 1947 (LMRA), 61 Stat. 157, codified, as amended, at 29 U. S. C. § 186(c)(5). Taft-Hartley plans are the product of joint negotiation between employers and a union representing employees and are administered by trustees nominated in equal numbers by employers and the union. *Ibid.* Unlike typical defined benefit plans, which call for variable employer contributions and provide for fixed benefits, most Taft-Hartley plans "possess the characteristics of both fixed contributions and fixed benefits." J. Melone, Collectively Bargained Multi-Employer Pension Plans 20 (1963) (hereinafter Melone). As PBGC has explained:

> "Employers participating in multiemployer plans are generally required to contribute at a fixed rate, specified

> in the collective bargaining agreement. . . . Traditionally, the multiemployer plan or the bargaining agreement have limited the employer's contractual obligation to contribute at the fixed rate, whether or not the contributions were sufficient to provide the benefits established by the joint board or the collectively bargained agreement." Pension Benefit Guaranty Corporation, Multiemployer Study Required by P. L. 95-214, p. 22 (1978) (hereinafter Multiemployer Study).

See also Melone 50; Goetz, Developing Federal Labor Law of Welfare and Pension Plans, 55 Cornell L. Rev. 911, 931 (1970).

Under these hybrid Taft-Hartley plans it is the plans' trustees, not the employers and the union, who are "usually responsible for determining the types of benefits to be provided . . . and the level of benefits, although in some cases these are set in the collective bargaining agreement." Multiemployer Study 22 (footnote omitted). See also GAO/HRD-85-58, Comptroller General's Report to the Congress, Effects of the Multiemployer Pension Plan Amendments Act on Plan Participants' Benefits, 37, App. I, Table 3 (June 14, 1985) (95% of 139 multiemployer plans surveyed provided that trustees set benefits) (hereinafter Report to the Congress). This delegation of responsibility to the trustees may well stem from an understanding on the part of employers and unions that under the fixed-contribution approach the plan rather than the employers would bear the risks of adverse experience and the benefits of favorable experience in the first instance. See Pension Plans Under Collective Bargaining: A Reference Guide for Trade Unions 64 (American Federation of Labor 1953). If the actuary's earnings assumptions proved too conservative, the plan would have excess assets that could be used to support an increase in benefits by the trustees, and if asset growth was lower than anticipated, benefits could be reduced. It now appears that Taft-Hartley plan employers will be liable for such experi-

ence losses in many cases, even where withdrawal occurs as a result of events over which an employer has no control, and even though experience gains can still ordinarily be used to increase benefits.

It is also noteworthy that, as this Court held in *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 331–332 (1981), "the duty of the management-appointed trustee of an employee benefit fund under § 302(c)(5) is directly antithetical to that of an agent of the appointing party." ERISA conclusively established that "an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him." *Id.*, at 334. In light of these fiduciary duties, it seems remarkable to impute responsibility to employers for the level of benefits promised by the plan and set by the joint board of trustees, notwithstanding the express limits on employer liability contained in the plan and agreed to in collective bargaining.

Yet that would appear to be what Congress may have done to the extent a Taft-Hartley plan such as the pension plan in this case is treated as a pure defined benefit plan in which the employer promised to make contributions to the extent necessary to fund the fixed benefits provided in the plan. As Representative Erlenborn put it in the hearings on the MPPAA:

> "[W]e have taken something that neither looked like a duck, or walked like a duck, or quacked like a duck, and we passed a law [ERISA] and said, 'It is a duck.' If it is that easy, I suppose we can repeal the law of gravity and solve our energy problem. It is treating the multiemployer plans where you negotiate a *contribution* as having put a legal obligation on the employer to reach a level of *benefits* that has caused the problem." Hearings on The Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management

Relations of the House Committee on Education and Labor, 96th Cong., 391 (1980) (emphasis added).

The foregoing observations suggest to me that whatever promises a collectively bargained plan makes with respect to benefits may not always be rationally traceable to the employer's conduct and that it may sometimes be quite fictitious to speak of such plans as "promising" benefits at a specified level, since to do so ignores express and bargained-for conditions on those promises. Where the plan's fixed-contribution aspects were agreed to by employees through their exclusive bargaining representatives, and where employers had no control over the level of benefits promised, employer responsibility for the benefits specified by the plan is very much attenuated, and employee expectations that those benefits will in all events be paid, in the face of plan language to the contrary, are not easily traceable to the employer's conduct.

The possible arbitrariness of imposing termination and withdrawal liability on some employers contributing to fixed-cost Taft-Hartley plans may be heightened in particular cases. For example, an employer who agrees to participate in a multiemployer plan long after the plan's benefit structure has been determined may have had no say whatever in establishing critical features of the plan that determine the level of benefits and the value of those benefits. Similarly, if a plan had regularly undergone increases and reductions in accrued benefits prior to ERISA, any contention that employers caused employees to rely on a promise of fixed benefits might carry even less weight.

Beyond that, the withdrawal provisions of the MPPAA are structured in a manner that may lead to extremely harsh results. For example, it appears that even if the trustees raised benefits for both retired and current employees during the period immediately prior to an employer's withdrawal, the withdrawing employer can be held liable for the resulting underfunding. Such benefit increases are not uncommon.

See Report to the Congress 43, App. I, Table 17 (68% of multiemployer plans surveyed increased benefits for working participants during 33 months prior to enactment of the MPPAA); Table 18 (46% of these plans increased retirees' benefits during the same period). In addition, the presumptive method for calculating employer withdrawal liability is based on the employer's proportionate share of the *contributions* made to the plan during the years in which the employer participated. 29 U. S. C. § 1391(b). As a result, because fixed-contribution plans typically do not set each employer's contributions on the basis of the value of the benefits accrued by that employer's employees, it seems entirely possible that an employer may be liable to the plan for substantial sums even though that employer's contributions plus its allocable share of plan earnings *exceed* the present value of all benefits accrued by its employees.

To be sure, the Court does not address these questions today. Since this case involves only a facial challenge under the Taking Clause to the MPPAA's withdrawal liability provisions, the Court properly refuses to look into the possibility that harsh results such as those I have noted may affect its analysis, let alone a due process inquiry, when the MPPAA is applied in particular cases. I write only to emphasize some of the issues the Court does not decide today, and to express the view that termination liability under ERISA, and withdrawal liability under the MPPAA, impose substantial retroactive burdens on employers in a manner that may drastically disrupt longstanding expectations, and do so on the basis of a questionable rationale that remains open to review in appropriate cases.

MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY v. MATHEWS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-1636. Argued November 4, 1985—Decided February 26, 1986

Respondent and another man (Daugherty) robbed a bank in Ohio. After an automobile chase, the police surrounded the two men when they stopped at a farmhouse. Thereafter, the police heard shots fired inside the house, and respondent emerged from the house and surrendered. The police then entered the house and found Daugherty dead. Based on the Coroner's opinion that Daugherty had committed suicide, the State did not charge respondent with Daugherty's death but with aggravated robbery. Respondent pleaded guilty, but two days later admitted having shot Daugherty. Respondent was then indicted for aggravated murder based on the bank robbery. The state trial court denied his pretrial motion to dismiss the indictment as violative of the Double Jeopardy Clause of the Fifth Amendment, and he was found guilty after a jury trial. Ultimately, the Ohio Court of Appeals, finding that the Double Jeopardy Clause barred respondent's conviction for aggravated murder, modified that conviction to that of the lesser included offense of murder. After the Ohio Supreme Court denied respondent's motion to appeal, he sought a writ of habeas corpus in Federal District Court, which denied the petition. The Federal Court of Appeals reversed. Apparently agreeing with respondent's assertion that evidence was admitted at his trial for aggravated murder that would have been inadmissible in a trial for murder and stating that the jury "may have been prejudiced" by that evidence, the court held that respondent had established a "reasonable possibility" that he was prejudiced by the double jeopardy violation sufficient to warrant a new trial on the murder charge.

Held: Reducing respondent's concededly jeopardy-barred conviction for aggravated murder to a conviction for murder that concededly was not jeopardy barred was an adequate remedy for the double jeopardy violation. Pp. 244-248.

(a) When a jeopardy-barred conviction is reduced to a conviction for a lesser included offense that is not jeopardy barred, the burden shifts to the defendant to demonstrate a reasonable probability (*i.e.*, a probability sufficient to undermine confidence in the outcome) that he would not have been convicted of the non-jeopardy-barred offense absent the presence of the jeopardy-barred offense. Where it is clear that the jury nec-

essarily found that the defendant's conduct satisfies the elements of the lesser included offense, it would be incongruous to order another trial as a means of curing the double jeopardy violation. Pp. 244–247.

(b) Here, the Federal Court of Appeals' legal and factual basis for ordering the writ of habeas corpus was seriously flawed. Its "reasonable possibility" standard was not sufficiently demanding, it did not expressly say that it agreed with respondent that certain evidence admitted at his trial would not have been admitted in a separate trial for murder nor did it refer to any Ohio authorities, and its observation that the admission of such evidence "may have prejudiced the jury" falls far short of a considered conclusion that if the evidence at issue was not before the jury in a separate trial for murder, there was a reasonable probability that respondent would not have been convicted. Pp. 247–248.

754 F. 2d 158, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which POWELL, J., joined, *post*, p. 248. BRENNAN, J., *post*, p. 257, and MARSHALL, J., *post*, p. 258, filed dissenting opinions.

Richard David Drake, Assistant Attorney General of Ohio, argued the cause for petitioner. With him on the brief was *Anthony J. Celebrezze, Jr.*, Attorney General.

Michael George Dane argued the cause for respondent. With him on the brief was *Edward F. Marek*.

JUSTICE WHITE delivered the opinion of the Court.

The question presented in this case is whether a state appellate court provided an adequate remedy for a violation of the Double Jeopardy Clause of the Fifth Amendment by modifying a jeopardy-barred conviction to that of a lesser included offense that is not jeopardy-barred.

I

On February 17, 1978, respondent James Michael Mathews and Steven Daugherty robbed the Alexandria Bank in Alexandria, Ohio. After an automobile chase, the police finally surrounded the two men when they stopped at a farmhouse. Soon thereafter, the police heard shots fired inside the house,

and respondent then emerged from the home and surrendered to police. When the officers entered the house, they found Daugherty dead, shot once in the head and once in the chest. The police also found the money stolen from the bank hidden in the pantry.

Once in custody, respondent gave a series of statements to law enforcement officials. In his first statement, given one hour after his surrender, respondent claimed that Daugherty and another man had forced him to aid in the bank robbery by threatening to kill both respondent and his girlfriend. Respondent denied shooting Daugherty. In the second statement, given the same day, respondent again denied shooting Daugherty, but admitted that no other man was involved with the robbery, and that he and Daugherty alone had planned and performed the crime.

Two days later, respondent gave a third statement to police in which he again confessed to robbing the bank. Respondent also related that after he and Daugherty arrived at the farmhouse, he had run back out to their van to retrieve the stolen money, and on his way back inside, he "heard a muffled shot from inside the house." App. 4. Upon investigation, respondent discovered that Daugherty had shot himself in the head. Respondent claimed that Daugherty was still conscious, and called to him by name. *Ibid.*

The County Coroner initially ruled Daugherty's death to be a suicide. The Coroner made this determination, however, before receiving the results of an autopsy performed by a forensic pathologist. This report indicated that Daugherty had received two wounds from the same shotgun. The initial shot had been fired while Daugherty was standing, and entered the left side of his face. This shot fractured Daugherty's skull, and the mere force of the blast would have rendered him immediately unconscious. This wound was not fatal. The second shot was fired while Daugherty was lying on his back, and was fired directly into his heart from extremely close range. This shot was instantaneously fatal.

As a result of this evidence, the Coroner issued a supplemental death certificate, listing "multiple gun shot wounds" as the cause of death. Record 295.

Based on the Coroner's first opinion that Daugherty took his own life, the State did not charge respondent with Daugherty's death. Instead, he was indicted under Ohio Rev. Code Ann. § 2911.01 (Supp. 1984) on aggravated robbery charges.[1] Respondent pleaded guilty on May 17 and was sentenced to a term of incarceration of from 7 to 25 years.

Two days after entering his guilty plea, respondent made the first of two statements in which he admitted having shot Daugherty. Respondent maintained that Daugherty initially had shot himself in the head, and that he was still alive when respondent discovered him after returning to the farmhouse with the stolen money. Acting on the theory that, if Daugherty were dead, respondent could claim that he was kidnaped and had not voluntarily robbed the bank, respondent "put [the gun] an inch or two from [Daugherty's] chest and pulled the trigger." App. 6.[2] Respondent's second

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[1] Ohio Rev. Code Ann. § 2911.01 (Supp. 1984) states:

"(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

"(1) Have a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

"(2) Inflict, or attempt to inflict serious physical harm on another.

"(B) Whoever violates this section is guilty of aggravated robbery, an aggravated felony of the first degree."

Respondent was also indicted for theft of the van used in the robbery and for burglary.

[2] Respondent's handwritten statement, in pertinent part, reads as follows:

"At that time I ask steve were the money was and he said it was still out in the van. I tould him to cover me I was going out in the van to get the money. He said to me right before I went out to be careful and then I went out to the van, and when I was out there getting ready to come back in I heard a muffled shot and I ran in and yelled for steve. I then heard

statement, given one week later, reiterated these same points. *Id.*, at 8–16.

On June 1, 1978, the State charged respondent with the aggravated murder of Steven Daugherty. Ohio Rev. Code § 2903.01 (1982) defines aggravated murder, in part, as "purposely caus[ing] the death of another . . . while fleeing immediately after committing . . . aggravated robbery."[3] The aggravated robbery referred to in the indictment was the armed robbery of the Alexandria Bank to which respondent had previously pleaded guilty. The state trial court denied respondent's pretrial motion to dismiss the aggravated murder indictment as violative of the Double Jeopardy Clause of the Fifth Amendment.

At the conclusion of the evidence, the trial judge instructed the jury as to the elements of the offense of aggravated mur-

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something like a moning up stairs. I then ran up stairs and seen steve laying there on the floor. He had shot himself somewere in the head and was bleeding pretty bad. He then seen me and said mike, mike, in a moning, and I said oh fuck, he still had the gun in his hand and was trying to load it up but failed and droped it And he then said to me mike mike in a moning voice please shot me. . . . I knew he was in a lot of pain and I couldn't really shot him even though he was in pretty bad shape. But I really didn't want to, but then I said to myself real quick that if he was dead I could say that I was kidnapped. And they couldn't prove that I robbed the bank. So I took 1 shell that was laying in steve hand and put it in the gun and I then I put it about an inch or two from his chest and pulled the trigger. I really don't know much after that but the gun was dropped on the floor not to far from steve body. I then run down stairs and looked for a place to hid the money." App. 5–6.

[3] Ohio Rev. Code Ann. § 2903.01 (1982) provides, in pertinent part, as follows:

"(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

"(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code."

der. The judge also instructed the jury on the lesser included offense of murder as follows:

> "If you find that the State proved beyond a reasonable doubt all of the essential elements of aggravated murder, your verdict must be guilty of that crime and in that event you will not consider any lesser offense.
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> "But if you find that the State failed to prove the killing was done while the defendant was committing or fleeing immediately after committing aggravated robbery, but that the killing was nonetheless purposely done, you will proceed with your deliberations and decide whether the State has proved beyond a reasonable doubt the elements of the lesser crime or murder.
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> "The crime of murder is distinguished from aggravated murder by the State's failure to prove that the killing was done while the defendant was committing or fleeing immediately after committing the crime of aggravated robbery." App. 21.

The jury found respondent guilty of aggravated murder, and the court sentenced him to a term of life imprisonment.

Respondent appealed his conviction, claiming that his trial for aggravated murder following his conviction for aggravated robbery violated the Double Jeopardy Clause. The Ohio Court of Appeals, Fifth Judicial District, affirmed his conviction, *State* v. *Mathews*, CA No. 2578 (Licking County, Aug. 9, 1979), and the Ohio Supreme Court declined to grant discretionary review. *State* v. *Mathews*, No. 79-1342 (Dec. 7, 1979). This Court granted respondent's petition for writ of certiorari, vacated the Court of Appeals' judgment, and remanded the case for further consideration in light of *Illinois* v. *Vitale*, 447 U. S. 410 (1980). *Mathews* v. *Ohio*, 448 U. S. 904 (1980).

On remand, the Court of Appeals found that the Double Jeopardy Clause, as construed by this Court in *Vitale*, barred respondent's conviction for aggravated murder. *State* v. *Mathews*, No. 2578 (Licking County, Nov. 7, 1980). The

court noted, however, that § 2903.01 defines aggravated murder as purposely causing the death of another while committing certain felonies, and that § 2903.02 defines murder simply as purposely causing the death of another. App. to Pet. for Cert. A-26.[4] In respondent's trial, therefore, "if all the facts relating to the aggravated robbery of which he was convicted are excluded from consideration of the court and jury, the defendant was still charged with and convicted of murder in that he did purposely cause the death of Steven Daugherty on the date charged." *Ibid.* Accordingly, the Court of Appeals modified the conviction of aggravated murder to murder and reduced respondent's sentence to an indefinite term of from 15 years to life. *Id.*, at A-27.[5] Once again, the Ohio Supreme Court denied respondent's motion to appeal, and this Court denied his subsequent petition for certiorari review. *Mathews* v. *Ohio*, 451 U. S. 975 (1981).

Respondent then sought a writ of habeas corpus in federal court. Applying the reasoning of the Ohio Court of Appeals,

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[4] Ohio Rev. Code. Ann. § 2903.02 (1982) provides as follows:

"(A) No person shall purposely cause the death of another.

"(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code."

[5] The Ohio Court of Appeals relied, in part, on Ohio Rule of Criminal Procedure 31, which states:

"(C) *Conviction of lesser offense.* The defendant may be found not guilty of the offense charged but guilty of an attempt to commit it if such an attempt is an offense at law. When the indictment, information, or complaint charges an offense, including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the offense charged but guilty of an inferior degree thereof, or of a lesser included offense."

The court also cited Ohio Rule of Criminal Procedure 33(A)(4):

"(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified."

the District Court denied respondent's petition. *Mathews* v. *Marshall*, No. C-1-81-834 (WD Ohio, Apr. 19, 1983).

A divided panel of the Court of Appeals for the Sixth Circuit reversed. *Mathews* v. *Marshall*, 754 F. 2d 158 (1985). Although refusing to hold that in a case like this a new trial on the nonbarred charge is always necessary, the court held that "a conviction obtained in violation of the double jeopardy clause cannot be modified if the defendant can show that there was a 'reasonable possibility that he was prejudiced' by the double jeopardy violation," and that "'an exceedingly small showing . . . would suffice.'" *Id.*, at 162, quoting *Graham* v. *Smith*, 602 F. 2d 1078, 1083 (CA2 1979). Apparently agreeing with respondent's assertion that "evidence was admitted in his trial for aggravated murder that would not have been admissible in a trial for murder," and stating that the jury "may have [been] prejudiced" by that evidence, the court concluded that respondent had established a sufficient possibility of prejudice to warrant a new trial on the murder charge. *Mathews* v. *Marshall*, *supra*, at 162.[6]

We granted certiorari, 471 U. S. 1134 (1985), and now reverse.

II

As an initial matter, we note several issues that are not in dispute. First, the State concedes that under our cases the prosecution of respondent for aggravated murder violated the Double Jeopardy Clause. Similarly, respondent concedes that the Clause would not prevent the State from trying him for murder. Next, all of the courts that have reviewed this case have agreed that, in finding respondent guilty of aggravated murder, the jury necessarily found that he "purposely cause[d] the death of another," which is the definition of murder under Ohio Rev. Code Ann. § 2903.02 (1982). See n. 4, *supra*. Finally, this is not a "harmless

[6] The dissenting judge was of the view that, even in a separate trial on the murder charges, the rules of evidence would allow the State "to prove the surrounding circumstances, including the facts surrounding the just-completed bank robbery." 754 F. 2d at 162 (Brown, J., dissenting).

error" case: allowing respondent to be tried for aggravated murder was error, and it was not in any sense harmless. With these considerations aside, the only issue before us is whether reducing respondent's conviction for aggravated murder to a conviction for murder is an adequate remedy for the double jeopardy violation.

Respondent argues that, because the trial for aggravated murder should never have occurred, the Double Jeopardy Clause bars the State from taking advantage of the jeopardy-barred conviction by converting it into a conviction for the lesser crime of murder. He submits that a new trial must be granted whether or not there is a showing of prejudice.

Respondent relies heavily on *Price* v. *Georgia*, 398 U. S. 323 (1970), but his reliance is misplaced. Price was tried for murder and convicted of the lesser-included offense of manslaughter. After that conviction was reversed on appeal, there was another trial for murder and another conviction of the lesser crime of manslaughter. We held that the second conviction could not stand because Price had been impliedly acquitted of murder at the first trial and could not be tried again on that charge. *Id.*, at 329. Nor could we "determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence." *Id.*, at 331.

This holding in *Price* did not impose an automatic retrial rule whenever a defendant is tried for a jeopardy-barred crime and is convicted of a lesser-included offense. Rather, the Court relied on the likelihood that the conviction for manslaughter had been influenced by the trial on the murder charge—that the charge of the greater offense for which the jury was unwilling to convict also made the jury less willing to consider the defendant's innocence on the lesser charge. That basis for finding or presuming prejudice is not present here. The jury did not acquit Mathews of the greater offense of aggravated murder, but found him guilty of that charge and, *a fortiori*, of the lesser offense of murder as well.

Benton v. *Maryland*, 395 U. S. 784 (1969), also strongly indicates that to prevail here, Mathews must show that trying him on the jeopardy-barred charge tainted his conviction for the lesser-included offense. Benton was tried for both larceny and burglary. The jury acquitted him on the larceny count, but found him guilty of burglary. His conviction was later set aside because the jury had been improperly sworn. Benton again was tried for both burglary and larceny, and the second jury found him guilty of both offenses. The Maryland Court of Appeals held there had been no double jeopardy violation, but we disagreed, ruling that the Double Jeopardy Clause required setting aside the larceny conviction and sentence. *Id.*, at 796–797.

Benton urged that his burglary conviction must also fall because certain evidence admitted at his second trial would not have been admitted had he been tried for burglary alone. This evidence, he claimed, prejudiced the jury and influenced their decision to convict him of burglary. We rejected that argument, saying both that "[i]t [was] not obvious on the face of the record that the burglary conviction was affected by the double jeopardy violation," and that we should not make this kind of evidentiary determination "unaided by prior consideration by the state courts." *Id.*, at 798 (footnote omitted). We thus vacated the judgment of the Maryland court, and remanded for further proceedings.

Neither *Benton* nor *Price* suggests that a conviction for an unbarred offense is inherently tainted if tried with a jeopardy-barred charge. Instead, both cases suggest that a new trial is required only when the defendant shows a reliable inference of prejudice. We perceive no basis for departing from this approach here; for except that murder was a lesser offense included in the aggravated murder charge rather than a separate charge, there is no difference between this case and *Benton* for double jeopardy purposes.

Accordingly, we hold that when a jeopardy-barred conviction is reduced to a conviction for a lesser included offense

which is not jeopardy barred, the burden shifts to the defendant to demonstrate a reasonable probability that he would not have been convicted of the non-jeopardy-barred offense absent the presence of the jeopardy-barred offense. In this situation, we believe that a "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 695 (1984). After all, one of the purposes of the Double Jeopardy Clause is to prevent multiple prosecutions and to protect an individual from suffering the embarrassment, anxiety, and expense of another trial for the same offense, *Green* v. *United States*, 355 U. S. 184, 187–188 (1957). In cases like this, therefore, where it is clear that the jury necessarily found that the defendant's conduct satisfies the elements of the lesser included offense, it would be incongruous always to order yet another trial as a means of curing a violation of the Double Jeopardy Clause.

The Court of Appeals thus was correct in rejecting respondent's *per se* submission, but it was nevertheless too ready to find that he had made the necessary showing of prejudice. First, the court's "reasonable possibility" standard, which could be satisfied by "an exceedingly small showing," was not sufficiently demanding. To prevail in a case like this, the defendant must show that, but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different.

Second, the Court of Appeals appeared to agree with respondent that certain evidence admitted at his trial would not have been admitted in a separate trial for murder, but it did not expressly say so, nor did it refer to any Ohio authorities. *Mathews* v. *Marshall*, 754 F. 2d, at 162. The State submits that under Ohio law, conduct of a defendant tending to show either "his motive or intent," or his "scheme, plan or system," is admissible, "notwithstanding that such proof may show or tend to show the commission of another crime by the defend-

ant." Ohio Rev. Code Ann. § 2945.59 (1982).[7] See generally *State* v. *Moorehead*, 24 Ohio St. 2d 166, 169, 265 N. E. 2d 551, 553 (1970). We normally accept a court of appeals' view of state law, but if this case turns on the admissibility of the challenged evidence in a separate trial for murder, the issue deserves a more thorough consideration by the lower court.

Finally, the court's observation that the admission of questionable evidence "may have prejudiced the jury" falls far short of a considered conclusion that if the evidence at issue was not before the jury in a separate trial for murder, there is a reasonable probability that respondent would not have been convicted.

Because the Court of Appeals' legal and factual basis for ordering the writ of habeas corpus to issue was seriously flawed, its judgment is reversed, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE POWELL joins, concurring in the judgment.

To remedy the jeopardy-barred prosecution and conviction of respondent James Michael Mathews for aggravated mur-

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[7] Ohio Rev. Code Ann. § 2945.59 (1982) provides as follows:

"In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

Similarly, Ohio Rule of Evidence 404(b) states:

"(B) *Other crimes, wrongs or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

der, the Ohio appellate court modified the conviction to one for the lesser included offense of murder, which was not jeopardy-barred. The United States Court of Appeals for the Sixth Circuit held this remedy constitutionally insufficient because there was a "reasonable possibility" that the presence of the aggravated-murder charge prejudiced respondent's defense against the charge of murder. I think the Court of Appeals applied the right standard but reached the wrong result. Accordingly, I concur in today's judgment but do not join the Court's opinion.

I

Respondent concedes that after he pleaded guilty to armed robbery Ohio could have tried him for murder without violating the Double Jeopardy Clause. Disagreeing with the Court of Appeals, however, he contends that the presence of the jeopardy-barred charge of aggravated murder in his subsequent trial *automatically* rendered unconstitutional any conviction resulting from that trial. The Court correctly points out that this position cannot be reconciled with the terms of the judgment in *Benton* v. *Maryland*, 395 U. S. 784 (1969). See *ante*, at 246. Moreover, respondent's primary argument for his position is unconvincing. He asserts that modifying his conviction from aggravated murder down to simple murder cannot possibly cure the violation, because the trial itself constituted the violation. The Double Jeopardy Clause, however, did not prohibit Ohio from holding a trial, only from seeking a conviction for aggravated murder. (It also barred the State from *obtaining* a conviction for aggravated murder, but the violation of that prohibition was remedied by the Ohio appellate court's modification of the judgment.) The error, then, was not that the trial was held, but that it was improperly broad. The prosecution did something it was not allowed to do: it tried respondent for aggravated murder in addition to simple murder. It is true that the prosecutorial conduct at issue is prohibited not simply for

its potential effect on the trial's outcome, but also for the ordeal through which it put the defendant. As a consequence, it is also true that reducing respondent's sentence does not make him "whole" for the violation: it does not compensate him, for example, for any mental anguish inflicted upon him by the prosecution for the aggravated offense. See *Price* v. *Georgia*, 398 U. S. 323, 331, and n. 10 (1970). But it hardly follows from these considerations that the appropriate remedy must always be to set aside the entire conviction and have yet another trial, particularly since one of the purposes of the Double Jeopardy Clause is to promote finality by avoiding multiple trials for the same offense.

Accordingly, the Court of Appeals held that respondent was entitled to a new trial on the murder charge only if he demonstrated a "'reasonable possibility that he was prejudiced'" by the violation. *Mathews* v. *Marshall*, 754 F. 2d 158, 162 (CA6 1985), quoting *Graham* v. *Smith*, 602 F. 2d 1078, 1083 (CA2), cert. denied, 444 U. S. 995 (1979). The majority here now rejects that standard and holds that a defendant must demonstrate "a reliable inference of prejudice." *Ante*, at 246. This means, the majority explains, that respondent must show that without the error "there is a reasonable *probability*" that he would not have been convicted of murder. *Ibid.* (emphasis added). In yet a third formulation of its standard, the Court announces: "To prevail in a case like this, the defendant must show that, but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different." *Ante*, at 247. To the extent that these standards differ from the "reasonable possibility" test applied by the Court of Appeals, they are, in my view, unprecedented and inappropriate.

II

The Court starts out on the wrong foot by asserting that "this is not a 'harmless error' case." *Ante*, at 244–245. Fundamentally, this *is* a "harmless error" case. Ohio concedes that it violated the Double Jeopardy Clause. To say

that the remedy imposed by the state courts was constitutionally adequate is simply to say that the State's acknowledged transgression may be deemed harmless with respect to respondent's conviction for the lesser included offense. In *Chapman* v. *California*, 386 U. S. 18 (1967), this Court rejected the argument that no constitutional violation can ever be harmless. Some constitutional rights, of course, are "so basic to a fair trial" that their denial automatically requires reversal, *id.*, at 23, but I agree with the Court that this category does not include double jeopardy violations of the sort involved here when the ultimate conviction is not for a jeopardy-barred offense. Under *Chapman*, therefore, respondent's conviction for simple murder may be sustained if the State shows "beyond a reasonable doubt" that its error did not contribute to the conviction. *Id.*, at 24; see also, *e. g.*, *United States* v. *Hasting*, 461 U. S. 499, 511 (1983). As was noted in *Chapman*, the "harmless . . . beyond a reasonable doubt" standard is essentially the same as a requirement of reversal whenever there is a "reasonable possibility" that the error contributed to the conviction. 386 U. S., at 23–24.

The "reasonable possibility" standard originated in *Fahy* v. *Connecticut*, 375 U. S. 85 (1963), where it was applied to the improper introduction of illegally seized evidence. Less than two years prior to this Court's decision in *Chapman*, the Court of Appeals for the Second Circuit persuasively demonstrated that the *Fahy* standard was equally applicable to situations of the kind involved here, *i. e.*, jeopardy-barred prosecutions that ultimately result in convictions on lesser included charges that are not barred. See *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844 (1965), cert. denied *sub nom. Mancusi* v. *Hetenyi*, 383 U. S. 913 (1966). Hetenyi was charged by the State with first-degree murder but convicted only of second-degree murder, a lesser included offense. After his conviction was overturned on appeal, he again was prosecuted for first-degree murder, and ultimately

convicted once more only of second-degree murder.[1] Writing for the Court of Appeals, then-Judge Marshall noted that the Constitution forbade the reprosecution of Hetenyi for an offense of which he had been impliedly acquitted in the first trial, but that the State constitutionally could have prosecuted Hetenyi again for second-degree murder. Nonetheless, the Court of Appeals invalidated Hetenyi's reconviction for the lesser offense, because there was a "*reasonable possibility* that he was prejudiced" by the fact that he was charged with first-degree murder. 348 F. 2d, at 864 (emphasis in original). "For example," Judge Marshall explained, "it is entirely possible that without the inclusion of the first degree murder charge, the jury, reflecting a not unfamiliar desire to compromise might have returned a guilty verdict on the first degree manslaughter charge," a lesser included offense of second-degree murder. *Id.*, at 866. The court refused to apply a more lenient test for harmless error, noting:

> "The ends of justice would not be served by requiring a factual determination that the accused was actually prejudiced . . . by being prosecuted for and charged with first degree murder, nor would the ends of justice be served by insisting upon a quantitative measurement of that prejudice. The energies and resources consumed by such inquiry would be staggering and the attainable level of certainty most unsatisfactory." *Id.*, at 864.

This Court relied on *Hetenyi* in *Price* v. *Georgia*, 398 U. S. 323 (1970), a case with similar facts. Price was tried for murder and found guilty of manslaughter. His conviction

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[1] Hetenyi was actually tried three times, each time for first-degree murder. In the second trial he was convicted of that offense, but the second conviction, like the first, was reversed on appeal on grounds other than double jeopardy. The third trial resulted in a conviction for second-degree murder.

was overturned on appeal, he was retried for murder, and he again was found guilty of manslaughter. This Court held that the reprosecution for murder was barred on double jeopardy grounds, and rejected the State's argument that the error was rendered harmless by the fact that the second jury convicted Price only of the unbarred offense. Citing *Hetenyi*, the Court noted that "we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence." 398 U. S., at 331. The Court did not explicitly employ the "reasonable possibility" standard, but it observed: "The Double Jeopardy Clause . . . is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequence of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly." *Ibid.* The Court certainly gave no indication that it would consider the error harmless unless Price could show that "but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different." See *ante*, at 247.[2]

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[2] Since *Price*, three Courts of Appeals have reviewed whether a double jeopardy violation was adequately remedied by modifying the jeopardy-barred conviction to one for a lesser included offense that was not jeopardy-barred; like the Court of Appeals for the Sixth Circuit in this case, each of the other two courts has followed *Hetenyi*. In *Graham* v. *Smith*, 602 F. 2d 1078 (CA2), cert. denied, 444 U. S. 995 (1979), the court addressed a situation similar to the one involved here. Graham's conviction for second-degree murder had been reduced on appeal to manslaughter. The modified conviction was then set aside on federal habeas, and the State successfully retried Graham for second-degree murder. Recognizing the double jeopardy violation, a state appellate court reduced the new conviction to manslaughter. This remedy was judged insufficient by the Court of Appeals because Graham's testimony at the second trial resulted in the introduction of extremely damaging impeachment evidence, and he claimed that he might not have testified had the State charged only manslaughter. The Court of Appeals found this claim doubtful but sufficiently plausible to

The Court today offers virtually no explanation for departing from *Chapman* and *Fahy* in favor of a more lenient approach. It cites no support at all for the "reliable inference" and "probably would have been different" formulations of the new test it announces. In support of the "reasonable probability" formulation, the Court refers to *Strickland* v. *Washington*, 466 U. S. 668 (1984), which used the same words but did not concern the adequacy of a proffered remedy for an acknowledged constitutional violation. The question in *Strickland* was whether there had been a constitutional violation in the first place. *Id.*, at 691–692. We held that a professionally unreasonable mistake by defense counsel constitutes ineffective assistance of counsel under the Sixth Amendment only if in retrospect there is a "reasonable probability" that the mistake altered the verdict—that is, "a probability sufficient to undermine confidence in the outcome." *Id.*, at 694, cf. *United States* v. *Bagley*, 473 U. S. 667 (1985) (prosecutor's failure to disclose evidence favorable to the accused violates due process where there is a "reasonable probability" that disclosure would have affected the outcome).[3] In this case, however, it is common ground that

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create a "'*reasonable possibility* that [Graham] was prejudiced.'" 602 F. 2d, at 1083, quoting *Hetenyi*, 348 F. 2d, at 864.

The Court of Appeals for the Fifth Circuit took a similar approach in *Tapp* v. *Lucas*, 658 F. 2d 383 (1981), cert. denied, 456 U. S. 972 (1982), which also involved facts resembling those here. Tapp was prosecuted for murder and convicted of manslaughter. The conviction was set aside, and he was retried for murder, this time with success. To remedy the double jeopardy violation, the State Supreme Court reduced the second conviction to manslaughter. Citing *Graham* v. *Smith*, the Court of Appeals upheld this remedy as "a common sense solution to the problem of avoiding yet another trial." 658 F. 2d, at 386. The court distinguished *Price* on the ground that "the *possibility* of prejudicial jury compromise is simply absent from this case." *Ibid.* (emphasis added).

[3] As in *Strickland*, the Court today defines a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Ante*, at 247; *Strickland*, 466 U. S., at 694. In *Strickland*, however, we specifically refused to require a showing "that counsel's deficient conduct *more*

respondent's rights under the Double Jeopardy Clause were violated when Ohio tried him for aggravated murder. The question is not whether Ohio has also violated the Sixth Amendment or the Due Process Clause. The question is whether the State has sufficiently contained the damage from its *acknowledged* violation of the Double Jeopardy Clause, or whether that transgression taints even the conviction for simple murder. At issue is the extent to which the law will tolerate a conviction that may have been obtained through abridgment of a defendant's constitutional rights. Once it is established that the State has violated the Constitution in the course of a prosecution, the proceedings lose whatever presumption of regularity they formerly enjoyed, and the State properly bears a heavy burden in arguing that the result should nonetheless be treated as valid.

By ruling, despite *Chapman*, that a defendant in a case such as this must show more than a reasonable possibility of prejudice to invalidate the conviction, the Court makes double jeopardy violations more readily excusable than any other kind of constitutional error. For me, that makes little sense. Violations of the Double Jeopardy Clause are no less serious than violations of other constitutional protections. Their excusability should be judged by the same standard. The Court offers no real explanation for the special leniency it announces today, and there is none.

III

The proper question in this case is thus whether Ohio has shown beyond a reasonable doubt that the aggravated-murder charge did not contribute to respondent's conviction for simple murder. Under *Chapman* and *Fahy* this means

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likely than not altered the outcome in the case." *Id.*, at 693 (emphasis added). The Court's reliance on some of the language of *Strickland* therefore renders particularly puzzling its wholly unprecedented demand one paragraph later that the respondent here demonstrate that without the jeopardy-barred charge "the result of the proceeding probably would have been different." *Ante*, at 247.

that the State must convincingly disprove any reasonable possibility that the greater charge prejudiced respondent's defense against the lesser. With most errors, the prejudice to be feared is so obvious that there is no need for the defendant to spell it out. When illegally obtained evidence is introduced, or when the prosecutor makes forbidden remarks, it is understood that the danger is that the illegal evidence or the remarks will influence the jury. In this case, however, there is no obvious way in which the defendant could have been prejudiced. The conviction for the jeopardy-barred offense was reduced to one for an unbarred, lesser included offense. There is no possibility of a compromise verdict, as in *Hetenyi* or *Price*, because here the jury convicted for the greater offense charged. Nor is there any reason to believe that evidence regarding the robbery, admitted to prove the aggravating factor in respondent's trial, would not have been admitted in a trial for simple murder. Like the Federal Rules of Evidence, Ohio's evidence code allows the introduction of evidence of other crimes to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ohio Rule Evid. 404(B); see also Fed. Rule Evid. 404(b). The murder in this case was committed while in flight from the bank robbery. The State's theory is that respondent murdered his accomplice in order to silence him so that respondent could escape prosecution for the robbery and, he hoped, return later to pick up the stolen money he had hidden. There consequently is no apparent reason why evidence of the robbery would not have been admissible to show motive and opportunity for the murder.

Given all this, respondent is obligated to spell out with some specificity how the trial might have gone better for him had the State charged only simple murder. He has not done so; instead, he has simply speculated that all sorts of things might have been different. That is not enough to prevent this Court from "declar[ing] a belief that [the error] was

harmless beyond a reasonable doubt." *Chapman*, 386 U. S., at 24. If it were, the remand in *Benton* v. *Maryland*, 395 U. S. 784 (1969), would have been inappropriate: the Court there simply would have vacated the burglary conviction, because there was no telling what would have happened had the defendant not been forced to defend himself against the larceny charge. Perhaps different trial tactics would have been tried; perhaps defense counsel would have prepared more fully on the burglary charge. Indeed, if abstract speculations of this sort sufficed to create a "reasonable doubt" that an error was harmless, it is difficult to see how any constitutional error ever would qualify.

I therefore concur in the Court's judgment, although I see no justification for departing from the traditional and established standards for deciding questions of this kind.

JUSTICE BRENNAN, dissenting.

Both the charge for aggravated robbery, to which respondent pleaded guilty, and the subsequent charge for aggravated murder arose from the same criminal transaction or episode. In those circumstances, Ohio's prosecution for aggravated murder, and the Ohio Court of Appeals' subsequent reduction of that conviction to simple murder, in my view, violated the prohibition of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), that no person shall be subject for the same offense to be twice put in jeopardy. I adhere to my view that the Double Jeopardy Clause requires that except in extremely limited circumstances not present here, "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction" be prosecuted in one proceeding. *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See, *e. g.*, *Brooks* v. *Oklahoma*, 456 U. S. 999 (1982) (BRENNAN, J., dissenting); *Snell* v. *United States*, 450 U. S. 957 (1981) (BRENNAN, J., dissenting); *Werneth* v. *Idaho*, 449 U. S. 1129 (1981) (BRENNAN, J., dissenting); *Thompson* v. *Oklahoma*,

429 U. S. 1053 (1977) (BRENNAN, J., dissenting). Accordingly, I would affirm the judgment below reversing the District Court, with directions to the Court of Appeals to remand the case to the District Court with instructions to issue the writ.

However, even on the view that a second prosecution is permissible under the circumstances of this case, I would agree with JUSTICE BLACKMUN for the reasons stated in his opinion concurring in the judgment, *ante*, p. 248, that respondent is entitled to a new trial if he could demonstrate a "reasonable possibility" that he was prejudiced. *Ante*, at 255–256. I also agree with JUSTICE MARSHALL, *post*, at 259, that the Court of Appeals' finding that this standard has been met should be sustained.

JUSTICE MARSHALL, dissenting.

For substantially the reasons stated in Parts I and II of JUSTICE BLACKMUN's thoughtful concurrence, I believe that the Court of Appeals was correct to conclude that respondent was entitled to a new trial if he could demonstrate a "'reasonable possibility that he was prejudiced'" by the double jeopardy violation, *Mathews* v. *Marshall*, 754 F. 2d 158, 162 (CA6 1985) (quoting *Graham* v. *Smith*, 602 F. 2d 1078, 1083 (CA2 1979)). This standard is consistent with the approach this Court has uniformly taken when constitutional violations do not require automatic reversal, see *ante*, at 250–253, and is justified by the difficulties that a defendant wishing to show even the probability of actual prejudice must face.

> "There [can] never be any certainty as to whether the jury was actually influenced by the unconstitutionally broad scope of the reprosecution or whether the accused's defense strategy was impaired by this scope of the charge, even if there were a most sensitive examination of the entire trial record and a more suspect and controversial inquest of the jurors still alive and available." *United States ex rel. Hetenyi* v. *Wilkins*, 348 F.

2d 844, 864 (CA2 1965), cert. denied *sub nom. Mancusi* v. *Hetenyi*, 383 U. S. 913 (1966).

The mere absence of any danger in a particular case that the bringing of a jeopardy-barred charge resulted in a compromise verdict, see, *e. g.*, *Price* v. *Georgia*, 398 U. S. 323 (1970); *Hetenyi*, *supra*, is no reason for adopting a different standard for determining whether a defendant is entitled to a new trial. By impermissibly expanding the scope of the prosecution, the double jeopardy violation may have exposed defendant to serious dangers of another sort.

One of the dangers faced by respondent here was that evidence that would not have been admitted (indeed, might not have even been offered) had he been tried for simple murder came in because the prosecution had brought the jeopardy-barred charge of aggravated murder. The Court of Appeals reversed respondent's conviction because it found that such otherwise inadmissible evidence had been admitted and "may have prejudiced the jury with regard to its findings as to intent and to the act itself." 754 F. 2d, at 162. Unlike JUSTICE BLACKMUN, I see no reason why the Court of Appeals should be required to reconsider its conclusion that respondent was so prejudiced. On such a question of state evidentiary law, "the federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues," *Butner* v. *United States*, 440 U. S. 48, 58 (1979). And, in the absence of any indication that the Court of Appeals gave anything less than its full attention to the question whether certain evidence that in fact came in would have been inadmissible in a simple murder trial, I believe that the majority's decision to remand the case for a "more thorough consideration by the lower court" of this issue, *ante*, at 248, is disingenuous at best.

FISHER ET AL. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 84-1538. Argued November 12, 1985—Decided February 26, 1986

A Berkeley, California, ordinance, enacted pursuant to popular initiative, imposes rent ceilings on residential real property in the city. The rent ceilings are under the control of a Rent Stabilization Board. Appellant landlords brought suit in California Superior Court challenging the constitutionality of the ordinance on Fourteenth Amendment grounds and seeking declaratory and injunctive relief. The Superior Court upheld the ordinance but was reversed by the California Court of Appeal. In the meantime, based on the intervening decision in *Community Communications Co.* v. *Boulder*, 455 U. S. 40, the question arose as to whether the ordinance was unconstitutional because it was pre-empted by the Sherman Act. The California Supreme Court held that there was no conflict between the ordinance and the Sherman Act.

Held: The ordinance is not unconstitutional as being pre-empted by the Sherman Act. Pp. 264–270.

(a) The rent ceilings established by the ordinance and maintained by the Rent Stabilization Board were unilaterally imposed by the city upon landlords to the exclusion of private control. Thus, the rent ceilings lack the element of concerted action needed before they can be characterized as a *per se* violation of § 1 of the Sherman Act. A restraint imposed unilaterally by government does not become concerted action within the meaning of § 1 simply because it has a coercive effect upon parties who must obey the law. And the mere fact that all competing landlords must comply with the ordinance is not enough to establish a conspiracy among landlords. Pp. 265–267.

(b) While the ordinance gives tenants some power to trigger its enforcement, it places complete control over maximum rent levels exclusively in the Rent Stabilization Board's hands. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, and *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, distinguished. Pp. 267–270.

37 Cal. 3d 644, 693 P. 2d 261, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR,

JJ., joined. POWELL, J., filed an opinion concurring in the judgment, *post*, p. 270. BRENNAN, J., filed a dissenting opinion, *post*, p. 274.

Jon D. Smock argued the cause for appellants. On the briefs were *James R. Parrinello*, *John E. Mueller*, and *Peter J. Donnici*.

Laurence H. Tribe argued the cause for appellees. With him on the brief were *Kathleen M. Sullivan*, *Myron Moskovitz*, and *Manuela Albuquerque*.*

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented here is whether a rent control ordinance enacted by a municipality pursuant to popular initiative is unconstitutional because pre-empted by the Sherman Act.

I

In June 1980, the electorate of the city of Berkeley, California, enacted an initiative entitled "Ordinance 5261-N. S., Rent Stabilization and Eviction for Good Cause Ordinance"

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*Briefs of *amici curiae* urging reversal were filed for the California Housing Council, Inc., by *Carla A. Hills* and *William C. Kelly, Jr.*; for the Mid-America Legal Foundation by *John M. Cannon*, *Susan W. Wunat*, and *Ann Plunkett Sheldon*; for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun* and *Robert K. Best*; and for the Washington Legal Foundation by *Daniel J. Popeo* and *Paul D. Kamenar*.

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey Department of the Public Advocate by *Richard E. Shapiro*; and for the United States Conference of Mayors et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, *Stephen Chapple*, and *Cynthia M. Pols*.

Briefs of *amici curiae* were filed for the City and County of San Francisco by *George P. Agnost* and *Burk E. Delventhal*; for the City of Santa Monica et al. by *Robert M. Myers*, *Stephen S. Stark*, *Karl M. Manheim*, *Raymond E. Ott*, and *K. D. Lyders*; for the Berkeley Property Owners' Association by *Thomas A. Seaton*; for the California Apartment Association by *Jon D. Smock*, *Wilbur H. Haines III*, and *Jeffrey J. Gale*; for the Coalition for Competition in Apartment Rentals by *E. Barrett Prettyman, Jr.*, and *Elwood S. Kendrick*; and for the National Apartment Association et al. by *Jon D. Smock*.

(hereafter Ordinance). Section 3 of the Ordinance stated the measure's purpose:[1]

> "The purposes of this Ordinance are to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of the City with regard to low and fixed income persons, minorities, students, handicapped, and the aged." App. to Juris. Statement A–111.

To accomplish these goals, the Ordinance places strict rent controls on all real property that "is being rented or is available for rent for residential use in whole or in part," § 5, *id.*, at A–113. Excepted are government-owned units, transient units, cooperatives, hospitals, certain small owner-occupied buildings, and all newly constructed buildings. For the remaining units, numbering approximately 23,000, 37 Cal. 3d 644, 678, 693 P. 2d 261, 288 (1984), the Ordinance establishes a base rent ceiling reflecting the rents in effect at the end of May 1980. A landlord may raise his rents from these levels only pursuant to an annual general adjustment of rent ceilings by a Rent Stabilization Board of appointed commissioners or after he is successful in petitioning the Board for an individual adjustment. A landlord who fails to register with the Board units covered by the Ordinance or who fails to ad-

[1] In 1982, while this case was pending in the California Court of Appeal, the Berkeley electorate enacted the "Tenants' Rights Amendments Act of 1982," revising certain sections of the 1980 Ordinance. Like the California Supreme Court, we review the Ordinance as amended, see 37 Cal. 3d 644, 654, n. 2, 693 P. 2d 261, 270, n. 2 (1984); all reference herein will therefore be to the 1982 version of the Ordinance.

here to the maximum allowable rent set under the Ordinance may be fined by the Board, sued by his tenants, or have rent legally withheld from him. If his violations are willful, he may face criminal penalties.

Shortly after the passage of the initiative, appellants, a group of landlords owning rental property in Berkeley, brought this suit in California Superior Court, claiming, *inter alia*, that the Ordinance violates their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and seeking declaratory and injunctive relief. The Superior Court upheld the Ordinance on its face, but was reversed by the Court of Appeal. While that appeal was pending, however, this Court's decision in *Community Communications Co.* v. *Boulder*, 455 U. S. 40 (1982), led certain *amici* to raise the question whether the Ordinance was unconstitutional because pre-empted by the federal antitrust laws. When the California Supreme Court heard the appeal from the Court of Appeal's decision, it therefore chose to consider plaintiffs' pre-emption claim along with their Fourteenth Amendment challenge.

Although fully briefed on the question whether the Berkeley Ordinance constitutes state action exempt from antitrust scrutiny under the standard established in *Boulder*, *supra*, the California Supreme Court noted that consideration of this issue would become necessary only were there to be "'truly a conflict between the Sherman Act and the challenged regulatory scheme,'" 37 Cal. 3d, at 660, 693 P. 2d, at 275 (quoting *First American Title Co.* v. *South Dakota Land Title Assn.*, 714 F. 2d 1439, 1452 (CA8 1983), cert. denied, 464 U. S. 1042 (1984)). Such a conflict would exist, the Supreme Court concluded, only if the Ordinance on its face mandated conduct prohibited by either § 1 or § 2 of the Sherman Act. See *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 661 (1982). After reviewing the two "traditional standards" that have consistently been used to determine whether conduct violates § 1 of the Sherman Act—the *per se* rules and the rule of reason, see

National Society of Professional Engineers v. *United States*, 435 U. S. 679, 692 (1978)—the court concluded that both standards, with their exclusive focus on competition and concern for the selfish motives of private actors, failed to give due deference to a municipality's legitimate interest in promoting public health, safety, and welfare. 37 Cal. 3d, at 667–673, 693 P. 2d, at 280–285. The Supreme Court therefore found both standards inappropriate and proceeded to apply a standard of its own devising, based upon this Court's Commerce Clause cases. Applying this test, the court found no conflict between the Ordinance and either § 1 or § 2 of the Sherman Act.

We noted probable jurisdiction limited to the antitrust pre-emption question, 471 U. S. 1124 (1985), and now affirm, although on grounds different from those relied on by the California Supreme Court. While that court was correct in noting that consideration of state action is not necessary unless an actual conflict with the antitrust laws is established, we find traditional antitrust analysis adequate to resolve the issue presented here.

II

We begin by noting that appellants make no claim under either § 4 or § 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, that the process by which the Rent Stabilization Ordinance was passed renders the Ordinance the product of an illegal "contract, combination . . . , or conspiracy." Appellants instead claim that, regardless of the manner of its enactment, the regulatory scheme established by the Ordinance, on its face, conflicts with the Sherman Act and therefore is pre-empted.

Recognizing that the function of government may often be to tamper with free markets, correcting their failures and aiding their victims, this Court noted in *Rice* v. *Norman Williams Co.*, *supra*, that a "state statute is not pre-empted by the federal antitrust laws simply because the state scheme may have an anticompetitive effect," *id.*, at 659. See *Exxon*

Corp. v. *Governor of Maryland*, 437 U. S. 117, 133 (1978). We have therefore held that a state statute should be struck down on pre-emption grounds "only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." 458 U. S., at 661.

While *Rice* involved a state statute rather than a municipal ordinance, the rule it established does not distinguish between the two. As in other pre-emption cases, the analysis is the same for the acts of both levels of government. See, *e. g.*, *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U. S. 204 (1983). Only where legislation is found to conflict "irreconcilably" with the antitrust laws, *Rice*, *supra*, at 659, does the level of government responsible for its enactment become important. Legislation that would otherwise be pre-empted under *Rice* may nonetheless survive if it is found to be state action immune from antitrust scrutiny under *Parker* v. *Brown*, 317 U. S. 341 (1943). The ultimate source of that immunity can be only the State, not its subdivisions. See *Community Communications Co.* v. *Boulder*, 455 U. S., at 50–51; *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 412–413 (1978) (opinion of BRENNAN, J.).

A

Appellants argue that Berkeley's Ordinance is pre-empted under *Rice* because it imposes rent ceilings across the entire rental market for residential units. Such a regime, they contend, clearly falls within the *per se* rule against price fixing, a rule that has been one of the settled points of antitrust enforcement since the earliest days of the Sherman Act, see *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 344–348 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218 (1940). That the prices set here are ceilings rather than floors and that the public interest has been invoked to justify this stabilization should not, appellants

argue, save Berkeley's regulatory scheme from condemnation under the *per se* rule.

Certainly there is this much truth to appellants' argument: Had the owners of residential rental property in Berkeley voluntarily banded together to stabilize rents in the city, their activities would not be saved from antitrust attack by claims that they had set reasonable prices out of solicitude for the welfare of their tenants. See *National Society of Professional Engineers* v. *United States*, *supra*, at 695; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897). Moreover, it cannot be denied that Berkeley's Ordinance will affect the residential housing rental market in much the same way as would the philanthropic activities of this hypothetical trade association. What distinguishes the operation of Berkeley's Ordinance from the activities of a benevolent landlords' cartel is not that the Ordinance will necessarily have a different economic effect, but that the rent ceilings imposed by the Ordinance and maintained by the Rent Stabilization Board have been unilaterally imposed by government upon landlords to the exclusion of private control.

The distinction between unilateral and concerted action is critical here. Adhering to the language of § 1, this Court has always limited the reach of that provision to "unreasonable restraints of trade effected by a 'contract, combination . . . , or conspiracy' between *separate* entities." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 768 (1984) (emphasis in original). We have therefore deemed it "of considerable importance" that independent activity by a single entity be distinguished from a concerted effort by more than one entity to fix prices or otherwise restrain trade, *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 763 (1984). Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement. *Id.*, at 760–761; *United States* v. *Parke, Davis*

& Co., 362 U. S. 29, 44 (1960). Thus, if the Berkeley Ordinance stabilizes rents without this element of concerted action, the program it establishes cannot run afoul of § 1.

Recognizing this concerted-action requirement, appellants argue that the Ordinance "forms a combination between [the city of Berkeley and its officials], on the one hand, and the property owners on the other. It also creates a horizontal combination among the landlords." Reply Brief for Appellants 10, n. 7. In so arguing, appellants misconstrue the concerted-action requirement of § 1. A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. Similarly, the mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords. Under Berkeley's Ordinance, control over the maximum rent levels of every affected residential unit has been unilaterally removed from the owners of those properties and given to the Rent Stabilization Board. While the Board may choose to respond to an individual landlord's petition for a special adjustment of a particular rent ceiling, it may decide not to. There is no meeting of the minds here. See *American Tobacco Co.* v. *United States*, 328 U. S. 781, 810 (1946), quoted in *Monsanto, supra*, at 764. The owners of residential property in Berkeley have no more freedom to resist the city's rent controls than they do to violate any other local ordinance enforced by substantial sanctions.

B

Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1. Certain restraints may be characterized as

"hybrid," in that nonmarket mechanisms merely enforce private marketing decisions. See *Rice* v. *Norman Williams Co.*, 458 U. S., at 665 (STEVENS, J., concurring in judgment). Where private actors are thus granted "a degree of private regulatory power," *id.*, at 666, n. 1, the regulatory scheme may be attacked under § 1. Indeed, this Court has twice found such hybrid restraints to violate the Sherman Act. See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980).

In *Schwegmann*, a Louisiana statute authorized a distributor to enforce agreements fixing minimum retail prices not only against parties to such contracts, but also against retailers who sold the distributor's products without having agreed to the price restrictions. After finding that the statute went far beyond the now-repealed Miller-Tydings Act, which offered a limited antitrust exemption to certain "'contracts or agreements prescribing minimum prices for the resale'" of specified commodities, the Court held that two liquor distributors had violated § 1 when they attempted to hold a retailer to the price-fixing terms of a contract it had refused to sign. In so holding, the Court noted that "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." 341 U.S, at 389. However, under the Louisiana statute, both the selection of minimum price levels and the exclusive power to enforce those levels were left to the discretion of distributors. While the petitioner-retailer in that case may have been legally required to adhere to the levels so selected, the involvement of his suppliers in setting those prices made it impossible to characterize the regulation as unilateral action by the State of Louisiana.

The trade restraint condemned in *Midcal* entailed a similar degree of free participation by private economic actors. That case presented an antitrust challenge to California's requirement that all wine producers, wholesalers, and rectifi-

ers file fair trade contracts or price schedules with the State. If a wine producer did not set prices, wholesalers had to post a resale price schedule for that producer's brands. No state-licensed wine merchant could sell wine to a retailer at other than those prices. 445 U. S., at 99. The Court found: "California's system for wine pricing plainly constitutes resale price maintainance in violation of the Sherman Act . . . . The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers." *Id.*, at 103. Here again, the mere existence of legal compulsion did not turn California's scheme into unilateral action by the State. The Court noted: "The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers." *Id.*, at 100.

The hybrid restraints condemned in *Schwegmann* and *Midcal* were thus quite different from the pure regulatory scheme imposed by Berkeley's Ordinance. While the Ordinance does give tenants—certainly a group of interested private parties—some power to trigger the enforcement of its provisions, it places complete control over maximum rent levels exclusively in the hands of the Rent Stabilization Board. Not just the controls themselves but also the rent ceilings they mandate have been unilaterally imposed on the landlords by the city.

C

There may be cases in which what appears to be a state- or municipality-administered price stabilization scheme is really a private price-fixing conspiracy, concealed under a "gauzy cloak of state involvement," *Midcal*, *supra*, at 106. This might occur even where prices are ostensibly under the absolute control of government officials. However, we have been given no indication that such corruption has tainted the rent controls imposed by Berkeley's Ordinance. Adopted by popular initiative, the Ordinance can hardly be viewed as a cloak for any conspiracy among landlords or between the landlords and the municipality. Berkeley's landlords have

simply been deprived of the power freely to raise their rents. That is why they are here. And that is why their role in the stabilization program does not alter the restraint's unilateral nature.[2]

III

Because under settled principles of antitrust law, the rent controls established by Berkeley's Ordinance lack the element of concerted action needed before they can be characterized as a *per se* violation of § 1 of the Sherman Act, we cannot say that the Ordinance is facially inconsistent with the federal antitrust laws. See *Rice* v. *Norman Williams Co.*, *supra*, at 661. We therefore need not address whether, even if the controls were to mandate § 1 violations, they would be exempt under the state-action doctrine from antitrust scrutiny. See *Hallie* v. *Eau Claire*, 471 U. S. 34 (1985).

The judgment of the California Supreme Court is

Affirmed.

JUSTICE POWELL, concurring in the judgment.

The Court today reaches out to decide a difficult preemption question when a straightforward and well-settled ground for decision is available. In my view, Berkeley's ordinance plainly falls within the "state action" exemption of *Parker* v. *Brown*, 317 U. S. 341 (1943), and its progeny. I therefore concur in the judgment, but on grounds different from those discussed in the Court's opinion.

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[2] Though they have not pressed the point with any vigor in this Court, appellants have suggested that Berkeley's rent controls constitute attempted monopolization because the city "is clearly engaged in the provision of housing in the public sector" and using the controls to depress the prices of residential properties as a prelude to taking them over. Tr. of Oral Arg. 14–15. As to this claim, we note only that the inquiry demanded by appellants' allegations goes beyond the scope of the facial challenge presented here. See *Rice* v. *Norman Williams Co.*, 458 U. S., at 661.

When a municipal government engages in anticompetitive activity pursuant to a clearly articulated state policy to displace competition with regulation, the "state action" exemption removes the conduct from the coverage of the antitrust laws. *Hallie* v. *Eau Claire*, 471 U. S. 34, 38–39 (1985); *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 54 (1982). In *Hallie*, we found such a policy embodied in a state statute that "delegated to [municipalities] the express authority to take action that foreseeably will result in anticompetitive effects." 471 U. S., at 43. See also *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 415 (1978) (opinion of BRENNAN, J.) ("[A]n adequate state mandate for anticompetitive activities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of'") (citation omitted). Thus, the question in this case is whether California has expressly delegated to Berkeley regulatory power that foreseeably would lead to the anticompetitive effects challenged by appellants.

The history of Berkeley's ordinance is illuminating. Prior to 1974, Article XI, § 3, of the California Constitution[1] required the state legislature to approve all changes in municipal charters. In 1972, in a citywide initiative, Berkeley's citizens approved a charter amendment authorizing rent

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[1] When Berkeley's charter amendment was passed in 1972, Article XI, § 3(a), of the California Constitution read:

"For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. The charter is effective when filed with the Secretary of State. A charter may be amended, revised, or repealed in the same manner. A charter, amendment, revision, or repeal thereof shall be published in the official state statutes. . . . The provisions of a charter are the law of the State and have the force and effect of legislative enactments."

This provision was construed to require that charter amendments be approved by concurrent resolution of both houses of the state legislature. *Birkenfeld* v. *City of Berkeley*, 17 Cal. 3d 129, 137, n. 2, 550 P. 2d 1001, 1007, n. 2 (1976).

control. This charter amendment effectively froze rents at 1971 levels, subject to individual adjustments by a popularly elected rent control board. *Birkenfeld* v. *City of Berkeley*, 17 Cal. 3d 129, 138, 550 P. 2d 1001, 1008 (1976). The California Legislature ratified the charter amendment on August 2, 1972, and the rent control plan went into effect. 1972 Cal. Stat. 3370. A group of landlords challenged the rent control plan on a number of constitutional and statutory grounds. In the ensuing litigation, the California Supreme Court invalidated the plan on the ground that it lacked procedural safeguards necessary to protect landlords from confiscatory rent ceilings.[2] *Birkenfeld*, *supra*, at 170–172, 550 P. 2d, at 1030–1032. In 1980, in another initiative, Berkeley's citizens adopted the ordinance at issue in this case. This ordinance provided the procedural protections that the 1972 charter provision lacked, and it subsequently survived constitutional challenge in state court. 37 Cal. 3d 644, 679–691, 693 P. 2d 261, 289–298 (1984).

The challenged ordinance thus replaces a rent control plan that was expressly authorized by the state legislature. Under *Hallie*, a general grant of authority to regulate rents would have sufficed to exempt Berkeley's ordinance from the antitrust laws. 471 U. S., at 42. It follows that the legislature's ratification of a particular rent control plan must also trigger the state-action exemption. See *ibid.*; *Boulder*, *supra*, at 55–56. The remaining issue is whether the authority granted in 1972 remains intact.

Appellants contend that it does not. First, appellants argue that the California Supreme Court's decision in *Birken-*

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[2] The 1972 charter provision permitted individual adjustments of the across-the-board rent ceiling only on a unit-by-unit basis, and only after a hearing on the particular unit whose rent was to be raised. The California Supreme Court found that this limitation "put the [rent control board] in a procedural strait jacket," and "unnecessarily preclude[d] reasonably prompt action" on meritorious petitions by landlords. *Birkenfeld*, *supra*, at 171, 172, 550 P. 2d, at 1031, 1032.

feld, invalidating the 1972 charter provision, effectively canceled the legislature's ratification of that provision. *Birkenfeld* did not, however, decide that rent control was bad policy, or that it was inconsistent with state law. See *Birkenfeld*, *supra*, at 159–164, 550 P. 2d, at 1023–1026 (finding that enacting a rent control plan was a permissible exercise of the city's police power); Note, 65 Calif. L. Rev. 304, 305 (1977) ("*Birkenfeld* offers California cities . . . the judicial equivalent of a rent control enabling act"). Rather, the decision stands only for the proposition that cities must couple rent control with procedures for adjusting rent ceilings to avoid fixing rents at confiscatory levels. 17 Cal. 3d, at 167–173, 550 P. 2d, at 1028–1033. *Birkenfeld* thus left Berkeley's basic power to impose rent controls unaffected.

Second, appellants contend that since 1972 the state legislature has declared its neutrality respecting a city's decision to control rents. See *Boulder*, *supra*, at 55 (clear articulation requirement is not satisfied "when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive"). This argument rests on the passage in 1980 of a comprehensive planning and zoning law, one provision of which states:

> "Nothing in this article shall be construed to be a grant of authority *or a repeal of any authority which may exist* of a local government to impose rent controls or restrictions on the sale of real property." Cal. Govt. Code Ann. § 65589(b) (West 1983) (emphasis added).

By its express terms this statute leaves intact cities' preexisting authority to adopt rent control provisions. For purposes of the clear-articulation requirement, Berkeley's preexisting authority is defined by the legislature's ratification of the city's 1972 charter amendment.

For these reasons, I would find that Berkeley's ordinance is exempt from the antitrust laws under our decisions in *Hallie* and *Boulder*. By ratifying Berkeley's charter amendment, the state legislature expressly authorized Berkeley to

control rents. The State has not since rescinded that authorization. That is all we need decide in this case.

I therefore concur in the judgment, and express no view on the merits of the pre-emption issue decided by the Court.

JUSTICE BRENNAN, dissenting.

Since *Parker* v. *Brown*, 317 U. S. 341 (1943), the Court has wrestled with the question of the degree to which federal antitrust laws prohibit state and local governments from imposing anticompetitive restraints on trade. Laws which impose such restraints have been held to be exempt from antitrust scrutiny if they constitute action of the State itself in its sovereign capacity, or state-authorized municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. See *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 52 (1982). Today, the Court holds that a municipality's price-fixing scheme is not pre-empted by the federal antitrust laws whether or not the scheme is state-authorized, or furthers or implements a clearly articulated and affirmatively expressed state policy. Because today's decision discards over 40 years of carefully considered precedent, I respectfully dissent.

I

A

Berkeley's Rent Stabilization Ordinance (hereafter Ordinance) effectively fixes prices for rental units in the city of Berkeley. In *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 661 (1982), we held that a state statute

> "may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation."

In this case, by declaring maximum prices landlords may charge, Berkeley's Ordinance irresistibly pressures landlords to fix prices for their rental units. Thus, the Ordinance "facially conflict[s] with the Sherman Act because it *mandate[s]* [price fixing], an activity that has long been regarded as a *per se* violation of the Sherman Act." *Id.*, at 659–660 (emphasis in original).

The Court recognizes that the Ordinance imposes anticompetitive restraints on trade, and that it has the same effect on the housing market as would a conspiracy by landlords to fix rental prices. *Ante*, at 266. Despite this, the Court holds that the Ordinance is not pre-empted by the Sherman Act because prices are fixed "unilaterally" by the city, rather than by "contract, combination, or conspiracy." I do not read our decisions necessarily to require proof of such concerted action as a prerequisite to a finding of pre-emption. Certainly, nothing we said in *Rice* supports such a narrow view of pre-emption.[1] Our other decisions have found statutes in conflict with the Sherman Act because they eliminated price competition in the relevant market.

In *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), a wine wholesaler sought to enjoin enforcement of a California statute which effectively

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[1] *Rice* held that a "state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect." 458 U. S., at 659. *Rice* involved a challenge to a California statute which effectively allowed liquor distillers to control distribution of their products in the State. The Court concluded that because such vertical *nonprice* restraints are not *per se* illegal under the Sherman Act, see *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977), the statute was not pre-empted. 458 U. S., at 661; see also *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978); *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35 (1966). In contrast, Berkeley's Rent Stabilization Board fixes prices for rental units in the city. Unlike *nonprice* restraints, *price fixing* has traditionally been held to be *per se* illegal under the Sherman Act. See *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911).

required it to sell wines at prices set by producers. The Court focused on the fact that the statute eliminated price competition, and held that the wine-pricing system constituted resale price maintenance in violation of the Sherman Act. The *Midcal* decision squarely controls the result here. Just as the statute challenged in *Midcal* compelled wine wholesalers to charge prices set by wine producers, Berkeley's Ordinance compels landlords to charge prices set by the city. The city "holds the power to prevent price competition by dictating the prices charged" by landlords. *Id.*, at 103. "[S]uch vertical control destroys horizontal competition as effectively as if [landlords] 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.'" *Ibid.* (quoting *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 408 (1911)).

Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951), is also directly on point. In *Schwegmann*, a Louisiana statute authorized liquor distributors to enforce agreements fixing minimum retail prices on their products against retailers who had not agreed to the price restrictions. The Court held that the statutory scheme amounted to resale price maintenance, in violation of the Sherman Act. To paraphrase the Court in *Schwegmann*, "when [the city] compels [landlords] to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." *Id.*, at 389. "[W]hen [landlords] are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids 'horizontal' price fixing." *Ibid.* (emphasis in original).

B

Even if I accepted the Court's analysis of the antitrust preemption issue, I would find a functional "combination" in this case between the city of Berkeley and its officials, on the one hand, and the landlords on the other—a combination that operates to fix prices for rental units in Berkeley. To reach a contrary result, the Court simply states a conclusion—that

"[a] restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law." *Ante*, at 267. The Court doesn't explain why this is so—it simply baldly asserts that "[t]he ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy." *Ibid.* The best I can make of this is that the Court apparently would interpret the Sherman Act to forbid only privately arranged price-fixing schemes. See *ante*, at 267–269. That interpretation would be plainly misguided.

Section 1 of the Sherman Act declares illegal restraints of trade resulting from any "contract, combination . . . , or conspiracy." 15 U. S. C. § 1. Understandably, that wording has led the Court to draw a "basic distinction" between concerted and independent action, and to hold that "[i]ndependent action is not proscribed" by § 1. *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 761 (1984). However, until today we have not held, or indeed even suggested, that government-imposed restraints on economic actions cannot constitute concerted action. Rather, both *Schwegmann* and *Midcal* held that state statutes which "had a coercive effect upon parties who must obey the law" violated § 1.[2]

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[2]The Court would distinguish *Schwegmann* and *Midcal* based on the role of private parties in setting prices. *Ante*, at 268–269. The Court characterizes the statutory restraints imposed in those cases as "hybrid, in that nonmarket mechanisms merely enforce private marketing decisions." *Ante*, at 267. In this case, the Court argues, Berkeley's landlords have no control over the prices they charge. *Ibid.*

True, in both cases private parties, rather than the State, were largely responsible for setting the prices that retailers had to adhere to. However, the lack of state supervision over price-fixing activities was only relevant to whether the challenged statutes were immune from antitrust liability under *Parker* v. *Brown*, 317 U. S. 341 (1943), see *Midcal*, 445 U. S., at 105; neither decision drew the distinction the Court today creates between "unilateral" and "hybrid" governmental restraints. In both cases the chal-

If the Ordinance allowed the individual landlords ultimately to set their own rental prices, I might understand the Court's conclusion that any resulting price restraints did not necessarily result from collective action. Cf. *Monsanto Co.* v. *Spray-Rite Service Corp.*, *supra*, at 761. However, because the Ordinance has the force of law, the city can compel landlords to do what the Sherman Act plainly forbids—to fix prices for rental units in Berkeley. Regardless of whether the landlords "agree" to the prices charged, the circumstances here clearly "exclude the possibility that the [city and the landlords] were acting independently." 465 U. S., at 764. The Ordinance eliminates price competition more effectively than any private "agreement" ever could, and is therefore pre-empted by the Sherman Act. The Court's contrary conclusion does not further, as it argues, but rather distorts "traditional antitrust principles." *Ante*, at 264.

II

Ultimately, the Court is holding that a municipality's authority to protect the public welfare should not be constrained by the Sherman Act. That holding excludes a broad range of local government anticompetitive activities from the reach of the antitrust laws. This flies in the face of the fact that Congress has not enacted such a broad antitrust exemption for municipalities. See *Community Communications Co.* v. *Boulder*, 455 U. S. 40 (1982); *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389 (1978); cf. 15 U. S. C. § 35(a) (1982 ed., Supp. II) (immunizing local governments

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lenged statute was found invalid simply because it compelled private parties to charge fixed prices for their products, conduct which the Sherman Act forbids. See *Schwegmann*, 341 U. S., at 389; *Midcal*, *supra*, at 103. The Court's "distinction" ignores the fact that price fixing has the same deleterious effect upon the competitive market whether prices are set by an administrative body or by private parties. Thus, regardless of whether Berkeley's landlords have some role in setting the prices they must charge, the coercive effect of the city's Ordinance results in concerted action violative of the Sherman Act.

only from liability for damages for violations of the antitrust laws). "In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we [have been] especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." *Lafayette, supra*, at 412–413 (plurality opinion). "The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a '*dual* system of government,' *Parker*, 317 U. S., at 351 (emphasis added), which has no place for sovereign cities." *Community Communications Co.* v. *Boulder, supra*, at 53. Of course, our decisions do not foreclose municipalities from enacting anticompetitive measures in the public interest, but only require that such actions be state-authorized and be implemented pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly service. See 455 U. S., at 52. Berkeley's Ordinance plainly is not exempt from antitrust scrutiny under this standard.

Appellees suggest that three considerations support their argument that the Ordinance implements a clearly articulated and affirmatively expressed state policy authorizing municipalities to enact rent control measures: (1) the state legislature's 1972 ratification of a city rent control charter amendment; (2) the California Supreme Court's decision in *Birkenfeld* v. *City of Berkeley*, 17 Cal. 3d 129, 550 P. 2d 1001 (1976), which ultimately invalidated that amendment; and (3) the city's state-law obligation to provide affordable housing. None of these considerations support appellees' position.

First, in 1972, Berkeley adopted a rent control charter amendment, which was approved by concurrent resolution of

both houses of the state legislature.[3] There are serious doubts that this purely *pro forma* approval would qualify the amendment for the *Parker* exemption. See *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976). In any event, that amendment was subsequently invalidated by the California Supreme Court, and the legislature's actions respecting its passage afford no support for the claimed exemption of the *current* Ordinance from antitrust scrutiny.

Second, the *Birkenfeld* decision, while invalidating Berkeley's rent control amendment, found state authority for such measures in constitutional provisions conferring upon cities the power to "make and enforce . . . all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." 17 Cal. 3d, at 140, 550 P. 2d, at 1009–1010. But we have made clear that such general grants of authority do not constitute the required mandate to engage in conduct that necessarily constitutes a violation of the antitrust laws. See *Community Communications Co.*, 455 U. S., at 55. "Acceptance of such a proposition . . . would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *Id.*, at 56.

Third, state law requires cities to "make adequate provision for the housing needs of all economic segments of the community." Cal. Govt. Code Ann. § 65580(d) (West 1983). But, although appellees argue that rent control measures are a "foreseeable result" of these statutory obligations, see *Hallie* v. *Eau Claire*, 471 U. S. 34 (1985), those laws are expressly neutral with respect to a city's authority to impose rent controls. California Govt. Code Ann. § 65589(b) (West 1983) expressly provides that "nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent con-

[3] At that time, the State Constitution required the legislature to approve city charter amendments. See *Birkenfeld*, 17 Cal. 3d, at 137, n. 2, 550 P. 2d, at 1007, n. 2. In 1974, the State Constitution was amended to eliminate this requirement.

trols." See also Cal. Health & Safety Code Ann. § 50202 (West Supp. 1986) ("[N]othing in this division shall authorize the imposition of rent regulations or controls"). The requirement of "'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." *Community Communications Co., supra*, at 55 (emphasis in original). Plainly, by that standard the Ordinance does not qualify for the *Parker* exemption from antitrust liability.

III

Finally, appellees suggest that a finding of pre-emption in this case will severely restrict a municipality's authority to enact a variety of measures in the public interest. "But this argument is simply an attack upon the wisdom of the long-standing congressional commitment to the policy of free markets and open competition embodied in the antitrust laws." *Community Communications Co., supra*, at 56. Congress may ultimately agree with appellees' argument, and may choose to amend the antitrust laws to grant municipalities broad discretion to enact anticompetitive measures in the public interest. Pending such amendment, however, only a clearly articulated and affirmatively expressed state policy will exempt ordinances like this from the reach of the Sherman Act.

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS ET AL. *v.* GOULD INC.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-1484. Argued December 9, 1985—Decided February 26, 1986

A Wisconsin statute debars persons or firms who have violated the National Labor Relations Act (NLRA) three times within a 5-year period from doing business with the State. The debarment lasts for three years. After appellee was debarred in 1982, it filed an action for injunctive and declaratory relief in Federal District Court, claiming, *inter alia*, that the Wisconsin statute was pre-empted by the NLRA. The court agreed and granted summary judgment for appellee. The Court of Appeals affirmed.

Held: The NLRA pre-empts the Wisconsin debarment statute. Pp. 286–291.

(a) States are prevented not only from setting forth standards of conduct inconsistent with the NLRA's substantive requirements, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the NLRA. Because the Wisconsin debarment statute functions as a supplemental sanction for violations of the NLRA, it conflicts with the National Labor Relations Board's comprehensive regulation of industrial relations in precisely the same way as would a prohibition against private parties within the State doing business with repeat labor law violators. That Wisconsin has chosen to use its spending power rather than its police power in enacting the debarment statute does not significantly lessen the inherent potential for conflict when two separate remedies are brought to bear on the same activity. Pp. 286–289.

(b) Although state action in the nature of "market participation" is not subject to the restrictions placed on state regulatory power by the Commerce Clause, Wisconsin by prohibiting state purchases from repeat labor law violators is not functioning as a private purchaser; its debarment scheme is tantamount to regulation. In any event, the "market participant" doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted, as it has here in enacting the NLRA. This is not a case where a State's spending policies address conduct that is of such "peripheral concern" to the NLRA or that implicates "interests so deeply rooted in local feeling and responsibility" that pre-emption should not be inferred. Nor is it a case where spending determinations that bear on labor relations were intentionally left to

the States by Congress. The manifest purpose and inevitable effect of the Wisconsin debarment scheme is to enforce the requirements of the NLRA. Pp. 289–291.

750 F. 2d 608, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Charles D. Hoornstra, Assistant Attorney General of Wisconsin, argued the cause for appellants. With him on the briefs was *Bronson C. La Follette*, Attorney General.

Columbus R. Gangemi, Jr., argued the cause for appellee. With him on the brief were *George B. Christensen, Gerald C. Peterson, Paul B. Biebel, Jr.*, and *John N. Bilanko.**

JUSTICE BLACKMUN delivered the opinion of the Court.

The question in this case is whether the National Labor Relations Act (NLRA), 29 U. S. C. § 151 *et seq.*, pre-empts a Wisconsin statute debarring certain repeat violators of the Act from doing business with the State. We hold that it does.

I

Wisconsin has directed its Department of Industry, Labor and Human Relations to maintain a list of every person or firm found by judicially enforced orders of the National Labor Relations Board to have violated the NLRA in three separate cases within a 5-year period. See Wis. Stat. § 101.245 (1983–1984).[1] State procurement agents are statu-

*Briefs of *amici curiae* urging reversal were filed for the State of Connecticut by *Joseph I. Lieberman*, Attorney General, *Elliot F. Gerson*, Deputy Attorney General, and *Arnold B. Feigin, Richard T. Sponzo*, and *Robert E. Walsh*, Assistant Attorneys General; for the National Governors' Association et al. by *Benna Ruth Solomon* and *Peter J. Kalis;* and for the American Federation of Labor and Congress of Industrial Organizations by *Marsha Berzon, David M. Silberman*, and *Laurence Gold.*

Briefs of *amici curiae* urging affirmance were filed for the National Labor Relations Board by *Norton J. Come, Linda Sher*, and *Elinor Hadley Stillman;* for the Chamber of Commerce of the United States by *Peter G. Nash, Dixie L. Atwater*, and *Stephen A. Bokat.*

[1] Section 101.245 provides in relevant part:

"(1) The department [of industry, labor and human relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a

torily forbidden to purchase "any product known to be manufactured or sold by any person or firm included on the list of labor law violators." § 16.75(8).[2] A name remains on the violators' list for three years. § 101.245(4).

5-year period as determined under sub. (1m), if the 3 final decisions involved a cumulative finding of at least three separate violations, to have violated the national labor relations act, 29 U. S. C. 151 et seq., and of persons or firms that have been found to be in contempt of court for failure to correct a violation of the national labor relations act on 3 or more occasions by a court within a 5-year period as determined under sub. (1m) if the 3 contempt findings involved a cumulative total of at least 3 different violations.

"(1m) On or before July 1 of each year the department shall compile the list required under sub. (1) based upon the 5-year period which ended on September 30 of the year preceding.

"(2) This list may be compiled from the records of the national labor relations board.

"(3) Whenever a new name is added to this list the department shall send the name to the department of administration for actions as provided in s. 16.75(8).

"(4) A name shall remain on the list for 3 years."

The statute was enacted as 1979 Wis. Laws, ch. 340, § 3. It became effective May 21, 1980.

[2] Section 16.75(8) provides in relevant part:

"The department [of administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under s. 101.245. The secretary may waive this subsection if maintenance, repair or operating supplies are required to maintain systems or equipment which were purchased by the state from a person or firm included on the list prior to the date of inclusion on the list, or if the secretary finds that there exists an emergency which threatens the public health, safety or welfare and a waiver is necessary to meet the emergency."

We are advised that the statutory ban applies only to purchases by the State and not to purchasing decisions of counties, municipalities, or other political subdivisions of the State. Tr. of Oral Arg. 4.

In addition to disqualifying repeat violators of the NLRA, Wisconsin provides statutory preferences to bids from Wisconsin companies, minority businesses, employers of disabled workers, and prison industries. See Wis. Stat. §§ 16.75(1)(a), (3m)(b), (3s)(a), and (3t)(c) (1983–1984).

Appellee Gould Inc. is a Delaware corporation with its principal place of business in Illinois. In 1982, Wisconsin placed Gould on its list of labor law violators following the judicial enforcement of four Board orders against various divisions of the company, none of which was located in Wisconsin and none of which Gould still owned at the time of its debarment. The State informed Gould that it would enter into no new contract with the company until 1985. The State also announced that it would continue its current contracts with Gould only as long as necessary to avoid contractual penalties, and that while Gould was on the list the State would not purchase products containing components produced by the company. At the time, Gould held state contracts worth over $10,000, and had outstanding bids for additional contracts in excess of $10,000.

Gould filed this action for injunctive and declaratory relief, arguing that the Wisconsin debarment scheme was preempted by the NLRA and violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[3] The United States District Court for the Western District of Wisconsin granted Gould summary judgment on the preemption claim, and did not reach the arguments pertaining to the Fourteenth Amendment. 576 F. Supp. 1290 (1983). The court enjoined the defendant state officials from refusing to do business with Gould, from refusing to purchase products with Gould components, and from including Gould on the list of labor law violators. *Id.*, at 1299; App. to Juris. State-

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[3] The original complaint also sought monetary damages, but Gould apparently abandoned this request in its motion and briefs for summary judgment. See 576 F. Supp. 1290, 1293, n. 3 (WD Wis. 1983).

Although Gould's debarment was scheduled to end in 1985, Wisconsin does not contend that the case is moot. At a minimum, the problem presented is "capable of repetition, yet evading review." *E. g., Dunn* v. *Blumstein*, 405 U. S. 330, 333, n. 2 (1972); *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969); *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911).

ment 86, 87.[4] The Court of Appeals for the Seventh Circuit affirmed in relevant part. 750 F. 2d 608 (1984). We noted probable jurisdiction, 471 U. S. 1115 (1985). As did the District Court and the Court of Appeals, we find it necessary to reach only the pre-emption issue.

II

It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations. Although some controversy continues over the Act's pre-emptive scope, certain principles are reasonably settled. Central among them is the general rule set forth in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), that States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. Because "conflict is imminent" whenever "two separate remedies are brought to bear on the same activity," *Garner* v. *Teamsters*, 346 U. S. 485, 498–499 (1953), the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act. See 359 U. S., at 247. The rule is designed to prevent "conflict in its broadest sense" with the "complex and interrelated federal scheme of law, remedy, and administration," *id.*, at 243, and this Court has recognized that "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 287 (1971).

[4] The complaint named as defendants three state agencies, including the Department of Industry, Labor and Human Relations, and four state officials. The District Court dismissed the agency defendants under the Eleventh Amendment but, pursuant to *Ex parte Young*, 209 U. S. 123 (1908), allowed the suit to proceed against the state officials. 576 F. Supp., at 1293. Gould did not appeal the dismissal of the agency defendants, and they appear in this Court only as nominal parties under the Court's Rule 10.4.

Consequently, there can be little doubt that the NLRA would prevent Wisconsin from forbidding *private parties* within the State to do business with repeat labor law violators. Like civil damages for picketing, which the Court refused to allow in *Garmon*, a prohibition against in-state private contracts would interfere with Congress' "integrated scheme of regulation" by adding a remedy to those prescribed by the NLRA. 359 U. S., at 247. Nor does it matter that a supplemental remedy is different in kind from those that may be ordered by the Board, for "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Id.*, at 243; *Lockridge*, 403 U. S., at 292. Indeed, "to allow the State to grant a remedy . . . which has been withheld from the National Labor Relations Board only accentuates the danger of conflict," *Garmon*, 359 U. S., at 247, because "the range and nature of those remedies that are and are not available is a fundamental part" of the comprehensive system established by Congress. *Lockridge*, 403 U. S., at 287.

Wisconsin does not assert that it could bar its residents from doing business with repeat violators of the NLRA. It contends, however, that the statutory scheme invoked against Gould escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power. But that seems to us a distinction without a difference, at least in this case, because on its face the debarment statute serves plainly as a means of enforcing the NLRA. The State concedes, as we think it must, that the point of the statute is to deter labor law violations and to reward "fidelity to the law." Tr. of Oral Arg. 4, 6; Brief for Defendants in Support of Motion for Summary Judgment in No. 83–C–1045, (WD Wis.), p. 18. No other purpose could credibly be ascribed, given the rigid and undiscriminating manner in which the statute operates: firms adjudged to have violated the

NLRA three times are automatically deprived of the opportunity to compete for the State's business.[5]

Because Wisconsin's debarment law functions unambiguously as a supplemental sanction for violations of the NLRA, it conflicts with the Board's comprehensive regulation of industrial relations in precisely the same way as would a state statute preventing repeat labor law violators from doing any business with private parties within the State. Moreover, if Wisconsin's debarment law is valid, nothing prevents other States from taking similar action against labor law violators. Indeed, at least four other States already have passed legislation disqualifying repeat or continuing offenders of the NLRA from competing for state contracts.[6] Each additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts

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[5] The conflict between the challenged debarment statute and the NLRA is made all the more obvious by the essentially punitive rather than corrective nature of Wisconsin's supplemental remedy. The regulatory scheme established for labor relations by Congress is "essentially remedial," and the Board is not generally authorized to impose penalties solely for the purpose of deterrence or retribution. *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7, 10–12 (1940). Wisconsin's debarment sanction, in contrast, functions as punishment and serves no corrective purpose. Punitive sanctions are inconsistent not only with the remedial philosophy of the NLRA, but also in certain situations with the Act's procedural logic. For example, the Board's certification of a bargaining representative is not subject to direct judicial appeal. An employer who believes that the Board erred in approving an election or defining a bargaining unit thus may obtain administrative and judicial review only by refusing to bargain and awaiting an enforcement action by the Board for violation of the Act. See *Magnesium Casting Co.* v. *NLRB*, 401 U. S. 137, 139 (1971); *AFL* v. *NLRB*, 308 U. S. 401 (1940). One of Gould's violations in fact occurred in precisely this manner. See *Gould, Inc., Elec. Components Div.* v. *NLRB*, 610 F. 2d 316 (CA5 1980). An unsuccessful challenge of this sort, if pursued in good faith, will generally present an especially inappropriate occasion for punitive sanctions.

[6] See Conn. Gen. Stat. § 31–57a (1985); Md. State Finance & Procurement Code Ann. § 13–404 (1985); Mich. Comp. Laws §§ 423.322, .323, and .324 (Supp. 1985); Ohio Rev. Code Ann. § 121.23 (1984).

from the "integrated scheme of regulation" created by Congress.

That Wisconsin has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict when "two separate remedies are brought to bear on the same activity," *Garner*, 346 U. S., at 498–499. To uphold the Wisconsin penalty simply because it operates through state purchasing decisions therefore would make little sense. "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Lockridge*, 403 U. S., at 292.

III

Wisconsin notes correctly that state action in the nature of "market participation" is not subject to the restrictions placed on state regulatory power by the Commerce Clause. See *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U. S. 204 (1983); *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976). We agree with the Court of Appeals, however, that by flatly prohibiting state purchases from repeat labor law violators Wisconsin "simply is not functioning as a private purchaser of services," 750 F. 2d, at 614; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation.

In any event, the "market participant" doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted. In addition to authorizing congressional action, the Commerce Clause limits state action in the absence of federal approval. The Clause restricts "state taxes and regulatory measures impeding free private trade in the national marketplace," but "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Reeves*, 447 U. S., at 437. The NLRA, in contrast, was de-

signed in large part to "entrus[t] administration of the labor policy for the Nation to a centralized administrative agency." *Garmon*, 359 U. S., at 242; see also, *e. g.*, *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 145 (1971) ("The Board is the sole protector of the 'national interest' defined with particularity in the Act") (footnote omitted). What the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what States may do with the Act in place. Congressional purpose is of course "'the ultimate touchstone'" of pre-emption analysis, see, *e. g.*, *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202, 208 (1985), quoting *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963), and we cannot believe that Congress intended to allow States to interfere with the "interrelated federal scheme of law, remedy, and administration," *Garmon*, 359 U. S., at 243, under the NLRA as long as they did so through exercises of the spending power.

Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. See, *e. g.*, *Elrod* v. *Burns*, 427 U. S. 347 (1976); *Perry* v. *Sindermann*, 408 U. S. 593 (1972). The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. See, *e. g.*, *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 148–151 (1976); *Teamsters* v. *Morton*, 377 U. S. 252, 259–260 (1964); Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1346, 1351–1359 (1972). The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

We do not say that state purchasing decisions may never be influenced by labor considerations, any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations. Doubtless some state spending policies, like some exercises of the police power, address conduct that is of such "peripheral concern" to the NLRA, or that implicates "interests so deeply rooted in local feeling and responsibility," that pre-emption should not be inferred. *Garmon*, 359 U. S., at 243–244; see also, *e. g.*, *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 498 (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. See *New York Tel. Co.* v. *New York State Labor Dept.*, 440 U. S. 519 (1979). But Wisconsin's debarment rule clearly falls into none of these categories. We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States. The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA. That goal may be laudable, but it assumes for the State of Wisconsin a role Congress reserved exclusively for the Board.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 291 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM FEBRUARY 24 THROUGH MARCH 3, 1986

FEBRUARY 24, 1986

Affirmed on Appeal

No. 85-1090. HUDNUT, MAYOR OF CITY OF INDIANAPOLIS, INDIANA, ET AL. *v.* AMERICAN BOOKSELLERS ASSN., INC., ET AL. Affirmed on appeal from C. A. 7th Cir. THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 771 F. 2d 323.

Appeals Dismissed

No. 85-979. SVENDROWSKI *v.* MISSOURI. Appeal from Ct. App. Mo., Eastern Dist., dismissed for want of substantial federal question. Reported below: 692 S. W. 2d 348.

No. 85-1080. SAN DIEGO GAS & ELECTRIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question.

No. 85-1091. LEONI ET AL. *v.* STATE BAR OF CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 39 Cal. 3d 609, 704 P. 2d 183.

No. 85-1232. STAMOS, INDIVIDUALLY AND AS NEXT FRIEND OF STAMOS, A MINOR, ET AL. *v.* SPRING BRANCH INDEPENDENT SCHOOL DISTRICT ET AL. Appeal from Sup. Ct. Tex. dismissed for want of substantial federal question. Reported below: 695 S. W. 2d 556.

No. 85-1035. CROCKER NATIONAL BANK *v.* PERDUE. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Reported below: 38 Cal. 3d 913, 702 P. 2d 503.

No. 85-1040. KERNER *v.* JUDGES OF THE WORCESTER PROBATE COURT ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-1113. CARTER *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-5931. DYSON *v.* TEXAS. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-5947. STEVENSON *v.* LEGAL AID SOCIETY OF HAWAII. Appeal from Int. Ct. App. Haw. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-6001. DOOLEY *v.* BELCHER. Appeal from Ct. App. Ohio, Montgomery County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-6002. DOOLEY *v.* FEDERAL HOME LOAN MORTGAGE CORPORATION ET AL. Appeal from Ct. App. Ohio, Montgomery County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-1050. TRAHAN *v.* TRAHAN. Appeal from Ct. App. Tex., 3d Sup. Jud. Dist., dismissed for want of substantial federal question. JUSTICE WHITE would postpone further consideration of question of jurisdiction to a hearing of the case on the merits. Reported below: 682 S. W. 2d 332.

No. 85-5650. TAYLOR *v.* ROBINSON, WARDEN. Appeal from Sup. Ct. Conn. dismissed for want of substantial federal question. JUSTICE WHITE, JUSTICE POWELL, and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 196 Conn. 572, 494 A. 2d 1195.

Vacated and Remanded on Appeal

No. 85-182. NORTHWEST CENTRAL PIPELINE CORP. ET AL. *v.* CORPORATION COMMISSION OF KANSAS ET AL. Appeal from Sup. Ct. Kan. Judgment vacated and case remanded for further consideration in light of *Transcontinental Gas Pipe Line Corp.* v. *State Oil and Gas Board,* 474 U. S. 409 (1986). Reported below: 237 Kan. 248, 699 P. 2d 1002.

Certiorari Granted—Vacated and Remanded

No. 84-1237. THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. *v.* JONES. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cabana* v. *Bullock*, 474 U. S. 376 (1986). Reported below: 741 F. 2d 805.

Miscellaneous Orders

No. ——. AGEE ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; and

No. ——. VESSICHIO *v.* CONNECTICUT. Motions of petitioners to direct the Clerk to file petitions for writs of certiorari that do not comply with the Rules of this Court denied.

No. ——. ANDREWS *v.* CALIFORNIA COOLER, INC. Motion of petitioner to direct the Clerk to file a petition for writ of certiorari out of time and for relief from the requirement of Rule 28.2 denied.

No. D-445. IN RE DISBARMENT OF NICHOLAS. Disbarment entered. [For earlier order herein, see 468 U. S. 1223.]

No. D-524. IN RE DISBARMENT OF WETHERBEE. Disbarment entered. JUSTICE STEVENS dissents. [For earlier order herein, see 474 U. S. 897.]

No. D-535. IN RE DISBARMENT OF ROMANO. Salvatore L. Romano, Jr., of Providence, R. I., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on December 9, 1985 [474 U. S. 1017], is hereby discharged.

No. D-544. IN RE DISBARMENT OF TILLEY. It is ordered that Kenneth L. Tilley, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-545. IN RE DISBARMENT OF WILLIS. It is ordered that David A. Willis, of Valparaiso, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-546. IN RE DISBARMENT OF AUGUST. It is ordered that Irving A. August, of Birmingham, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the Special Master for allowance of interim fees and disbursements granted and a total of $34,213.09 is allowed. [For earlier order herein, see, *e. g.*, 468 U. S. 1202.]

CHIEF JUSTICE BURGER, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

In *Louisiana* v. *Mississippi*, 466 U. S. 921 (1984), I dissented from an order of the Court granting fees to the Special Master. The basis for my dissent was that the hourly rates at which the Special Master sought fees for work performed by his junior associates, some of whom were only "summer law clerks," were not supported and were unreasonable.

In the present case, the Special Master (who also sat in the *Louisiana* case) has applied for interim fees in the amount of $33,511. I dissent because the Special Master has elected to give the Court even less information supporting the fee request than he did in *Louisiana*. The Special Master omits any information concerning the experience levels of the four attorneys for whose services he seeks to charge. (I assume, although it is not so stated, that they are in fact members of the bar, for I cannot believe such a claim would be made for services of any persons not admitted to practice.) We are not informed as to the hourly rates charged for his work and the work of those attorneys. Instead, we are provided only with enough information to conclude that the average hourly rate charged by the attorneys is $140 per hour. The Court and the parties are thus necessarily left to speculate as to whether that average reflects a charge in excess of $100 per hour for work performed only by junior associates.

As I noted in *Louisiana*,

> "[t]he fees and expenses charged by a Special Master when allowed by this Court, represent our assurance to the parties that the charges are reasonable and proper." *Id.*, at 923.

This applies with equal force where, as here, the parties do not oppose the application. The present application for *interim* fees

is made by an adjudicator who has yet to adjudicate. I draw no inferences, affirmative or negative, from the fact that the parties have elected not to express their views concerning the Special Master's application.

However, in dissenting in *Louisiana*, I stated:

> "A Special Master of this Court is a surrogate of the Court and in that sense the service performed is an important public duty of high order in much the same way as is serving in the Judiciary. I do not suggest that Special Masters should serve without compensation, as for example, Senior Federal Judges have done for a number of years in such cases, but I believe the public service aspect of the appointment is a factor that is not to be wholly ignored in determining the reasonableness of fees charged in a case like this." *Id.*, at 921.

Even if the public service aspect of the function of a Special Master of this Court should not enter into the fixing of fees, I am unwilling to act without being provided with at least as much information as private clients routinely receive from their privately retained counsel. The contending litigants have a right to expect this Court to exercise its independent judgment on fees rather than requiring each or both of them to challenge the amounts.

I would defer action on the application for interim fees until adequate information is provided. Without such data, this Court cannot protect the legitimate public interests implicated.

No. 84-902. WARDAIR CANADA INC. *v.* FLORIDA DEPARTMENT OF REVENUE. Sup. Ct. Fla. [Probable jurisdiction noted, 474 U. S. 943.] Motion of National Governors' Association et al. for leave to file a brief as *amici curiae* granted.

No. 84-1905. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* OWENS ET AL. D. C. C. D. Cal. [Probable jurisdiction noted *sub nom. Heckler* v. *Owens*, 474 U. S. 899.] Motion of appellee Buenta Owens to be substituted as representative of appellee Kenneth Owens, deceased, granted.

No. 85-93. BAZEMORE ET AL. *v.* FRIDAY ET AL.; and

No. 85-428. UNITED STATES ET AL. *v.* FRIDAY ET AL. C. A. 4th Cir. [Certiorari granted, 474 U. S. 978.] Motion of respondents for divided argument denied. JUSTICE BRENNAN would grant this motion.

No. 85-117. BAKER ET AL. *v.* GENERAL MOTORS CORP. ET AL. Sup. Ct. Mich. [Probable jurisdiction noted, 474 U. S. 899.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-227. SMALIS ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. [Certiorari granted, 474 U. S. 944.] Motion of petitioners for divided argument denied. JUSTICE BRENNAN would grant this motion.

No. 85-236. EICHENLAUB *v.* YURKY ET AL. C. A. 3d Cir. [Certiorari granted, 474 U. S. 1049.] Motion for appointment of counsel granted, and it is ordered that David Rudovsky, Esquire, of Philadelphia, Pa., be appointed to serve as counsel for respondent David A. Yurky in this case.

No. 85-372. CHRISTENSEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioners to consolidate this case with No. 85-546, *United States* v. *Mottaz* [certiorari granted, 474 U. S. 994], denied.

No. 85-437. ARCARA, DISTRICT ATTORNEY OF ERIE COUNTY *v.* CLOUD BOOKS, INC., DBA VILLAGE BOOK & NEWS STORE, ET AL. Ct. App. N. Y. [Certiorari granted, 474 U. S. 978.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 85-519. RANDALL ET AL. *v.* LOFTSGAARDEN ET AL. C. A. 8th Cir. [Certiorari granted, 474 U. S. 978.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-530. O'CONNOR ET AL. *v.* ORTEGA. C. A. 9th Cir. [Certiorari granted, 474 U. S. 1018.] Joel I. Klein, Esquire, of Washington, D. C., a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

No. 85-558. O'CONNOR ET UX. *v.* UNITED STATES;
No. 85-559. COPLIN ET UX. *v.* UNITED STATES; and
No. 85-560. MATTOX ET UX. *v.* UNITED STATES. C. A. Fed. Cir. [Certiorari granted, 474 U. S. 1050.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 85-568. NANTAHALA POWER & LIGHT CO. ET AL. *v.* THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL.

Sup. Ct. N. C. [Probable jurisdiction noted, 474 U. S. 1018.] Motions of Edison Electric Institute and New England Electric System for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of appellees for divided argument denied. JUSTICE BRENNAN would grant this motion. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 85-621. COMMODITY FUTURES TRADING COMMISSION *v.* SCHOR ET AL.; and

No. 85-642. CONTICOMMODITY SERVICES, INC. *v.* SCHOR ET AL. C. A. D. C. Cir. [Certiorari granted, 474 U. S. 1018.] Motion of petitioner ContiCommodity Services, Inc., for divided argument granted. Motion of respondents for divided argument denied. JUSTICE BRENNAN would grant this motion.

No. 85-632. ATKINS, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE *v.* RIVERA ET AL. Sup. Jud. Ct. Mass. [Certiorari granted, 474 U. S. 1018.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-905. SALISBURY *v.* JAMES RIVER CORP. ET AL., 474 U. S. 1061. Motion of United Paperworkers International Union for damages and fees denied.

No. 85-954. JAPAN WHALING ASSN. ET AL. *v.* AMERICAN CETACEAN SOCIETY ET AL.; and

No. 85-955. BALDRIGE, SECRETARY OF COMMERCE, ET AL. *v.* AMERICAN CETACEAN SOCIETY ET AL. C. A. D. C. Cir. [Certiorari granted, 474 U. S. 1053.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 85-1030. RADOL ET AL. *v.* THOMAS ET AL. C. A. 6th Cir.;

No. 85-1043. PILOT LIFE INSURANCE CO. *v.* DEDEAUX. C. A. 5th Cir.; and

No. 85-1066. MARTIN, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* HAITH. Appeal from D. C. E. D. N. C. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 85-5542. FORD *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. [Certiorari

granted, 474 U. S. 1019.] Motions of American Psychological Association et al., Office of the Capital Collateral Representative for Florida et al., and American Psychiatric Association for leave to file briefs as *amici curiae* granted.

No. 85-5699. WILSON *v.* SCHILLINGER ET AL. C. A. 3d Cir. Motion of petitioner to grant the petition for writ of certiorari, vacate the judgment, and remand the case to the United States Court of Appeals for the Third Circuit for further consideration denied.

No. 85-6233. SHEWCHUN *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 17, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85-851. IN RE CARSON. C. A. 6th Cir. Petition for writ of common-law certiorari and/or mandamus denied.

No. 85-6142. IN RE JOHNSON. Petition for writ of habeas corpus denied.

No. 85-5921. IN RE MURPHY; and
No. 85-6090. IN RE BRAATEN. Petitions for writs of mandamus denied.

No. 85-5971. IN RE BARRITT. Petition for writ of mandamus and/or prohibition denied.

No. 85-6141. IN RE GREEN. Petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 85-732. WESTERN AIR LINES, INC., ET AL. *v.* BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA ET AL. Appeal from Sup. Ct. S. D. Probable jurisdiction noted. Reported below: 372 N. W. 2d 106.

No. 85-1377. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES *v.* SYNAR, MEMBER OF CONGRESS, ET AL.;

No. 85-1378. UNITED STATES SENATE *v.* SYNAR, MEMBER OF CONGRESS, ET AL.; and

No. 85-1379. O'NEILL, SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL. *v.* SYNAR, MEMBER OF CONGRESS, ET AL. Appeals from D. C. D. C. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted each side for oral argument. Motion of the parties to dispense temporarily with printing and to set an expedited briefing schedule and argument date granted. Reported below: 626 F. Supp. 1374.

No. 85-1021. R. J. REYNOLDS TOBACCO CO. *v.* DURHAM COUNTY, NORTH CAROLINA, ET AL. Appeal from Sup. Ct. N. C.; and

No. 85-1022. R. J. REYNOLDS TOBACCO CO. *v.* DURHAM COUNTY, NORTH CAROLINA, ET AL. Appeal from Ct. App. N. C. Further consideration of question of jurisdiction postponed to hearing of cases on the merits. Cases consolidated and a total of one hour allotted for oral argument. Reported below: No. 85-1021, 314 N. C. 540, 335 S. E. 2d 21; No. 85-1022, 73 N. C. App. 475, 326 S. E. 2d 911.

Certiorari Granted

No. 85-782. IMMIGRATION AND NATURALIZATION SERVICE *v.* CARDOZA-FONSECA. C. A. 9th Cir. Certiorari granted. Reported below: 767 F. 2d 1448.

No. 85-1033. KELLY, CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL. *v.* ROBINSON. C. A. 2d Cir. Certiorari granted. Reported below: 776 F. 2d 30.

No. 85-686. METROPOLITAN LIFE INSURANCE CO. *v.* TAYLOR; and

No. 85-688. GENERAL MOTORS CORP. *v.* TAYLOR. C. A. 6th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 763 F. 2d 216.

No. 85-759. MARYLAND *v.* GARRISON. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 303 Md. 385, 494 A. 2d 193.

No. 85-937. WEST VIRGINIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 764 F. 2d 1028.

No. 84-6075. TISON *v.* ARIZONA (two cases). Sup. Ct. Ariz. Motions of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 142 Ariz. 446, 690 P. 2d 747 (first case); 142 Ariz. 454, 690 P. 2d 755 (second case).

No. 85-5454. GRAY *v.* MISSISSIPPI. Sup. Ct. Miss. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 472 So. 2d 409.

Certiorari Denied. (See also Nos. 85-1040, 85-1113, 85-5931, 85-5947, 85-6001, 85-6002, and 85-851, *supra.*)

No. 84-1692. BIBBY *v.* UNITED STATES; and
No. 84-1851. GILLOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 752 F. 2d 1116.

No. 85-125. WALTON ET AL. *v.* COLVILLE CONFEDERATED TRIBES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 752 F. 2d 397 and 758 F. 2d 1324.

No. 85-591. W. C. GARCIA & ASSOCIATES, INC. *v.* SASSI, DISTRICT DIRECTOR, INTERNAL REVENUE SERVICE. C. A. 9th Cir. Certiorari denied.

No. 85-596. ARNSBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 757 F. 2d 971.

No. 85-670. ETHYL CORP. *v.* UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 180.

No. 85-708. ALL SOULS EPISCOPAL CHURCH *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL.; and
No. 85-1017. ROCKET OIL CO. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 769 F. 2d 658.

No. 85-713. BEERLY, TRUSTEE OF THE GUSTAV E. BEERLY TRUST *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 942.

No. 85-728. CARR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 764 F. 2d 496.

No. 85-746. ALBANO ET AL. *v.* CRAIG CORP. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 924.

No. 85-758. CITY OF PRIOR LAKE, MINNESOTA *v.* SHAKOPEE MDEWAKANTON SIOUX COMMUNITY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 771 F. 2d 1153.

No. 85-775. MASTROPAOLO *v.* MASTROPAOLO. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 166 Cal. App. 3d 953, 213 Cal. Rptr. 26.

No. 85-796. AMERICAN FINANCIAL SERVICES ASSN. *v.* FEDERAL TRADE COMMISSION ET AL.; and

No. 85-797. SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS *v.* FEDERAL TRADE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 247 U. S. App. D. C. 167, 767 F. 2d 957.

No. 85-821. FLORIDA DEPARTMENT OF BUSINESS REGULATION ET AL. *v.* UNITED STATES DEPARTMENT OF THE INTERIOR ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1248.

No. 85-822. AMOCO PRODUCTION CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 2d 669.

No. 85-840. GINSBURG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 773 F. 2d 798.

No. 85-843. LONG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1164.

No. 85-850. PURVIS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1237.

No. 85-854. ESPOSITO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 771 F. 2d 283.

No. 85-857. SIMMONS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 38.

No. 85-861. HADDON HOUSE FOOD PRODUCTS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 764 F. 2d 182.

No. 85-867. HODGES *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1061.

No. 85-876. VICARS *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA (EPPLER ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85-884. BANKS ET AL. *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1399.

No. 85-897. KOWALCHUK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 773 F. 2d 488.

No. 85-904. HERFORD *v.* SUN PIPE LINE CO. C. A. 5th Cir. Certiorari denied. Reported below: 770 F. 2d 163.

No. 85-907. FROMM ET AL. *v.* ROSEWELL, TREASURER OF COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 771 F. 2d 1089.

No. 85-924. MURPHY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 1518.

No. 85-927. SHOKRIAN *v.* CARROLL, SUPERINTENDENT OF PRISONS, DEPARTMENT OF CORRECTIONS OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85-930. CHAMBLESS ET UX. *v.* MASTERS, MATES & PILOTS PENSION PLAN ET AL.; and

No. 85-1097. MASTERS, MATES & PILOTS PENSION PLAN ET AL. *v.* CHAMBLESS ET UX. C. A. 2d Cir. Certiorari denied. Reported below: 772 F. 2d 1032.

No. 85-935. JONES *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 129 Ill. App. 3d 618, 472 N. E. 2d 1176.

No. 85-938. ROSS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 132 Ill. App. 3d 498, 477 N. E. 2d 1258.

No. 85-940. DE LUCA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 110 App. Div. 2d 1091, 488 N. Y. S. 2d 529.

No. 85-942. FERN *v.* FERN. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85-950. MARCHANT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 888.

No. 85-956. CLOPTON *v.* CITY OF DALLAS. C. A. 5th Cir. Certiorari denied. Reported below: 773 F. 2d 1235.

No. 85-959. TOWNSHIP OF LACEY *v.* JERSEY CENTRAL POWER & LIGHT CO. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 1103.

No. 85-964. LIBERTARIAN PARTY OF VIRGINIA ET AL. *v.* DAVIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 766 F. 2d 865.

No. 85-975. ROSS BICYCLES, INC. *v.* CYCLES USA, INC. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 1502.

No. 85-978. KOREY *v.* CITY OF DAVENPORT, IOWA. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1170.

No. 85-980. ERNEST *v.* UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF ALABAMA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1082.

No. 85-982. SAMPSON *v.* RASKIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 925.

No. 85-984. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO *v.* QANTAS AIRWAYS, LTD. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 911.

No. 85-985. MASIN ET UX. *v.* DRAIN ET UX. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-986. GISSARO *v.* GROSS & HECHT TRUCKING, INC. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85-989. QUILICI *v.* SECOND AMENDMENT FOUNDATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 2d 414.

No. 85-992. FREESE, NEXT FRIEND FOR FREESE, ET UX. *v.* CORNING GLASS WORKS. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 165.

No. 85-1000. FACER INSURANCE AGENCY, INC. *v.* FABE, SUPERINTENDENT OF INSURANCE OF OHIO. C. A. 7th Cir. Certiorari denied. Reported below: 773 F. 2d 142.

No. 85–1001. BOHN ET UX. *v.* COUNTY OF DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 772 F. 2d 1433.

No. 85–1002. CIAMPITTI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 893.

No. 85–1004. BEAIRD *v.* MILLER'S MUTUAL INSURANCE ASSOCIATION OF ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 133 Ill. App. 3d 670, 479 N. E. 2d 374.

No. 85–1006. SINHA *v.* VETERANS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 768 F. 2d 330.

No. 85–1008. BRITT *v.* SIMI VALLEY UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 1052.

No. 85–1009. YARBOUGH ET AL. *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 100 N. J. 627, 498 A. 2d 1239.

No. 85–1013. RITTENHOUSE *v.* DEKALB COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 1451.

No. 85–1014. SMITH *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied.

No. 85–1015. LEEBRO MANAGEMENT, INC., DBA SAMSON BUICK, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 895.

No. 85–1016. MCKNIGHT ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 771 F. 2d 388.

No. 85–1019. RUSSELL *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 85–1023. JON-T. CHEMICALS, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 2d 686.

No. 85–1024. PLISKA *v.* STEEL KING INDUSTRIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 1168.

No. 85-1025. WILLIAMS, T/A WILLIAMS ELECTRIC *v.* SCHOOL BOARD OF THE CITY OF PITTSBURGH. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 897.

No. 85-1029. STARKMAN *v.* MARATHON OIL CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 231.

No. 85-1031. HUCKS ET AL. *v.* BELL TELEPHONE LABORATORIES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 760 F. 2d 265.

No. 85-1032. M. J. M. EXHIBITORS, INC. *v.* STERN, INDIVIDUALLY AND AS CHAIRMAN OF THE NEW YORK STATE URBAN DEVELOPMENT CORPORATION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 770 F. 2d 288.

No. 85-1034. JACKSON *v.* CABINET FOR HUMAN RESOURCES OF THE COMMONWEALTH OF KENTUCKY. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1162.

No. 85-1039. QUANSAH *v.* JIM BUTLER & CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 913.

No. 85-1041. LLANO, INC. *v.* INTERNATIONAL MINERALS & CHEMICAL CORP. C. A. 10th Cir. Certiorari denied. Reported below: 770 F. 2d 879.

No. 85-1044. QUARLES *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 85-1046. RAMIREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 769 F. 2d 453.

No. 85-1047. MIKULEC *v.* BRAUN, SHERIFF OF ERIE COUNTY. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 112 App. Div. 2d 803, 492 N. Y. S. 2d 305.

No. 85-1049. CHRYSLER PLASTIC PRODUCTS CORP. *v.* EREBIA. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 1250.

No. 85-1055. PYLE, BY STRAUB, A SUCCESSOR GUARDIAN OF HER ESTATE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 766 F. 2d 1141.

No. 85-1056. BISCAYNE 21 CONDOMINIUM, INC. *v.* SOUTH ATLANTIC FINANCIAL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 767 F. 2d 814.

No. 85–1057. OTARI CORP. *v.* KING INSTRUMENT CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 767 F. 2d 853.

No. 85–1059. DOE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 300.

No. 85–1060. RAYTHEON CO. *v.* CVD, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 769 F. 2d 842.

No. 85–1062. HORNBUCKLE *v.* ARCO OIL & GAS CO. C. A. 5th Cir. Certiorari denied. Reported below: 770 F. 2d 1321.

No. 85–1068. DEMJANJUK *v.* PETROVSKY, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 776 F. 2d 571.

No. 85–1069. COE *v.* COE. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1068.

No. 85–1070. JONES ET AL. *v.* THORNE; and
No. 85–5961. THORNE ET UX. *v.* JONES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 1270.

No. 85–1072. ANGEL *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO (RENN, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85–1073. BLUE BELL, INC. *v.* WILHELM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 773 F. 2d 1429.

No. 85–1075. DANIEL *v.* SECURITY PACIFIC NATIONAL BANK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 771 F. 2d 1352.

No. 85–1076. LYONS, GUARDIAN OF THE PERSON AND ESTATE OF WHITTINGTON, A MINOR *v.* BUTE, CONSERVATOR OF THE ESTATE OF WHITTINGTON, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 107 Ill. 2d 169, 483 N. E. 2d 210.

No. 85–1078. BERNSTEIN *v.* PORTLAND SAVINGS & LOAN ASSN. Ct. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 716 S. W. 2d 532.

No. 85–1086. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 959.

No. 85-1087. HOLMES *v.* DRUMMOND. Sup. Ct. Del. Certiorari denied. Reported below: 504 A. 2d 572.

No. 85-1089. GALLO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 763 F. 2d 1504.

No. 85-1101. BURBANK-GLENDALE-PASADENA AIRPORT AUTHORITY *v.* BAKER ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 39 Cal. 3d 862, 705 P. 2d 866.

No. 85-1102. MANN *v.* WARDEN, EGLIN AIR FORCE BASE. C. A. 11th Cir. Certiorari denied. Reported below: 771 F. 2d 1453.

No. 85-1103. CHALUISSANT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 44.

No. 85-1106. SHANDLOFF ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 170 Cal. App. 3d 372, 215 Cal. Rptr. 916.

No. 85-1107. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, ET AL. *v.* MURPHY. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 114.

No. 85-1108. DELTA RESINS & REFRACTORIES, INC., ET AL. *v.* ASHLAND OIL, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 281.

No. 85-1110. CARRALERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 702.

No. 85-1111. POWELL PRESSED STEEL CO. *v.* POLICY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 609.

No. 85-1112. FALSTAFF BREWING CORP. *v.* TRINITY CARTON CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 184.

No. 85-1114. EARNEST *v.* LOUISIANA. 15th Jud. Dist. Ct. La., Lafayette Parish. Certiorari denied.

No. 85-1115. MOATS *v.* WICK, DIRECTOR, UNITED STATES INFORMATION AGENCY, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 85-1119. MARKOWSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 358.

No. 85-1123. TAYLOR *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 767 F. 2d 930.

No. 85-1124. CHRISTENSEN *v.* UNITED STATES (two cases). C. A. 10th Cir. Certiorari denied.

No. 85-1125. PRYOR *v.* PRYOR. Ct. App. Okla. Certiorari denied.

No. 85-1127. KING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 232.

No. 85-1128. HALE ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1164.

No. 85-1130. HAMILTON ET AL. *v.* ALDAG, TOWN CLERK FOR LOS GATOS (FERRITO ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 85-1132. ROSENTHAL & ROSENTHAL INC. ET AL. *v.* NEW YORK STATE URBAN DEVELOPMENT CORPORATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 771 F. 2d 44.

No. 85-1134. FIRST UNITED FUND, LTD. *v.* BROCKTON SAVINGS BANK. C. A. 1st Cir. Certiorari denied. Reported below: 771 F. 2d 5.

No. 85-1135. FLOYD *v.* HAIG ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-1136. WINSLOW *v.* BOARD OF COUNTY COMMISSIONERS OF MORGAN COUNTY, COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 706 P. 2d 792.

No. 85-1137. ELSTON ET AL. *v.* BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 469 So. 2d 1022.

No. 85-1139. AMERICAN VELODUR METAL, INC. *v.* SCHINABECK. App. Ct. Mass. Certiorari denied. Reported below: 20 Mass. App. 460, 481 N. E. 2d 209.

No. 85-1143. WALLACE *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 321.

No. 85-1144. SISTRUNK ET AL. *v.* CIRCLE BAR DRILLING CO. C. A. 5th Cir. Certiorari denied. Reported below: 770 F. 2d 455.

No. 85-1147. RADIATION TECHNOLOGY, INC. *v.* NEUTRON PRODUCTS, INC., ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-1149. BRODKA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 303.

No. 85-1156. SPALLATO, ADMINISTRATOR OF THE ESTATE OF SPALLATO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1050.

No. 85-1157. HILLTOP REALTY, INC. *v.* CITY OF CLEVELAND HEIGHTS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 135.

No. 85-1160. SINICROPI *v.* BENNETT, DEPUTY DIRECTOR OF PROBATION OF THE COUNTY OF NASSAU, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 111 App. Div. 2d 801, 490 N. Y. S. 2d 1005.

No. 85-1161. DANIELS *v.* LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1173.

No. 85-1162. DANIELS *v.* LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1173.

No. 85-1163. SAMPLE ET AL. *v.* JOHNSON, DEPUTY COMMISSIONER FOR THE OFFICE OF WORKERS' COMPENSATION PROGRAMS FOR DISTRICT 14, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 771 F. 2d 1335.

No. 85-1175. REECE *v.* TENNESSEE CIVIL SERVICE COMMISSION. Ct. App. Tenn. Certiorari denied. Reported below: 699 S. W. 2d 808.

No. 85-1214. LANGELLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 776 F. 2d 1078.

No. 85-1242. HALTER *v.* SECRETARY OF THE TREASURY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 911.

No. 85-1254. FERGUSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 776 F. 2d 217.

No. 85-5277. O'DRISCOLL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 761 F. 2d 589.

No. 85-5354. NORTH *v.* WEST VIRGINIA BOARD OF REGENTS. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 332 S. E. 2d 141.

No. 85-5431. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 1122.

No. 85-5554. PREER *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-5595. DUEMMEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 1022.

No. 85-5599. BARKLEY *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 85-5661. GULOY *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 104 Wash. 2d 412, 705 P. 2d 1182.

No. 85-5676. BARKLEY *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-5688. JONES *v.* AMERICAN POSTAL WORKERS UNION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 247 U. S. App. D. C. 148, 766 F. 2d 1566.

No. 85-5698. MARRERA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 201.

No. 85-5708. DAVIS *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 2d 1197.

No. 85-5711. HUGHES *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 85-5714. SWEETWINE *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 769 F. 2d 991.

No. 85-5737. CLAUSEN *v.* TEXAS. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 682 S. W. 2d 328.

No. 85-5739. HALLAHAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 768 F. 2d 754.

No. 85-5744. ANDERSON ET AL. *v.* MILLER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 375.

No. 85-5760. SCHUSTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 769 F. 2d 337.

No. 85-5762. NEWTON *v.* MCCOTTER MOTORS, INC., ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 475 So. 2d 230.

No, 85-5774. BROADWAY *v.* HULL, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-5780. WOODARD *v.* RASMUSSEN, WARDEN. Ct. App. Ore. Certiorari denied. Reported below: 73 Ore. App. 689, 700 P. 2d 675.

No. 85-5787. ANDERSON *v.* COLORADO. Sup. Ct Colo. Certiorari denied.

No. 85-5790. VELASQUEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 1348.

No. 85-5792. WESTFALL *v.* HEDRICK, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 85-5794. POLK *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 37.

No. 85-5803. FREDERICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85-5805. FARRUGIA ET AL. *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1237.

No. 85–5818. BEAMON *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1238.

No. 85–5819. CLAY *v.* VOSE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, NORFOLK. C. A. 1st Cir. Certiorari denied. Reported below: 771 F. 2d 1.

No. 85–5822. SHARLOW *v.* YOUNG, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 373.

No. 85–5829. MARK *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85–5859. GLENN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 131 Ill. App. 3d 1160, 493 N. E. 2d 1221.

No. 85–5865. HOWARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 57.

No. 85–5874. MARQUEZ-MEDINA ET AL. *v.* MEESE, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 766 F. 2d 1478.

No. 85–5902. LUCIEN *v.* CHRANS, WARDEN; and
No. 85–5918. LUCIEN *v.* CHRANS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 85–5906. ADAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 908.

No. 85–5907. LUMBERT *v.* DEROBERTIS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 85–5912. PRICE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1177.

No. 85–5914. MOORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 827.

No. 85–5919. CRAWFORD *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 85–5922. PUTA *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied.

No. 85-5927. DENNIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 2d 902.

No. 85-5932. BAGLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 482.

No. 85-5934. SULLIVAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 909.

No. 85-5937. DEPREE *v.* SOCIAL SECURITY ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-5943. KIRK *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 699 S. W. 2d 814.

No. 85-5944. EVANS *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 85-5948. BRYANT *v.* WARDEN, METROPOLITAN CORRECTIONAL CENTER OF NEW YORK CITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 776 F. 2d 394.

No. 85-5950. TRIPATI *v.* BROWN. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1172.

No. 85-5952. GISRIEL *v.* BOARD OF APPEALS, MARYLAND DEPARTMENT OF EMPLOYMENT AND TRAINING. Ct. Sp. App. Md. Certiorari denied. Reported below: 62 Md. App. 715.

No. 85-5953. BURTON *v.* SARGENT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-5954. CARR *v.* WOODS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 776 F. 2d 1043.

No. 85-5955. ESSIX *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 475 So. 2d 694.

No. 85-5958. PARRIS *v.* HOLLOHAN, WARDEN, ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 85-5960. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 771 F. 2d 79.

No. 85-5962. MILLER *v.* CAMPOY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 85–5964. LEVENTHAL *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 766 F. 2d 1351.

No. 85–5966. HARDING *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 457 N. E. 2d 1098.

No. 85–5969. KOPP *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 895.

No. 85–5970. GAY *v.* HERNANDEZ-CUEBAS. C. A. 3d Cir. Certiorari denied.

No. 85–5974. TROUTMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 807.

No. 85–5975. MOORE *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied.

No. 85–5976. HOWARD *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 916.

No. 85–5977. ISLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 914.

No. 85–5978. CLARK *v.* STATE TREASURER'S OFFICE EMPLOYER ET AL. C. A. 4th Cir. Certiorari denied.

No. 85–5980. HOELKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 1422.

No. 85–5981. HAASE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 125 Wis. 2d 574, 373 N. W. 2d 86.

No. 85–5982. DEPREE *v.* ROBERTS, COMMISSIONER OF LABOR OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 85–5984. CALLAHAN *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 173.

No. 85–5985. KAPP *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 1017.

No. 85–5992. RUBIN *v.* BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES (WESTERN ILLINOIS UNIVERSITY). C. A. 7th Cir. Certiorari denied.

No. 85-5993. SIMMONS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 475 So. 2d 884.

No. 85-5994. SEWARD *v.* SAN LUIS OBISPO COUNTY DEPARTMENT OF SOCIAL SERVICES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-5995. VILLAREAL *v.* STAGNER, SUPERINTENDENT, CORRECTIONAL TRAINING FACILITY. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 915.

No. 85-5996. ROSBERG *v.* DEUTSCHE CREDIT CORP. Sup. Ct. Neb. Certiorari denied. Reported below: 220 Neb. xxiii.

No. 85-5997. SPENCER *v.* DEVOE & REYNOLDS CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85-5998. RUNNELS *v.* KINGSTON ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-5999. STRYKER *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied.

No. 85-6003. HURLEY *v.* HONGISTO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1438.

No. 85-6007. KRUMPELMAN *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 586.

No. 85-6008. BRANCEWICZ *v.* LAMBIRIS ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-6012. MUZA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 85-6013. WELLS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 64 Md. App. 719.

No. 85-6014. ROSBERG *v.* DEUTSCHE CREDIT CORP. C. A. 8th Cir. Certiorari denied.

No. 85-6015. WHITE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 300.

No. 85-6016. FLITTIE *v.* SOLEM, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 775 F. 2d 933.

No. 85-6017. DALY *v.* BAILEY. Sup. Ct. Conn. Certiorari denied. Reported below: 198 Conn. 801, 501 A. 2d 758.

No. 85-6018. GLOVER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 39.

No. 85-6020. DEMOURA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 39.

No. 85-6021. DRAPER *v.* VIRGINIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 1154.

No. 85-6023. TURNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 1508.

No. 85-6025. WELCH *v.* WOODARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 1156.

No. 85-6028. MARKS *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6029. SHOOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 53.

No. 85-6030. HOLMES *v.* HARDY ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-6031. REED *v.* MANSON, COMMISSIONER OF CORRECTIONS OF CONNECTICUT, ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-6032. NIVEN *v.* KAISER FOUNDATION HOSPITAL. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 933.

No. 85-6036. HAASE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 125 Wis. 2d 574, 373 N. W. 2d 87.

No. 85-6040. RICHARDS ET UX. *v.* SWINEBROAD & DENTON AUCTIONEERS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 167.

No. 85-6041. SPENCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1024.

No. 85-6042. VERSE *v.* FOLTZ, REGIONAL ADMINISTRATOR, MICHIGAN DEPARTMENT OF CORRECTIONS. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 2d 168.

No. 85-6043. MELVIN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 706 P. 2d 163.

No. 85-6046. HANS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 44.

No. 85-6047. BROWN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 1056.

No. 85-6052. AUGUSTYNIAK *v.* CITY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 65 N. Y. 2d 922, 483 N. E. 2d 135.

No. 85-6053. SAYRE *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 471 N. E. 2d 708.

No. 85-6054. SANDERSON *v.* RICE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 777 F. 2d 902.

No. 85-6056. KELLER *v.* SALTON. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 895.

No. 85-6059. GLICK *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1047.

No. 85-6061. GILLARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 1055.

No. 85-6062. RAYSOR *v.* PORT AUTHORITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 768 F. 2d 34.

No. 85-6066. WESER *v.* CARLIN, GOVERNOR OF KANSAS. Sup. Ct. Kan. Certiorari denied.

No. 85-6067. SALLEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 2d 909.

No. 85-6068. FREEMAN *v.* MCNAMARA, DIRECTOR, NORTH CAROLINA DIVISION OF PRISONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 776 F. 2d 1043.

No. 85-6070. FIELDS *v.* SIMMONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6071. BLEVINS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1178.

No. 85-6075. MCDONALD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1049.

No. 85-6076. FLETCHER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-6078. MUZA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 85-6079. SMITH *v.* WENZELMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 924.

No. 85-6081. LUCERO *v.* SNYDER. C. A. 10th Cir. Certiorari denied.

No. 85-6087. POOL *v.* BRACKMAN, JUDGE, ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-6088. ALEEM *v.* CARR ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-6093. GEORGEVICH *v.* STRAUSS. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 1078.

No. 85-6097. WALLACE *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1164.

No. 85-6099. RODMAN *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 85-6105. LEWIEL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 132 Ill. App. 3d 1161, 494 N. E. 2d 959.

No. 85-6106. ANTHONY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 769 F. 2d 1544.

No. 85-6107. WYCOFF *v.* MENKE. C. A. 8th Cir. Certiorari denied. Reported below: 773 F. 2d 983.

No. 85-6110. WALTER *v.* TORRES ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-6112. OFARRIL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 791.

No. 85-6113. BAKER, AKA WALKER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 477 So. 2d 496.

No. 85-6115. BUTLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 85-6116. PALAFOX *v.* EDWARDS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 52.

No. 85-6121. WINTERHALDER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-6129. THOMAS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85-6131. BARCENA *v.* WASHINGTON, MAYOR OF CITY OF CHICAGO, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 85-6132. BOYNTON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 473 So. 2d 703.

No. 85-6133. GRAF *v.* CITY OF OSHKOSH, WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 85-6143. JOHNSTON *v.* WILKINS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1162.

No. 85-6148. GRANGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 2d 351.

No. 85-6157. LAWSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 39.

No. 85-6161. MOSQUERA ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 776 F. 2d 1071.

No. 85-6162. CASTRO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 776 F. 2d 1118.

No. 85-6176. GIPSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-6178. RANDAZZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 38.

No. 85-6179. SHACK *v.* SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND CORRECTIONAL DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD. C. A. 3d Cir. Certiorari denied. Reported below: 776 F. 2d 1170.

No. 85-6180. SHARP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 778 F. 2d 1182.

No. 85-6182. CRUZEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1084.

No. 85-6188. MURRAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1023.

No. 85-6189. GALVIN-MOREJON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 702.

No. 85-6190. NABORS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1064.

No. 85-6191. BRYANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 770 F. 2d 1283.

No. 85-6195. ADU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 1511.

No. 85-6202. BEARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 1577.

No. 85-6203. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1170.

No. 85-6205. DROEGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1178.

No. 85-6232. OLSEN *v.* DRUG ENFORCEMENT ADMINISTRATION. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 267.

No. 85-6238. WARD *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 54.

No. 85-6241. CARTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 1056.

No. 85-6243. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 121.

No. 85-6245. PUGH *v.* UNITED STATES PAROLE COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1033.

No. 85-6251. ECHEVERRI-JARAMILLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 777 F. 2d 933.

No. 85-6258. GIANGROSSO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 376.

No. 85-6261. SPECKIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1044.

No. 85-6265. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 1055.

No. 84-6108. BUSH *v.* FLORIDA. Sup. Ct. Fla.;
No. 84-6971. STEVENS *v.* KEMP, WARDEN. Sup. Ct. Ga.;
No. 85-5702. BIRD *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85-5741. SNOW *v.* NEVADA. Sup. Ct. Nev.;
No. 85-5784. FRANKLIN *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85-5933. MIRANDA *v.* NEVADA. Sup. Ct. Nev.;
No. 85-5935. SMITH *v.* SOUTH CAROLINA. Sup. Ct. S. C.;
No. 85-5987. HORSLEY *v.* ALABAMA. Sup. Ct. Ala.;
No. 85-6009. BOGGS *v.* VIRGINIA. Sup. Ct. Va.;
No. 85-6072. GORE *v.* FLORIDA. Sup. Ct. Fla.;
No. 85-6089. PASTER *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85-6098. DUNCAN *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 85-6102. THOMAS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 85-6103. BIEGHLER *v.* INDIANA. Sup. Ct. Ind.;
No. 85-6123. MILLS *v.* FLORIDA. Sup. Ct. Fla.; and
No. 85-6146. FUNCHESS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir.
Certiorari denied. Reported below: No. 84-6108, 461 So. 2d 936; No. 84-6971, 254 Ga. 228, 327 S. E. 2d 185; No. 85-5702, 692 S. W. 2d 65; No. 85-5741, 101 Nev. 439, 705 P. 2d 632; No. 85-5784, 693 S. W. 2d 420; No. 85-5933, 101 Nev. 562, 707 P. 2d 1121; No. 85-5935, 286 S. C. 406, 334 S. E. 2d 277; No. 85-5987,

476 So. 2d 626; No. 85-6009, 229 Va. 501, 331 S. E. 2d 407; No. 85-6072, 475 So. 2d 1205; No. 85-6089, 701 S. W. 2d 843; No. 85-6098, 698 S. W. 2d 63; No. 85-6102, 767 F. 2d 738; No. 85-6103, 481 N. E. 2d 78; No. 85-6123, 476 So. 2d 172; No. 85-6146, 772 F. 2d 683.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85-400. FLORIDA *v.* ROMERO, AKA MASCARA. Dist. Ct. App. Fla., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 471 So. 2d 110.

No. 85-968. ARMONTROUT, WARDEN *v.* MOORE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 766 F. 2d 1253.

No. 85-1005. DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON *v.* WEBSTER. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 767 F. 2d 1206.

No. 85-459. MELLON BANK, N. A., ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 762 F. 2d 283.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN and JUSTICE POWELL join, dissenting.

The Internal Revenue Code allows a deduction from the taxable estate of bequests "to or for the use of any corporation organized and operated exclusively for . . . charitable . . . purposes." 26 U. S. C. § 2055(a)(2). This petition presents the question whether a bequest to a nonprofit cemetery association qualifies for a deduction pursuant to this section.

A. Leon Davis died testate on December 6, 1976. His will provided that the residue of his estate was to be distributed to the Verona Cemetery in Oakmont, Pennsylvania. The cemetery was established by nearby residents in 1881 as a nonstock, nonprofit corporation for the purpose of providing burial space to any person regardless of religion or race. Davis' executors filed a federal

estate tax return, paid the tax, and then submitted a claim asserting a charitable deduction of $370,901.74, the total amount distributed to the cemetery. The Internal Revenue Service disallowed the deduction and denied the accompanying claim for a refund. After exhausting administrative remedies, the executors instituted the present refund action in Federal District Court. Concluding that Verona Cemetery was a "corporation organized and operated exclusively for . . . charitable . . . purposes," 590 F. Supp. 160, 162, n. 1 (WD Pa. 1984), the District Court held that the bequest qualified for a deduction under § 2055(a)(2). In reaching that conclusion, the court observed that the cemetery was exempt from federal income taxes, that the bequest had already been held exempt from Pennsylvania's inheritance tax and, more generally, that bequests to public nonprofit cemetery associations traditionally had been considered charitable under the common law of trusts.

A divided panel of the Court of Appeals for the Third Circuit reversed. 762 F. 2d 283 (1985). It acknowledged the "anomaly" of treating nonprofit cemetery associations differently for federal estate and income tax purposes. It believed, however, that this asymmetry was compelled by the language and history of the relevant provisions of the Code. Employing language that closely parallels § 2055(a)(2), § 501(c)(3) exempts from federal income taxes "[c]orporations . . . organized and operated exclusively for . . . charitable . . . purposes." Since 1913, the Code has included a separate exemption for "[c]emetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit." 26 U. S. C. § 501(c)(13). In 1954, as part of the general revision of the Code, Congress enacted § 170(c)(5), which permits deductions of contributions to any cemetery company that meets a standard virtually identical to that set out in § 501(c)(13). After examining this history, the Court of Appeals concluded that nonprofit cemetery companies did not qualify as a "charitable" corporation under § 2055(a)(2). Because Congress had thought it necessary to enact a special provision for cemeteries on the income tax side, the court reasoned, it must have believed that such entities were not within the general deduction for "charitable" contributions. 26 U. S. C. § 170 (c)(2)(B). Thus, the court concluded, the failure to adopt a parallel provision on the estate tax side foreclosed petitioners' contention that ceme-

tery associations qualified as "charitable" within the meaning of § 2055(a)(2).

This reasoning is far from inevitable. That Congress explicitly provided for nonprofit cemetery associations in § 501(c)(13) and § 170(c)(5) does not lead inescapably to the conclusion that many such associations are not within the more general exemption for "charitable" corporations. Some family cemetery corporations, for example, are covered by § 501(c)(13) but almost certainly would not qualify as "charitable" within the more general language of § 501(c)(3). See *John D. Rockefeller Family Cemetery Corp.* v. *Commissioner*, 63 T. C. 355 (1974). Congress clearly intended to confer on these private cemetery associations an exemption from federal income taxation. *Ibid.* The nearly identical language of § 170(c)(5) suggests that Congress also intended that contributions to such associations be tax deductible. But it does not inevitably follow that public organizations that already qualified as "charitable" suddenly ceased to be so by virtue of a decision to afford a tax benefit to some organizations that could not meet this more restrictive requirement. This construction is especially unlikely in light of the virtually uniform consensus under state common and statutory law that nonprofit, public cemetery associations are "charitable" and that bequests to such organizations are therefore exempt from inheritance taxes. See, *e. g.*, *In re Estate of Edwards*, 88 Cal. App. 3d 383, 151 Cal. Rptr. 770 (1979). See also Restatement (Second) of Trusts § 374, Comment *h* (1959).

I recognize that the Court of Appeals' analysis conforms with that of other federal courts that have considered the issue. See, *e. g.*, *Child* v. *United States*, 540 F. 2d 579, 584 (CA2 1976). I recognize also, in the words of the dissenting judge below, that "[t]he Republic will stand" regardless of how this issue is resolved. 762 F. 2d, at 287. Nonetheless, because the Court of Appeals' construction of the Code will have a significant impact on the financial vitality of these organizations and because I am unconvinced that this anomalous construction is justified by the language and history of the relevant provisions of the Code, I would grant the petition for certiorari.

No. 85-633. AMREP CORP. v. FEDERAL TRADE COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 768 F. 2d 1171.

JUSTICE WHITE, dissenting.

The Federal Trade Commission ordered petitioner to cease various unfair trade practices in selling land, and required, among other things, that petitioner send all customers still under land sale contracts with it a letter disclosing that the Commission had brought an action against petitioner and explaining possible courses of action the customers might take. The United States Court of Appeals for the Tenth Circuit affirmed the Commission's order over petitioner's objection that the notification order was not within the Commission's remedial authority under § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45. 768 F. 2d 1171 (1985). The Tenth Circuit's decision is at odds with decisions of the Fourth and Ninth Circuits holding that § 5 authorizes only cease-and-desist orders, and not notification orders. See *Barrett Carpet Mills, Inc.* v. *Consumer Product Safety Comm'n*, 635 F. 2d 299 (CA4 1980); *Congoleum Industries, Inc.* v. *Consumer Product Safety Comm'n*, 602 F. 2d 220 (CA9 1979).* I would grant certiorari to resolve this apparent conflict.

No. 85-769. ORUM *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE POWELL would grant certiorari.

No. 85-786. BELLISSIMO *v.* WESTINGHOUSE ELECTRIC CORP. ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 764 F. 2d 175.

No. 85-849. PRESIDIO VALLEY FARMERS ASSN. ET AL. *v.* CALDERON ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 765 F. 2d 1334.

No. 85-926. CHRISTIAN BROADCASTING NETWORK, INC. *v.* COPYRIGHT ROYALTY TRIBUNAL. C. A. D. C. Cir. Motion of Old-Time Gospel Hour et al. for leave to file out-of-time brief in support of petition denied. Certiorari denied. Reported below: 249 U. S. App. D. C. 4, 772 F. 2d 922.

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*The decisions in *Barrett* and *Congoleum* are interpretations of the powers of the Consumer Product Safety Commission under the Flammable Fabrics Act, 15 U. S. C. § 1191 *et seq.* Since 15 U. S. C. § 1194 incorporates § 5 of the Federal Trade Commission Act by reference, *Barrett* and *Congoleum* are effectively interpretations of the scope of § 5.

No. 85-960. COLSON *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 498 A. 2d 585.

No. 85-974. HESS *v.* TREECE. Sup. Ct. Ark. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 286 Ark. 434, 693 S. W. 2d 792.

No. 85-961. HOLDING *v.* SOVRAN BANK ET AL. Sup. Ct. Va. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 85-1020. GELLERT *v.* EASTERN AIR LINES, INC. Sup. Ct. Fla. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 475 So. 2d 694.

No. 85-1098. VEVODA ET AL. *v.* MILK DRIVERS & DAIRY EMPLOYEES UNION, TEAMSTERS LOCAL 302. C. A. 9th Cir. Motion of National Right to Work Legal Defense Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 772 F. 2d 530.

No. 85-1173. SPANG & CO. *v.* GRECCO. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 779 F. 2d 44.

No. 85-5928. LEON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 775 F. 2d 302.

No. 85-5972. SCHIRO *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 479 N. E. 2d 556.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The trial judge in this case rejected a unanimous jury decision that petitioner's life should be spared, and sentenced him to die. Petitioner's allegations, which call into question the reliability of the judge's sentencing determination, further illustrate why a judge should not have the awesome power to reject a jury recommendation of life. Moreover, a serious inadequacy in the Indiana capital sentencing procedure dramatically distinguishes it from the jury-override procedure that this Court upheld in *Spaziano* v.

Florida, 468 U. S. 447 (1984). I must dissent from the Court's decision not to consider petitioner's substantial claims.

I

Thomas N. Schiro was convicted of murder in the course of a rape and, following a hearing on the appropriateness of sentencing him to die, the jury recommended a life sentence. The trial judge, however, rejected the jury's decision and imposed a sentence of death. Upon direct appeal, the Supreme Court of Indiana found that the trial court's findings pertaining to the sentencing did not set out clearly and properly the court's reasons for imposing the death penalty. *Schiro* v. *State*, 451 N. E. 2d 1047, 1056 *(Schiro I)*, cert. denied, 464 U. S. 1003 (1983). That court ordered that the trial court make written findings setting out the aggravating circumstance proved beyond a reasonable doubt and the mitigating circumstances, if any, as listed in the state statute. 451 N. E. 2d, at 1056.

In response, the trial court specified one aggravating circumstance, that the jury had convicted petitioner of murder in the course of a rape; it then stated that it found no mitigating circumstances, listing and rejecting each of the statutory mitigating circumstances, even though several were suggested by the evidence. With regard to the mitigating factor concerning a defendant's mental or emotional condition and the impairment of his capacity to appreciate the criminality of his acts, the court found as follows:

> "This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

On the basis of his own suspicions, not subject to evidentiary requirements or tested by cross-examination, the judge decided that a unanimous jury was wrong and that petitioner should die. The Indiana Supreme Court upheld the sentence of death. 479 N. E. 2d 556 (1985).

II

In *Spaziano* v. *Florida*, *supra*, this Court sustained a scheme that gave the judge the power to override the jury's decision to impose a life sentence, provided that the judge could make certain specified findings. The Court relied, in part, on the Florida Supreme Court's anticipated adherence to the so-called "*Tedder* standard." Under *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975), a Florida trial judge may not reject a jury decision of life imprisonment unless the evidence favoring death is "so clear and convincing that virtually no reasonable person could differ." *Ibid.* This Court believed *Tedder* to be a "significant safeguard," *Spaziano*, 468 U. S., at 465, and was satisfied that "the Florida Supreme Court takes that standard seriously." *Ibid.*

In contrast, the State of Indiana has not committed itself to any comparable safeguard to protect against the arbitrary rejection of a life sentence. On the contrary, the rules governing the scope of appellate review of sentences provide that the appellate court "will not revise a sentence authorized by statute except where such sentence is *manifestly unreasonable*," and a "sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate . . . ." Indiana Rules Appellate Review of Sentences 1, 2 (emphasis added). Applying these rules to death sentences, the Supreme Court of Indiana specifically declared that it "will not engage in a different standard of review where jury and trial court disagree" concerning the appropriateness of the death sentence. *Schiro I*, *supra*, at 1058. Thus, while the *Tedder* standard accords the jury's recommendation a presumption of correctness by requiring "clear and convincing" evidence to justify overriding it, the Indiana Supreme Court accords a similar presumption to the judge's sentence, whether it was imposed pursuant to the recommendation of the jury or against it.

This Court has emphasized that a sentence of death must reflect an ethical judgment about the "moral guilt" of the defendant. See *Enmund* v. *Florida*, 458 U. S. 782, 800–801 (1982). "Moral guilt" is a determination that a jury, as representative of the community, is peculiarly well suited to render. But if a prosecutor, even with the substantial tools available to him, see, *e. g.*, *Wainwright* v. *Witt*, 469 U. S. 412 (1985); *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), is unable to persuade the conscience of the community that death is the appropriate punishment for a particular offense, then that expression on the question of "moral guilt" is

entitled to at least some weight. By according no significance at all to the jury's assessment of the crime and the defendant, either at the sentencing itself or on appeal, Indiana's procedure derogates the historic role of the jury. "*Furman* [v. *Georgia*, 408 U. S. 238 (1972),] and its progeny provide no warrant for—indeed do not tolerate—the exclusion from the capital sentencing process of the jury and the critical contribution only it can make toward linking the administration of capital punishment to community values." *Spaziano*, *supra*, at 489–490 (STEVENS, J., joined by BRENNAN and MARSHALL, JJ., dissenting in part).

Moreover, the disregard of jury determinations injects a "level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck* v. *Alabama*, 447 U. S. 625, 643 (1980). In this case, for example, the judge speculated that the jury's recommendation of life "may well have" resulted from petitioner's propensity to rock back and forth in the presence of the jury. Indiana law does not require the jury to set forth its reasons for recommending a life sentence, so the court could not have known whether the rocking motion had anything to do with the jury's verdict; the court's decision was necessarily speculative. The reliability that this Court has demanded from capital sentencing decisions is totally lacking here, and the "manifestly unreasonable" standard adopted by the Supreme Court of Indiana effectively insulates the sentence from meaningful review.

Because I understand the Eighth Amendment to require, at the very least, that a jury's considered recommendation of a life sentence rather than death not be ignored without some showing that it was unreasonable, I would grant the petition to review Indiana's method of bringing to execution those whose juries believed that they should live.

No. 85–6010. WATERS *v.* KEMP, WARDEN. Sup. Ct. Ga. Certiorari denied. JUSTICE MARSHALL and JUSTICE BLACKMUN would grant the petition for writ of certiorari, vacate the judgment, and remand the case for further consideration in light of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985).

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153,

227 (1976), I would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 84-1855. STEINES *v.* ROCK ISLAND ARSENAL DEPARTMENT OF ARMY ET AL., 474 U. S. 822;

No. 84-6051. ALLEN *v.* GEORGIA, 470 U. S. 1059;

No. 85-654. HURVITZ *v.* DIVISION OF MEDICAL QUALITY, BOARD OF MEDICAL QUALITY ASSURANCE, DEPARTMENT OF CONSUMER AFFAIRS OF CALIFORNIA, 474 U. S. 1081;

No. 85-753. PENNINGTON, ADMINISTRATOR FOR THE ESTATE OF TORRES *v.* FLOTA MERCANTE GRANCOLOMBIANA, S.A., ET AL., 474 U. S. 1057;

No. 85-5155. MCKINNEY *v.* ELLIS ET AL., 474 U. S. 1022;

No. 85-5337. SCHEPPF *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL., 474 U. S. 1035;

No. 85-5525. VEALE ET AL. *v.* VEALE ET AL., 474 U. S. 1010;

No. 85-5633. CALPIN *v.* UNITED STATES, 474 U. S. 1084;

No. 85-5642. HANCE *v.* GEORGIA, 474 U. S. 1038;

No. 85-5663. CONKLIN *v.* GEORGIA, 474 U. S. 1038;

No. 85-5695. FRAZIER *v.* PLACER SAVINGS & LOAN ASSN. ET AL., 474 U. S. 1035;

No. 85-5725. GENTSCH *v.* ROBERSON ET AL., 474 U. S. 1065;

No. 85-5777. PARKER *v.* FAIRMAN, WARDEN, ET AL., 474 U. S. 1066;

No. 85-5810. HOOKS *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, 474 U. S. 1068; and

No. 85-5867. MARTIN *v.* OHIO, 474 U. S. 1073. Petitions for rehearing denied.

No. 85-5165. BROWN *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL., 474 U. S. 858;

No. 85-5405. AMES *v.* ALASKA ET AL., 474 U. S. 951; and

No. 85-5433. SANCHEZ *v.* ROTH ET AL., 474 U. S. 982. Motions for leave to file petitions for rehearing denied.

FEBRUARY 25, 1986

Certiorari Granted. (See No. 84-1360, *ante*, at 43-44, n. 1.)

FEBRUARY 26, 1986

Dismissal Under Rule 53

No. 85-1003. PEREIRA *v.* UTAH TRANSPORT, INC., ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 764 F. 2d 686.

Miscellaneous Order

No. A-651 (85-6276). BUNDY *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, scheduled for Tuesday, March 4, 1986, presented to JUSTICE POWELL, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court. Motion for leave to supplement the petition for writ of certiorari is granted. Supplement is to be filed on or before March 28, 1986. Response to the supplement shall be filed on or before April 11, 1986. Motion to defer consideration of the petition for writ of certiorari is granted pending receipt of the supplement to the petition and the response thereto.

FEBRUARY 28, 1986

Miscellaneous Order

No. A-653. ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

MARCH 1, 1986

Rehearing Denied

No. A-653. ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante* this page. Petition for rehearing denied.

MARCH 3, 1986

Dismissal Under Rule 53

No. 85-1213. PACKAGING SERVICE CORPORATION OF KENTUCKY ET AL. *v.* GAYNER. Appeal from Ct. App. Ky. dismissed under this Court's Rule 53.

Appeals Dismissed

No. 85–987. METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY *v.* AMALGAMATED TRANSIT UNION INTERNATIONAL, AFL–CIO, ET AL. Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction. Reported below: 248 U. S. App. D. C. 411, 771 F. 2d 1551.

No. 85–6026. NAMES *v.* CALIFORNIA. Appeal from Ct. App. Cal., 6th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85–6144. ACUFF *v.* HENRY ET AL. Appeal from Sup. Ct. Tex. dismissed for want of substantial federal question.

Vacated and Remanded on Appeal

No. 85–1116. CITY OF WHITTIER ET AL. *v.* WALNUT PROPERTIES, INC., ET AL. Appeal from C. A. 9th Cir. Judgment vacated and case remanded for further consideration in light of *Renton* v. *Playtime Theatres, Inc., ante,* p. 41. Reported below: 774 F. 2d 1176.

Miscellaneous Orders

No. ——. GRACE *v.* HEARTLAND TRANSPORTATION INC. Motion of petitioner seeking leave to proceed as a seaman and to be relieved from printing the petition for writ of certiorari and the petition for writ of mandamus in compliance with Rule 33 denied. JUSTICE STEVENS would grant the motion.

No. A–625 (85–1429). AMERICAN GENERAL LIFE & ACCIDENT INSURANCE CO. *v.* MILLER ET AL. Sup. Ct. Miss. Application for stay pending appeal, addressed to JUSTICE POWELL and referred to the Court, denied. JUSTICE BLACKMUN dissents.

No. D–512. IN RE DISBARMENT OF MEISNER. Disbarment entered. [For earlier order herein, see 473 U. S. 930.]

No. D–529. IN RE DISBARMENT OF MENDELL. Disbarment entered. [For earlier order herein, see 474 U. S. 941.]

No. D–534. IN RE DISBARMENT OF PESNER. Disbarment entered. [For earlier order herein, see 474 U. S. 1016.]

No. D–537. IN RE DISBARMENT OF KIDWELL. Disbarment entered. [For earlier order herein, see 474 U. S. 1030.]

No. 84-1979. MERITOR SAVINGS BANK, FSB *v.* VINSON ET AL. C. A. D. C. Cir. [Certiorari granted *sub nom. PSFS Savings Bank* v. *Vinson*, 474 U. S. 815.] Motion of Women's Legal Defense Fund et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 85-227. SMALIS ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. [Certiorari granted, 474 U. S. 944.] Motion of National District Attorneys Association et al. for leave to file a brief as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-766. TASHJIAN, SECRETARY OF STATE OF CONNECTICUT *v.* REPUBLICAN PARTY OF CONNECTICUT ET AL. C. A. 2d Cir. [Probable jurisdiction noted, 474 U. S. 1049.] Motion of appellant to schedule oral argument during April Session denied. JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR would grant this motion.

No. 85-905. SALISBURY *v.* JAMES RIVER CORP. ET AL., 474 U. S. 1061. Motion of respondent James River Corp. for damages and fees denied.

No. 85-998. UNITED STATES *v.* DUNN. C. A. 5th Cir. Motion of the Solicitor General to defer consideration of the petition for writ of certiorari granted.

No. 85-1258. BROWN ET AL. *v.* KERR-MCGEE CHEMICAL CORP. C. A. 7th Cir. Motion of respondent to expedite consideration of the petition for certiorari denied.

No. 85-6033. SHAH *v.* KERN COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 24, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85-6150. IN RE NELSON. Petition for writ of mandamus denied.

No. 85-6126. IN RE LARTEY; and
No. 85-6183. IN RE MAY. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 85-693. ASAHI METAL INDUSTRY CO., LTD. *v.* SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY (CHENG SHIN RUBBER INDUSTRIAL CO., LTD., REAL PARTY IN INTEREST). Sup. Ct. Cal. Certiorari granted. Reported below: 39 Cal. 3d 35, 702 P. 2d 543.

No. 85-781. BURKE, ACTING ARCHIVIST OF THE UNITED STATES, ET AL. *v.* BARNES ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 245 U. S. App. D. C. 1, 759 F. 2d 21.

No. 85-920. ALASKA AIRLINES, INC., ET AL. *v.* BROCK, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 247 U. S. App. D. C. 132, 766 F. 2d 1550.

No. 85-971. CLARKE, COMPTROLLER OF THE CURRENCY *v.* SECURITIES INDUSTRY ASSN.; and
No. 85-972. SECURITY PACIFIC NATIONAL BANK *v.* SECURITIES INDUSTRY ASSN. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 244 U. S. App. D. C. 419, 758 F. 2d 739, and 247 U. S. App. D. C. 42, 765 F. 2d 1196.

Certiorari Denied. (See also No. 85-6026, *supra.*)

No. 84-1747. SHOULTZ *v.* MONFORT OF COLORADO, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 754 F. 2d 318.

No. 85-489. JACQUES *v.* ALDRICH, UNITED STATES DISTRICT COURT JUDGE FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 761 F. 2d 302.

No. 85-569. DRAVO BASIC MATERIALS CO. ET AL. *v.* LOUISIANA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 758 F. 2d 1081.

No. 85-615. CALIFORNIA DEPARTMENT OF TRANSPORTATION *v.* NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC., ET AL.; and

No. 85-639. DESERT OUTDOOR ADVERTISING, INC. *v.* NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC. Sup. Ct. Cal. Certiorari denied. Reported below: 38 Cal. 3d 509, 698 P. 2d 150.

No. 85-645. LAW & TECHNOLOGY PRESS *v.* LADD, REGISTER OF COPYRIGHTS. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 2d 809.

No. 85-750. ROSE, INDIVIDUALLY AND AS SUPERINTENDENT OF THE CALLOWAY COUNTY SCHOOLS, ET AL. *v.* LITTLEJOHN. C. A. 6th Cir. Certiorari denied. Reported below: 768 F. 2d 765.

No. 85-799. MONROE *v.* UNITED STATES DEPARTMENT OF THE TREASURY. C. A. Fed. Cir. Certiorari denied. Reported below: 770 F. 2d 1044.

No. 85-879. THOMAS INTERNATIONAL LTD. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 773 F. 2d 300.

No. 85-900. ILLINOIS *v.* CRILLY, JUDGE, CIRCUIT COURT OF COOK COUNTY, ILLINOIS, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 108 Ill. 2d 301, 483 N. E. 2d 1236.

No. 85-914. JURECZKI *v.* CITY OF SEABROOK, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 1120.

No. 85-922. INEXCO OIL CO. *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 776 F. 2d 1554.

No. 85-965. LOOMIS *v.* UNITED STATES; and

No. 85-966. VERMOUTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 915.

No. 85-973. HANSEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 249 U. S. App. D. C. 22, 772 F. 2d 940.

No. 85-977. COPELAND *v.* RODRIGUEZ ET AL. Sup. Ct. La. Certiorari denied. Reported below: 475 So. 2d 1071.

No. 85-988. METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY *v.* AMALGAMATED TRANSIT UNION INTERNATIONAL, AFL-CIO, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 247 U. S. App. D. C. 149, 767 F. 2d 939.

No. 85-990. AMERICAN POSTAL WORKERS UNION, AFL-CIO, ET AL. *v.* UNITED STATES POSTAL SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 766 F. 2d 715.

No. 85-994. PFLAUMER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 774 F. 2d 1224.

No. 85-1012. PEAT, MARWICK, MITCHELL & CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 8th Cir. Certiorari denied. Reported below: 775 F. 2d 928.

No. 85-1045. SPRYNCZYNATYK ET AL. *v.* GENERAL MOTORS CORP. C. A. 8th Cir. Certiorari denied. Reported below: 771 F. 2d 1112.

No. 85-1064. FAITH CENTER, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 85-1077. EMPLOYERS INSURANCE OF WAUSAU *v.* INGERSOLL-RAND FINANCIAL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 771 F. 2d 910.

No. 85-1081. BOURKE *v.* EAST BAY REGIONAL PARK DISTRICT ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85-1121. RICHARD A. PLEHN, INC., ET AL. *v.* IMPERIAL BANCORP ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 2d 276.

No. 85-1126. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 810.

No. 85-1131. WHITTAKER CORP. *v.* WILDER. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 169 Cal. App. 3d 969, 215 Cal. Rptr. 536.

No. 85-1133. ABBOT ET AL. *v.* HAGNER MANAGEMENT CORP. Ct. App. D. C. Certiorari denied.

No. 85-1138. KENT *v.* SANBORN COOPERATIVE GRAIN CO. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 299.

No. 85-1148. MORRIS *v.* BOARD OF PROFESSIONAL RESPONSIBILITY FOR THE DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied Reported below: 495 A. 2d 1162.

No. 85-1151. LAROUCHE ET AL. *v.* CROWELL, SECRETARY OF STATE OF TENNESSEE. Ct. App. Tenn. Certiorari denied. Reported below: 709 S. W. 2d 585.

No. 85-1152. BANDAI AMERICA INC. ET AL. *v.* BALLY MIDWAY MFG. CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 775 F. 2d 70.

No. 85-1153. KEARNEY & TRECKER CORP. *v.* PHUC HUU NGUYEN ET UX. Ct. App. Wis. Certiorari denied. Reported below: 126 Wis. 2d 509, 375 N. W. 2d 219.

No. 85-1154. ELLSWORTH ET AL. *v.* CITY OF RACINE, WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 182.

No. 85-1159. EXXON SHIPPING CO. *v.* COOK, PERSONAL REPRESENTATIVE OF THE ESTATE OF COOK. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 2d 750 and 773 F. 2d 1001.

No. 85-1164. TEXAS ENERGY INVESTMENT CORP. ET AL. *v.* NIMROD MARKETING (OVERSEAS) LTD. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 769 F. 2d 1076.

No. 85-1168. CITY OF CLEVELAND ET AL. *v.* HAWLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 773 F. 2d 736.

No. 85-1172. MITCHELL *v.* PEPSI-COLA BOTTLERS, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 342.

No. 85-1174. WYATT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 908.

No. 85-1179. SONDEREGGER v. E. F. HUTTON & CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 171.

No. 85-1205. ROSENTHAL ET AL. v. DAY ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 170 Cal. App. 3d 1125, 217 Cal. Rptr. 89.

No. 85-1221. FOSTER v. ARCATA ASSOCIATES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 1453.

No. 85-1269. HOWARD ET AL. v. DEERBROOK STATE BANK. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1051.

No. 85-1284. MONTEMAYOR v. UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 776 F. 2d 1046.

No. 85-1328. BONOMO ET AL. v. HARTFORD ACCIDENT & INDEMNITY CO. Ct. App. Ind. Certiorari denied. Reported below: 474 N. E. 2d 152.

No. 85-5680. CAMPBELL v. MORRIS, SUPERINTENDENT, SOUTHEASTERN OHIO TRAINING CENTER, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 769 F. 2d 314.

No. 85-5742. REED v. LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 759 F. 2d 618.

No. 85-5771. BOWLDING v. UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 2d 913.

No. 85-5812. VIA v. ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 146 Ariz. 108, 704 P. 2d 238.

No. 85-5824. MILLER v. STAGNER, SUPERINTENDENT, CORRECTIONAL TRAINING FACILITY. C. A. 9th Cir. Certiorari denied. Reported below: 757 F. 2d 988 and 768 F. 2d 1090.

No. 85-5872. WOODLEY v. UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85-5908. CRUMP v. UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 719.

No. 85-5923. HELLWARTH v. UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1178.

No. 85-5967. DRYDEN *v.* SAFECO INSURANCE COMPANY OF AMERICA. C. A. 10th Cir. Certiorari denied.

No. 85-5988. BLOCKER *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 422 Mich. 970.

No. 85-5991. MUNOZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 85-6000. DEANES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 44.

No. 85-6024. WILLIAMS *v.* REES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1164.

No. 85-6034. BELASCO *v.* MORRIS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 1052.

No. 85-6039. TRIPATI *v.* BRIMMER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-6044. BOYD *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. Ct. App. Ore. Certiorari denied.

No. 85-6050. GONZALEZ *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 2d 1351.

No. 85-6055. LAMA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 39.

No. 85-6057. FREEMAN *v.* STAGNER, SUPERINTENDENT, CORRECTIONAL TRAINING FACILITY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 757 F. 2d 988 and 768 F. 2d 1090.

No. 85-6058. LACKHOUSE *v.* MERIT SYSTEMS PROTECTION BOARD ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 773 F. 2d 313.

No. 85-6060. BROWN *v.* BRYANT ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6065. ARIZA-FUENTAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1541.

No. 85-6069. COPLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 728.

No. 85-6077. TILLIS *v.* DAVIS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 85-6084. MUNGUIA ET AL. *v.* CHEVRON CO., U. S. A., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 2d 649.

No. 85-6085. BARBER *v.* PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 772 F. 2d 982.

No. 85-6086. GARRIS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 64 Md. App. 721.

No. 85-6096. JEFFRIES *v.* CHICAGO TRANSIT AUTHORITY. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 2d 676.

No. 85-6101. WILLIS *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 771 F. 2d 1445.

No. 85-6111. WEBSTER *v.* BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 25, BANNOCK COUNTY, POCATELLO, IDAHO. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1176.

No. 85-6114. SMITH *v.* MONSANTO CHEMICAL CO. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 2d 719.

No. 85-6117. SEEVERS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 325.

No. 85-6118. MARTIN *v.* LITTLE, BROWN & CO. C. A. 3d Cir. Certiorari denied.

No. 85-6125. BROWN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 131 Ill. App. 3d 1160, 493 N. E. 2d 1220.

No. 85-6130. PRESGRAVES *v.* HEDRICK, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 85-6134. ROBINSON *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-6135. PERKINS *v.* ALESI ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 782 F. 2d 1045.

No. 85-6136. SPARKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 47.

No. 85-6137. RIVERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 1559.

No. 85-6139. REEDER *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1163.

No. 85-6140. BORRMAN *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 699.

No. 85-6149. OKOT *v.* HAMMERSLEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 912.

No. 85-6152. BURGESS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1177.

No. 85-6153. CICALA *v.* BUTTERCREEK INVESTMENT CORP. Sup. Ct. Pa. Certiorari denied.

No. 85-6154. KELLY *v.* CITY OF WAUTOMA, WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 85-6156. DABON *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-6159. RASKE *v.* FALLON ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6160. SMOTHERMON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85-6163. HAASE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 125 Wis. 2d 578, 373 N. W. 2d 89.

No. 85-6165. GRAF *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 125 Wis. 2d 574, 373 N. W. 2d 86.

No. 85-6169. LLOYD *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 1053.

No. 85-6172. MESHULAM *v.* MESHULAM ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 774 F. 2d 1149.

No. 85-6173. TOMPKINS *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 705 P. 2d 836.

No. 85-6174. PALOW *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 777 F. 2d 52.

No. 85-6175. FLOYD *v.* GENERAL MOTORS CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 2d 696.

No. 85-6177. KIRKSEY-BEY *v.* YOUNG ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1048.

No. 85-6181. VILLANUEVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1029.

No. 85-6184. MITCHELL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 62 Md. App. 733.

No. 85-6185. GALLOWAY *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 238 Kan. 100, 708 P. 2d 508.

No. 85-6193. COLATRIANO *v.* CAVE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1068.

No. 85-6199. GARRETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1021.

No. 85-6204. KIDD *v.* UNITED VIRGINIA BANK OF LYNCHBURG, VIRGINIA, N. A., ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-6210. FAIRFAX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-6216. PETERSON *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 103 N. M. 638, 711 P. 2d 915.

No. 85-6220. GADDIS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 325.

No. 85-6225. DELORIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 85–6226. GOLDSTON *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1026.

No. 85–6235. WARDY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 777 F. 2d 101.

No. 85–6244. JONES *v.* DEROBERTIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 766 F. 2d 270.

No. 85–6248. STEPHENS *v.* MONTANA. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1028.

No. 85–6262. D'ARCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 85–6295. WARD *v.* BLEVINS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85–6300. AROCENA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 778 F. 2d 943.

No. 85–6309. HUBBLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 909.

No. 85–539. LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. *v.* ENOCH ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 768 F. 2d 161.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

For the reasons I have twice before stated, *Smith* v. *Jago*, 470 U. S. 1060 (1985) (dissenting), *Taliaferro* v. *Maryland*, 461 U. S. 948 (1983) (dissenting), I dissent from the Court's refusal to resolve the important question, which has divided the lower courts, of when, if ever, a State may exclude a defense witness on account of a criminal defendant's failure to comply with a discovery rule.

No. 85–727. MISSOURI FARMERS ASSN., INC. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 764 F. 2d 488.

JUSTICE WHITE, dissenting.

In this case the United States Court of Appeals for the Eighth Circuit held that a federal regulation provides the appropriate rule for deciding whether the Farmers Home Administration (FmHA)

retains a continuing security interest in collateral to whose sale the FmHA allegedly consented.* 764 F. 2d 488 (1985). The question presented is whether, under *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715 (1979), the Eighth Circuit erred in looking to federal regulations rather than state law for the rule of decision.

In *Kimbell Foods* this Court determined that although federal law should determine the priority of liens stemming from federal lending programs, a national rule is not necessary to protect the federal interests underlying the loan programs of the Small Business Administration and FmHA. Thus, we held that "absent a *congressional* directive, the relative priority of private liens and consensual liens arising from these Government lending programs is to be determined under nondiscriminatory state laws." *Id.*, at 740 (emphasis added).

I find it difficult to reconcile the Court of Appeals' decision with *Kimbell Foods*. A federal regulation is not a congressional directive, and although *Kimbell Foods* involves a question of lien priority while the present case concerns the extinguishment of a federal lien, that distinction is tenuous at best.

Besides being in obvious tension with *Kimbell Foods*, the Court of Appeals' decision conflicts with the decision in *United States* v. *Tugwell*, 779 F. 2d 5 (CA4 1985), which holds that under *Kimbell Foods* the question whether a FmHA lien is extinguished upon sale of the collateral must be resolved by looking to state law. I would grant certiorari to resolve this conflict among the Courts of Appeals.

No. 85-757. LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. *v.* REED. C. A. 7th Cir. Motion of re-

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*The regulation on which the Eighth Circuit relied is 7 CFR § 1962.18(b) (1985), which at the time the case was decided provided in relevant part:

"When borrowers [from the FmHA] sell security, the sale will be made subject to the FmHA lien. The property and proceeds will remain subject to the lien until the lien is released or the sale is approved by the County Supervisor and the proceeds are used for one or more of the purposes stated in § 1962.17."

This regulation has since been rewritten: 50 Fed. Reg. 45787 (1985) (proposed 7 CFR § 1962.17(a)), which provides that "[w]hen the borrower sells security, the property and proceeds remain subject to the lien until the lien is released by the County Supervisor." This change in wording is immaterial to the issues presented in this case.

spondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 759 F. 2d 618.

No. 85-1061. OWENS, SUPERINTENDENT, INDIANA STATE REFORMATORY *v.* RINER. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 764 F. 2d 1253.

No. 85-785. RIVER ROAD ALLIANCE, INC., ET AL. *v.* CORPS OF ENGINEERS OF THE UNITED STATES ARMY ET AL.; and

No. 85-800. ILLINOIS *v.* CORPS OF ENGINEERS OF THE UNITED STATES ARMY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 764 F. 2d 445.

JUSTICE WHITE, dissenting.

In 1980, respondent National Marine Service applied to respondent Army Corps of Engineers for a permit to construct a temporary barge-fleeting facility on the Mississippi River. After holding a public hearing on the environmental effects of the proposed facility, the Corps issued a brief "environmental assessment" concluding that the facility would have no significant environmental effects. Based on this conclusion, the Corps determined that it was not required to prepare an Environmental Impact Statement (EIS) on the proposed project, since such an EIS is required by the National Environmental Policy Act (NEPA), 83 Stat. 853, 42 U. S. C. § 4332(2)(C), only for projects that will "significantly affec[t] the quality of the human environment." Thus, the Corps issued the permit sought.

Petitioners, the State of Illinois and others including River Road Alliance, Inc., brought suit in the United States District Court for the Southern District of Illinois, challenging the issuance of the permit and the Corps' underlying finding of no significant environmental effects. On the petitioners' motion for summary judgment, the District Court found that "[w]hile paying lip service to [NEPA], the Corps has failed to take the 'hard look' required to support its conclusions, and has failed to document that 'hard look' in the Environmental Assessment . . . ." App. to Pet. for Cert. in No. 85-800, p. 33. Based on this conclusion, the District Court held that the Corps' action was arbitrary and capricious and entered judgment in favor of the petitioners.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed. 764 F. 2d 445 (1985). While observing that

that court had previously held that an agency's decision not to prepare an EIS is reviewed only for an abuse of discretion, see, *e. g.*, *Wisconsin* v. *Weinberger*, 745 F. 2d 412, 417 (CA7 1984), the Court of Appeals in this case acknowledged that other Courts of Appeals have held that such decisions are reviewed for reasonableness. 764 F. 2d, at 449. Having noted these differing formulations, the Court of Appeals expressed its doubt as to the "practical difference" between the two standards: "There is plenary review and there is deferential review, and whether it is fruitful to attempt fine gradations within the second category may be doubted, though there is no need to resolve our doubt here." *Ibid.* The court then declined to substitute its judgment for the Corps' and reversed the decision of the District Court.

Although the precise contours of the Court of Appeals' review in this case are somewhat unclear, the decision below again presents to this Court the unresolved question of the standard of review to be applied by courts reviewing an agency decision not to prepare an EIS. I have noted before the divergent standards of review invoked by the various Courts of Appeals in this context, see *Gee* v. *Boyd*, 471 U. S. 1058, 1059 (1985) (dissenting from denial of certiorari), and I will not again detail the alignment of the lower courts here. I reiterate, however, my previously expressed view that "[t]his conflict is not merely semantic or academic": The courts that invoke the abuse-of-discretion or arbitrary-and-capricious standard emphasize that the decision is committed to the agency's discretion and expertise; the courts that invoke the reasonableness standard, in contrast, stress the nondiscretionary nature of NEPA's language. *Id.*, at 1060. Because this conflict among the Circuits raises a significant question as to the proper interpretation of a federal statute, because this question recurs regularly, and because I believe that the issue is not merely one of semantics, I would grant certiorari to resolve the issue.

No. 85–798. PETTY MOTOR CO. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 767 F. 2d 712.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

In this case the United States Court of Appeals for the Tenth Circuit held that as a matter of federal law a United States Marshal's conducting a judicial foreclosure sale constitutes "seizing

or levying" within the meaning of 28 U. S. C. § 1921.* As the Government concedes, this decision conflicts with the decisions of three Courts of Appeals that have held that costs could not be taxed under § 1921 in cases involving judicial foreclosure sales. See *Travelers Insurance Co.* v. *Lawrence*, 509 F. 2d 83 (CA9 1974); *James T. Barnes & Co.* v. *United States*, 593 F. 2d 352 (CA8 1979); *Federal Land Bank of St. Paul* v. *Hassler*, 595 F. 2d 356 (CA6 1979). I would grant certiorari to resolve this conflict.

No. 85–844. DAVIS *v.* UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 1510.

JUSTICE WHITE, dissenting.

The question presented is what statute of limitations to borrow in this suit against a union for an alleged violation of a former member's rights under § 101 of the Labor-Management Reporting and Disclosure Act, 29 U. S. C. § 411. The United States Court of Appeals for the Eleventh Circuit held that in light of *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983), the appropriate source from which to borrow a limitations period is not state law but § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b). 765 F. 2d 1510 (1985). Although not without support in other Circuits, see, *e. g.*, *Local Union 1397* v. *United Steelworkers of America, AFL–CIO*, 748 F. 2d 180 (CA3 1984), the Eleventh Circuit's decision in this case conflicts with *Doty* v. *Sewall*, 784 F. 2d 1 (CA1 1986). *Doty* explicitly rejects the analysis of this case and *Local Union 1397*, *supra*, and holds that the usual practice of borrowing statutes of limitations from state law should be followed in a suit like this one. I would grant certiorari to resolve this conflict.

No. 85–863. LUBRIZOL ENTERPRISES, INC. *v.* CANFIELD, BANKRUPTCY TRUSTEE FOR RICHMOND METAL FINISHERS, INC.

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*Title 28 U. S. C. § 1921 provides in relevant part:

"Only the following fees of United States marshals shall be collected and taxed as costs, except as otherwise provided:

. . . . .

"For seizing or levying on property (including seizures in admiralty), disposing of the same by sale, setoff, or otherwise and receiving and paying over money, commissions of 3 per centum on the first $1,000 of the amounts collected and 1½ per centum on the excess of any sum over $1,000."

C. A. 4th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 756 F. 2d 1043.

No. 85-991. IN RE MARTIN-TRIGONA. C. A. 2d Cir. Petition for writ of certiorari and/or mandamus denied. Reported below: 770 F. 2d 157.

No. 85-1053. CRAFT *v.* METROMEDIA, INC. C. A. 8th Cir. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 766 F. 2d 1205.

No. 85-1183. P. B. C. *v.* D. H. Sup. Jud. Ct. Mass. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 396 Mass. 68, 483 N. E. 2d 1094.

No. 85-5386. FLEMING *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 748 F. 2d 1435.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

I would grant certiorari in this case because petitioner was not represented by counsel at a critical stage of a criminal proceeding, and is therefore entitled to reversal of his conviction. See *United States* v. *Cronic*, 466 U. S. 648, 659, and n. 25 (1984); *Holloway* v. *Arkansas*, 435 U. S. 475, 489 (1978).

Petitioner was convicted of murdering a police officer and sentenced to death. After exhausting state remedies, petitioner filed a petition for a writ of habeas corpus in the District Court. Petitioner contended that he had been denied counsel at a commitment hearing, a device used under Georgia law to determine the existence of probable cause to detain a suspect, Ga. Code Ann. § 17-7-23 (1982), and one that the Georgia Supreme Court has held to be a critical stage of the prosecution, *State* v. *Houston*, 234 Ga. 721, 218 S. E. 2d 13 (1975); cf. *Coleman* v. *Alabama*, 399 U. S. 1 (1970). The District Court held that the hearing that took place in this case had not been a "commitment hearing" as contemplated

by state law, and that in any event petitioner had been represented by an attorney, Millard Farmer. 560 F. Supp. 525 (MD Ga. 1983). Viewing the latter question as one of fact and the District Court's resolution as not clearly erroneous, a divided Court of Appeals affirmed without considering the nature of the hearing. 748 F. 2d 1435 (CA11 1984).

Assuming for the sake of argument that the District Court's determination that attorney Farmer represented petitioner is a pure issue of fact, but see *Cuyler* v. *Sullivan*, 446 U. S. 335, 342 (1980) (whether counsel engaged in multiple representation is mixed question of law and fact), I would not hesitate to hold that finding clearly erroneous. See 748 F. 2d, at 1456 (Tuttle, J., concurring in part and dissenting in part). Petitioner, Son Fleming, was arrested along with Henry Willis and Larry Fleming, who is petitioner's nephew. Petitioner and his two codefendants requested and received separate appointed counsel. Larry Fleming's appointed counsel induced Farmer, an experienced full-time criminal attorney, to represent both Larry Fleming and Henry Willis. Farmer then requested a commitment hearing for his two clients, who, like petitioner, had been indicted for kidnaping but not yet for murder. Petitioner's counsel, who had been appointed on the kidnaping charge but not the murder charge, chose not to participate. Nevertheless, the prosecutor required petitioner to be at the hearing, at which the State introduced testimony on the kidnaping and murder charges, and permitted Farmer an opportunity to cross-examine.

The District Court found that Farmer had represented all three defendants at the hearing. It based this conclusion on the facts that the transcript showed Farmer appearing "for the defendants," *id.*, at 1444, and that the prosecutor had referred to Farmer as "counsel for the defendants," *ibid.* The District Court also gave weight to Farmer's failure to inform the court during the hearing that he was not representing all three defendants, and to his cross-examination of the State's witnesses, which related to the conduct of all three defendants.

These facts are simply insufficient to support the conclusion that Farmer represented petitioner in the face of direct evidence to the contrary. Farmer, whom the District Court characterized as an experienced criminal attorney, 560 F. Supp., at 529, testified under oath at the habeas hearing that he had not represented petitioner at the "commitment" hearing, *id.*, at 533. Petitioner's ap-

pointed attorney also believed that Farmer had not represented petitioner at the hearing. 748 F. 2d, at 1460 (Tuttle, J., concurring in part and dissenting in part). Finally, it is undisputed that the prosecutor knew before the hearing that Farmer did not represent petitioner. *Id.*, at 1459; 560 F. Supp., at 529–530.

Most importantly, Farmer could not possibly have represented petitioner without incurring an actual and substantial conflict of interest. At the time of the hearing, none of the defendants had been indicted for the murder. Petitioner had told the police that he had not participated in the killing, but instead had begged his codefendants to spare the victim's life. *Id.*, at 529. According to Larry Fleming, however, petitioner and Willis had shot the victim. 748 F. 2d, at 1460. No extended discussion is necessary to demonstrate that Farmer could not represent both petitioner and Larry Fleming under those circumstances. Petitioner thus had either no counsel or counsel who "actively represented conflicting interests," *Cuyler*, *supra*, at 350. In either event, reversal is automatic. *Holloway*, *supra*, at 489; *Cuyler*, *supra*, at 349–350.

The District Court's determination that the hearing in this case was not a critical stage is even less persuasive. The District Court concluded that there had been no need for a commitment hearing because all three defendants could legally have been detained on the kidnaping charges. Moreover, the Justice of the Peace had made no probable-cause determination, as he presumably would have following a commitment hearing. The District Court therefore chose to characterize the hearing as "an agreed upon discovery conference." 560 F. Supp., at 533. Sixth Amendment rights, however, do not turn upon how a proceeding is characterized for purposes of state law, or indeed upon whether state law expressly mandates such a proceeding. *Coleman* v. *Alabama*, 399 U. S., at 8 (plurality opinion). The critical inquiry is whether "counsel's absence might derogate from the accused's right to a fair trial." *United States* v. *Wade*, 388 U. S. 218, 226 (1967) (footnote omitted).

The hearing in this case was unquestionably a critical stage within the meaning of *Wade* and *Coleman*. As Judge Tuttle observed, the hearing was petitioner's first opportunity to cross-examine the State's witnesses. 748 F. 2d, at 1457. Thus the plurality's observations in *Coleman*, *supra*, at 9, are equally relevant here:

> "[T]he skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. . . . [T]rained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial."

Petitioner therefore had a Sixth Amendment right to counsel at the hearing, no matter what that hearing was called or why Farmer requested it. The District Court's determination that Farmer represented petitioner is either contrary to law or clearly erroneous. I would grant the petition for certiorari and set the case for hearing on the merits.

No. 85-6166. CUPPAY *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 778 F. 2d 788.

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No. 85-773. ATLANTIC RICHFIELD CO. ET AL. *v.* ALASKA ET AL., 474 U. S. 1043. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

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OF

THE SUPREME COURT

MARCH 4 THROUGH MARCH 31, 1986

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1985

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL–CIO, ET AL. *v.* HUDSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84–1503. Argued December 2, 1985—Decided March 4, 1986

Petitioner Chicago Teachers Union has been the exclusive collective-bargaining representative of the Chicago Board of Education's educational employees since 1967. Approximately 95% of the employees are members of the Union. Until 1982, the members' dues financed the entire cost of the Union's collective bargaining and contract administration, and nonmembers received the benefits of the Union's representation without making any contributions to its cost. In an attempt to solve this "free rider" problem, the Union and the Board entered into an agreement requiring the Board to deduct "proportionate share payments" from nonmembers' paychecks. The Union determined that the "proportionate share" assessed on nonmembers was 95% of union dues, computed on the basis of the Union's financial records. The Union also established a procedure for considering nonmembers' objections to the deductions. After the deduction was made, a nonmember could object by writing the Union President, and the objection would then meet a three-stage procedure; (1) the Union's Executive Committee would consider the objection and notify the objector within 30 days of its decision; (2) if the objector disagreed with that decision and appealed within another 30 days, the Union's Executive Board would consider the objection; and (3) if the objector continued to protest after the Executive Board's decision, the Union's President would select an arbitrator. If an objection was sustained at any stage, the remedy would be a reduction in future deductions and a rebate for the objector. Respondent objecting nonmembers of the Union brought suit in Federal District Court, challenging the Union procedure on the grounds that it violated their First Amendment rights to freedom of expression and association and their Fourteenth Amendment due process rights and also permitted the use of their proportionate shares for impermissible purposes. The District Court rejected the challenges and upheld the procedure. The Court of Appeals reversed, holding that the procedure was constitutionally inadequate. The court rejected the Union's defense that its subsequent adoption of an arrangement whereby it voluntarily placed all of the objectors' agency fees in escrow cured any constitutional defects.

Held:

1. Under an agency shop agreement, procedural safeguards are necessary to prevent compulsory subsidization of ideological activity by nonunion employees who object thereto while at the same time not restricting the union's ability to require any employee to contribute to the cost of collective-bargaining activities. The fact that nonunion employees' rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize an agency shop's infringement on those rights. And the nonunion employee must have a fair opportunity to identify the impact on those rights and to assert a meritorious First Amendment claim. Pp. 301–304.

2. Here, the original Union procedure contained three constitutional defects. First, it failed to minimize the risk that nonunion employees' contributions might be temporarily used for impermissible purposes. Second, it failed to provide nonmembers with adequate information about the basis for the proportionate share from which the advance deduction of dues was calculated. And third, it failed to provide for a reasonably prompt decision by an impartial decisionmaker. The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner. Pp. 304–309.

3. The Union's subsequent adoption of an escrow arrangement did not cure all of these defects. Two still remain—failure to provide an adequate explanation for the advance reduction of dues and to provide for a reasonably prompt decision by an impartial decisionmaker. Pp. 309–310.

743 F. 2d 1187, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 311.

Laurence Gold argued the cause for petitioners. With him on the briefs were *Joseph M. Jacobs*, *Charles Orlove*, *Nancy E. Tripp*, *Thomas P. Brown*, *Patricia S. Whitten*, *Lawrence A. Poltrock*, *Wayne B. Giampietro*, and *David M. Silberman*.

Edwin Vieira, Jr., argued the cause and filed a brief for respondents.*

**Robert H. Chanin* and *James J. Brudney* filed a brief for the National Education Association as *amicus curiae* urging reversal.

Ronald A. Zumbrun, *John H. Findley*, and *Anthony T. Caso* filed a brief for William Cumero as *amicus curiae*.

JUSTICE STEVENS delivered the opinion of the Court.

In *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), "we found no constitutional barrier to an agency shop agreement between a municipality and a teacher's union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis* v. *Railway Clerks*, 466 U. S. 435, 447 (1984). The *Ellis* case was primarily concerned with the need "to define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." *Ibid.* In contrast, this case concerns the constitutionality of the procedure adopted by the Chicago Teachers Union, with the approval of the Chicago Board of Education, to draw that necessary line and to respond to nonmembers' objections to the manner in which it was drawn.

I

The Chicago Teachers Union has acted as the exclusive collective-bargaining representative of the Board's educational employees continuously since 1967. Approximately 95% of the 27,500 employees in the bargaining unit are members of the Union. Until December 1982, the Union members' dues financed the entire cost of the Union's collective bargaining and contract administration. Nonmembers received the benefits of the Union's representation without making any financial contribution to its cost.

In an attempt to solve this "free rider" problem, the Union made several proposals for a "fair share fee" clause in the labor contract. Because the Illinois School Code did not expressly authorize such a provision, the Board rejected these proposals until the Illinois General Assembly amended the

School Code in 1981.[1] In the following year, the Chicago Teachers Union and the Chicago Board of Education entered into an agreement requiring the Board to deduct "proportionate share payments" from the paychecks of nonmembers. The new contractual provision authorized the Union to specify the amount of the payment; it stipulated that the amount could not exceed the members' dues. The contractual provision also required the Union to indemnify the Board for all action taken to implement the new provision.

For the 1982–1983 school year, the Union determined that the "proportionate share" assessed on nonmembers was 95% of union dues. At that time, the union dues were $17.35 per month for teachers and $12.15 per month for other covered employees; the corresponding deduction from the nonmembers' checks thus amounted to $16.48 and $11.54 for each of the 10 months that dues were payable.

Union officials computed the 95% fee on the basis of the Union's financial records for the fiscal year ending on June 30, 1982. They identified expenditures unrelated to collective bargaining and contract administration (which they estimated as $188,549.82). They divided this amount by the Union's income for the year ($4,103,701.58) to produce a percentage of 4.6%; the figure was then rounded off to 5% to provide a "cushion" to cover any inadvertent errors.

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[1] The statute, which became effective on August 1, 1981, provided:

"Where a collective bargaining agreement is entered into with an employee representative organization, the school board may include in the agreement a provision requiring employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members. In such case, proportionate share payments shall be deducted by the board from the earnings of the non-member employees and paid to the representative organization." Ill. Rev. Stat., ch. 122, ¶ 10–22.40a (1983).

That statute has now been superseded by the Illinois Educational Labor Relations Act, Ill. Rev. Stat., ch. 48, ¶ 1701 *et seq.* (Supp. 1984).

The Union also established a procedure for considering objections by nonmembers. Before the deduction was made, the nonmember could not raise any objection. After the deduction was made, a nonmember could object to the "proportionate share" figure by writing to the Union President within 30 days after the first payroll deduction. The objection then would meet a three-stage procedure. First, the Union's Executive Committee would consider the objection and notify the objector within 30 days of its decision. Second, if the objector disagreed with that decision and appealed within another 30 days, the Union's Executive Board would consider the objection. Third, if the objector continued to protest after the Executive Board decision, the Union President would select an arbitrator from a list maintained by the Illinois Board of Education. The Union would pay for the arbitration, and, if there were multiple objections, they could be consolidated. If an objection was sustained at any stage of the procedure, the remedy would be an immediate reduction in the amount of future deductions for all nonmembers and a rebate for the objector.

In October 1982, the Union formally requested the Board to begin making deductions and advised it that a hearing procedure had been established for nonmembers' objections. The Board accepted the Union's 95% determination without questioning its method of calculation and without asking to review any of the records supporting it. The Board began to deduct the fee from the paychecks of nonmembers in December 1982. The Board did not provide the nonmembers with any explanation of the calculation, or of the Union's procedures. The Union did undertake certain informational efforts. It asked its member delegates at all schools to distribute flyers, display posters, inform nonmembers of the deductions, and invite nonmembers to join the Union with an amnesty for past fines. It also described the deduction and the protest procedures in the December issue of the Union newspaper, which was distributed to nonmembers.

Three nonmembers—Annie Lee Hudson, K. Celeste Campbell, and Walter Sherrill—sent identical letters of protest to the Union stating that they believed the Union was using part of their salary for purposes unrelated to collective bargaining and demanding that the deduction be reduced. A fourth nonmember—Beverly Underwood—objected to any deduction from her paycheck. The Union's response to each of the four briefly explained how the proportionate-share fee had been calculated, described the objection procedure, enclosed a copy of the Union Implementation Plan, and concluded with the advice that "any objection you may file" would be processed in compliance with that procedure. None of the letters was referred to the Executive Committee. Only Hudson wrote a second letter; her request for detailed financial information was answered with an invitation to make an appointment for an "informational conference" at the Union's office, at which she could review the Union's financial records. The four nonmembers made no further effort to invoke the Union procedures; instead, they challenged the new procedure in court.

II

In March 1983, the four nonmembers, joined by three other nonmembers who had not sent any letters,[2] filed suit in Federal District Court, naming as defendants, the Union, its officials, the Board, and the Board members. They objected to the Union procedure for three principal reasons: it violated their First Amendment rights to freedom of expression and association; it violated their Fourteenth Amendment due

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[2] The three other nonmembers were Estherlene Holmes, Edna Rose McCoy, and Dr. Debra Ann Petitan. For an unknown reason, proportionate shares had not been deducted from McCoy's paycheck. 573 F. Supp. 1505, 1509, n. 6 (ND Ill. 1983). Proportionate shares had, however, been deducted from the paychecks of the other six plaintiffs. *Id.*, at 1509.

process rights; and it permitted the use of their proportionate shares for impermissible purposes.[3]

The District Court rejected the challenges. 573 F. Supp. 1505 (ND Ill. 1983). It first noted that the procedure passed the initial threshold established by an earlier Seventh Circuit opinion on the subject because the procedure itself was fair; it represented a good-faith effort by the Union; and it was not unduly cumbersome. The District Court then rejected the First Amendment objection because it found that the procedure was the "least restrictive means" to protect the nonmembers' First Amendment rights while also protecting the Union's legitimate interest in promptly obtaining service fees from nonmembers. The District Court also rejected the argument that the procedure deprived the plaintiffs of property without due process because it did not accept the plaintiffs' analogy to cases requiring predeprivation hearings. Finally, the District Court refused to reach the contention that the nonmembers' proportionate shares were, in fact, being used for impermissible purposes.[4] The District Court found that only two of the plaintiffs (Hudson and Underwood) had validly invoked the Union procedure; that only those two were thus entitled to rebates if their objections were sustained; and that any assessment of the permissible use of the funds should await the outcome of the Union procedure.

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[3] Respondents relied on 42 U. S. C. § 1983 as a basis for their federal constitutional claims. They also alleged pendent state claims. The District Court rejected the pendent claims, and respondents have not pursued them. Similarly, respondents mounted a facial attack on the Illinois statute as violative of the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The District Court also rejected this facial attack.

[4] The plaintiffs had challenged, for instance, the Union's 95% calculation because more than half of the Union's income ($2,167,000 of an income of $4,103,701.58) was passed on to affiliated state and national labor organizations. The plaintiffs claimed that some of this money was expended for political or ideological activities.

The posture of the case changed significantly in the Court of Appeals. The plaintiffs no longer focused on the claim that particular expenditures were inappropriate; they concentrated their attack on the procedure used by the Union to determine the amount of the deductions and to respond to their objections.[5] The Union also modified its position. Instead of defending the procedure upheld by the District Court, it advised the Court of Appeals that it had voluntarily placed all of the dissenters' agency fees in escrow, and thereby avoided any danger that respondents' constitutional rights would be violated.

The Court of Appeals was unanimous in its judgment reversing the District Court. 743 F. 2d 1187 (CA7 1984). All three judges agreed that the Constitution requires the Union to follow a procedure that protects the nonmembers from being compelled to subsidize political or ideological activities not germane to the collective-bargaining process, that the Union's objection procedure was inadequate, and that any rebate which allowed the Union temporary use of money for activities that violate the nonmembers' rights was unconstitutional. In his concurring opinion, however, Judge Flaum declined to reach certain questions discussed by the majority.

Specifically, the majority concluded that the category of impermissible expenditures included all those that were not germane to collective bargaining, even if they might not be characterized as "political or ideological." Judge Flaum found it unnecessary to reach this constitutional issue because the procedure could be deemed inadequate without deciding it and because, in his view, the collective-bargaining agreement and the Illinois statute limited agency shop fees to collective-bargaining and representational expenses. How-

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[5] "The unusual feature of this case is that the plaintiffs, while objecting in passing to particular uses of the agency fee, make almost their whole attack on the procedure for determining how much shall be deducted." 743 F. 2d 1187, 1191 (CA7 1984). Respondents do not dispute this assessment.

ever, the majority believed that its conclusion derived from the fact that the possible infringement on the "liberty" of the nonmembers was not limited to the forced subsidization of political or ideological views, but also included the negative dimension of the freedom of association.

Determining that the Union's existing procedure was constitutionally inadequate, and that the Union "must go back to the drawing board," *id.*, at 1196, the majority suggested that the "constitutional minimum" of any revised procedure must include "fair notice, a prompt administrative hearing before the Board of Education or some other state or local agency—the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decision. The combination of an internal union remedy and an arbitration procedure is unlikely to satisfy constitutional requirements given the nature of the issues to be decided and the union's stake in how they are decided." *Ibid.*[6]

In response to the Union's advice that it had voluntarily placed dissenters' agency fees in escrow, the majority noted that the Union had made no commitment to continue the escrow in the future, had not indicated the terms of the escrow, and, in all events, "[t]he terms cannot be left entirely up to the Union." *Id.*, at 1197.

The importance of the case, and the divergent approaches of other courts to the issue,[7] led us to grant certiorari, 472

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[6] Presumably because the First Amendment arguments were dispositive, neither the majority nor the concurrence mentioned the plaintiffs' objections that they were being deprived of property without due process. The majority viewed its freedom of association analysis in terms of the due process required for a deprivation of liberty. Like the District Court, moreover, the Seventh Circuit rejected the facial challenge to the constitutionality of the Illinois statute.

[7] See, *e. g.*, *Robinson* v. *New Jersey*, 741 F. 2d 598 (CA3 1984), cert. denied, 469 U. S. 1228 (1985); *Kempner* v. *Dearborn Local 2077*, 126 Mich. App. 452, 337 N. W. 2d 354 (1983), appeal dism'd, 469 U. S. 926 (1984); *White Cloud Education Assn.* v. *Board of Education*, 101 Mich. App. 309,

U. S. 1007 (1985). We affirm the judgment of the Court of Appeals, but we do not find it necessary to resolve all of the questions discussed in its opinion.

III

In *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), we recognized that requiring nonunion employees to support their collective-bargaining representative "has an impact upon their First Amendment interests," *id.*, at 222, and may well "interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit," *ibid.* See also *id.*, at 255 (POWELL, J., concurring in judgment). We nevertheless rejected the claim that it was unconstitutional for a public employer to designate a union as the exclusive collective-bargaining representative of its employees, and to require nonunion employees, as a condition of employment, to pay a fair share of the union's cost of negotiating and administering a collective-bargaining agreement.[8] We also held, however, that nonunion employees do have a constitutional right to

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300 N. W. 2d 551 (1980), appeal dism'd, 469 U. S. 875 (1984); *School Committee of Greenfield* v. *Greenfield Education Assn.*, 385 Mass. 70, 431 N. E. 2d 180 (1982); *Association of Capitol Powerhouse Engineers* v. *Division of Building and Grounds*, 89 Wash. 2d 177, 570 P. 2d 1042 (1977).

[8] Earlier cases had construed the Railway Labor Act to permit a similar arrangement without violating the Constitution. See *Railway Clerks* v. *Allen*, 373 U. S. 113 (1963); *Machinists* v. *Street*, 367 U. S. 740 (1961); *Railway Employees* v. *Hanson*, 351 U. S. 225 (1956). In *Abood*, we emphasized that those cases reflected the important "principle of exclusive union representation," 431 U. S., at 220, and that they accorded great weight to the congressional judgment that "it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost." *Id.*, at 219. See also *Ellis* v. *Railway Clerks*, 466 U. S. 435, 455–456 (1984) ("[B]y allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. . . . It has long been settled that such interference with First Amendment rights is justified by the governmental interest in industrial peace").

"prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.*, at 234.[9]

The question presented in this case is whether the procedure used by the Chicago Teachers Union and approved by the Chicago Board of Education adequately protects the basic distinction drawn in *Abood*. "[T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood*, 431 U. S., at 237.

Procedural safeguards are necessary to achieve this objective for two reasons. First, although the government inter-

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[9] We explained that this right is firmly grounded in the First Amendment:

"The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. See *Elrod* v. *Burns*, [427 U. S.], at 356–357; *Stanley* v. *Georgia*, 394 U. S. 557, 565; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304. . . .

. . . .

"These principles prohibit a State from compelling any individual to affirm his belief in God, *Torcaso* v. *Watkins*, 367 U. S. 488, or to associate with a political party, *Elrod* v. *Burns*, *supra*; see 427 U. S., at 363–364, n. 17, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." 431 U. S., at 234–235 (footnote omitted).

We also emphasized that freedom of association, as well as freedom of expression, supported our conclusion. See *Abood*, 431 U. S., at 233. See also *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984) (citing *Abood* for the principle that "[f]reedom of association . . . plainly presupposes a freedom not to associate").

est in labor peace is strong enough to support an "agency shop"[10] notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement.[11] Second, the nonunion employee—the individual whose First Amendment rights are being affected—must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim.[12]

In *Ellis* v. *Railway Clerks*, 466 U. S., at 443, we determined that, under the Railway Labor Act, a "pure rebate ap-

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[10] Under an "agency shop" arrangement, a union that acts as exclusive bargaining representative may charge nonunion members, who do not have to join the union or pay union dues, a fee for acting as their bargaining representative. R. Gorman, Basic Text on Labor Law 642 (1976).

[11] See *Roberts* v. *United States Jaycees*, *supra*, at 623 (Infringements on freedom of association "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"); *Elrod* v. *Burns*, 427 U. S. 347, 363 (1976) (government means must be "least restrictive of freedom of belief and association"); *Kusper* v. *Pontikes*, 414 U. S. 51, 58–59 (1973) ("[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty"); *NAACP* v. *Button*, 371 U. S. 415, 438 (1963) ("Precision of regulation must be the touchstone" in the First Amendment context).

[12] "[P]rocedural safeguards often have a special bite in the First Amendment context." G. Gunther, Cases and Materials on Constitutional Law 1373 (10th ed. 1980). Commentators have discussed the importance of procedural safeguards in our analysis of obscenity, Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518, 520–524 (1970); overbreadth, L. Tribe, American Constitutional Law 734–736 (1978); vagueness, Gunther, *supra*, at 1373, n. 2, and 1185–1195; and public forum permits, Blasi, Prior Restraints on Demonstrations, 68 Mich. L. Rev. 1481, 1534–1572 (1970). The purpose of these safeguards is to insure that the government treads with sensitivity in areas freighted with First Amendment concerns. See generally, Monaghan, *supra*, at 551 ("The first amendment due process cases have shown that first amendment rights are fragile and can be destroyed by insensitive procedures").

proach is inadequate." We explained that, under such an approach, in which the union refunds to the non-union employee any money to which the union was not entitled, "the union obtains an involuntary loan for purposes to which the employee objects." *Id.*, at 444. We noted the possibility of "readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts," *ibid.*, but, for purposes of that case, it was sufficient to strike down the rebate procedure.

In this case, we must determine whether the challenged Chicago Teachers Union procedure survives First Amendment scrutiny, either because the procedure upheld by the District Court was constitutionally sufficient, or because the subsequent adoption of an escrow arrangement cured any constitutional defect. We consider these questions in turn.[11]

IV

The procedure that was initially adopted by the Union and considered by the District Court contained three funda-

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[11] Respondents argue that this case should be considered through the prism of the procedural due process protections necessary for deprivations of property. As in *Abood*, we analyze the problem from the perspective of the First Amendment concerns. We are convinced that, in this context, the procedures required by the First Amendment also provide the protections necessary for any deprivation of property.

Moreover, in view of the fact that the First Amendment principles identified in *Abood* require procedural safeguards and in view of the fact that respondents' challenge is to the procedure, not the expenditures, we find it unnecessary to resolve any question concerning nongermane, nonideological expenditures. Unlike the Seventh Circuit, we are not convinced that resolution of the constitutional nongermaneness question will lead to appreciably different procedural requirements, and we thus find no need to reach that constitutional question. See *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–572 (1947). Cf. *Ellis* v. *Railway Clerks*, 466 U. S. 435 (1984) (analyzing specific challenged expenditures under the Railway Labor Act and, as necessary, under the First Amendment).

mental flaws.[14] First, as in *Ellis*, a remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose. "[T]he Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Abood*, 431 U. S., at 244 (concurring opinion). The amount at stake for each individual dissenter does not diminish this concern. For, whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear. In *Abood*, we emphasized this point by quoting the comments of Thomas Jefferson and James Madison about the tyrannical character of forcing an individual to contribute even "three pence" for the "propagation of opinions which he disbelieves."[15] A forced exaction followed by a rebate equal to the amount im-

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[14] Like the Seventh Circuit, we consider the procedure as it was presented to the District Court. It is clear that "voluntary cessation of allegedly illegal conduct does not moot a case." *United States* v. *Concentrated Phospate Export Assn., Inc.*, 393 U. S. 199, 203 (1968). See also *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 289 (1982); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953). The same concerns—the fear that a defendant would be "free to return to his old ways," *ibid.*, and that he would have "a powerful weapon against public law enforcement," *ibid.*—dictate that we review the legality of the practice defended before the District Court.

[15] "James Madison, the First Amendment's author, wrote in defense of religious liberty: 'Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' 2 The Writings of James Madison 186 (G. Hunt ed. 1901). Thomas Jefferson agreed that 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' I. Brant, James Madison: The Nationalist 354 (1948)." *Abood*, 431 U. S., at 234–235, n. 31.

properly expended is thus not a permissible response to the nonunion employees' objections.

Second, the "advance reduction of dues" was inadequate because it provided nonmembers with inadequate information about the basis for the proportionate share. In *Abood*, we reiterated that the nonunion employee has the burden of raising an objection, but that the union retains the burden of proof: "'Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.'" *Abood*, 431 U. S., at 239–240, n. 40, quoting *Railway Clerks* v. *Allen*, 373 U. S. 113, 122 (1963).[16] Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*.[17]

In this case, the original information given to the nonunion employees was inadequate. Instead of identifying the expenditures for collective bargaining and contract administra-

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[16] The nonmember's "burden" is simply the obligation to make his objection known. See *Machinists* v. *Street*, 367 U. S., at 774 ("[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee"); *Railway Clerks* v. *Allen*, 373 U. S., at 119; *Abood*, 431 U. S., at 238.

[17] Although public sector unions are not subject to the disclosure requirements of the Labor-Management Reporting and Disclosure Act, see 29 U. S. C. § 402(e), the fact that private sector unions have a duty of disclosure suggests that a limited notice requirement does not impose an undue burden on the union. This is not to suggest, of course, that the information required by that Act, see 29 U. S. C. § 431(b); 29 CFR § 403.3 (1985), is either necessary or sufficient to satisfy the First Amendment concerns in this context.

tion that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee—the Union identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers. An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%.[18]

Finally, the original Union procedure was also defective because it did not provide for a reasonably prompt decision by an impartial decisionmaker. Although we have not so specified in the past,[19] we now conclude that such a requirement is necessary. The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner.[20]

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[18] We continue to recognize that there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." *Allen*, 373 U. S., at 122, quoted in *Abood*, 431 U. S., at 239–240, n. 40. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. With respect to an item such as the Union's payment of $2,167,000 to its affiliated state and national labor organizations, see n. 4, *supra*, for instance, either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required.

[19] Our prior opinions have merely suggested the desirability of an internal union remedy. See *Abood*, *supra*, at 240, and n. 41; *Allen*, *supra*, at 122.

[20] We reject the Union's suggestion that the availability of ordinary judicial remedies is sufficient. This contention misses the point. Since the agency shop itself is "a significant impingement on First Amendment rights," *Ellis*, 466 U. S., at 455, the government and union have a responsibility to provide procedures that minimize that impingement and that fa-

The Union's procedure does not meet this requirement. As the Seventh Circuit observed, the "most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the union, which is an interested party, since it is the recipient of the agency fees paid by the dissenting employees." 743 F. 2d, at 1194–1195. The initial consideration of the agency fee is made by Union officials, and the first two steps of the review procedure (the Union Executive Committee and Executive Board) consist of Union officials. The third step—review by a Union-selected arbitrator—is also inadequate because the selection represents the Union's unrestricted choice from the state list.[21]

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cilitate a nonunion employee's ability to protect his rights. We are considering here the procedural adequacy of the agency shop arrangement itself; we presume that the courts remain available as the ultimate protectors of constitutional rights.

In other First Amendment contexts, of course, we have required swift judicial review of the challenged governmental action. See, *e. g.*, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975); *Blount* v. *Rizzi*, 400 U. S. 410 (1971); *Freedman* v. *Maryland*, 380 U. S. 51 (1965). In this context, we do not believe that such special judicial procedures are necessary. Clearly, however, if a State chooses to provide extraordinarily swift judicial review for these challenges, that review would satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker.

[21] We do not agree, however, with the Seventh Circuit that a full-dress administrative hearing, with evidentiary safeguards, is part of the "constitutional minimum." Indeed, we think that an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice. In contrast to the Union's procedure here, selection of an arbitrator frequently does not represent one party's unrestricted choice from a list of state-approved arbitrators. See F. Elkouri & E. Elkouri, How Arbitration Works 135–137 (4th ed. 1985); O. Fairweather, Practice and Procedure in Labor Arbitration 79–90 (2d ed. 1981).

The arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action. See *McDonald* v. *West Branch*, 466 U. S. 284 (1984).

Thus, the original Union procedure was inadequate because it failed to minimize the risk that nonunion employees' contributions might be used for impermissible purposes, because it failed to provide adequate justification for the advance reduction of dues, and because it failed to offer a reasonably prompt decision by an impartial decisionmaker.

V

The Union has not only created an escrow of 100% of the contributions exacted from the respondents, but has also advised us that it would not object to the entry of a judgment compelling it to maintain an escrow system in the future. The Union does not contend that its escrow has made the case moot. Rather, it takes the position that because a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly, it eliminates any valid constitutional objection to the procedure and thereby provides an adequate remedy in this case. We reject this argument.

Although the Union's self-imposed remedy eliminates the risk that nonunion employees' contributions may be temporarily used for impermissible purposes, the procedure remains flawed in two respects. It does not provide an adequate explanation for the advance reduction of dues, and it does not provide a reasonably prompt decision by an impartial decisionmaker. We reiterate that these characteristics are required because the agency shop itself impinges on the nonunion employees' First Amendment interests, and because the nonunion employee has the burden of objection. The appropriately justified advance reduction and the prompt, impartial decisionmaker are necessary to minimize both the impingement and the burden.[22]

[22] In view of the fact that plaintiffs established a constitutional violation, moreover, the task of fashioning a proper remedy is one that should be performed by the District Court after all interested parties have had an opportunity to be heard. The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at

We need not hold, however, that a 100% escrow is constitutionally required. Such a remedy has the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain. If, for example, the original disclosure by the Union had included a certified public accountant's verified breakdown of expenditures, including some categories that no dissenter could reasonably challenge, there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories.[23] On the record before us, there is no reason to believe that anything approaching a 100% "cushion" to cover the possibility of mathematical errors would be constitutionally required. Nor can we decide how the proper contribution that might be made by an independent audit, in advance, coupled with adequate notice, might reduce the size of any appropriate escrow.

Thus, the Union's 100% escrow does not cure all of the problems in the original procedure. Two of the three flaws remain, and the procedure therefore continues to provide less than the Constitution requires in this context.

VI

We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

The determination of the appropriate remedy in this case is a matter that should be addressed in the first instance by the District Court. The Court of Appeals correctly reversed the

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large. See *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 697–698 (1978); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15–16 (1971).

[23] If the Union chooses to escrow less than the entire amount, however, it must carefully justify the limited escrow on the basis of the independent audit, and the escrow figure must itself be independently verified.

District Court's original judgment and remanded the case for further proceedings. That judgment of reversal is affirmed, and those further proceedings should be consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom the THE CHIEF JUSTICE joins, concurring.

I join the opinion and judgment of the Court with the following observations. First, since the Court, as did Judge Flaum in the Court of Appeals, deems it unnecessary to reach the issue of nongermane, nonideological expenditures, the panel's remarks on the subject are therefore obvious dicta. Under our cases, they are also very questionable.

Second, as I understand the Court's opinion, the complaining nonmember need only complain; he need not exhaust internal union hearing procedures, if any, before going to arbitration. However, if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.

WHITLEY, INDIVIDUALLY AND AS ASSISTANT SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL. *v.* ALBERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1077. Argued December 10, 1985—Decided March 4, 1986

During the course of a riot at the Oregon State Penitentiary, a prison officer was taken hostage and placed in a cell on the upper tier of a two-tier cellblock. In an attempt to free the hostage, prison officials worked out a plan that called for the prisoner security manager to enter the cellblock unarmed, followed by prison officers armed with shotguns. The security manager ordered one of the officers to fire a warning shot and to shoot low at any inmates climbing the stairs to the upper tier since he would be climbing the stairs to free the hostage. One of the officers, after firing a warning shot, shot respondent in the left knee when he started up the stairs. Respondent subsequently brought an action in Federal District Court against petitioner prison officials pursuant to 42 U. S. C. § 1983, alleging, *inter alia*, that they had deprived him of his rights under the Eighth and Fourteenth Amendments. At the conclusion of the trial, the District Court directed a verdict for petitioners. The Court of Appeals reversed and remanded for a new trial on respondent's Eighth Amendment claim.

Held:

1. The shooting of respondent did not violate his Eighth Amendment right to be free from cruel and unusual punishments. Pp. 318–326.

(a) It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring control over a tumultuous cellblock. The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense. The general requirement that an Eighth Amendment claimant establish the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct involved. Thus, where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that poses significant risks to the safety of inmates

and prison staff, the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm. Pp. 318–322.

(b) Viewing the evidence in the light most favorable to respondent, as must be done in reviewing the decision reversing the trial court's directed verdict for petitioners, it does not appear that the evidence supports a reliable inference of wantonness in the infliction of pain under the above standard. Evidence arguably showing that the prison officials erred in judgment when they decided on a plan that employed potentially deadly force, falls far short of a showing that there was no plausible basis for their belief that this degree of force was necessary. In particular, the order to shoot, qualified by an instruction to shoot low, falls short of commanding the infliction of pain in a wanton and unnecessary fashion. Nor was the failure to provide for a verbal warning, in addition to a warning shot, so insupportable as to be wanton, since any inmate running up the stairs after the prison security manager could reasonably be thought to pose a threat to the rescue attempt. And the failure to take into account the possibility that respondent might climb the stairs in an effort to return to his cell does not rise to the level of an Eighth Amendment violation. Assuming that the prison officer shot at respondent rather than at the inmates as a group does not establish that the officer shot respondent knowing that it was unnecessary to do so. Under all these circumstances, the shooting was part and parcel of a good-faith effort to restore prison security. Pp. 322–326.

2. In this case, the Due Process Clause of the Fourteenth Amendment cannot serve as an alternative basis for affirmance, independently of the Eighth Amendment. In the prison security context, the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause. Pp. 326–327.

743 F. 2d 1372, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, and in all but n. 2 of which STEVENS, J., joined, *post*, p. 328.

Dave Frohnmayer, Attorney General of Oregon, argued the cause for petitioners. With him on the briefs were *William F. Gary*, Deputy Attorney General, *James E. Mountain, Jr.*, Solicitor General, *Virginia L. Linder*, Assistant So-

licitor General, and *Robert M. Atkinson*, Assistant Attorney General.

Gene B. Mechanic, by appointment of the Court, 474 U. S. 809, argued the cause and filed a brief for respondent.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide what standard governs a prison inmate's claim that prison officials subjected him to cruel and unusual punishment by shooting him during the course of their attempt to quell a prison riot.

I

At the time he was injured, respondent Gerald Albers was confined in cellblock "A" of the Oregon State Penitentiary. Cellblock "A" consists of two tiers of barred cells housing some 200 inmates. The two tiers are connected by a stairway that offers the only practical way to move from one tier to another.

At about 8:30 on the evening of June 27, 1980, several inmates were found intoxicated at the prison annex. Prison guards attempted to move the intoxicated prisoners, some of whom resisted, to the penitentiary's isolation and segregation facility. This incident could be seen from the cell windows in cellblock "A", and some of the onlookers became agitated because they thought that the guards were using unnecessary force. Acting on instructions from their superiors, Officers Kemper and Fitts, who were on duty in cellblock "A", ordered the prisoners to return to their cells. The order was not obeyed. Several inmates confronted the two officers, who were standing in the open area of the lower tier. One inmate, Richard Klenk, jumped from the second tier and assaulted Officer Kemper. Kemper escaped but Officer

Acting Solicitor General Fried, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, and *Andrew J. Pincus* filed a brief for the United States as *amicus curiae* urging reversal.

Steven Ney and *Michael Mushlin* filed a brief for the Correctional Association of New York et al. as *amici curiae* urging affirmance.

Fitts was taken hostage. Klenk and other inmates then began breaking furniture and milling about.

Upon being informed of the disturbance, petitioner Harol Whitley, the prison security manager, entered cellblock "A" and spoke with Klenk. Captain Whitley agreed to permit four residents of cellblock "A" to view the inmates who had been taken to segregation earlier. These emissaries reported back that the prisoners in segregation were intoxicated but unharmed. Nonetheless, the disturbance in cellblock "A" continued.

Whitley returned to the cellblock and confirmed that Fitts was not harmed. Shortly thereafter, Fitts was moved from an office on the lower tier to cell 201 on the upper tier, and Klenk demanded that media representatives be brought into the cellblock. In the course of the negotiations, Klenk, who was armed with a homemade knife, informed Whitley that one inmate had already been killed and other deaths would follow. In fact, an inmate had been beaten but not killed by other prisoners.

Captain Whitley left the cellblock to organize an assault squad. When Whitley returned to cellblock "A", he was taken to see Fitts in cell 201. Several inmates assured Whitley that they would protect Fitts from harm, but Klenk threatened to kill the hostage if an attempt was made to lead an assault. Klenk and at least some other inmates were aware that guards had assembled outside the cellblock and that shotguns had been issued. Meanwhile, respondent had left his cell on the upper tier to see if elderly prisoners housed on the lower tier could be moved out of harm's way in the event that tear gas was used. Respondent testified that he asked Whitley for the key to the row of cells housing the elderly prisoners, and Whitley indicated that he would return with the key. Whitley denied that he spoke to respondent at any time during the disturbance. Tr. 380.

Whitley next consulted with his superiors, petitioners Cupp, the prison Superintendent, and Kenney, the Assistant

Superintendent. They agreed that forceful intervention was necessary to protect the life of the hostage and the safety of the inmates who were not rioting, and ruled out tear gas as an unworkable alternative. Cupp ordered Whitley to take a squad armed with shotguns into cellblock "A".

Whitley gave the final orders to the assault team, which was assembled in the area outside cellblock "A". Petitioner Kennicott and two other officers armed with shotguns were to follow Whitley, who was unarmed, over the barricade the inmates had constructed at the cellblock entrance. A second group of officers, without firearms, would be behind them. Whitley ordered Kennicott to fire a warning shot as he crossed the barricade. He also ordered Kennicott to shoot low at any prisoners climbing the stairs toward cell 201, since they could pose a threat to the safety of the hostage or to Whitley himself, who would be climbing the stairs in an attempt to free the hostage in cell 201.

At about 10:30 p.m., Whitley reappeared just outside the barricade. By this time, about a half hour had elapsed since the earlier breaking of furniture, and the noise level in the cellblock had noticeably diminished. Respondent, who was standing at the bottom of the stairway, asked about the key. Whitley replied "No," clambered over the barricade, yelled "shoot the bastards," and ran toward the stairs after Klenk, who had been standing in the open areaway along with a number of other inmates. Kennicott fired a warning shot into the wall opposite the cellblock entrance as he followed Whitley over the barricade. He then fired a second shot that struck a post near the stairway. Meanwhile, Whitley chased Klenk up the stairs, and shortly thereafter respondent started up the stairs. Kennicott fired a third shot that struck respondent in the left knee. Another inmate was shot on the stairs and several others on the lower tier were wounded by gunshot. The inmates in cell 201 prevented Klenk from entering, and Whitley subdued Klenk at the cell door, freeing the hostage.

As a result of the incident, respondent sustained severe damage to his left leg and mental and emotional distress. He subsequently commenced this action pursuant to 42 U. S. C. § 1983, alleging that petitioners deprived him of his rights under the Eighth and Fourteenth Amendments and raising pendent state law claims for assault and battery and negligence. Many of the facts were stipulated, see Tr. 53–60, but both sides also presented testimony from witnesses to the disturbance and the rescue attempt, as well as from expert witnesses with backgrounds in prison discipline and security. At the conclusion of trial, the District Judge directed a verdict for petitioners. He understood respondent's claim to be based solely on the Eighth Amendment as made applicable to the States by the Fourteenth Amendment. See *Robinson* v. *California*, 370 U. S. 660 (1962). The District Judge held:

> "[D]efendants' use of deadly force was justified under the unique circumstances of this case. Possible alternatives were considered and reasonably rejected by prison officers. The use of shotguns and specifically the order to shoot low anyone following the unarmed Whitley up the stairs were necessary to protect Whitley, secure the safe release of the hostage and to restore order and discipline. Even in hindsight, it cannot be said that defendants' actions were not reasonably necessary." 546 F. Supp. 726, 735 (Ore. 1982).

In the alternative, he held that petitioners were immune from damages liability because the constitutional constraints on the use of force in a prison riot were not clearly established. Finally, the District Judge held that respondent was barred from recovery on his pendent state law claims by virtue of an immunity conferred on public officers by the Oregon Tort Claims Act as to claims arising out of riots or mob actions.

A panel of the Court of Appeals for the Ninth Circuit reversed in part, affirmed in part, with one judge dissenting.

743 F. 2d 1372 (1984). The court held that an Eighth Amendment violation would be established "if a prison official deliberately shot Albers under circumstances where the official, with due allowance for the exigency, knew or should have known that it was unnecessary," *id.*, at 1375, or "if the emergency plan was adopted or carried out with 'deliberate indifference' to the right of Albers to be free of cruel unusual punishment." *Ibid.* The Court of Appeals pointed to evidence that the general disturbance in cellblock "A" was subsiding and to respondent's experts' testimony that the use of deadly force was excessive under the circumstances and should have been preceded by a verbal warning, and concluded that the jury could have found an Eighth Amendment violation. *Id.*, at 1376.

The Court of Appeals also ruled that petitioners could not prevail on their qualified immunity defense, because "[a] finding of deliberate indifference is inconsistent with a finding of good faith or qualified immunity." *Ibid.* Accordingly, the court remanded for a new trial on respondent's Eighth Amendment claim, while agreeing with the District Judge that respondent could not prevail on his state law claims, *id.*, at 1377, and that he had not asserted an independent violation of the Fourteenth Amendment. *Id.*, at 1374, n. 1. We granted certiorari, 472 U. S. 1007 (1985), and now reverse.

II

The language of the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," manifests "an intention to limit the power of those entrusted with the criminal-law function of government." *Ingraham* v. *Wright*, 430 U. S. 651, 664 (1977). The Cruel and Unusual Punishments Clause "was designed to protect those convicted of crimes," *ibid.*, and consequently the Clause applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Id.*, at 671, n. 40.

See also *Revere* v. *Massachusetts General Hospital*, 463 U. S. 239, 244 (1983); *Bell* v. *Wolfish*, 441 U. S. 520, 535, n. 16 (1979). An express intent to inflict unnecessary pain is not required, *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976) ("deliberate indifference" to a prisoner's serious medical needs is cruel and unusual punishment), and "conditions of confinement" may constitute cruel and unusual punishment because such conditions "are part of the penalty that criminal offenders pay for their offenses against society." *Rhodes* v. *Chapman*, 452 U. S. 337, 347 (1981).

Not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny, however. "After incarceration, only the '"unnecessary and wanton infliction of pain"' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Ingraham* v. *Wright*, *supra*, at 670 (quoting *Estelle* v. *Gamble*, *supra*, at 103) (citations omitted). To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. This reading of the Clause underlies our decision in *Estelle* v. *Gamble*, *supra*, at 105–106, which held that a prison physician's "negligen[ce] in diagnosing or treating a medical condition" did not suffice to make out a claim of cruel and unusual punishment. It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock. The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense.

The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged. The deliberate indifference standard articulated in *Estelle* was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities. Consequently, "deliberate indifference to a prisoner's serious illness or injury," *Estelle*, *supra*, at 105, can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates. But, in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threats the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used. As we said in *Hudson* v. *Palmer*, 468 U. S. 517, 526–527 (1984), prison administrators are charged with the responsibility of ensuring the safety of the prison staff, administrative personnel, and visitors, as well as the "obligation to take reasonable measures to guarantee the safety of the inmates themselves." In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.

Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically

for the very purpose of causing harm." *Johnson* v. *Glick*, 481 F. 2d 1028, 1033 (CA2) (Friendly, J.), cert. denied *sub nom. John* v. *Johnson*, 414 U. S. 1033 (1973). As the District Judge correctly perceived, "such factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted," 481 F. 2d, at 1033, are relevant to that ultimate determination. See 546 F. Supp., at 733. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur. See *Duckworth* v. *Franzen*, 780 F. 2d 645, 652 (CA7 1985) (equating "deliberate indifference," in an Eighth Amendment case involving security risks, with "recklessness in criminal law," which "implies an act so dangerous that the defendant's knowledge of the risk can be inferred"); cf. *Block* v. *Rutherford*, 468 U. S. 576, 584 (1984) (requiring pretrial detainees claiming that they were subjected to "punishment" without due process to prove intent to punish or show that the challenged conduct "'is not reasonably related to a legitimate goal,'" from which an intent to punish may be inferred); *Bell* v. *Wolfish*, *supra*, at 539. But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response.

When the "ever-present potential for violent confrontation and conflagration," *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 132 (1977), ripens into *actual* unrest and conflict, the admonition that "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators," *Rhodes* v. *Chapman*, *supra*, at 349, n. 14, carries special weight. "Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their

judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell* v. *Wolfish*, 441 U. S., at 547. That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline. It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice. Accordingly, in ruling on a motion for a directed verdict in a case such as this, courts must determine whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives. Unless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain under the standard we have described, the case should not go to the jury.

III

Since this case comes to us from a decision of the Court of Appeals reversing the District Court's directed verdict for petitioners, we evaluate the facts in the light most favorable to respondent. The Court of Appeals believed that testimony that the disturbance was subsiding at the time the assault was made, and the conflicting expert testimony as to whether the force used was excessive, were enough to allow a jury to find that respondent's Eighth Amendment rights were violated. We think the Court of Appeals effectively collapsed the distinction between mere negligence and wanton conduct that we find implicit in the Eighth Amendment. Only if ordinary errors of judgment could make out an Eighth Amendment claim would this evidence create a jury question.

To begin with, although the evidence could be taken to show that the general disturbance had quieted down, a guard was still held hostage, Klenk was armed and threatening,

several other inmates were armed with homemade clubs, numerous inmates remained outside their cells, and the cellblock remained in the control of the inmates. The situation remained dangerous and volatile. As respondent concedes, at the time he was shot "an officer's safety was in question and . . . an inmate was armed and dangerous." Brief for Respondent 25. Prison officials had no way of knowing what direction matters would take if they continued to negotiate or did nothing, but they had ample reason to believe that these options presented unacceptable risks.

Respondent's expert testimony is likewise unavailing. One of respondent's experts opined that petitioners gave inadequate consideration to less forceful means of intervention, and that the use of deadly force under the circumstances was not necessary to "prevent imminent danger" to the hostage guard or other inmates. Tr. 266. Respondent's second expert testified that prison officials were "possibly a little hasty in using the firepower" on the inmates. *Id.*, at 314. At most, this evidence, which was controverted by petitioners' experts, establishes that prison officials arguably erred in judgment when they decided on a plan that employed potentially deadly force. It falls far short of a showing that there was no plausible basis for the officials' belief that this degree of force was necessary. Indeed, any such conclusion would run counter to common sense, in light of the risks to the life of the hostage and the safety of inmates that demonstrably persisted notwithstanding repeated attempts to defuse the situation. An expert's after-the-fact opinion that danger was not "imminent" in no way establishes that there was no danger, or that a conclusion by the officers that it *was* imminent would have been wholly unreasonable.

Once the basic design of the plan was in place, moreover, it is apparent why any inmate running up the stairs after Captain Whitley, or interfering with his progress towards the hostage, could reasonably be thought to present a threat to the success of the rescue attempt and to Whitley—particu-

larly after a warning shot was fired. A sizable group of inmates, in defiance of the cell-in order and in apparent support of Klenk, continued to stand in the open area on the lower tier. Respondent testified that this was not "an organized group," *id.*, at 113, and that he saw no inmates armed with clubs in that area. *Id.*, at 114. But the fact remains that the officials had no way of knowing which members of that group of inmates had joined with Klenk in destroying furniture, breaking glass, seizing the hostage, and setting up the barricade, and they certainly had reason to believe that some members of this group might intervene in support of Klenk. It was perhaps also foreseeable that one or more of these inmates would run up the stairs after the shooting started in order to return to their cells. But there would be neither means nor time to inquire into the reasons why each inmate acted as he did. Consequently, the order to shoot, qualified as it was by an instruction to shoot low, falls short of commanding the infliction of pain in a wanton and unnecessary fashion.

As petitioners' own experts conceded, a verbal warning would have been desirable, in addition to a warning shot, if circumstances permitted it to be given without undue risk. See *id.*, at 446, 556. While a jury might conclude that this omission was unreasonable, we think that an inference of wantonness could not properly be drawn. First, some warning was given in the form of the first shot fired by Officer Kennicott. Second, the prison officials could have believed in good faith that such a warning might endanger the success of the security measure because of the risk that it would have allowed one or more inmates to climb the stairs before they could be stopped. The failure to provide for verbal warnings is thus not so insupportable as to be wanton. Accordingly, a jury could not properly find that this omission, coupled with the order to shoot, offended the Eighth Amendment.

To be sure, the plan was not adapted to take into account the appearance of respondent on the scene, and, on the facts

as we must take them, Whitley was aware that respondent was present on the first tier for benign reasons. Conceivably, Whitley could have added a proviso exempting respondent from his order to shoot any prisoner climbing the stairs. But such an oversight simply does not rise to the level of an Eighth Amendment violation. Officials cannot realistically be expected to consider every contingency or minimize every risk, and it was far from inevitable that respondent would react as he did. Whitley was about to risk his life in an effort to rescue the hostage, and he was understandably focusing on the orders essential to the success of the plan. His failure to make special provision for respondent may have been unfortunate, but is hardly behavior from which a wanton willingness to inflict unjustified suffering on respondent can be inferred.

Once it is established that the order to shoot low at anyone climbing the stairs after a warning shot was not wanton, respondent's burden in showing that the actual shooting constituted the wanton and unnecessary infliction of pain is an extremely heavy one. Accepting that respondent could not have sought safety in a cell on the lower tier, the fact remains that had respondent thrown himself to the floor he would not have been shot at. Instead, after the warning shot was fired, he attempted to return to his cell by running up the stairs behind Whitley. That is equivocal conduct. While respondent had not been actively involved in the riot and indeed had attempted to help matters, there is no indication that Officer Kennicott knew this, nor any claim that he acted vindictively or in retaliation. Respondent testified that as he started to run up the stairs he "froze" when he looked to his left and saw Kennicott, and that "we locked eyes." *Id.*, at 119. Kennicott testified that he saw several inmates running up the stairs, that he thought they were pursuing Whitley, and that he fired at their legs. *Id.*, at 459. To the extent that this testimony is conflicting, we resolve the conflict in respondent's favor by assuming that Kennicott shot at re-

spondent rather than at the inmates as a group. But this does not establish that Kennicott shot respondent knowing it was unnecessary to do so. Kennicott had some basis for believing that respondent constituted a threat to the hostage and to Whitley, and had at most a few seconds in which to react. He was also under orders to respond to such a perceived threat in precisely the manner he did. Under these circumstances, the actual shooting was part and parcel of a good-faith effort to restore prison security. As such, it did not violate respondent's Eighth Amendment right to be free from cruel and unusual punishments.

IV

As an alternative ground for affirmance, respondent contends that, independently of the Eighth Amendment, the shooting deprived him of a protected liberty interest without due process of law, in violation of the Fourteenth Amendment. Respondent correctly observes that any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision, see *United States* v. *New York Telephone Co.*, 434 U. S. 159, 166, n. 8 (1977), and argues that he has maintained throughout this litigation that his "constitutional protection against the use of excessive and unnecessary force, as well as the use of deadly force without meaningful warning," derives from the Due Process Clause as well as the Eighth Amendment. Brief for Respondent 25, n. 13.

The District Court was correct in ruling that respondent did not assert a *procedural* due process claim that the State was obliged to afford him some kind of hearing either before or after he was shot. See 546 F. Supp., at 732, n. 1. But we believe respondent did raise a claim that his "substantive rights under the Due Process Clause of the Fourteenth Amendment," *Youngberg* v. *Romeo*, 457 U. S. 307, 309 (1982), were infringed by prison officials when he was shot. His complaint alleged violations of the Eighth and Four-

teenth Amendments, App. 2, 7 (First Amended Complaint), and at argument on petitioners' motion for a directed verdict, counsel for both petitioners and respondents treated the Fourteenth Amendment as a distinct though overlapping source of substantive protection from state action involving excessive force. See *id.*, at 21, 27. Accordingly, we consider whether the Due Process Clause could serve as an alternative basis for affirmance.

We need say little on this score. We think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified. It would indeed be surprising if, in the context of forceful prison security measures, "conduct that shocks the conscience" or "afford[s] brutality the cloak of law," and so violates the Fourteenth Amendment, *Rochin* v. *California*, 342 U. S. 165, 172, 173 (1952), were not also punishment "inconsistent with contemporary standards of decency" and "'repugnant to the conscience of mankind,'" *Estelle* v. *Gamble*, 429 U. S., at 103, 106, in violation of the Eighth. We only recently reserved the general question "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." *Daniels* v. *Williams*, 474 U. S. 327, 334, n. 3 (1986). Because this case involves prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty we imply nothing as to the proper answer to that question outside the prison security context by holding, as we do, that in these circumstances the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause.

Petitioners also ask us to hold that the Court of Appeals erred in ruling that they did not enjoy qualified immunity. We decline to review that holding, because our decision that

petitioners were entitled to a directed verdict on the merits makes it unnecessary to do so.

The judgment of the Court of Appeals is

Reversed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

I share the majority's concern that prison officials be permitted to respond reasonably to inmate disturbances without unwarranted fear of liability. I agree that the threshold for establishing a constitutional violation under these circumstances is high. I do not agree, however, that the contested existence of a "riot" in the prison lessens the constraints imposed on prison authorities by the Eighth Amendment.

The majority has erred, I believe, both in developing its legal analysis and in employing it. First, the especially onerous standard the Court has devised for determining whether a prisoner injured during a prison disturbance has been subjected to cruel and unusual punishment is incorrect and not justified by precedent. That standard is particularly inappropriate because courts deciding whether to apply it must resolve a preliminary issue of fact that will often be disputed and properly left to the jury. Finally, the Court has applied its test improperly to the facts of this case. For these reasons, I must respectfully dissent.

I

The Court properly begins by acknowledging that, for a prisoner attempting to prove a violation of the Eighth Amendment, "[a]n express intent to inflict unnecessary pain is not required, *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976)." *Ante*, at 319. Rather, our cases have established that the "unnecessary and wanton" infliction of pain on prisoners constitutes cruel and unusual punishment prohibited by the Eighth Amendment, even in the absence of intent to harm. *Ibid.*; see also *Ingraham* v. *Wright*, 430 U. S. 651, 670 (1977); *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976) (joint opinion of

Stewart, POWELL, and STEVENS, JJ.). Having correctly articulated the teaching of our cases on this issue, however, the majority inexplicably arrives at the conclusion that a constitutional violation in the context of a prison uprising can be established only if force was used "maliciously and sadistically for the very purpose of causing harm," *ante*, at 320–321—thus requiring the very "express intent to inflict unnecessary pain" that it had properly disavowed.[1]

The Court imposes its heightened version of the "unnecessary and wanton" standard only when the injury occurred in the course of a "disturbance" that "poses significant risks," *ante*, at 320. But those very questions—whether a disturbance existed and whether it posed a risk—are likely to be hotly contested. It is inappropriate, to say the least, to condition the choice of a legal standard, the purpose of which is to determine whether to send a constitutional claim to the jury, upon the court's resolution of factual disputes that in many cases should themselves be resolved by the jury.

The correct standard for identifying a violation of the Eighth Amendment under our cases is clearly the "unnecessary and wanton" standard, which establishes a high hurdle to be overcome by a prisoner seeking relief for a constitutional violation. The full circumstances of the plaintiff's injury, including whether it was inflicted during an attempt to quell a riot and whether there was a reasonable apprehension of danger, should be considered by the factfinder in determining whether that standard is satisfied in a particular case. There is simply no justification for creating a distinct and more onerous burden for the plaintiff to meet merely because

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[1] This intent standard ostensibly derives from an opinion of Judge Friendly in *Johnson* v. *Glick*, 481 F. 2d 1028, 1033 (CA2), cert. denied *sub nom. John* v. *Johnson*, 414 U. S. 1033 (1973). That opinion, however, considered maliciousness not as a prerequisite to a constitutional violation, but rather as a factor that, if present, could enable a plaintiff to survive a motion to dismiss when otherwise the facts might be insufficient to make out a claim. 481 F. 2d, at 1033.

the judge believes that the injury at issue was caused during a disturbance that "pose[d] significant risks to the safety of inmates and prison staff." *ante*, at 320. Determination of whether there was such a disturbance or risk, when disputed, should be made by the jury when it resolves disputed facts, not by the court in its role as arbiter of law. See *Byrd* v. *Blue Ridge Cooperative*, 356 U. S. 525, 537 (1958).

II

The Court properly begins its application of the law by reciting the principle that the facts must be viewed in the light most favorable to respondent, who won a reversal of a directed verdict below. See *Galloway* v. *United States*, 319 U. S. 372, 395 (1943). If, under any reasonable interpretation of the facts, a jury could have found the "unnecessary and wanton" standard to be met, then the directed verdict was improper. The majority opinion, however, resolves factual disputes in the record in petitioners' favor and discounts much of respondent's theory of the case. This it is not entitled to do.

The majority pays short shrift to respondent's significant contention that the disturbance had quieted down by the time the lethal force was employed. *Ante*, at 322–323. Respondent presented substantial testimony to show that the disturbance had subsided, Tr. 112, 165, 188, 193; that only one prisoner, Klenk, remained in any way disruptive, *id.*, at 212; and that even Klenk had calmed down enough at that point to admit that he had "'gone too far.'" *Id.*, at 117. The majority asserts that "a guard was still held hostage, Klenk was armed and threatening, several other inmates were armed with homemade clubs, numerous inmates remained outside their cells, and . . . [t]he situation remained dangerous and volatile." *Ante*, at 322–323. Respondent's evidence, however, indicated that the guard was not, in fact, in danger. He had been put into a cell by several inmates to prevent Klenk from harming him. Tr. 161. Captain Whitley had

been to see the guard, and had observed that the inmates protecting him from Klenk were not armed and had promised to keep Klenk out. *Id.*, at 58 (stipulation), 163. According to respondent's evidence, moreover, no other inmates were assisting Klenk in any way when the riot squad was called in; they were simply "milling around," waiting for Klenk to be taken into custody, or for orders to return to their cells. *Id.*, at 188. Respondent's evidence tended to show not that the "situation remained dangerous and volatile," *ante*, at 323, but, on the contrary, that it was calm. Although the Court sees fit to emphasize repeatedly "the risks to the life of the hostage and the safety of inmates that demonstrably persisted notwithstanding repeated attempts to defuse the situation," *ibid.*, I can only point out that respondent bitterly disputed that any such risk to guards or inmates had persisted. The Court just does not believe his story.

The Court's treatment of the expert testimony is equally insensitive to its obligation to resolve all disputes in favor of respondent. Respondent's experts testified that the use of deadly force under these circumstances was not justified by any necessity to prevent imminent danger to the officers or the inmates, Tr. 266; that the force used was excessive, *ibid.*; and that even if deadly force had been justified, it would have been unreasonable to unleash such force without a clear warning to allow nonparticipating inmates to return to their cells. *Id.*, at 269. Insofar as expert testimony can ever be useful to show that prison authorities engaged in the "unnecessary and wanton" infliction of pain, even though it will always amount to "after-the-fact opinion" regarding the circumstances of the injury, see *ante*, at 323, respondent's expert evidence contributed to the creation of a factual issue.

The majority characterizes the petitioners' error in using deadly force where it was not justified as an "oversight." *Ante*, at 325. This is an endorsement of petitioners' rendition of the facts. As portrayed by respondent's evidence, the "error" was made in cold blood. Respondent's involve-

ment started when, at the request of one of the inmates, he approached petitioner Whitley, who was talking to Klenk, to ask if Whitley would supply a key to a gate so that the elderly and sick patients in so-called "medical cells" near the area of disturbance could be removed before any tear gas was used. Tr. 115–116. Captain Whitley said that he would go and get the key, and left the cellblock. *Ibid.* In two or three minutes, Whitley returned. *Id.*, at 118. Respondent went to the door of the cellblock, and asked Whitley if he had brought the key. Whitley responded "'No,'" turned his head back and yelled: "'Let's go, let's go. Shoot the bastards!'" *Ibid.*

Respondent, afraid, ran from his position by the door and headed for the stairs, the only route back to his cell. *Id.*, at 118–119. He caught some movement out of the corner of his eye, looked in its direction, and saw petitioner Kennicott. According to respondent: "'I froze. I looked at him; we locked eyes, then I looked down and seen the shotgun in his hand, then I seen the flash, and the next thing I know I was sitting down, grabbing my leg.'" *Id.*, at 119. Losing a great deal of blood, respondent crawled up the stairs and fell on his face, trying to get out of range of the shotguns. *Ibid.* After about 10 minutes, an officer grabbed respondent by the hair and dragged him downstairs. *Id.*, at 194. As he lay there, another officer came and stood over respondent and shoved the barrel of a gun or gas pistol into respondent's face. *Id.*, at 122. Respondent was left lying and bleeding profusely for approximately 10 or 15 more minutes, and was then taken to the prison hospital. *Id.*, at 194. He suffered very severe injury. Meanwhile, Klenk had been subdued with no resistance by Whitley, *id.*, at 164, 234, who was unarmed, *id.*, at 233.

Other testimony showed that, although most of the inmates assembled in the area were clearly not participating in the misconduct, they received no warning, instructions, or opportunity to leave the area and return to their cells before the officers started shooting. *Id.*, at 163. Neither respond-

ent nor any other inmate attempted to impede the officers as they entered the cellblock. *Id.*, at 234. The officers were described as "wild," "agitated, excited," not in full control of their emotions. *Id.*, at 192. One officer, prior to entering cellblock "A," told the others to "'shoot their asses off, and if Klenk gets in the way, kill him.'" *Ibid.* At the time of this assault, the cellblock was described as "quiet." *Id.*, at 193.

If a jury credited respondent's testimony and that of his witnesses, it would have believed that there was only one inmate who was temporarily out of control, Klenk—"scared," *id.*, at 165, and "high," *id.*, at 117—and ready to give up. The disturbance in the block had lasted only 15 or 20 minutes when it subsided, and there appeared to be no lasting danger to anyone. Respondent was shot while he stood motionless on the stairs, and was left to bleed for a perilously long time before receiving any assistance.

III

Part III of the Court's opinion falls far short of a rendition of the events in the light most favorable to respondent. In that light, the facts present a very close question as to whether the prison officials' infliction of pain on respondent could be said to display the level of wantonness necessary to make out a constitutional violation. At the very least, it is clear that fair-minded people could differ on the response to that question, and that is all it takes to preclude a directed verdict.

The majority suggests that the existence of more appropriate alternative measures for controlling prison disturbances is irrelevant to the constitutional inquiry, but surely it cannot mean what it appears to say. For if prison officials were to drop a bomb on a cellblock in order to halt a fistfight between two inmates, for example, I feel confident that the Court would have difficulty concluding, as a matter of law, that such an action was not sufficiently wanton to present a jury question, even though concededly taken in an effort to re-

store order in the prison. Thus, the question of wantonness in the context of prison disorder, as with other claims of mistreatment under the Eighth Amendment, is a matter of degree. And it is precisely in cases like this one, when shading the facts one way or the other can result in different legal conclusions, that a jury should be permitted to do its job. Properly instructed, a jury would take into account the petitioners' legitimate need to protect security, the extent of the danger presented, and the reasonableness of force used, in assessing liability. Moreover, the jury would know that a prisoner's burden is a heavy one, if he is to establish an Eighth Amendment violation under these circumstances.[2] Whether respondent was able to meet that burden here is a question for the jury. From the Court's usurpation of the jury's function, I dissent. I would affirm the judgment of the Court of Appeals.

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[2] The majority also rejects the pure Fourteenth Amendment due process claim asserted by respondent before the District Court. For the reasons stated in JUSTICE BLACKMUN's dissent in *Davidson* v. *Cannon*, 474 U. S. 344, 349 (1986), which I joined, I believe that the evidence precluding a directed verdict under the "unnecessary and wanton" standard also precludes a directed verdict on respondent's due process claim. JUSTICE STEVENS does not join this footnote.

MALLEY ET AL. *v.* BRIGGS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84-1586. Argued November 13, 1985—Decided March 5, 1986

On the basis of the monitoring of two telephone calls pursuant to a court-authorized wiretap of the telephone of an acquaintance of respondents' daughter, petitioner Rhode Island state trooper (hereafter petitioner) prepared felony complaints charging respondents with possession of marihuana. The complaints were presented to a state judge, accompanied by arrest warrants and supporting affidavits. The judge signed the warrants and respondents were arrested, but the charges were subsequently dropped when the grand jury did not return an indictment. Respondents then brought a damages action in Federal District Court under 42 U. S. C. § 1983, alleging that petitioner in applying for the arrest warrants violated their rights under the Fourth and Fourteenth Amendments. The case was tried to a jury, and the court, while granting a directed verdict for petitioner on other grounds at the close of respondents' evidence, stated that a police officer who believes that the facts stated in an affidavit are true and submits them to a neutral magistrate may be entitled to immunity under the "objective reasonableness" standard of *Harlow* v. *Fitzgerald*, 457 U. S. 800. The Court of Appeals reversed.

Held: Petitioner is not entitled to absolute immunity but only to qualified immunity from liability for damages. Pp. 339-346.

(a) Neither the common law nor public policy affords any support for absolute immunity. Such immunity cannot be permitted on the basis that petitioner's function in seeking the arrest warrants was similar to that of a complaining witness, since complaining witnesses were not absolutely immune at common law. As a matter of public policy, qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law. Nor is there any tradition of absolute immunity for a police officer requesting a warrant comparable to that afforded a prosecutor at common law. In the case of an officer applying for a warrant, the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity. The *Harlow* "objective reasonableness" standard, which gives ample room for mistaken judgments, will not deter an officer from submitting an affidavit when there is probable cause to make an arrest, and defines the quali-

fied immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest. Pp. 340–345.

(b) Petitioner cannot avoid liability under the rule of qualified immunity on the grounds that the act of applying for an arrest warrant is *per se* objectively reasonable where the officer believes that the facts alleged in his affidavit are true, and that he is entitled to rely on the judicial officer's judgment in issuing the warrant and hence finding that probable cause exists. The question is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the application for the warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. Pp. 345–346.

748 F. 2d 715, affirmed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, J., joined, *post*, p. 346.

Ann M. Sheadel, Assistant Attorney General of Rhode Island, argued the cause for petitioners. With her on the brief was *Arlene Violet*, Attorney General.

Leonard Decof, argued the cause for respondents. With him on the brief was *John S. Foley*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Minnesota et al. by *Hubert H. Humphrey III*, Attorney General of Minnesota, and *Catharine F. Haukedahl*, Special Assistant Attorney General, *Charles A. Graddick*, Attorney General of Alabama, *Robert K. Corbin*, Attorney General of Arizona, *John K. Van de Camp*, Attorney General of California, *Jim Smith*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *Corinne Watanabe*, Acting Attorney General of Hawaii, *Jim Jones*, Attorney General of Idaho, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *William J. Guste, Jr.*, Attorney General of Louisiana, *Frank J. Kelley*, Attorney General of Michigan, *Edwin Lloyd Pittman*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Mike Greely*, Attorney General of Montana, *Robert M. Spire*, Attorney General of Nebraska, *Brian McKay*, Attorney General of Nevada, *Stephen E. Merrill*, Attorney General of New Hampshire, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Lacy H. Thornburg*, Attorney General of North Carolina, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *David*

JUSTICE WHITE delivered the opinion of the Court.

This case presents the question of the degree of immunity accorded a defendant police officer in a damages action under 42 U. S. C. § 1983 when it is alleged that the officer caused the plaintiffs to be unconstitutionally arrested by presenting a judge with a complaint and a supporting affidavit which failed to establish probable cause.

I

In December 1980, the Rhode Island State Police were conducting a court-authorized wiretap on the telephone of one Paul Driscoll, an acquaintance of the respondents' daughter. On December 20, the police intercepted a call to Driscoll from an unknown individual who identified himself as "Dr. Shogun." The police logsheet summarizes the call as follows: "General conversation re. a party they went to last night—caller says I can't believe I was token *[sic]* in front of Jimmy Briggs—caller states he passed it to Louisa . . . Paul says Nancy was sitting in his lap rolling her thing." App. 78.

Petitioner Edward Malley (hereafter petitioner) was the Rhode Island state trooper in charge of the investigation of Driscoll. After reviewing the logsheet for December 20, petitioner decided that the call from "Dr. Shogun" was incriminating, because in drug parlance "toking" means smoking marihuana and "rolling her thing" refers to rolling a mari-

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Frohnmayer, Attorney General of Oregon, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *T. Travis Medlock*, Attorney General of South Carolina, *W. J. Michael Cody*, Attorney General of Tennessee, *David L. Wilkinson*, Attorney General of Utah, *William G. Broaddus*, Attorney General of Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, and *A. G. McClintock*, Attorney General of Wyoming; and for Americans for Effective Law Enforcement, Inc., et al. by *David Crump*, *Daniel B. Hales*, *Fred E. Inbau*, *Wayne W. Schmidt*, and *James P. Manak*.

Steven P. Lockman, *Jack D. Novik*, *Burt Neuborne*, and *Lynette Labinger* filed a brief for the American Civil Liberties Union et al. as *amici curiae*.

huana cigarette. Petitioner also concluded that another call monitored the same day showed that the party discussed by Driscoll and "Dr. Shogun" took place at respondents' house. On the basis of these two calls, petitioner drew up felony complaints charging that respondents and Paul Driscoll "did unlawfully conspire to violate the uniform controlled substance act of the State of Rhode Island by having [marihuana] in their possession . . . ." *Id.*, at 74. These complaints were presented to a State District Court judge in February 1981, after the wiretap of Driscoll's phone had been terminated. Accompanying the complaints were unsigned warrants for each respondent's arrest, and supporting affidavits describing the two intercepted calls and petitioner's interpretation of them. The judge signed warrants for the arrest of respondents and 20 other individuals charged by petitioner as a result of information gathered through the wiretap.

Respondents were arrested at their home shortly before six o'clock on the morning of March 19, 1981. They were taken to a police station, booked, held for several hours, arraigned, and released. Local and statewide newspapers published the fact that respondents, who are prominent members of their community, had been arrested and charged with drug possession. The charges against repondents were subsequently dropped when the grand jury to which the case was presented did not return an indictment.

Respondents brought an action under 42 U. S. C. § 1983 in the United States District Court for the District of Rhode Island charging, *inter alia*, that petitioner, in applying for warrants for their arrest, violated their rights under the Fourth and Fourteenth Amendments. The case was tried to a jury, and at the close of respondents' evidence, petitioner moved for and was granted a directed verdict.[1] The District

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[1] Respondents' compiaint also named the State of Rhode Island as a defendant. At the close of respondents' evidence, Rhode Island moved for and was granted a directed verdict on Eleventh Amendment grounds. Re-

Court's primary justification for directing a verdict was that the act of the judge in issuing the arrest warrants for respondents broke the causal chain between petitioner's filing of a complaint and respondents' arrest. The court also stated that an officer who believes that the facts stated in his affidavit are true and who submits them to a neutral magistrate may thereby be entitled to immunity under the "objective reasonableness" standard of *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982).

The United States Court of Appeals for the First Circuit reversed, holding that an officer who seeks an arrest warrant by submitting a complaint and supporting affidavit to a judge is not entitled to immunity unless the officer has an objectively reasonable basis for believing that the facts alleged in his affidavit are sufficient to establish probable cause. 748 F. 2d 715 (1984). We granted certiorari in order to review the First Circuit's application of the "objective reasonableness" standard in this context. 471 U. S. 1124 (1985). We affirm.

II

Petitioner urges reversal on two grounds: first, that in this context, he is absolutely immune from liability for damages; second, that he is at least entitled to qualified immunity in this case. We reject both propositions and address first the absolute immunity issue.

A

Our general approach to questions of immunity under § 1983 is by now well established. Although the statute on its face admits of no immunities, we have read it "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler* v. *Pachtman*, 424 U. S. 409, 418 (1976). Our initial inquiry is whether an official claiming immunity under § 1983 can point to a

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spondents have not contested the propriety of the directed verdict for the State.

common-law counterpart to the privilege he asserts. *Tower* v. *Glover*, 467 U. S. 914 (1984). If "an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Id.*, at 920. Thus, while we look to the common law for guidance, we do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form.

Our cases also make plain that "[f]or executive officers in general, . . . qualified immunity represents the norm." *Harlow*, *supra*, at 807.[2] Like federal officers, state officers who "seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Butz* v. *Economou*, 438 U. S. 478, 506 (1978).

B

Although we have previously held that police officers sued under § 1983 for false arrest are qualifiedly immune, *Pierson* v. *Ray*, 386 U. S. 547, 557 (1967), petitioner urges that he should be absolutely immune because his function in seeking an arrest warrant was similar to that of a complaining witness. The difficulty with this submission is that complaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and

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[2] *Harlow* was a suit against federal, not state, officials, but as we stated in deciding the case, it is "'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.'" 457 U. S., at 818, n. 30 (quoting *Butz* v. *Economou*, 438 U. S. 478, 504 (1978)).

without probable cause.[3] Given malice and the lack of probable cause, the complainant enjoyed no immunity. The common law thus affords no support for petitioner.

Nor are we moved by petitioner's argument that policy considerations require absolute immunity for the officer applying for a warrant. As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law. At common law, in cases where probable cause to arrest was lacking, a complaining witness' immunity turned on the issue of malice, which was a jury question.[4] Under the *Harlow* standard, on the other hand, an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner. The *Harlow* standard is specifically designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment," and we believe it sufficiently serves this goal. Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.

C

As an alternative ground for claiming absolute immunity, petitioner draws an analogy between an officer requesting a warrant and a prosecutor who asks a grand jury to indict a suspect. Like the prosecutor, petitioner argues, the officer must exercise a discretionary judgment based on the evi-

[3] See, *e. g.*, *Dinsman* v. *Wilkes*, 12 How. 390, 402 (1852); *Randall* v. *Henry*, 5 Stew. & P. 367, 378 (Ala. 1834); *Bell* v. *Keepers*, 37 Kan. 64, 14 P. 542 (1887); *Finn* v. *Frink*, 84 Me. 261, 24 A. 851 (1892); 4 W. Wait, Actions and Defenses 352–356 (1878). The same rule applied in the case of search warrants. See, *e. g.*, *Barker* v. *Stetson*, 73 Mass. 53, 54 (1856); *Carey* v. *Sheets*, 67 Ind. 375, 378–379 (1879).

[4] See 4 Wait, *supra*, at 345 ("Whether malice is proved or not is a question of fact for the jury").

dence before him, and like the prosecutor, the officer may not exercise his best judgment if the threat of retaliatory lawsuits hangs over him. Thus, petitioner urges us to read § 1983 as giving the officer the same absolute immunity enjoyed by the prosecutor. Cf. *Imbler* v. *Pachtman*, 424 U. S. 409 (1976).

We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition. In *Imbler, supra*, we concluded that at common law "[t]he general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution." *Id.*, at 437. We do not find a comparable tradition of absolute immunity for one whose complaint causes a warrant to issue. See n. 3, *supra*. While this observation may seem unresponsive to petitioner's policy argument, it is, we believe, an important guide to interpreting § 1983. Since the statute on its face does not provide for *any* immunities, we would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871.

Even were we to overlook the fact that petitioner is inviting us to expand what was a qualified immunity at common law into an absolute immunity, we would find his analogy between himself and a prosecutor untenable. We have interpreted § 1983 to give absolute immunity to functions "intimately associated with the *judicial* phase of the criminal process," *Imbler, supra*, at 430 (emphasis added), not from an exaggerated esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself. *Briscoe* v. *LaHue*, 460 U. S. 325, 334–335 (1983). We intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than

the act of a prosecutor in seeking an indictment. Furthermore, petitioner's analogy, while it has some force, does not take account of the fact that the prosecutor's act in seeking an indictment is but the first step in the process of seeking a conviction. Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability. Thus, we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process.[5]

In the case of the officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity. We do not believe that the *Harlow* standard, which gives ample room for mistaken judgments, will frequently deter an officer from submitting an affidavit when probable cause to make an arrest is present. True, an officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect, before submitting a request for a warrant, whether he has a reasonable basis for believing that his affidavit establishes probable cause. But such reflection is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature. Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the

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[5] The organized bar's development and enforcement of professional standards for prosecutors also lessens the danger that absolute immunity will become a shield for prosecutorial misconduct. As we observed in *Imbler*, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." 424 U. S., at 429 (footnote omitted). The absence of a comparably well-developed and pervasive mechanism for controlling police misconduct weighs against allowing absolute immunity for the officer.

innocent or, by giving the basis for a suppression motion, benefit the guilty.

Furthermore, it would be incongruous to test police behavior by the "objective reasonableness" standard in a suppression hearing, see *United States* v. *Leon*, 468 U. S. 897 (1984), while exempting police conduct in applying for an arrest or search warrant from any scrutiny whatsoever in a § 1983 damages action.[6] While we believe the exclusionary rule serves a necessary purpose, it obviously does so at a considerable cost to society as a whole, because it excludes evidence probative of guilt. On the other hand, a damages remedy for an arrest following an objectively unreasonable request for a warrant imposes a cost directly on the officer responsible for the unreasonable request, without the side effect of hampering a criminal prosecution. Also, in the case of the § 1983 action, the likelihood is obviously greater than at the suppression hearing that the remedy is benefiting the victim of police misconduct one would think most deserving of a remedy—the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason. See *Owen* v. *City of Independence*, 445 U. S. 622, 653 (1980).

Accordingly, we hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon*, *supra*, defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest.[7] Only where the warrant

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[6] Although the case before us only concerns a damages action for an officer's part in obtaining an allegedly unconstitutional arrest warrant, the distinction between a search warrant and an arrest warrant would not make a difference in the degree of immunity accorded the officer who applied for the warrant.

[7] Petitioner has not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest. It should be clear, however, that the District Court's "no causation" rationale in this case is inconsistent with our interpretation of § 1983. As we stated in *Monroe* v. *Pape*, 365 U. S. 167, 187 (1961),

application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, *Leon*, *supra*, at 923, will the shield of immunity be lost.

III

We also reject petitioner's argument that if an officer is entitled to only qualified immunity in cases like this, he is nevertheless shielded from damages liability because the act of applying for a warrant is *per se* objectively reasonable, provided that the officer believes that the facts alleged in his affidavit are true. Petitioner insists that he is entitled to rely on the judgment of a judicial officer in finding that probable cause exists and hence issuing the warrant. This view of objective reasonableness is at odds with our development of that concept in *Harlow* and *Leon*. In *Leon*, we stated that "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." 468 U. S., at 922, n. 23. The analogous question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.[8] If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under

§ 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link.

[8] The question is not presented to us, nor do we decide, whether petitioner's conduct in this case was in fact objectively reasonable. That issue must be resolved on remand.

docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.[9]

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, concurring in part and dissenting in part.

Although I agree with much of the Court's opinion, I write separately to emphasize that substantial weight should be accorded the judge's finding of probable cause in determining whether petitioner state trooper (hereafter petitioner) will be personally liable for damages under § 1983. I also believe that summary judgment would have been appropriate here because respondents failed to show that petitioner's decision to request a warrant was not objectively reasonable.

I

At the outset, I supplement the facts stated by the Court. Petitioner was supervising a wiretap in a narcotics investigation pursuant to an order by the Rhode Island Superior

[9] Notwithstanding petitioner's protestations, the rule we adopt in no way "requires the police officer to assume a role even more skilled . . . than the magistrate." Brief for Petitioners 33. It is a sound presumption that "the magistrate is more qualified than the police officer to make a probable cause determination," *ibid.*, and it goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable. But it is different if no officer of reasonable competence would have requested the warrant, *i. e.*, his request is outside the range of the professional competence expected of an officer. If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate.

Court. It appears from a logged conversation recorded on the wiretap that a "Jimmy Briggs" and a "Luisa *[sic]* Briggs" attended a party where some of those present possessed and used marihuana. A marihuana cigarette may have been passed to Mrs. Briggs. The conversation also referred to a party that was going to be held at respondents' home and attended by some of these people. A fair inference from the log is that respondents were hosting a marihuana party similar to the earlier one.

On the basis of this conversation, petitioner and his partner decided to seek warrants against respondents for possessing marihuana.[1] Petitioner presented the affidavits to Judge Capelli, a Rhode Island District Judge.[2] Judge Capelli reviewed the affidavits, and entered an order stating:

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[1] The State Police successfully sought 20 additional arrest warrants in connection with the narcotics investigation. The record before this Court does not disclose how many of these warrants resulted in indictments.

[2] Trooper Malley's attachment to the affidavit seeking a warrant for the arrest of James R. Briggs stated:

"Your affiant upon oath states that he has reason to believe and does believe that grounds for issuance of an arrest warrant exists *[sic]* and states the following facts on which such belief is founded:

"Persuant *[sic]* to a court ordered wire intercept . . . .

"On December 20, 1980, at 5:30 p.m. an incoming call was received to Paul Driscoll recorded on Reel 7, Side 1, Footage 30–48. This unidentified male calls Paul Driscoll and states, 'This is Doctor Shotgun' *[sic]*. General conversation reference to a party they went to last night. Caller states, 'I can't believe I was token in front of Jimmy Briggs.' Caller states that he passed it to Luisa *[sic]*. Caller and Paul talk about another party going on tonight. Paul says that Nancy was sitting in his lap rolling her thing.

"On the same date at 5:56 p.m., Reel 7, Footage 48–59. Male subject Scott calls Paul Driscoll. General conversation about a party at Jaime's parents' [respondents'] home. Also, that they went there last night. They are referring to Jaime's parents' home, that is James and Luisa Briggs. Further, in regard to the conversation at 5:30 p.m. this unidentified male who called himself Doctor Shotgun *[sic]* stated that he was token in front of Jimmy Briggs. In your affiant's experience, he was smoking a marijuana cigarette in front of James Briggs. He then states that he passed it to Luisa. Luisa would be Luisa Briggs. He passed her a mari-

"TO ANY AUTHORIZED OFFICER:

"Affidavit (and complaint) having been made to me under oath, and as I am satisfied that there is probable cause for the belief therein set forth that grounds for issuing an arrest warrant exists *[sic]*, you are hereby commanded to arrest the defendant forthwith and to bring him before a judge of this court without unnecessary delay."

The record before us does not disclose any evidence or claim that Judge Capelli failed to act in a competent judicial manner, or that he failed to exercise independent judgment in determining whether the arrest warrant should issue.

Respondents were prominent citizens in the community, and had never previously been implicated in any violation of the criminal laws. The grand jury did not return an indictment against them, and they instituted this suit under § 1983, seeking to hold petitioner personally liable for damages.[3] The District Court directed a verdict for petitioner. It held that Judge Capelli's finding of probable cause and his issuance of the arrest warrants immunized petitioner from respondents' claim for damages.

The Court of Appeals for the First Circuit reversed, holding that liability under § 1983 will attach when "an officer is 'constitutionally negligent,' that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause." 748 F. 2d 715, 721 (1984). The Court of Appeals also denied petitioner's claim of immunity, purporting to apply the standard of objective reasonableness for qualified immunity articulated in *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). This Court today affirms.

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juana cigarette. Where Paul states that Nancy was sitting on his lap rolling her thing, she was rolling a marijuana cigarette." App. 72–73.

The statement attached to the affidavit seeking a warrant for the arrest of Louisa Briggs was identical.

[3] Respondents each sought $1 million in compensatory damages and $1 million in punitive damages.

II

I agree with the Court's decision that petitioner was not entitled to absolute immunity, and that the *Harlow* standard of qualified immunity—objective reasonableness—properly applies. In *Harlow*, however, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*, at 818. Putting it differently, we also stated that a claim for qualified immunity "would be defeated [only] if an official '*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff].'" *Id.*, at 815, quoting *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975).

At one point in the Court's opinion today, it correctly recognizes that as the "qualified immunity defense has evolved, it provides ample protection to all but the *plainly incompetent or those who knowingly violate the law.*" *Ante*, at 341 (emphasis added). The Court also says that liability will attach "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Ibid.*

I agree with the foregoing characterizations of the applicable standard when an official raises the defense of qualified immunity. I disagree, however, with the Court in two major respects. First, rather than deciding whether petitioner's conduct met the foregoing standard, the Court remands for trial on this issue. Yet, as the Court recognizes, unless "no reasonably competent officer would have concluded that a warrant should issue," *ibid.*, petitioner should

be immune from damages. *Ibid.* In my view, in the light of the logs of the duly authorized wiretap, a reasonably competent officer could have believed that a warrant should issue.

It is undisputed that wiretaps initiated as part of a drug investigation revealed that respondents had attended a party where marihuana was being smoked, that a marihuana cigarette may have been passed to Mrs. Briggs,[4] and that another party—at least inferentially of a similar type—was to be held in respondents' home. Under the *Harlow* standard, we need not consider whether this information would be viewed by *every* reasonable officer as sufficient evidence of probable cause for the issuance of a warrant. Police often operate "in the midst and haste of a criminal investigation," *United States* v. *Ventresca*, 380 U. S. 102, 108 (1965), and they have to make judgment calls over which reasonable officers could differ. In this case, the logs from the wiretap at least arguably implicated respondents in unlawful activities. See *supra*, at 347, and n. 1. Under these circumstances, an officer of reasonable competence could have believed that the wiretap provided probable cause to arrest respondents.

Second, and perhaps of greater importance, in determining whether the police officer acted with objective reasonableness, the Court apparently would give little evidentiary weight to the finding of probable cause by a magistrate or judicial officer.[5] The Court quotes from *United States* v.

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[4] Although the affidavit from Trooper Malley stated that a marihuana cigarette was passed to Mrs. Briggs, the call log simply states that the caller "passed it to Louisa." *Id.*, at 78. A subsequent call to Driscoll mentioned a "Louisa (Bungershort)," probably in connection with the same party. *Ibid.* It is possible that the marihuana cigarette was passed to Louisa Bungershort rather than Louisa Briggs. At trial, Mrs. Briggs denied seeing any marihuana at that party or receiving a marihuana cigarette. *Id.*, at 40.

[5] The words "magistrate" and "judicial officer" often are used interchangeably in Court opinions. *Shadwick* v. *City of Tampa*, 407 U. S. 345 (1972). The Court's emphasis on magistrates has "been directed at the

Leon, 468 U. S. 897, 922, n. 23 (1984), that "'our good-faith inquiry is *confined* to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization.'" *Ante*, at 345 (emphasis added). Although this quotation does not foreclose some consideration by the District Court of the judge's judicial decision, the Court seems to denigrate the relevance of the judge's determination of probable cause and his role in the issuance of a warrant.[6] In my view, the Court misconstrues the respective roles of, and the relationship between, the police officer and the magistrate or judicial officer. In cases where a criminal defendant has asserted claims of unconstitutional search and seizure, this Court has consistently accorded primary evidentiary weight to a magistrate's determination of probable cause.[7] No rea-

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need for independent, neutral, and detached judgment, not at legal training." *North* v. *Russell*, 427 U. S. 328, 337 (1976).

[6] The Court observes that "ours is not an ideal system," and states that "it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should." *Ante*, at 345–346. While I do not question the possibility that some magistrates in some cases may "fail to perform as a magistrate should," no one suggests that such is the case here.

The Court previously has stated that "[i]f a magistrate serves merely as a 'rubber stamp' for the police or is unable to exercise mature judgment, closer supervision or removal provides a more effective remedy than the exclusionary rule." *United States* v. *Leon*, 468 U. S., at 917–918, n. 18. I also believe that closer supervision or removal provides a more effective remedy than personal liability for police officers.

[7] In *United States* v. *Ventresca*, 380 U. S. 102, 105–106 (1965), the Court stated:

"We begin our analysis of [the Fourth Amendment] mindful of the fact that in this case a search was made pursuant to a search warrant. . . .

. . . . . .

"In *Jones* v. *United States*, 362 U. S. 257, 270, this Court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall. In *Johnson* v. *United States*, 333 U. S. 10, and *Chapman* v. *United States*, 365 U. S. 610, the Court, in condemning searches by officers who invaded premises without a warrant,

son has been articulated by the Court, and certainly none occurs to me, why less weight should be accorded the magistrate's decision in a § 1983 damages suit against the police officer who applied for the warrant.

Our common law has long recognized a "reasonable division of functions," *Baker* v. *McCollan*, 443 U. S. 137, 145 (1979), in law enforcement: the gathering of information is the province of the police, and the weighing and judging of that information is virtually the exclusive province of the magistrate. As Lord Mansfield stated two centuries ago: "It is not fit that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer." *Leach* v. *Three of the King's Messengers*, 19 How. St. Tr. 1001, 1027 (1765), quoted in *United States* v. *United States District Court*, 407 U. S. 297, 316 (1972).

We have affirmed that the arrest warrant "should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify [issuance of a warrant]." *United States* v. *United States District Court*, *supra*, at 316. This Court also has recognized that "the informed and deliberate determinations of magistrates . . . are to be preferred over the hurried actions of officers." *United States* v. *Lefkowitz*, 285 U. S. 452, 464 (1932). Judicial evaluation of probable cause by a magistrate is the essential "checkpoint between the Government and the citizen." *Steagald* v. *United States*,

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plainly intimated that had the proper course of obtaining a warrant from a magistrate been followed and had the magistrate on the same evidence available to the police made a finding of probable cause, the search under the warrant would have been sustained."

Generally, the judicial officer's determination of probable cause has greater reliability than a police officer's, not only because the judicial officer is not immersed in the criminal investigation, but also because the judicial officer usually has greater time for deliberation and greater familiarity through training or education with the legal concepts concerning probable cause.

451 U. S. 204, 212 (1981). As we stated in *Arkansas* v. *Sanders*, 442 U. S. 753, 759 (1979):

> "The prominent place the warrant requirement is given in our decisions reflects the 'basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.' *United States* v. *United States District Court*, *supra*, at 317. By requiring that conclusions concerning probable cause and the scope of a search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime,' *Johnson* v. *United States*, 333 U. S. 10, 14 (1948), we minimize the risk of unreasonable assertions of executive authority."[8]

The police, where they have reason to believe probable cause exists, should be encouraged to submit affidavits to judicial officers.[9] I therefore believe that in a suit such as this, the Court should expressly hold that the decision by the magistrate is entitled to substantial evidentiary weight. A more restrictive standard will discourage police officers from seeking warrants out of fear of litigation and possible personal liability. The specter of personal liability for a mistake in judgment may cause a prudent police officer to close his eyes to facts that should at least be brought to the attention of the judicial officer authorized to make the decision

[8] There will, of course, be instances where "it is plainly evident that a magistrate or judge ha[s] no business issuing a warrant." *Illinois* v. *Gates*, 462 U. S. 213, 264 (1983) (WHITE, J., concurring in judgment). If the magistrate has wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319 (1979), then the magistrate's approval of a warrant would not necessarily be probative of whether an officer's request for a warrant was objectively reasonable.

[9] It is of course true that actions by police must comport with the Constitution. Police departments and prosecutors have an obligation to instill this understanding in officers, and to discipline those found to have violated the Constitution.

whether a warrant should issue. Law enforcement is ill-served by this *in terrorem* restraint.

III

This Court has long sought to divide the functions of law enforcement to impose on the magistrate the primary responsibility for determining whether a warrant will issue. It is inconsistent with this jurisprudence to imply or hold that the magistrate's determination of probable cause is irrelevant in this suit. A judicial officer's "judgment call" in determining probable cause, although not conclusive, is entitled to substantial evidentiary weight in suits seeking to impose personal liability on the police officer. In this case, in the light of the judge's determination and the evidence of illegal activity, I would hold that petitioner is immune from damages.

I agree with the judgment declining to accord absolute immunity to the officer seeking a warrant, but I do not join the Court's opinion, and I dissent from the decision to remand this case for trial on the immunity issue.

EXXON CORP. ET AL. v. HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 84-978. Argued December 9, 1985—Decided March 10, 1986

The New Jersey Spill Compensation and Control Act (Spill Act), enacted in 1977 to respond to the problem of hazardous substance release, imposes an excise tax upon major petroleum and chemical facilities within the State to finance the prevention and cleanup of oil spills and leaks of hazardous chemicals from disposal sites. The tax revenue goes into a permanent fund (Spill Fund), which may spend money not only to clean up releases of hazardous substances, but also to compensate third parties for certain economic losses sustained as a result of such releases, and to pay administrative and research costs. The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), enacted in response to similar concerns, imposes an excise tax on petroleum and other specified chemicals and establishes a trust fund (Superfund) that may be used to clean up hazardous substance releases and for certain other purposes. CERCLA does not cover oil spills; nor is Superfund money available to compensate private parties for economic harms that result from hazardous substance releases. Superfund money may be used to reimburse private parties only for their cleanup activities that are expressly authorized by the Federal Government; to finance Federal or State Government expenses for short-term cleanup or for measures to achieve a permanent remedy to a particular hazardous waste problem; and to compensate those governments for damages to their natural resources. Appellant corporations, having paid the Spill Act tax, brought suit in the New Jersey Tax Court against appellees (the State and certain of its officials), seeking a tax refund and a declaratory judgment that the New Jersey tax was invalid in its entirety as being pre-empted under § 114(c) of CERCLA, which provides: "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter." Section 114(c) also contains a saving provision stating that nothing in § 114(c) shall be interpreted to prevent a State from using general revenues for such a fund or from imposing a special tax to purchase or locate equipment or otherwise prepare for a response to hazardous substance releases. The court entered summary judgment for appellees, and the Appellate Divi-

sion of the New Jersey Superior Court affirmed. The New Jersey Supreme Court also affirmed, holding that the Spill Fund tax was not pre-empted by § 114(c) insofar as the Spill Fund "is used to compensate hazardous-waste cleanup costs and related claims that are either not covered or not actually paid under Superfund."

Held:

1. The words "costs of response or damages or claims" in § 114(c) are to be read as a unit, and the entire phrase is modified by the phrase "which may be compensated under this subchapter," thus pre-empting any special state tax fund used to reimburse either a State or a third party for cleanup expenses. An interpretation of those terms so as to include only a private party's cleanup expenses, and so as to permit state-fund expenditures for all state-government cleanup efforts is not supported by CERCLA's history or the wording of other provisions of CERCLA, particularly the saving provision of § 114(c) which, in authorizing special state taxes to pay for the State's preparations for responding to hazardous substance releases, would be redundant if the pre-emption provision did not cover direct governmental expenditures at all. Pp. 363–370.

2. Section 114(c)'s phrase "which may be compensated under this subchapter" is to be interpreted as pre-empting any state fund that is intended, in whole or in part, to pay for the same types of expenses that may be paid by Superfund, and not as covering only expenses that are actually paid by Superfund. Pp. 370–371.

3. Neither the structure nor the legislative history of CERCLA supports appellees' contention that although § 114(c) is not restricted to cases in which Superfund actually disburses money, it applies only when Superfund pays a claim or *would have* paid the claim had it not already been paid by a state fund. Remedying the Nation's toxic waste problems as effectively as possible was not the sole policy choice reflected in CERCLA. Congress' decision to enact a pre-emption provision resulted in part from its concern about the potentially adverse effects of overtaxation on the competitiveness of the American petrochemical industry. That consideration cautions against concluding that Congress would not have wanted to hinder state attempts to clean up hazardous substances in any way. Nor is there sufficient support in § 114(c)'s language or history to accept appellees' contention that in view of the limited availability of Superfund money, only projects that have been actually approved, or are almost certain to be approved, can be termed "eligible" for Superfund financing, and then only to the extent of the approved funding. Pp. 371–374.

4. The National Contingency Plan—which CERCLA requires to be revised annually to list sites most in need of federal efforts—provides

the appropriate measure of whether a given expenditure constitutes "costs of response or damages or claims which may be compensated" by Superfund. Since CERCLA also provides that a State must agree to pay at least 10% of the cost of any remedial action for a hazardous site within the State, such state share is not eligible for Superfund money and thus is not a cost that "may be compensated" for purposes of § 114(c). Under the above-stated principles, use of the New Jersey Spill Fund to compensate third parties for damage resulting from hazardous substance discharges, to pay personnel and equipment costs, to administer the fund, and to conduct research is beyond the scope of CERCLA, and therefore not pre-empted by § 114(c). However, use of the Spill Fund to finance state governmental cleanup (except the 10% state share of remedial costs) and to reimburse third parties for cleanup costs is pre-empted, so long as such efforts occur at sites that are eligible for Superfund financing according to the terms of the National Contingency Plan. Pp. 374–376.

97 N. J. 526, 481 A. 2d 271, affirmed in part, reversed in part, and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 377. POWELL, J., took no part in the consideration or decision of the case.

Daniel M. Gribbon argued the cause for appellants. With him on the briefs were *John J. Carlin, Jr.*, and *E. Edward Bruce*.

Mary C. Jacobson, Deputy Attorney General of New Jersey, argued the cause for appellees. With her on the brief were *Irwin I. Kimmelman*, Attorney General, and *Michael R. Cole*, First Assistant Attorney General.*

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*A brief of *amicus curiae* urging reversal was filed for the United States by *Solicitor General Lee, Assistant Attorney General Habicht, Deputy Solicitor General Claiborne, Samuel A. Alito, Jr., Robert L. Klarquist*, and *Dirk N. Snel*.

A brief of *amici curiae* urging affirmance was filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Theodora Berger*, Assistant Attorney General, *Reed Sato*, Deputy Attorney General, *Joseph I. Lieberman*, Attorney General of Connecticut, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *James E. Tierney*, Attorney General of Maine, *Stephen E. Merrill*, Attorney General of New Hampshire, *Robert Abrams*, Attorney General of New York, *Jim Mattox*,

JUSTICE MARSHALL delivered the opinion of the Court.

The question for our determination is whether § 114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 94 Stat. 2796, 42 U. S. C. § 9614(c), pre-empts the New Jersey Spill Compensation and Control Act, N. J. Stat. Ann. §§ 58:10–23.11 to 58:10–23.11z (West 1982 and Supp. 1985) (Spill Act). We conclude that the Spill Act is pre-empted in part.

I

A

In 1977 the New Jersey Legislature enacted the Spill Act to respond to the problem of hazardous substance release. Finding that oil spills threatened the health and beauty of the State's natural resources, and that leaks of hazardous chemicals from disposal sites presented a great risk to the public, the legislature intended the Spill Act to protect the citizens and environment of New Jersey through prevention and cleanup of spills and other releases. Those efforts are financed by an excise tax levied upon major petroleum and chemical facilities within the State. The money collected goes into a permanent fund known as the "Spill Fund." The Spill Fund may spend money to clean up releases of hazardous substances, to compensate third parties for certain economic losses sustained as a result of such releases, and to pay administrative and research costs. N. J. Stat. Ann. § 58:10–23.11o (West Supp. 1985).[1]

Attorney General of Texas, and *Jeffrey L. Amestoy*, Attorney General of Vermont.

[1] The compensation for third-party economic loss is broad. The Spill Fund is strictly liable to any party that suffers direct or indirect economic damage from releases of hazardous substances, including (1) damage to any real or personal property, (2) damage to natural resources, (3) loss of income or earning capacity, in certain circumstances, (4) loss of property tax revenue by the State or a local government for one year following the discharge, and (5) interest incurred on loans to ameliorate the effects of a

In 1980 Congress enacted CERCLA in response to similar concerns. CERCLA imposes an excise tax on petroleum and other specified chemicals. The Act establishes a trust fund, commonly known as "Superfund," 87.5% of which is financed through the excise tax, and the remainder through general revenues. Superfund money may be used to clean up releases of hazardous substances and for certain other purposes.[2] Unlike the Spill Act, CERCLA does not include oil spills within its definition of hazardous substance releases, nor is Superfund money available to compensate private parties for economic harms that result from discharges of hazardous substances. Rather, it seeks to facilitate government cleanup of hazardous waste discharges and prevention

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discharge pending reimbursement by the Spill Fund. N. J. Stat. Ann. § 58.10–23.11g (West 1982).

[2] Title 42 U. S. C. § 9611(a) provides:

"The President shall use the money in the Fund for the following purposes:

"(1) payment of governmental response costs incurred pursuant to section 9604 of this title, including costs incurred pursuant to the Intervention on the High Seas Act;

"(2) payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 1321(c) of title 33 and amended by section 9605 of this title: *Provided, however,* That such costs must be approved under said plan and certified by the responsible Federal official;

"(3) payment of any claim authorized by subsection (b) of this section [providing for reimbursement to the Federal and State Governments for damage to natural resources under their respective control] and finally decided pursuant to section 9612 of this title, including those costs set out in subsection 9612(c)(3) of this title [providing for recovery by Fund of interest, costs, and attorney's fees in action against any person liable to the claimant or to the Fund]; and

"(4) payment of costs specified under subsection (c) of this section [providing for research, restoration or replacement of natural resources, prevention of releases, equipment and overhead, and administrative costs].

"The President shall not pay for any administrative costs or expenses out of the Fund unless such costs and expenses are reasonably necessary for and incidental to the implementation of this subchapter."

of future releases. There are two primary purposes for which the Superfund money may be spent—to finance "governmental response," and to pay "claims." See § 111(a) of CERCLA, 42 U. S. C. § 9611(a). Governmental response consists of "removal," or short-term cleanup, § 9601(23), and "remedial action," or measures to achieve a "permanent remedy" to a particular hazardous waste problem, § 9601(24).[3] Claims are demands for reimbursement made upon the Superfund, and also come in two types. One type of claim is a demand by "any other person" for costs incurred pursuant to the federal plan for cleanup of hazardous substances, known as the "national contingency plan." § 9611(a)(2).[4] Thus, Superfund may reimburse private parties only to the extent that their cleanup activities are expressly authorized by the Federal Government. The second type of claim is a demand by the Federal or a State Government for compensation for damages to natural resources belonging to that government. § 9611(a)(3). Superfund money may not be used to pay for injury to persons or property caused by hazardous wastes, except for payment to the Federal and State Governments for their natural resource losses.

This litigation concerns § 114(c) of CERCLA, as set forth in 42 U. S. C. § 9614(c), which provides:

> "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated

[3] Section 104 of CERCLA, 42 U. S. C. § 9604, which sets out procedures for governmental response to hazardous substance releases, provides that state and local governments, as well as the Federal Government, may be delegated by the President to undertake appropriate measures and receive reimbursement from Superfund. It appears, therefore, that the term "governmental response costs" in § 9611(a)(1), see n. 2, *supra*, refers to Federal, State, and local Government.

[4] Because paragraph (1) of 42 U. S. C. § 9611(a) apparently applies to any governmental entity, see n. 3, *supra*, the phrase "any other person" in paragraph (2) of that subsection must denote any nongovernmental entity.

> under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State."

Clearly, this provision is meant to forbid the States to impose taxes to finance certain types of funds. The issue in this case is whether the New Jersey Spill Fund is, in whole or in part, the type of fund that § 114(c) pre-empts.

B

Appellants are corporations that have paid the Spill Act tax since its inception. After unsuccessful attempts to litigate the issue in the federal courts, see *Exxon Corp.* v. *Hunt*, 683 F. 2d 69 (CA3 1982), cert. denied, 459 U. S. 1104 (1983); cf. *New Jersey* v. *United States*, 16 ERC 1846 (DC 1981) (dismissing suit brought by New Jersey seeking to have tax declared valid),[5] appellants brought suit in the New Jersey Tax Court against New Jersey and certain of its officials (collectively New Jersey), seeking a declaratory judgment and a refund of taxes paid pursuant to the Spill Act. Appellants claimed that the New Jersey tax was invalid in its entirety under § 114(c) and the Supremacy Clause. The Tax Court entered summary judgment for New Jersey on two alternative grounds. First, the court concluded that § 114(c) does not pre-empt state funds that pay cleanup costs and

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[5] A member of the New Jersey Legislature also brought suit against the United States seeking to have the Spill Act declared valid. The parties settled the litigation, stipulating that New Jersey could spend Spill Fund money for seven enumerated purposes, including compensation for response costs and damages that are eligible for Superfund compensation but are not actually compensated. See *Lesniak* v. *United States*, 17 ERC 1456 (NJ 1982). Appellants, of course, were not parties to that settlement.

other claims that are not actually compensated by Superfund. Second, even accepting Exxon's argument that § 114(c) precludes any state taxation of industry to pay for cleanup and remedial activities, the court found that there were sufficient nonpre-empted purposes to the Spill Fund to make the Fund valid in its entirety. 4 N. J. Tax 294 (1982).

The Appellate Division of the New Jersey Superior Court affirmed, 190 N. J. Super. 131, 462 A. 2d 193 (1983), as did the New Jersey Supreme Court, 97 N. J. 526, 481 A. 2d 271 (1984). The latter court, like the Tax Court, concluded that "the Spill Fund tax . . . is not preempted by section 114(c) of Superfund insofar as Spill Fund is used to compensate hazardous-waste cleanup costs and related claims that are either not covered or not actually paid under Superfund." *Id.*, at 544, 481 A. 2d, at 281. We noted probable jurisdiction, 472 U. S. 1015 (1985), and we now affirm in part and reverse in part.[6]

II

This is an express pre-emption case; appellants claim that the plain language of § 114(c) forbids state taxation of the type the Spill Act imposes. When a federal statute unambiguously precludes certain types of state legislation, we need go no further than the statutory language to determine whether the state statute is pre-empted. *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U. S. 7, 12 (1983).

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[6] CERCLA was a temporary experiment; by its terms, the Federal Government's authority to collect the excise tax and to appropriate general revenues for Superfund expired on September 30, 1985. 42 U. S. C. §§ 9653, 9631(b)(2). The Congress is currently considering legislation that would extend CERCLA for another five years. See S. 51, 99th Cong., 1st Sess. (1985), passed by the Senate, see 131 Cong. Rec. 25090–25091 (1985), and H. R. 2817, 99th Cong., 1st Sess. (1985), inserted into H. R. 2005, 99th Cong., 1st Sess. (1985), passed by the House, see Cong. Rec. H11564 (Dec. 10, 1985). As passed, both the Senate and House bills eliminate § 114(c). See S. 51, § 135; H. R. 2005, § 147. Of course, appellants' claims for a refund of taxes paid through September 30, 1985, are unaffected by the expiration of CERCLA or by any changes in the law after that date.

Section 114(c), unfortunately, is not a model of legislative draftsmanship. The critical language, "no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter," is at best inartful and at worst redundant. As just one example, it is not clear whether "which may be compensated under this subchapter" modifies only the word "claims" which immediately precedes it, or the entire phrase "any costs of response or damages or claims." Because the terms "claims," "response," and "damages" have specific, technical definitions under CERCLA, the way the sentence is parsed may have a significant effect on its meaning. Finally, § 114(c) by itself does not provide a method for determining whether a particular expenditure "may be compensated" by Superfund. That determination, therefore, necessitates reference to the remainder of CERCLA.

III

Our task, then, must proceed in three parts. First, we must determine what class of expenses is encompassed within the phrase "costs of response or damages or claims." Then, because at least some of those expenses are covered by § 114(c) only to the extent that they "may be compensated" by Superfund, we must determine the meaning of that phrase as well. Finally, if we find an overlap between § 114(c)'s prohibitions and the Spill Act's provisions, we must hold the latter pre-empted.

A

Both parties agree as to the first question. Each concludes that the words "costs of response or damages or claims" are to be read as a unit, and the entire phrase is modified by the phrase "which may be compensated under this subchapter." However, the Solicitor General, appearing on behalf of the United States as *amicus curiae*, adopts a contrary position. He contends that § 114(c) should be read to

prohibit funds whose purpose is to pay "compensation for [a] claims for any costs of response or damages[,] or [b] claims which may be compensated under this subchapter." Under the Solicitor General's view, therefore, any expense that fits CERCLA's definitions of a "claim" for "costs of response" or "damages" may not be paid by a state fund supported by special taxes, whether or not that expenditure "may" be paid by Superfund.[7] Because "costs of response" covers essentially the entire spectrum of cleanup expenses, see 42 U. S. C. § 9604, the Solicitor General's reading of the pre-emptive scope of § 114(c) might seem very broad at first reading.

The wide sweep of the Solicitor General's position, however, is tempered considerably by his interpretation of the term "claim." CERCLA defines a "claim" as "a demand in writing for a sum certain." § 9601(4). Under the Solicitor General's view, only a private party's demand upon a state fund or Superfund for reimbursement for that party's own cleanup expenses constitutes a "claim." Any State or Federal Government use of a special fund is merely a governmental expenditure, and not the payment of a "claim." Because each of the two clauses created by the Solicitor General's parsing of § 114(c) begins with the word "claims," he argues, that section does not prohibit *any* state fund expenditures for a state government's own cleanup efforts. It prohibits only expenditures to reimburse private parties. Were we to accept the Solicitor General's reading of § 114(c), therefore, New Jersey could freely tax appellants to pay for its own cleanup costs, even if Superfund might otherwise pay

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[7] An example of a "cost of response" that would not be eligible for Superfund compensation would be the cost of a private party's cleanup efforts if that party did not receive prior authorization from the Federal Government or its agent, see 42 U. S. C. § 9611(a)(2). Under the Solicitor General's reading of § 114(c), a state fund could not reimburse those costs even though it is clear that they would not be eligible for Superfund money.

those costs. New Jersey could not, however, tax appellants to pay for third-party cleanup costs, whether or not Superfund might bear those costs. Similarly, New Jersey could not use the Spill Fund to pay for any party's "damages," defined by CERCLA to mean loss of natural resources, even though Superfund covers only "damages" suffered by governments.

The United States is not a party, of course, and all parties before us disagree with the Solicitor General's reading of the statute. However, the Solicitor General's view has considerable logical force, and assessing it will prove helpful in evaluating the parties' positions on issues as to which they disagree. Although we ultimately reject the Solicitor General's position, therefore, we find it helpful to analyze it in some detail.

One problem with the Solicitor General's view is that the distinction between a government's own cleanup costs, on the one hand, and "claims," on the other, has not been so consistent throughout CERCLA's history as the Solicitor General suggests. The 96th Congress fully considered three major hazardous substance response bills—H. R. 85, H. R. 7020, and S. 1480—in addition to the Carter administration bill, S. 1341, which died in Committee. See 1 The Environmental Law Institute, Superfund: A Legislative History xiii (1983) (hereafter Leg. Hist.).[8] The earliest of these, H. R.

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[8] Bill H. R. 85, 96th Cong., 1st Sess., was introduced on January 15, 1979, by Representative Biaggi. After consideration in Committee, the bill was reported to the full House, see H. R. Rep. No. 96-172 (1979), but it ran into opposition from the oil and chemical industries. A substitute bill, introduced by Representative Breaux as an amendment to H. R. 85, was considered and passed by the full House. 126 Cong. Rec. 26391 (1980). The bill as passed created two funds financed from taxes on petroleum and chemical feedstocks. One fund was to provide compensation for oil spills and the other for hazardous chemical spills in navigable waters; the bill did not cover hazardous substance releases on land. The bill entitled governments and individuals to recover damages for cleanup costs and

85, had a pre-emption provision resembling § 114(c). Section 110 of the bill as passed by the House provided: "no person may be required to contribute to any fund, the purpose of which is to compensate for a loss which is a compensable damage" under that bill.[9]

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certain economic losses, and imposed strict liability on owners and operators of vessels and other facilities.

Representative Florio introduced H. R. 7020, 96th Cong., 2d Sess., on April 2, 1980. The bill was reported out of Committee, see H. R. Rep. No. 96-1016 (1980), and enacted by the House, 126 Cong. Rec. 26799 (1980). The bill created a fund financed from a tax on oil and chemicals and from general revenues. The fund was to support government response to releases of hazardous substances, including oil, from inactive hazardous waste sites; it did not cover spills in navigable waters, nor did it provide for compensation for economic losses.

The most ambitious of the bills, S. 1480, 96th Cong., 1st Sess., was introduced by Senators Culver, Muskie, Stafford, Chafee, Randolph, and Moynihan on July 11, 1979. It was favorably reported, see S. Rep. No. 96-848 (1980). As reported, the bill provided for a $4 billion fund from general revenues and fees on petroleum and chemicals, and for strict liability for a broad range of persons responsible for releases of hazardous chemicals (not including oil). The liability and compensation provisions covered cleanup costs and a variety of private damages, including medical expenses.

As all three bills reached the Senate, S. 1480 was attacked as too comprehensive and H. R. 85 and H. R. 7020 as too weak. Eventually the Senate passed a substitute bill, see *infra*, at 368, as an amendment to H. R. 7020. The new H. R. 7020 was enacted by both Houses, and signed into law on December 11, 1980. Pub. L. 96-510, 94 Stat. 2767. See 1 Leg. Hist. xiii-xxi; see also Senate Committee on Environment and Public Works, A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), 97th Cong., 2d Sess. (Comm. Print 1983); Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. Env. L. 1 (1982).

[9] As discussed in n. 8, *supra*, H. R. 85 as passed by the House provided for two funds, one to cover oil spills and the other to cover hazardous chemical spills. Section 110 applied to the oil spill fund only. Section 302 of H. R. 85 applied to the chemical spill fund, and is worded identically to § 110. We will hereafter use "§ 110" to refer to both pre-emption provisions.

The Solicitor General argues that § 110 had a purpose similar to that which he finds in § 114(c).[10] The sort of loss contemplated by the quoted language, he contends, is a loss suffered by nongovernmental entities, and not a state expenditure. This argument, however, misperceives the overall structure of H. R. 85. That bill defined compensable damages broadly, to include cleanup costs as well as injury to persons or property. Any "United States claimant" could assert a claim for these compensable damages. Significantly, a United States claimant was defined as "any person residing in the United States, the Government of the United States or an agency thereof, or the government of a State or a political subdivision thereof, who asserts a claim." § 101(p). Thus, under H. R. 85 a state government would clearly assert a "claim" for its own cleanup expenses.[11] Those expenses would constitute "compensable damages," and § 110 would therefore pre-empt the creation of a special state fund to pay such "claims."

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[10] The Solicitor General relies on language in the House Report on H. R. 85 and in the debates to the effect that the pre-emption provision did not prevent a State from collecting taxes to pay for costs that are not "compensable damages" as defined in that bill. See Brief for United States as *Amicus Curiae* 13–15. However, as the Solicitor General misperceives the broad scope of the term "compensable damages" in H. R. 85, the use of that term in the legislative history of § 110 does not advance his argument.

[11] Bill H. R. 85, unlike CERCLA, did not provide that the President would enter into contracts with a state government under which the latter would undertake to respond to a release on behalf of the President, see 42 U. S. C. § 9604(d). Nor did it give the President special authority to respond to releases, as does CERCLA § 104. It therefore appears that H. R. 85 put both the Federal Government and the affected state government in a position closely analogous to that of a nongovernmental claimant, so far as their ability to seek compensation from the fund for costs of response to an oil spill was concerned. That fact provides further support for the argument that state governments were intended to be "claimants" under H. R. 85.

Nor do CERCLA's other predecessors support the Solicitor General's interpretation. Bill S. 1341, like H. R. 85, provided for claims by governments and had a pre-emption provision similar to § 110.[12] Bill H. R. 7020, as first passed by the House, contained no pre-emption provision. Bill S. 1480 was the most far-reaching of the bills considered, and the first to contemplate a fund of the magnitude of Superfund. As reported out of Committee, it contained no pre-emption provision analogous to § 114(c).

After S. 1480 ran into opposition, the Senate considered two compromise bills intended to be "a combination of the best of [H. R. 85, H. R. 7020, and S. 1480]." 126 Cong. Rec. 30935 (1980) (remarks of Sen. Stafford). The second of these, introduced by Senators Stafford and Randolph, eventually became CERCLA. Only with the Stafford-Randolph substitute bill did the exact language of § 114(c) come into being. Given the remarkable similarity between a debate between Senators Bradley and Randolph on the meaning of § 114(c) and a debate between Congressmen Florio and Biaggi on the meaning of H. R. 85's pre-emption provision,[13] it is unlikely that the Senate considered the two provisions to differ substantially. The substitute bill was prepared and passed in considerable haste, and we are reluctant to conclude that Congress intended to adopt a wholly new approach

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[12] Section 607(b)(1) of S. 1341, 96th Cong., 1st Sess. (1979), provided that a "claim" for removal costs could be asserted "(A) by any agency of the United States Government, [and] (B) by any State, with respect to reimbursements allowed under the system established in the National Contingency Plan." "United States claimant" was defined in exactly the same way as it was in H. R. 85. See S. 1341, § 601(mm). The pre-emption provision, § 612(a), provided that no court action could be maintained to recover for response costs or damages "a claim for which may be asserted under this title," and that "no person may be required to contribute to any fund, the purpose of which is to pay compensation for such a loss."

[13] Compare 126 Cong. Rec. 30949 (1980) (remarks of Sens. Bradley and Randolph), with *id.*, at 26197–26198 (remarks of Reps. Florio and Biaggi).

to pre-emption of state funds by the slight changes in language between § 110 of H. R. 85 and § 114(c) of CERCLA.

A second reason for rejecting the Solicitor General's argument proceeds from the wording of § 114(b). That section provides: "Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation" for the same expenses under any other state or federal law. We consider the similarity between § 114(b)'s phrase "removal costs or damages or claims" and § 114(c)'s phrase "costs of response or damages or claims" to suggest that Congress intended the three terms to be read as a unit.[14] When read in conjunction with § 111(a), which provides that Superfund money may be spent on payment of governmental response costs, natural resource damages, and third-party cleanup claims, it seems likely that Congress intended the phrase "removal costs or damages or claims" to provide a shorthand for the authorized uses of Superfund. This strongly undercuts the Solicitor General's approach, because it suggests that Congress envisioned state funds paying "claims" for *all* of the authorized uses of Superfund, including state cleanup costs.

A final reason for so concluding derives from the saving provision of § 114(c). The section provides that nothing in it shall be interpreted to prevent a State from imposing a special tax to purchase or preposition equipment or otherwise prepare for a quick response to hazardous substance releases. If the pre-emption provision does not cover direct governmental expenditures at all, as the Solicitor General contends,

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[14] Moreover, if the phrase is not to be read as a unit, but split, as the Solicitor General contends, into "claims for any costs of response or damages" and "claims which may be compensated under this subchapter," the latter phrase becomes surplusage. Under the Solicitor General's view, the only two situations that can result in a "claim" under CERCLA are first, when a third party seeks reimbursement for its "costs of response," and second, when a government seeks "damages." See 42 U. S. C. §§ 9611(a)(2), (3). Both situations, however, are already covered in the first phrase, rendering the latter superfluous.

then that saving provision is redundant. On balance, then, we conclude that the use of the term "compensation for claims" in § 114(c) represents an instance of inartful drafting rather than the intentional drawing of a subtle distinction.

B

Having adopted the parties' view of the interpretation of "costs of response or damages or claims," we must now determine the proper interpretation of the phrase "which may be compensated under this subchapter." The New Jersey Supreme Court read that language very narrowly, concluding that it covered only expenses that are actually paid by Superfund. Appellants, adopting a broader interpretation of "may be compensated," contend that § 114(c) pre-empts any fund that is intended, in whole or in part, to pay for the same types of expenses that may be paid by Superfund.

Appellants challenge the state court's holding on several grounds. First, they contend, it is highly unlikely that a State would choose to pay such double compensation, even in the absence of an express prohibition. Second, § 114(b) provides that any person who receives compensation under Superfund "shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law." The New Jersey Supreme Court's interpretation of § 114(c), therefore, makes that section redundant. Appellants rely most heavily, however, on the literal meaning of the phrase "may be compensated." They contend that the New Jersey courts have violated the plain meaning of the statute by reading the phrase to mean, in effect, "is actually compensated."

We find these arguments persuasive. Congress has already banned double compensation in § 114(b), and there is accordingly no reason to read "may be compensated" to mean "is compensated." The contrary view adopted by the New Jersey Supreme Court renders the first sentence of § 114(c) surplusage. The language of § 114(c) permitting the States

to use general revenues for such a fund would also be meaningless under such a narrow reading.

C

Nevertheless, New Jersey contends that the decision below, with one minor modification, is correct. New Jersey concedes that § 114(c) is not restricted to cases in which Superfund actually disburses money. New Jersey argues, however, that § 114(c) applies only when Superfund pays a claim or *would have* paid the claim had it not already been paid by the state fund. It contends that the structure and legislative history of CERCLA support its argument. We will examine each in turn.

New Jersey emphasizes the limited scope of CERCLA. The federal statute does not cover several broad areas—for example, payment for nongovernmental property losses and costs arising from oil spills—that are important aspects of hazardous substance control, and are covered by New Jersey's Spill Act. Moreover, Congress was well aware that the funding level of Superfund was and is insufficient to clean up more than a few of the most dangerous hazardous waste disposal sites. These facts, New Jersey claims, suggest that Congress recognized that Superfund would not solve all of the Nation's hazardous waste problems, and that the States would have to continue their own efforts. It follows that Congress did not intend to pre-empt state taxation to pay for cleanup efforts that the Federal Government was unable to undertake because of unavailability of funds, even though such efforts were of the type that are eligible for Superfund money.

That Congress has not chosen the most comprehensive or efficient method of attacking the problem of hazardous substance discharges, however, is no reason to depart from the language of the statute. Moreover, while we agree with New Jersey that the overall purpose of a statute is a useful referent when trying to decipher ambiguous statutory lan-

guage, remedying the Nation's toxic waste problems as effectively as possible was not the sole policy choice reflected in CERCLA. Previous attempts to enact a comprehensive hazardous substance response bill were defeated in part because of opposition by the affected industries. It seems clear that the decision to enact a pre-emption provision resulted in part from Congress' concern about the potentially adverse effects of overtaxation on the competitiveness of the American petrochemical industry.[15] That consideration, whether wise or not, cautions against our concluding that Congress would not have wanted to hinder state attempts to clean up hazardous substances in any way.

New Jersey contends, however, that its reading of § 114(c) does no violence to the statutory language. It argues that we must look not only to the provisions of CERCLA, but also to the amount of money available in Superfund, before deciding whether a particular expense "may be compensated" by Superfund. New Jersey argues that the availability of Superfund money is sufficiently low, as a practical matter, that only projects that have been actually approved, or are almost certain to be approved, can be termed "eligible" for Superfund financing, and then only to the extent of the approved funding.

We cannot agree. To say that the only expenses that "may be compensated" are those that *are* compensated twists both language and logic further than we are willing to go.

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[15] See, *e. g.*, H. R. Rep. No. 96-172, p. 22 (1979) (accompanying H. R. 85) ("The increasing distress over the development of a multitude of State statutes related to liability and compensation for damage from oil spills, felt by those engaged in the national and international movement and storage of petroleum and petroleum products, was again articulated. It was argued that, if this continues, they will be severely hampered in their ability to conduct their operations in a manner that is economically sound and of reasonable cost to the consumer of oil"); see also 42 U. S. C. § 9651(a)(1)(F) (requiring President to report to Congress on effect of Superfund tax on "the Nation's balance of trade with other countries").

Had that been Congress' intent, it surely would have said so in plainer terms than those of § 114(c).

Comparisons with the prior bills reinforce our reading of the statute. As previously discussed, § 114(c) is derived from the pre-emption provision of H. R. 85. Section 110 of that bill pre-empted state funds whose purpose was "to compensate for a loss which is a compensable damage" under the bill. This language is not ambiguous; it clearly covers any "compensable" loss, whether or not the claimant actually receives compensation from the federal fund. Bill S. 1341 was the only other bill to contain a pre-emption provision covering state funds, prior to the 11th-hour Stafford-Randolph substitute bill. That provision also unambiguously covers any "compensable" loss.

We also fail to find sufficient support for New Jersey's position in the sparse legislative history of the Stafford-Randolph substitute bill that became CERCLA. New Jersey relies on a floor debate between Senators Bradley and Randolph on § 114(c). New Jersey is correct in arguing that some statements in that debate imply that state fund money could be used for any expense not actually paid by Superfund.[16] In view of the haste with which the bill was considered, and the ambiguities and inaccuracies included in the debate between Senators Bradley and Randolph,[17] we de-

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[16] See, *e. g.*, 126 Cong. Rec. 30949 (1980):

"Mr. RANDOLPH. . . . Any damage not reimbursed by this bill fund may similarly be the proper subject of a State fund if a State so chooses to construct its fund.

. . . . .

"Mr. BRADLEY. And am I also correct in noting that State funds are preempted only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?

"Mr. RANDOLPH. That is correct."

[17] Taken, in part, word-for-word from the Florio-Biaggi debate, the Bradley-Randolph debate contains a number of statements that might apply to H. R. 85 but could not apply to CERCLA. Senator Bradley used

cline to attach any great significance to those statements. Moreover, as we have previously mentioned, the fact that this "debate" was essentially a re-enactment of the Florio-Biaggi debate over H. R. 85's pre-emption provision implies that the Senators involved did not consider the two provisions to differ. We reject New Jersey's reading of § 114(c).

IV

Having decided that "may be compensated" should be given its ordinary meaning, we must define the category of expenses that may be compensated by Superfund. Fortunately, CERCLA itself furnishes an appropriate test. Section 105(8)(B) of CERCLA, 42 U. S. C. § 9605(8)(B), requires the President to revise the National Contingency Plan (NCP) to reflect CERCLA's provisions. As part of that revision, the President must create and revise annually a list of sites most in need of federal efforts, now known as the National Priorities List.[18] The NCP currently specifies that removal, or immediate cleanup, will be financed by Superfund only in emergency situations, see 40 CFR § 300.65 (1985). Remedial action will be financed only for sites on the National Priorities List, § 300.68(a). Finally, the Environmental Protection Agency, pursuant to the NCP, has proposed criteria for the use of Superfund money for natural resource claims. See 50 Fed. Reg. 9593 (1985). The NCP, therefore, provides criteria that determine what expenses, at which sites,

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the phrase "compensable damages" from H. R. 85, § 110, which nowhere appears in CERCLA § 114(c). Senator Bradley also referred to "the Secretary" in his questioning. While the hazardous substance program of H. R. 85 was under the control of the Secretary of Transportation, see § 101(a) of that bill as enacted, CERCLA's requirements are addressed to the Administrator of the Environmental Protection Agency and to the President. Finally, Senator Randolph stated that the pre-emption provision would take effect 180 days after passage of the bill—a provision that does not appear in CERCLA.

[18] The National Priorities List is set out at 40 CFR pt. 300, App. B. (1985).

will be eligible for Superfund money. We therefore conclude that the NCP provides the appropriate measure of whether a given expenditure constitutes "costs of response or damages or claims which may be compensated" by Superfund.

CERCLA also provides that a State must agree to pay at least 10% of the cost of any remedial action for a hazardous waste site within the State. 42 U. S. C. § 9604(c)(3)(C). This state share is, by definition, not eligible for Superfund money. We therefore conclude that the 10% state share is not a cost that "may be compensated" by Superfund.

To the extent that appellants argue that § 114(c) covers any cleanup or remedial expenses, whether or not eligible for Superfund compensation, we must reject their position. While we have acknowledged Congress' desire to spare the involved industries from excessive taxation, we must assume that Congress meant the words "which may be compensated under this subchapter" to have some meaning. The only plausible explanation for the use of that phrase is that Congress intended to prohibit state funds that covered Superfund-eligible expenses. Once again, we decline to second-guess the methods Congress used to achieve its purposes.

Our remaining task is to determine whether the "purpose" of the Spill Fund is to pay costs that we have found to fall within the scope of pre-emption. As we have explained above, the Spill Fund may be used for six purposes: (1) to finance governmental cleanup of hazardous waste sites; (2) to reimburse third parties for cleanup costs; (3) to compensate third parties for damage resulting from hazardous substance discharges; (4) to pay personnel and equipment costs; (5) to administer the fund itself; and (6) to conduct research. Of these, the latter four are clearly beyond the scope of CERCLA, and are therefore not covered by § 114(c). The first two are within the scope of CERCLA, except to the ex-

tent that they are intended to provide the 10% state share of remedial costs. Those parts of the statute that permit Spill Fund expenditures beyond this state share for remedial costs for sites on the National Priorities List, or for removal costs that are eligible for Superfund compensation under the terms of the NCP, are pre-empted by § 114(c).

New Jersey argues, finally, that after the enactment of CERCLA, or at least after the publication of the National Priorities List, all Spill Fund expenditures for purposes (1) and (2) above have been for non-Superfund eligible sites, and therefore are for nonpre-empted purposes. To the extent that the Spill Act permits taxation to support pre-empted expenditures, however, it cannot stand. State legislation is invalid "to the extent that it actually conflicts with federal law," *Pacific Gas & Electric Co.* v. *Energy Resources Comm'n*, 461 U. S. 190, 204 (1983), and such a conflict has been demonstrated in this case. We leave to the New Jersey Supreme Court the state-law question whether, or to what extent, the nonpre-empted provisions of the statute are severable from the pre-empted provisions. See *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 196–197 (1983). We decline the dissent's invitation to hold that the Spill Act is valid in its entirety because a substantial portion of its purposes are permissible. Such a holding would be an open invitation to the States to flout federal law by including valid provisions within clearly invalid statutes.

V

To the extent that the New Jersey Supreme Court held that the Spill Act could constitutionally impose a tax to support expenditures for purposes that we have identified above as nonpre-empted, that court's judgment is affirmed. To the extent it held that the Spill Act could constitutionally impose a tax to support expenditures for purposes that we have identified as pre-empted, its judgment is reversed, and the case is

remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE POWELL took no part in the consideration or decision of this case.

JUSTICE STEVENS, dissenting.

The purposes of the "Spill Fund" Act passed by the New Jersey Legislature in 1977,[1] and the "Superfund" legislation enacted by the Congress of the United States in 1980[2] overlap partially but not entirely. In the area of overlap, both statutes create funds to defray the costs of responding to environmental damage caused by the disposal of certain hazardous substances. Even in this area, however, the state and federal funds are not identical, for § 114(c) of the federal statute provides that no person may be required to contribute to any state fund if "the purpose" of the fund is to pay "compensation for claims for any costs of response or damages or claims which may be compensated under" the federal fund.[3] The question presented by this case is whether the words "the purpose" should be construed to mean "one of the purposes."

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[1] New Jersey Spill Compensation and Control Act (Spill Fund), N. J. Stat. Ann. §§ 58:10–23.11 to 58:10–23.11z (West 1982 and Supp. 1985).

[2] Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund or CERCLA), 94 Stat. 2767, 42 U. S. C. § 9601 *et seq.*

[3] Section 114(c) of Superfund states in full:

"Except as provided in this Act, no person may be required to contribute to any fund, *the purpose* of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State." 94 Stat. 2796, 42 U. S. C. § 9614(c) (emphasis added).

I

Both parties agree that the New Jersey Spill Fund was created to serve multiple purposes, and that at least some of these purposes are not expressly described in § 114(c).[4] Moreover, even if the bulk of the moneys in the Spill Fund has to date been expended in furtherance of purposes served by the federal Superfund, there is no reason to believe that the separate purposes are pretextual or illegitimate, or that in the future New Jersey will not use its Spill Fund to meet an ecological threat, such as an oil spill, for which Superfund

[4] As appellants concede, the New Jersey Spill Fund "has subsidiary purposes that do not duplicate those of CERCLA." Brief for Appellants 22, n. 24. For example, while Spill Fund moneys may be used to pay for petroleum and crude oil spills, N. J. Stat. Ann. § 58:10–23.11b(k) (West Supp. 1985), Superfund expressly excludes such pollutants from its definition of "hazardous substances," § 101(14), 94 Stat. 2769, 42 U. S. C. § 9601(14). In addition, New Jersey's Spill Fund authorizes payments for income or property value losses caused by damage resulting from a discharge of hazardous substances, and covers the cost of restoration or replacement of natural resources damaged or destroyed by a discharge. N. J. Stat. Ann. § 58:10–23.11g(a) (West 1982). In contrast, the federal Superfund provides limited damages coverage in relation to natural resources, and authorizes such compensation only if the release occurred after December 11, 1980, and only if the claimants are the United States or a State. §§ 107(a)(4)(A), 107(f), 111(c)(2), 111(d)(1), 94 Stat. 2731, 2783, 2789–2790, 42 U. S. C. §§ 9607(a)(4)(A), 9607(f), 9611(c)(2), 9611(d)(1). Additional expenditures authorized by the State Spill Fund, but not by its federal counterpart, include (1) the purchase and prepositioning of equipment to respond to release of hazardous substances, compare N. J. Stat. Ann. § 58:10–23.11o(4) (West Supp. 1985), with § 114(c), 94 Stat. 2796, 42 U. S. C. § 9614(c); (2) expenses related to administration of the State Spill Fund, see N. J. Stat. Ann. § 58:10–23.11o(4); and (3) research concerning pollution and cleanup techniques, including ocean pollution, see §§ 58:10–23.11o(3), (5). The Spill Fund statute is also authorized to pay the 10% state share "of the costs of the remedial action, including all future maintenance" required in order to qualify for federal funding which is not compensated by Superfund, § 104(c)(3), 94 Stat. 2775–2776, 42 U. S. C. § 9604(c)(3). See N. J. Stat. Ann. §§ 58:10–23.11o(1), (2) (West Supp. 1985). Appellants argued in state court that taxes for this purpose contravene § 114(c).

makes no provision. See Tr. in Nos. SC 319A-81 and SC 303A-81, p. 21 (N. J. Tax Court).

These concededly legitimate state purposes are, in my view, sufficient to validate the tax supporting New Jersey's Spill Fund. First, § 114(c) literally pre-empts only taxes to support state funds for which "the purpose" is to compensate for claims compensable under Superfund. In accordance with this language, contributions to state funds would be pre-empted only if their sole purpose—or perhaps their only nontrivial purpose—was to compensate for claims covered by Superfund. Unless Congress intended to forbid further contributions to state funds merely because they have not expended "sufficient" moneys on legitimate state objectives (whatever that threshold amount should be), New Jersey's Spill Fund unquestionably escapes the pre-emptive sweep of § 114(c).

If this purely literal reading of § 114(c) resulted in manifest injustice, or were plainly at war with the probable intent of Congress, I would reject it. But such a reading is consistent with the sparse legislative history that has been called to our attention.[5] In the debate on the Senate floor, New Jersey Senator Bradley pointed out that his State had enacted a "Spill Compensation Fund" supported by "a tax applied to transfers of petroleum and a tax on nonpetroleum hazardous substances." 126 Cong. Rec. 30949 (1980), reprinted in Sen-

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[5] The explanation for the absence of committee reports and for the brief remarks on the floor lies in the fact that the compromise legislation that became Superfund was introduced as a floor amendment in the Senate in the waning days of the lame-duck session of the 96th Congress. The lineal ancestor of Superfund, S. 1480, was reported out of Committee on November 18, 1980—after the national elections had changed the political complexion by assuring the Republicans control of the Presidency and of the Senate in 1981. In the aftermath of the November elections, S. 1480, along with three other bills, became the subject of an 11th-hour compromise forged primarily in the Senate. The original provision in S. 1480 for a $4.1 billion fund was dramatically reduced to $1.6 billion and, of importance to our inquiry, § 114(c) was added.

ate Committee on Environment and Public Works, A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), 97th Cong., 2d Sess., 731 (Comm. Print 1983) (hereinafter 1 Leg. Hist.). Acknowledging industry's fear that it might be forced to bear a "double tax," *ibid.*, the Senator propounded a series of questions to Senator Randolph of West Virginia, the bill's sponsor in the Senate, to clarify the scope of § 114(c). This colloquy, as I read it, is generally in keeping with pre-emption of nothing more than state taxation to support funds for which "the purpose" is to compensate for claims covered by Superfund:

> "Mr. BRADLEY.
>
> . . . . .
>
> "Am I correct in understanding that it is the purpose of this legislation [§ 114(c)] to prohibit States from requiring any person to contribute to a fund *for the purpose* of reimbursing claims already provided for in this legislation?
>
> "Mr. RANDOLPH. Yes, that is the clear intent. The purpose is to prohibit States from creating *duplicate funds* to pay damage compensable under this bill.
>
> "Mr. BRADLEY. However, there is *no such preemption* of a State's ability to collect such taxes or fees for *other costs* associated with releases that are not compensable damages as defined in this legislation.
>
> "Mr. RANDOLPH. The Senator is correct.
>
> . . . . .
>
> "Nothing in the language or intent of this bill would prohibit a State from using its fund for the purposes you have inquired about. The purpose of this legislation is simply to preempt *double taxation* of the substances enumerated in the bill *for the purposes* of compensation of the covered damage. . . .

"*Any damage not reimbursed* by this bill fund may similarly be the proper *subject* of a State fund if a State so chooses to construct its fund. . . .

. . . . .

". . . What this bill does is prohibit a State from requiring any person to contribute to any fund if *the purpose* of that fund is to compensate for a claim paid for under the provisions of this bill. Thus the State cannot receive a fee or a tax on a substance if that fee or tax is to go into a fund *and the fund is for the purpose* of paying [compensable] claims.

"Putting it simply, this is a prohibition against *double taxation for the same purposes. It [does] not . . . prohibit a State from imposing fees or taxes for other purposes* . . . .

"In summary, Mr. President, this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation." 126 Cong. Rec., at 30949 (emphasis added), reprinted in 1 Leg. Hist. 731–733.[6]

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[6] I recognize that some language in this colloquy may be read to imply that § 114(c) pre-empts only those state funds whose purpose is to compensate for claims actually paid for by Superfund. See 126 Cong. Rec. 30949 (1980) (remarks of Sen. Bradley and Sen. Randolph), reprinted in 1 Leg. Hist. 731–732. See also 97 N. J. 526, 536–544, 481 A. 2d 271, 276–281 (1984). I agree with the Court that this interpretation conflicts with the "may be compensated" language of § 114(c), would trivialize it by rendering only actual conflicts pre-empted, and would render superfluous the proviso to § 114(c) that States may use "general revenues for such a fund" to pay "costs of response or damages . . . which may be compensated" under Superfund. See *ante*, at 370–371. Besides, it seems odd to suppose that States would choose to compensate claims already redressed by federal funds. In addition to these deficiencies, the colloquy inaccurately refers to a 180-day grace period before pre-emption would take effect and to compensation for damage caused by oil spills. See *ante*, at 373–374, n. 17. In light of the haste with which this legislation was passed, and the consequent inaccuracies of some of the remarks regarding the details of the legislation, I consider the remarks on the floor only at a high level of generality.

The legislation passed by the Senate was introduced in the House of Representatives by Representative Florio of New Jersey, whose brief remarks on the floor are likewise consistent with construing § 114(c) to pre-empt taxation to support state imitations of Superfund:

> "Regarding the preemption language contained in these amendments, I would point out that some States, including my own State of New Jersey, have successful spill funds and that while States may not create *duplicate funds* to pay damages compensable under this bill, there is *no preemption* of the State's ability to collect taxes on fees for *other costs* associated with releases that are *not compensable damages* as defined in this legislation.
>
> ". . . Putting it simply, this is a prohibition against *double taxation for the same purposes.*" 126 Cong. Rec. 31965 (1980) (emphasis added), reprinted in part in 1 Leg. Hist. 780.

As I see it, if Congress had intended to forbid any further contributions to the New Jersey Spill Fund—the existence of which it was made acutely aware—it surely could have expressed that intent in less ambiguous language than is found in § 114(c). Indeed, if that had been its purpose, I would expect it to be revealed either in a committee report or in some unequivocal comment during the debates on the legislation. I have found no such legislative history. In my opinion, we should not presume pre-emption unless Congress clearly identifies its intent to curtail the lawmaking power of a sovereign State, either by careful draftsmanship of its pre-emptive command or by necessary implication based on the scope of its entire regulatory program.[7] The language of § 114(c) is

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[7] See *Chicago & N. W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311, 317 (1981) ("Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the

simply too opaque to support the broad prohibition that appellants ask us to find in it.

II

For the foregoing reasons, the New Jersey Spill Fund tax is not a "contribut[ion]" to a fund "the purpose of which is to pay compensation for claims . . . which may be compensated under" Superfund. Because there exist several legitimate purposes for which New Jersey may expend funds, "the purpose" of the State Spill Fund does not duplicate the purpose of Superfund, and the tax levied to support it is to that extent unquestionably valid under § 114(c). Moreover, while the Spill Fund is by statute available (and has been used) for the purpose described in § 114(c), the State Fund's compensation for claims covered by its federal counterpart does not entitle appellants to a *pro tanto* refund of taxes on a theory that the Spill Fund is "partially pre-empted." The unqualified language of § 114(c) either forbids all contributions to the Fund or it forbids none; it affords no basis for objecting to a tax for the concededly legitimate state purposes identified earlier, see n. 4, *supra*.

But since the Court concludes that the Spill Act is "pre-empted in part," *ante*, at 358; accord, *ante*, at 376, it must confront the difficult question of relief. In keeping with its "partial pre-emption" analysis, the Court should advise the New Jersey courts how they should calculate the partial refund of taxes to which appellants are presumably entitled on remand. For example, must appellants be refunded the percentage of Spill Act taxes expended on Superfund-compensable claims in the tax years in question, or may the State reduce their refund by imputing an average annual cost for the cleanup of oil spills, which are one of the contingencies against which the Spill Fund was intended to accumulate reserves but which has not yet occurred?

Congress has unmistakably so ordained'" (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963)).

Rather than facing up to the difficult but essential remedial choices to which its analysis inescapably gives rise, the Court takes the entirely unresponsive course of resolving a lawsuit that has not yet been filed. In the litigation it apparently contemplates, a contributor to the Spill Fund has challenged a particular expenditure of the Fund as being in conflict with § 114(c). In this situation, I might agree that the purpose of § 114(c)'s pre-emption of double *taxation* prevents New Jersey from *spending* these moneys on activities compensable under Superfund. Taxing and spending are obviously linked in § 114(c): taxes may not be levied to support funds indemnifying claims compensable under Superfund. Given this linkage, the hypothetical plaintiff might argue that § 114(c)'s prohibition of "double taxation" pre-empts state expenditures of Spill Fund moneys for Superfund-compensable claims generally, whether collected in a separately identifiable fund or not, on the theory that such expenditures would constitute the functional equivalent of a distinct "fund" whose purpose is to pay claims compensable under Superfund.[8]

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[8] New Jersey recognizes an obligation to expend Spill Fund moneys in furtherance of purposes not benefited by Superfund, and has promulgated regulations intended to promote administration of the State Spill Fund in conformity with Superfund by circumscribing permissible expenditures. See Regulations Governing New Jersey Spill Compensation Fund Expenditures in Light of Federal Superfund Law, N. J. Admin. Code 17:26–2.1 (Supp. 1985). These regulations limit Spill Fund expenditures to the following eight purposes: (1) "[t]he clean-up and removal of a petroleum or petroleum products discharge"; (2) certain third-party damages payments; (3) "[t]he administrative costs of the fund"; (4) "[t]he cost of purchasing or pre-positioning hazardous substance response equipment or other preparations for the response"; (5) the 10% state share of remedial costs; (6) the advancement of moneys for the cleanup and removal of hazardous substances for which the State has a prior commitment for reimbursement from Superfund; (7) for the above purpose if the state fund administrator promptly applies for federal reimbursement; and (8) any payments authorized by the Act using tax revenues collected before the effective date of Superfund. 14 N. J. Reg. 36(b) (1982). Appellants have contested only purposes five through seven. See App. to Brief on Behalf of Plaintiffs-

But whatever the merits of the hypothesized challenge to particular state expenditures, the case or controversy which would raise it is *not* before this Court. Appellants challenge the Spill Fund tax in its entirety; they make no claim for a partial refund. App. to Brief on Behalf of Plaintiffs-Appellants in No. A-3913-81T1 (N. J. Super. Ct.), pp. 2a-7a (N. J. Tax Court Complaint ¶¶ 3-4); *id.*, at 16a-23a (N. J. Chancery Division Complaint ¶¶ 11-36); Tr. in Nos. SC 319A-81 & SC 303A-81, p. 34 (N. J. Tax Court). This litigation does not concern any particular expenditure of Spill Fund assets for *any* purpose, let alone the purpose described in § 114(c).[9] As a consequence, it is plainly inappropriate to let stand the Spill Fund tax challenged by appellants and instead order New Jersey to restrict Fund expenditures not properly before us.

Of course, if the hypothesized challenge were successful, the Court would be entirely correct that the next question would be whether New Jersey would have set the same tax rate despite circumscription of the purposes for which the Fund might be expended, and that this state-law question should be left for the New Jersey courts.[10] The only ques-

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Appellants in No. A-3913-81T1 (N. J. Super. Ct.), pp. 122a-126a. See also n. 4, *supra*. Appellants' challenge to the validity of the fifth purpose is not pressed in this Court; the sixth and seventh purposes provide for the advancement of cleanup funds (in effect, loans) in anticipation of an award of federal funds.

These regulations were held invalid by the New Jersey intermediate appellate court for failure to satisfy a statutory notice period, 190 N. J. Super. 131, 133-134, 462 A. 2d 193, 195 (1983), and they are not before us. According to the New Jersey Office of Administrative Law, the regulation, although invalid, is still "on the books." Further action presumably awaits the decision of this Court.

[9] Indeed, the record on which the New Jersey Tax Court awarded summary judgment was so lacking in information regarding Spill Fund expenditures that appellants saw the need to supplement the record in this Court.

[10] If the New Jersey courts were to hold that the proscribed purposes were severable from the permissible ones, appellants would be entitled to

tion before us today, however, is whether "the purpose" of the New Jersey tax is to fund claims which may be compensated under Superfund. For me, the universal agreement that the tax moneys poured into New Jersey's Spill Fund may be spent in furtherance of entirely valid purposes is sufficient to sustain the state tax.

The judgment of the Supreme Court of New Jersey should be affirmed.

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no refund. If they were to find instead that the legitimate purposes were inseparable from the purposes described in § 114(c), the Spill Fund would stand or fall in its entirety.

It seems likely that the New Jersey courts would find the invalid provisions severable. The New Jersey Tax Court found a "legislative intent that every purpose of spill fund was to be accomplished" and concluded that "the Legislature specifically envisioned that the spill act would be enforced in conjunction with any other applicable law." *Exxon Corp.* v. *Hunt*, 4 N. J. Tax 294, 320 (1982). Accordingly, it held that "even if § 114(c) of super fund could be construed to preempt part of spill fund, the aforementioned nonpreempted areas are more than sufficient to sustain its continued validity." *Ibid.* The New Jersey Supreme Court acknowledged the Tax Court's alternative holding, but relied on its primary holding that § 114(c) pre-empted only claims actually compensated to uphold the Spill Fund. See 97 N. J., at 530, 481 A. 2d, at 273.

UNITED STATES v. INADI

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-1580. Argued December 3, 1985—Decided March 10, 1986

Following a jury trial in Federal District Court, respondent was convicted of conspiring to manufacture and distribute methamphetamine, and related offenses. Part of the evidence consisted of taped conversations between various participants in the conspiracy. Respondent sought to exclude the recorded statements of the unindicted co-conspirators, including one Lazaro, on the ground that they did not satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E), which provides that a statement by a co-conspirator of a party made "during the course and in furtherance of the conspiracy" is not hearsay when offered against the party. Respondent also objected to the admission of the statements on Confrontation Clause grounds, contending that they were inadmissible absent a showing that the declarants were unavailable. The District Court held that the statements satisfied Rule 801(d)(2)(E), and admitted the statements, conditioned on the prosecution's commitment to produce Lazaro. The Government subpoenaed Lazaro, but he failed to appear, and defense counsel made no effort to secure his presence. The court then overruled respondent's renewed Confrontation Clause objections, holding that Lazaro's statements were admissible because they satisfied the co-conspirator rule. The Court of Appeals reversed, holding, in reliance on *Ohio* v. *Roberts*, 448 U. S. 56, that although Rule 801(d)(2)(E) had been satisfied, the Confrontation Clause established an independent requirement that the Government, as a condition to admission of any out-of-court statements, must show the declarant's unavailability.

Held: The Confrontation Clause does not require a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying co-conspirator. Pp. 392-400.

(a) *Ohio* v. *Roberts*, *supra*, which simply reaffirmed a longstanding rule that applies unavailability analysis to the prior testimony of a witness not produced at trial, cannot fairly be read to stand for the proposition that no out-of-court statement can be introduced by the prosecution without a showing that the declarant is unavailable. Pp. 392-394.

(b) The principles whereby prior testimony may be admitted as a substitute for live testimony only if the declarant is unavailable do not apply to co-conspirator statements. Co-conspirator statements derive much of their value from the fact that they are made in a context very different

from trial, and therefore are usually irreplaceable as substantive evidence. Their admission into evidence thus actually furthers the Confrontation Clause's mission of advancing the "truth-determining process." Pp. 394–396.

(c) Little benefit would be accomplished by an unavailability rule. Under such a rule, if the co-conspirator either is unavailable or is available and produced by the prosecution, his prior statements could be introduced. Nor is an unavailability rule likely to produce much testimony that adds anything to the "truth-determining process" over and above what would be produced without such a rule, because the relative interests of the parties will have changed drastically. In contrast to the slight benefits, the burden imposed by an unavailability rule is significant. A rule that required each invocation of Rule 801(d)(2)(E) to be accompanied by a decision on the declarant's availability would impose a substantial burden on the entire criminal justice system. Moreover, a significant practical burden would be imposed on the prosecution, since in every case involving co-conspirators' statements, the prosecution would be required to identify each declarant, locate them, and then attempt to ensure their availability for trial. Pp. 396–400.

748 F. 2d 812, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 400.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Trott*, *Samuel A. Alito, Jr.*, and *Patty Merkamp Stemler*.

Holly Maguigan argued the cause for respondent. With her on the brief were *Julie Shapiro* and *William F. Sheehan*.

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the Confrontation Clause requires the Government to show that a nontestifying co-conspirator is unavailable to testify, as a condition for admission of that co-conspirator's out-of-court statements.

I

Following a jury trial in the Eastern District of Pennsylvania, respondent Joseph Inadi was convicted of conspiring to

manufacture and distribute methamphetamine, and related offenses. He was sentenced to three years' imprisonment to be followed by a 7-year parole term. The evidence at trial showed that in September 1979, respondent was approached by unindicted co-conspirator Michael McKeon, who was seeking a distribution outlet for methamphetamine. Respondent's role was to supply cash and chemicals for the manufacture of methamphetamine and to be responsible for its distribution. McKeon and another unindicted co-conspirator, William Levan, were to manufacture the substance.

In the course of manufacturing and selling methamphetamine, McKeon, Levan, and respondent met with another unindicted co-conspirator, John Lazaro, at an empty house in Cape May, New Jersey. There they extracted additional methamphetamine from the liquid residue of previous batches. In the early morning hours of May 23, 1980, two Cape May police officers, pursuant to a warrant, secretly entered the house and removed a tray covered with drying methamphetamine. With the permission of the issuing Magistrate, the officers delayed returning an inventory, leaving the participants to speculate over what had happened to the missing tray.

On May 25, 1980, two Drug Enforcement Administration agents in Philadelphia monitored a meeting between respondent and Lazaro alongside Lazaro's car. At one point one of the agents saw respondent lean into the car. After Lazaro drove off, the agents stopped his car. They searched the car, Lazaro, and a passenger, Marianne Lazaro, but they found nothing and let the Lazaros leave. Marianne Lazaro later recounted that during the search she threw away a clear plastic bag containing white powder that her husband had handed to her after the meeting with respondent. Eight hours after the search, one of the agents returned to the scene of the crime and found a clear plastic bag containing a small quantity of methamphetamine.

From May 23 to May 27, 1980, the Cape May County Prosecutor's Office lawfully intercepted and recorded five telephone conversations between various participants in the conspiracy. These taped conversations were played for the jury at trial. The conversations dealt with various aspects of the conspiracy, including planned meetings and speculation about who had taken the missing tray from the house and who had set Lazaro up for the May 25 stop and search. Respondent sought to exclude the recorded statements of Lazaro and the other unindicted co-conspirators on the ground that the statements did not satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E), governing admission of co-conspirator declarations.[1] After listening to the tapes the trial court admitted the statements, finding that they were made by conspirators during the course of and in furtherance of the conspiracy, and thereby satisfied Rule 801(d)(2)(E).

Respondent also objected to admission of the statements on Confrontation Clause grounds, contending that the statements were inadmissible absent a showing that the declarants were unavailable. The court suggested that the prosecutor bring Lazaro to court in order to demonstrate unavailability. The court also asked defense counsel whether she wanted the prosecution to call Lazaro as a witness, and defense counsel stated that she would discuss the matter with her client. The co-conspirators' statements were admitted, conditioned on the prosecution's commitment to produce Lazaro. The Government subpoenaed Lazaro, but he failed to appear, claiming car trouble. The record does not indicate that the defense made any effort on its own part to secure Lazaro's presence in court.

Respondent renewed his Confrontation Clause objections, arguing that the Government had not met its burden of show-

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[1] Federal Rule of Evidence 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

ing that Lazaro was unavailable to testify. The trial court overruled the objection, ruling that Lazaro's statements were admissible because they satisfied the co-conspirator rule.[2]

The Court of Appeals for the Third Circuit reversed. 748 F. 2d 812 (1984). The court agreed that the Government had satisfied Rule 801(d)(2)(E), but decided that the Confrontation Clause established an independent requirement that the Government, as a condition to admission of any out-of-court statements, must show the unavailability of the declarant. 748 F. 2d, at 818. The court derived this "unavailability rule" from *Ohio* v. *Roberts*, 448 U. S. 56 (1980). The Court of Appeals rejected the Government's contention that *Roberts* did not require a showing of unavailability as to a nontestifying co-conspirator, finding that *Roberts* created a "clear constitutional rule" applicable to out-of-court statements generally. 748 F. 2d, at 818. The court found no reason to create a special exception for co-conspirator statements, and therefore ruled Lazaro's statements inadmissible. *Id.*, at 818–819.

We granted certiorari, 471 U. S. 1124 (1985), to resolve the question whether the Confrontation Clause requires a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying co-conspirator, when those statements otherwise satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E).[3] We now reverse.

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[2] The trial court also noted that two of the four co-conspirator declarants (Mrs. Lazaro and McKeon) had testified and that a third (Levan) was unavailable because he had asserted his Fifth Amendment privilege outside the presence of the jury.

[3] The reliability of the out-of-court statements is not at issue in this case. The Court of Appeals determined that whether or not the statements are reliable, their admission violated the Sixth Amendment because the Government did not show that the declarant was unavailable to testify. 748 F. 2d, at 818–819. The sole issue before the Court is whether that decision is correct.

II

A

The Court of Appeals derived its rule that the Government must demonstrate unavailability from our decision in *Roberts*. It quoted *Roberts* as holding that "in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." 448 U. S., at 65. The Court of Appeals viewed this language as setting forth a "clear constitutional rule" applicable before any hearsay can be admitted. 748 F. 2d, at 818. Under this interpretation of *Roberts*, no out-of-court statement would be admissible without a showing of unavailability.

Roberts, however, does not stand for such a wholesale revision of the law of evidence, nor does it support such a broad interpretation of the Confrontation Clause. *Roberts* itself disclaimed any intention of proposing a general answer to the many difficult questions arising out of the relationship between the Confrontation Clause and hearsay. "The Court has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay "exceptions."'" 448 U. S., at 64–65, quoting *California* v. *Green*, 399 U. S. 149, 162 (1970). The Court in *Roberts* remained "[c]onvinced that 'no rule will perfectly resolve all possible problems'" and rejected the "invitation to overrule a near-century of jurisprudence" in order to create such a rule. 448 U. S., at 68, n. 9, quoting Natali, *Green, Dutton*, and *Chambers:* Three Cases in Search of a Theory, 7 Rutgers-Camden L. J. 43, 73 (1975). In addition, the Court specifically noted that a "demonstration of unavailability . . . is not always required." 448 U. S., at 65, n. 7. In light of these limiting statements, *Roberts* should not be read as an abstract answer to questions not presented in that case, but

rather as a resolution of the issue the Court said it was examining: "the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial." *Id.*, at 58.[4]

The Confrontation Clause analysis in *Roberts* focuses on those factors that come into play when the prosecution seeks to admit testimony from a prior judicial proceeding in place of live testimony at trial. See Fed. Rule Evid. 804(b)(1). In particular, the *Roberts* Court examined the requirement, found in a long line of Confrontation Clause cases involving prior testimony, that before such statements can be admitted the government must demonstrate that the declarant is unavailable. See *Mancusi* v. *Stubbs*, 408 U. S. 204 (1972); *California* v. *Green*, *supra*; *Barber* v. *Page*, 390 U. S. 719 (1968); *Berger* v. *California*, 393 U. S. 314 (1968).[5] All of the cases cited in *Roberts* for this "unavailability rule" concern prior testimony. In particular, the Court focused on two cases, *Barber* and *Mancusi*, that directly "explored the issue of constitutional unavailability." 448 U. S., at 76. Both cases specifically limited the unavailability exception to

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[4] *Roberts* involved a state criminal trial on charges of forging a check in the name of Bernard Isaacs and of possession of stolen credit cards belonging to Isaacs and his wife. At the preliminary hearing, defense counsel called the Isaacs' daughter as a witness. She testified that she had permitted the defendant to use the apartment for several days, but she refused to admit that she had given the defendant the checks or credit cards. Between the preliminary hearing and the trial, through no fault of the State, she disappeared. At trial, the defendant testified that the Isaacs' daughter had given him the checks and credit cards to use. The State sought to offer the transcript of her preliminary hearing testimony in rebuttal. 448 U. S., at 58–60.

[5] Federal Rule of Evidence 804 also imposes an unavailability requirement before allowing the admission of prior testimony. The Rule 804 requirement is part of the law of evidence regarding hearsay. While it "may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values," *California* v. *Green*, 399 U. S., at 155, the overlap is not complete.

prior testimony. *Barber, supra,* at 722; *Mancusi, supra,* at 211.

Roberts must be read consistently with the question it answered, the authority it cited, and its own facts. All of these indicate that *Roberts* simply reaffirmed a longstanding rule, foreshadowed in *Pointer* v. *Texas,* 380 U. S. 400 (1965), established in *Barber,* and refined in a line of cases up through *Roberts,* that applies unavailability analysis to prior testimony.[6] *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.

B

There are good reasons why the unavailability rule, developed in cases involving former testimony, is not applicable to co-conspirators' out-of-court statements. Unlike some other exceptions to the hearsay rules, or the exemption from the hearsay definition involved in this case, former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence. See Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim. L. Bull. 99, 143 (1972). But if the declarant is unavailable, no "better" version of the evidence exists, and

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[6] In federal court the unavailability rule for former trial testimony was established long before *Pointer* v. *Texas,* 380 U. S. 400 (1965), in *Mattox* v. *United States,* 156 U. S. 237 (1895).

the former testimony may be admitted as a substitute for live testimony on the same point.

Those same principles do not apply to co-conspirator statements. Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court. When the Government—as here—offers the statement of one drug dealer to another in furtherance of an illegal conspiracy, the statement often will derive its significance from the circumstances in which it was made. Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy.

In addition, the relative positions of the parties will have changed substantially between the time of the statements and the trial. The declarant and the defendant will have changed from partners in an illegal conspiracy to suspects or defendants in a criminal trial, each with information potentially damaging to the other. The declarant himself may be facing indictment or trial, in which case he has little incentive to aid the prosecution, and yet will be equally wary of coming to the aid of his former partners in crime. In that situation, it is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force.

These points distinguish co-conspirators' statements from the statements involved in *Roberts* and our other prior testimony cases. Those cases rested in part on the strong similarities between the prior judicial proceedings and the trial. No such strong similarities exist between co-conspirator statements and live testimony at trial. To the contrary, co-conspirator statements derive much of their value from the

fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence. Under these circumstances, "only clear folly would dictate an across-the-board policy of doing without" such statements. Advisory Committee's Introductory Note on the Hearsay Problem, quoted in Westen, The Future of Confrontation, 77 Mich. L. Rev. 1185, 1193, n. 35 (1979). The admission of co-conspirators' declarations into evidence thus actually furthers the "Confrontation Clause's very mission" which is to "advance 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee* v. *Street*, 471 U. S. 409, 415 (1985), quoting *Dutton* v. *Evans*, 400 U. S. 74, 89 (1970).

C

There appears to be little, if any, benefit to be accomplished by the Court of Appeals' unavailability rule. First, if the declarant either is unavailable, or is available and produced by the prosecution, the statements can be introduced anyway. Thus, the unavailability rule cannot be defended as a constitutional "better evidence" rule, because it does not actually serve to exclude anything, unless the prosecution makes the mistake of not producing an otherwise available witness. Cf. Westen, *supra;* Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1403 (1972). In this case, for example, out-of-court statements by Michael McKeon and Marianne Lazaro, who testified under immunity, could be introduced based on their testimony in court. The statements of William Levan were admissible because he properly asserted his Fifth Amendment privilege and thereby was unavailable.

Second, an unavailability rule is not likely to produce much testimony that adds anything to the "truth-determining process" over and above what would be produced without such a rule. *Dutton, supra*, at 89. Some of the available declarants already will have been subpoenaed by the prosecution or

the defense, regardless of any Confrontation Clause requirements. Presumably only those declarants that neither side believes will be particularly helpful will not have been subpoenaed as witnesses. There is much to indicate that Lazaro was in that position in this case. Neither the Government nor the defense originally subpoenaed Lazaro as a witness.[7] When he subsequently failed to show, alleging car trouble, respondent did nothing to secure his testimony. If respondent independently wanted to secure Lazaro's testimony, he had several options available, particularly under Federal Rule of Evidence 806,[8] which provides that if the party against whom a co-conspirator statement has been admitted calls the declarant as a witness, "the party is entitled to examine him on the statement as if under cross-examination." Rule 806 would not require respondent to make the showing necessary to have Lazaro declared a hostile witness, although presumably that option also was available to him. The Compulsory Process Clause would have aided respondent in obtaining the testimony of any of these declarants.[9] If the

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[7] In fact, the actions of the parties in this case demonstrate what is no doubt a frequent occurrence in conspiracy cases—neither side wants a co-conspirator as a witness. As explained *supra*, at 395, the interests of the prosecution and the co-conspirator seldom will run together. Nor do the co-conspirator's interests coincide with his former partners, since each is in a position that is potentially harmful to the others.

[8] Rule 806 states:

"When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. . . . If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination."

[9] U. S. Const., Amdt. 6: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." Cf. Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567, 586–601 (1978).

Government has no desire to call a co-conspirator declarant as a witness, and if the defense has not chosen to subpoena such a declarant, either as a witness favorable to the defense, or as a hostile witness, or for cross-examination under Federal Rule of Evidence 806,[10] then it is difficult to see what, if anything, is gained by a rule that requires the prosecution to make that declarant "available."[11]

While the benefits seem slight, the burden imposed by the Court of Appeals' unavailability rule is significant. A constitutional rule requiring a determination of availability every time the prosecution seeks to introduce a co-conspirator's declaration automatically adds another avenue of appellate review in these complex cases. The co-conspirator rule apparently is the most frequently used exception to the hearsay rule. See 4 D. Louisell & C. Mueller,

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[10] It is not clear from the Court of Appeals' opinion whether in order to meet its burden of showing unavailability, the prosecution would be required to call the declarant as a witness, or only to ensure that the declarant is available for testimony if needed. The unavailability rule suffers from many of the same flaws under either interpretation, and in fact may be even less defensible under an interpretation requiring the prosecution to call each declarant as a witness.

[11] In addition to the reasons mentioned in the text why an unavailability rule would be of little value, many co-conspirator statements are not introduced to prove the truth of the matter asserted, and thus do not come within the traditional definition of hearsay, even without the special exemption of Federal Rule of Evidence 801(d)(2)(E). Thus, some of the out-of-court statements in this case presumably could be admitted without implicating the Confrontation Clause. For example, in one of the recorded phone conversations Levan and Lazaro discuss the missing tray with Lazaro suggesting that "Mike" took it and speculating about who set Lazaro up for the May 25 stop. 748 F. 2d, at 815. Certainly these statements were not introduced in order to prove the truth of the matters asserted, but as background for the conspiracy, or to explain the significance of certain events. We explained just last Term that admission of nonhearsay "raises no Confrontation Clause concerns." *Tennessee* v. *Street*, 471 U. S. 409, 414 (1985). Cross-examination regarding such statements would contribute nothing to Confrontation Clause interests.

Federal Evidence § 427, p. 331 (1980).[12] A rule that required each invocation of Rule 801(d)(2)(E) to be accompanied by a decision on the declarant's availability would impose a substantial burden on the entire criminal justice system.

Moreover, an unavailability rule places a significant practical burden on the prosecution. In every case involving co-conspirator statements, the prosecution would be required to identify with specificity each declarant, locate those declarants, and then endeavor to ensure their continuing availability for trial. Where declarants are incarcerated there is the burden on prison officials and marshals of transporting them to and from the courthouse, as well as the increased risk of escape. For unincarcerated declarants the unavailability rule would require that during the sometimes lengthy period before trial the Government must endeavor to be aware of the whereabouts of the declarant or run the risk of a court determination that its efforts to produce the declarant did not satisfy the test of "good faith." See *Ohio* v. *Roberts*, 448 U. S., at 74–77; *id.*, at 77–82 (BRENNAN, J., dissenting); see also *United States* v. *Ordonez*, 737 F. 2d 793, 802 (CA9 1984).[13]

An unavailability rule would impose all of these burdens even if neither the prosecution nor the defense wished to examine the declarant at trial. Any marginal protection to the defendant by forcing the government to call as witnesses those co-conspirator declarants who are available, willing to testify, hostile to the defense and yet not already subpoenaed by the prosecution, when the defendant himself can call and cross-examine such declarants, cannot support an unavail-

[12] Federal Rule of Evidence 801 characterizes out-of-court statements by co-conspirators as exemptions from, rather than exceptions to, the hearsay rule. Whether such statements are termed exemptions or exceptions, the same Confrontation Clause principles apply.

[13] The court in *Ordonez* found a Confrontation Clause violation because the Government, after introducing drug ledgers containing entries made by unidentified co-conspirators, did not adequately demonstrate that it was totally unable to identify those conspirators.

ability rule. We hold today that the Confrontation Clause does not embody such a rule.

III

To some degree, respondent's arguments in this case require us to revisit this Court's resolution of this question in *Dutton* v. *Evans*, 400 U. S. 74 (1970). Although *Dutton* involved a state co-conspirator rule instead of Federal Rule of Evidence 801, the state rule actually admitted a broader category of co-conspirator statements. Nevertheless, a plurality of this Court found that the rule did not violate the Confrontation Clause and a fifth Member of the Court, Justice Harlan, reasoned that the Confrontation Clause was not applicable at all. In *Dutton* the plurality stated that "we do not question the validity of the coconspirator exception applied in the federal courts." *Id.*, at 80. Upon closer examination today, we continue to affirm the validity of the use of co-conspirator statements, and we decline to require a showing of the declarant's unavailability as a prerequisite to their admission.

We accordingly reverse the judgment of the Court of Appeals for the Third Circuit.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

With respect to the case before us, the majority takes but a small step. In *Ohio* v. *Roberts*, 448 U. S. 56 (1980), the Court held: "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'" *Id.*, at 66 (quoting *Dutton* v. *Evans*, 400 U. S. 74, 89 (1970) (plurality opinion)). The majority now assures us that "[t]he reliability of the out-of-court statements is not at issue in this case." *Ante*, at 391, n. 3. Respondent is thus free to return to the Court of Appeals and argue that the

co-conspirator declarations admitted against him lack the "indicia of reliability" demanded by the Confrontation Clause.[1]

With respect to its constitutional analysis, however, the majority makes a giant leap. Even while conceding that the "very mission" of the Confrontation Clause is to "'advance "the accuracy of the truth-determining process in criminal trials,"'" *ante*, at 396, the Court today holds that the Clause is not offended when the prosecution fails to make even the slightest effort to produce for cross-examination the authors of the out-of-court statements with which it hopes to convict a defendant. Because I cannot share the majority's implicit faith that the camaraderie of a criminal conspiracy can substitute for in-court cross-examination to guarantee the reliability of conspiratorial statements, I can neither accept the majority's analysis nor stand silent while the values embodied in the Sixth Amendment are so cavalierly subordinated to prosecutorial efficiency.

I

A

In *Ohio* v. *Roberts*, *supra*, after canvassing the many previous cases that had examined the relationship between the

[1] Today's decision does nothing to resolve the conflict among the lower courts as to whether declarations of co-conspirators who are not present in court for cross-examination must be shown to have particularized "indicia of reliability" before they can be admitted for substantive purposes against a criminal defendant. Compare *United States* v. *DeLuna*, 763 F. 2d 897 (CA8 1985) (particularized inquiry into reliability of co-conspirator statements demanded in addition to unavailability requirement); *United States* v. *Ordonez*, 722 F. 2d 530, 535 (CA9 1983) (particularized assessment of reliability needed for every statement admitted under co-conspirator hearsay exemption); *United States* v. *Perez*, 702 F. 2d 33 (CA2) (same), cert. denied, 462 U. S. 1108 (1983), with *Boone* v. *Marshall*, 760 F. 2d 117, 119 (CA6 1985) (declaration admitted under co-conspirator exemption "automatically satisfies the Sixth Amendment requirements"); *United States* v. *Molt*, 758 F. 2d 1198 (CA7 1985) (same); *Ottomano* v. *United States*, 468 F. 2d 269, 273 (CA1 1972) (same), cert. denied, 409 U. S. 1128 (1973). See Mueller, The Federal Coconspirator Exception: Action, Assertion, and Hearsay, 12 Hofstra L. Rev. 323, 361–362, and nn. 131–132 (1984).

Confrontation Clause of the Sixth Amendment and the many exceptions to the hearsay rule, the Court noted:

> "The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. . . .
>
> "The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Id.*, at 65 (quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 107 (1934)).

This sweeping language was in no way limited to any particular variety of out-of-court declarations, and the Third Circuit panel that the Court reverses today was hardly alone in believing the rule in *Roberts* to be applicable to all such declarations. See, *e. g.*, *United States* v. *Massa*, 740 F. 2d 629, 639 (CA8 1984); *Haggins* v. *Warden*, 715 F. 2d 1050, 1055 (CA6 1983), cert. denied, 464 U. S. 1071 (1984); see also *United States* v. *Caputo*, 758 F. 2d 944, 950, n. 2 (CA3 1985) (collecting cases). The majority, however, now tells us that *Roberts* "simply reaffirmed a longstanding rule . . . that applies unavailability analysis to prior testimony." *Ante*, at 394. This effort to confine *Roberts* misconstrues both the meaning of that decision and the essential command of the Confrontation Clause.

Contrary to the majority's suggestion, it is clear that the *Roberts* Court consciously sought to lay down an analytical

framework applicable to all out-of-court declarations introduced by the prosecution for the truth they contain. JUSTICE BLACKMUN, writing for the Court, introduced his affirmation of the Confrontation Clause's twin requirements of unavailability and reliability by noting: "The Court has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay "exceptions."' *California* v. *Green*, 399 U. S. [149,] 162 [1970]. But a general approach to the problem is discernible." 448 U. S., at 64–65. For its general principles, the *Roberts* Court of course turned to a number of cases involving former testimony, *e. g.*, *Mancusi* v. *Stubbs*, 408 U. S. 204 (1972); *Barber* v. *Page*, 390 U. S. 719 (1968); *Motes* v. *United States*, 178 U. S. 458 (1900); *California* v. *Green*, *supra* (all cited at 448 U. S., at 65). But it also relied on *Dutton* v. *Evans*, 400 U. S. 74 (1970) (cited at 448 U. S., at 65, n. 7, and 66), where the hearsay had been admitted pursuant to the Georgia co-conspirator exception, and *Douglas* v. *Alabama*, 380 U. S. 415 (1965) (cited at 448 U. S., at 63), which involved an accomplice's confession. Indeed, it was on *Douglas* that *Roberts* relied for the proposition that "the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that a 'primary interest secured by [the provision] is the right of cross-examination.'" 448 U. S., at 63 (footnote omitted) (quoting *Douglas*, *supra*, at 418).

The absence of any language in *Roberts* confining its analysis to prior testimony is not surprising. The Court simply recognized that whenever the prosecution seeks to convict a defendant by relying on the truth asserted in out-of-court declarations, confrontation and cross-examination of the declarant in open court are the most trusted guarantors of the reliability that is the primary concern of the Confrontation Clause. The need for these guarantors is as critical in cases involving the extrajudicial statements of co-conspirators as it is in cases involving the prior testimony of an absent declarant or the confession of an accomplice.

B

When the prosecution introduces the statements of a co-conspirator merely to show what the declarant might have been thinking or what he wished his listeners to believe at the time he spoke, neither the rule against hearsay nor the Confrontation Clause is implicated by their admission against a defendant. See *Tennessee* v. *Street*, 471 U. S. 409 (1985). However, when the prosecution invokes the co-conspirator exemption to the hearsay rule, as it does in this case, it is urging the truth of the matters asserted in the extrajudicial statements. The question here must be whether we have so much confidence in the factual accuracy of statements made by conspirators in furtherance of their conspiracy that we deem the testing of these statements by cross-examination unnecessary to guarantee the reliability of a trial's result.

The majority is quite right to suggest that "[c]onspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand." *Ante*, at 395. However, the differences between an accomplice's conspiratorial utterances and his testimony in court are not merely those of diction and demeanor. That a statement was truly made "in furtherance" of a conspiracy cannot possibly be a guarantee, or even an indicium, of its reliability. See Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1384–1391 (1972); Note, Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay, 53 Ford. L. Rev. 1291, 1311–1312 (1985). As one commentator has noted:

> "Conspirators' declarations are good to prove that some conspiracy exists but less trustworthy to show its aims and membership. The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different

members) and other aims than in fact it has. It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law." Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159, 1165–1166 (1954).

The unreliability of co-conspirator declarations as trial evidence is not merely a product of the duplicity with which criminals often conduct their business. It also stems from the ambiguities that so often appear in all casual conversations, not just those of outlaws. See, *e. g.*, *Dutton* v. *Evans*, *supra*, at 104 (MARSHALL, J., dissenting). And the difficulties one has in making sense of slang and dialect can be compounded where conspirators use private codes, as indeed they did in this case. Because of these problems, trained case agents are often hard pressed to piece together the facts of a criminal conspiracy from the confused tangle of conversations they have intercepted. The appearance of a co-conspirator declarant in court will allow the elimination of ambiguity that neither side has a right to profit from.

C

Consideration of the reasons why co-conspirator declarations have been exempted from the rule against hearsay only confirms doubts as to the reliability of the truth asserted in those statements. In contrast to other types of statements excepted from the rule, the co-conspirator declarations have not been admitted because of a belief in their special reliability. See Davenport, *supra*, at 1384–1385; Levie, *supra*, at 1161–1167. Rather, the root of the exemption lies in substantive law. Under the agency theory that supports conspiracy law, "once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all." *United States* v. *Gooding*, 12 Wheat. 460, 469 (1827). Every statement of co-conspirators in furtherance of

their illegal scheme is thus a verbal act admissible against each conspirator as if it had been his own.

This agency theory, which even the Advisory Committee on the proposed Federal Rules of Evidence labeled "at best a fiction," Advisory Committee Notes on Fed. Rule Evid. 801(d)(2)(E), 28 U. S. C. App., p. 718, might justify the exemption conferred upon co-conspirator declarations from the traditional rule against hearsay. But it speaks not at all to the Confrontation Clause's concern for reliable factfinding.

II

Without even attempting to argue that co-conspirator declarations have an inherent reliability that might justify their admission at trial when the declarant is not present in court for cross-examination, the majority instead supports its holding by arguing that "it is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force." *Ante*, at 395. Indeed, the Court asserts, "co-conspirator statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence." *Ante*, at 395–396.

I truly cannot understand the majority's fear that a rule requiring the prosecution to do its best to produce a co-conspirator declarant in court would somehow deprive triers of fact of valuable evidence. Under this rule, if the prosecution could not in all good faith produce the declarant, the extrajudicial statements could come in, so long as they could be shown to have "adequate 'indicia of reliability,'" *Roberts*, 448 U. S., at 66. The majority's fear must therefore stem from a notion that if the prosecution is able to produce the declarant in court, his presence will somehow prevent the jury from hearing the truth. This conclusion overlooks the critical importance of cross-examination in the truth-seeking process.

If a declarant takes the stand, his out-of-court statements will still be admitted as evidence, so long as they are sufficiently reliable and there are no other grounds for their exclusion. And cross-examination will only enhance their value to the jury. The defendant will have a chance to inquire into the circumstances under which the statements were made and the motives that might have led the declarant to color their truth at the time. Cross-examination also may force the declarant to clarify ambiguous phrases and coded references. If anything he says is inconsistent with his prior statement, the declarant will no doubt advance some explanation for the inaccuracy of the extrajudicial statement—"an explanation a jury may be expected to understand and take into account in deciding which, if either, of the statements represents the truth," *California* v. *Green*, 399 U. S. 149, 159 (1970). Cf. *Nelson* v. *O'Neil* 402 U. S. 622, 627–629 (1971).

Whether or not a co-conspirator produced in court affirms, denies, or qualifies the truth of his out-of-court statement, his presence will contribute to the accuracy of the factfinding enterprise, the accuracy that is the primary concern of the Confrontation Clause. Whatever truth is contained in his extrajudicial declarations cannot be lost. It can only be supplemented by additional information of no less use to the triers of fact.

III

Recognizing that there may well be cases in which the cross-examination of a co-conspirator declarant is indispensable to a defendant's case, the Court reminds us that a defendant can always exercise his rights under the Compulsory Process Clause and call the declarant as his own witness. As long as this option remains open to a defendant, the Court reasons, "it is difficult to see what, if anything, is gained by a rule that requires the prosecution to make that declarant 'available.'" *Ante*, at 398. However, even assuming, as the Court seems to do, that the "good faith standard governing

the state's obligation to produce defense witnesses [pursuant to the Compulsory Process Clause] is precisely the same one that governs the state's obligation to confront a defendant with the witnesses against him [pursuant to the Confrontation Clause]," Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567, 588 (1978), this is not a satisfactory response to respondent's Confrontation Clause claim.

The short answer to the majority's argument is that the Confrontation Clause gives a defendant a *right* to be confronted with the witnesses against him, not merely an opportunity to seek out witnesses on his own. As one court once noted of a situation similar to that presented in this case:

> "That [a co-conspirator declarant] was available to be called as a witness does not mitigate the prosecution's misconduct here. The State sought to shift to the defendant the risk of calling [the declarant] to the stand. To accept the State's argument that the availability of [the declarant] is the equivalent of putting him on the stand and subjecting him to cross-examination would severely alter the presumptions of innocence and the burdens of proof which protect the accused." *Hoover* v. *Beto*, 439 F. 2d 913, 924 (CA5 1971) (Wisdom, J.), rev'd on rehearing en banc, 467 F. 2d 516 (CA5) (over dissent of seven judges), cert. denied, 409 U. S. 1086 (1972).

See also *Dutton* v. *Evans*, 400 U. S., at 104 (MARSHALL, J., dissenting).

The disadvantages that the majority would impose upon a defendant are not merely theoretical. The Court notes the "significant practical burden" placed on the prosecution by a requirement that the Government identify co-conspirator declarants with specificity. *Ante*, at 399. As an illustration of the difficulties that the prosecution would be forced to face, the majority refers to *United States* v. *Ordonez*, 737 F. 2d 793 (CA9 1984), where the court found a Confrontation Clause violation in the Government's failure to identify the

individuals who had made the entries in the "drug ledgers" introduced as evidence against the defendant. *Ante*, at 399, n. 13. However, the Court now places this "significant practical burden" upon the defendant, who may well be in no better a position to make such identifications. Even were it proper to assume the defendant's guilt and impute to him knowledge regarding pending charges, it can hardly be claimed that a defendant who has played but a minor role in a complex conspiracy necessarily has an intimate knowledge of the names and activities of his alleged co-conspirators.[2] "The prosecution therefore [should have] the burden of producing and calling to the witness stand the persons whose out-of-court statements it uses against the accused because, as between the two sides, the prosecution is in a better position to identify them and to initiate their production at that time." Westen, *supra*, at 616.

Even when a defendant is in as good a position as the prosecution to subpoena available declarants, a rule requiring him to call those declarants as his own witnesses may deny the defendant certain tactical advantages vouchsafed him by the Confrontation Clause. Under the regime established today, the only cross-examination that will attend the prosecution's introduction of co-conspirator declarations will be of whoever heard or recorded those statements and will focus merely on whether or not the statements were actually made. Any inquiry into the reliability of the statements must await the defendant's case. But if the defendant chooses to call the declarant as a defense witness, defendant risks bolstering in the jury's eyes the very conspiracy allegations he wishes to rebut. That the witness is viewed as hostile by the defendant, and has possibly been certified as such by the trial judge, does not necessarily mean that his relationship to the defendant will be so perceived by the jury, unless defense counsel

[2] I realize that this was not the case here. However, the Court's holding addresses all cases involving co-conspirator declarations and thus extends to all the hypotheticals I discuss.

chooses to dramatize the antagonism with hyperbole that might lose him the sympathy of the jury.

Moreover, even the harshest grilling of a declarant by the defense can occur only after the prosecution has rested its case. In a complex conspiracy trial, the time elapsing between the introduction of the hearsay and the cross-examination of the declarant may be quite substantial. During this time, the declarations will be unrebutted in jurors' minds. And their effect may actually be enhanced should either the defense or prosecution repeat the statements in the course of examining the declarant. In short, "[o]nly a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure." *New York Life Ins. Co.* v. *Taylor*, 79 U. S. App. D. C. 66, 74, 147 F. 2d 297, 305 (1945); see *United States* v. *Oates*, 560 F. 2d 45, 82, n. 39 (CA2 1977).

In federal prosecutions, there is an additional drawback. When a defendant calls a declarant as his own witness, he has no statutory right to obtain any prior statements of that declarant in the Government's possession—a right that attaches only "[a]fter a witness called by the United States has testified on direct examination," 18 U. S. C. § 3500.

In view of all the disadvantages that attend a defendant's decision to call a co-conspirator declarant as a witness, the majority's reliance on the defendant's right to compulsory process to justify a decision to deprive him of a critical aspect of his Confrontation Clause right cannot be supported. The two are simply not equivalent. Moreover, the majority's belief that an unavailability requirement would contribute nothing but a cast of unwanted supernumeraries has no basis in the realities of criminal prosecutions. There might be instances in which an available declarant is of so little value to either side that calling him as a witness would truly be an unnecessary exercise. See, *e. g.*, *Anderson* v. *United States*,

417 U. S. 211, 220, n. 11 (1974). But a defendant's failure to call a declarant as his own witness can in no way be taken as proof that such is the case.

IV

At bottom, today's decision rests upon the Court's judgment that a defendant's constitutional interest in subjecting the extrajudicial declarations of co-conspirators to the cross-examination that has traditionally been the primary guarantee of reliability in trials must be subordinated to considerations of prosecutorial efficiency. I do not believe the concerns of the Confrontation Clause should be so easily disregarded. The plight of Sir Walter Raleigh, condemned on the deposition of an alleged accomplice who had since recanted, may have loomed large in the eyes of those who drafted that constitutional guarantee. See F. Heller, The Sixth Amendment 104 (1951); Stephen, The Trial of Sir Walter Raleigh, in 2 Transactions of the Royal Historical Society 172 (4th series 1919). But the Framers, had they the prescience, would surely have been as apprehensive of the spectacle of a defendant's conviction upon the testimony of a handful of surveillance technicians and a very large box of tapes recording the boasts, faulty recollections, and coded or ambiguous utterances of outlaws. The Court's decision helps clear the way for this spectacle to become a common occurrence. I dissent.

MORAN, SUPERINTENDENT, RHODE ISLAND DEPARTMENT OF CORRECTIONS *v.* BURBINE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84-1485. Argued November 13, 1985—Decided March 10, 1986

After respondent was arrested by the Cranston, Rhode Island, police in connection with a breaking and entering, the police obtained evidence suggesting that he might be responsible for the murder of a woman in Providence earlier that year. An officer telephoned the Providence police at approximately 6 p. m., and an hour later Providence police officers arrived at the Cranston headquarters to question respondent about the murder. That same evening, unknown to respondent, his sister, who was unaware that respondent was then under suspicion for murder, telephoned the Public Defender's Office to obtain legal assistance for her brother on the burglary charge. At 8:15 p. m., an Assistant Public Defender telephoned the Cranston detective division, stated that she would act as respondent's counsel if the police intended to question him, and was informed that he would not be questioned further until the next day. The attorney was not informed that the Providence police were there or that respondent was a murder suspect. Less than an hour later, the Providence police began a series of interviews with respondent, giving him warnings pursuant to *Miranda* v. *Arizona*, 384 U. S. 436, before each session and obtaining three signed waivers from him prior to eliciting three signed statements admitting to the murder. At all relevant times, respondent was unaware of his sister's efforts to retain counsel and of the attorney's telephone call, but at no time did he request an attorney. The state trial court denied his pretrial motion to suppress the statements, finding that he had validly waived his privilege against self-incrimination and his right to counsel. Respondent was convicted of first-degree murder, and the Rhode Island Supreme Court affirmed, rejecting the contention that the Fifth and Fourteenth Amendments required suppression of the statements. Respondent then unsuccessfully sought habeas corpus relief in Federal District Court, but the Court of Appeals reversed, holding that the police conduct in failing to inform respondent as to the attorney's call had fatally tainted his waivers of his Fifth Amendment privilege against self-incrimination and right to counsel.

Held:

1. The Court of Appeals erred in construing the Fifth Amendment to require the exclusion of respondent's confessions. The record supports the state-court findings that the Providence police followed *Miranda* procedures with precision in obtaining respondent's written waivers of his Fifth Amendment rights prior to eliciting the confessions. Pp. 420–428.

(a) The police's failure to inform respondent of the attorney's telephone call did not deprive him of information essential to his ability to knowingly waive his Fifth Amendment rights to remain silent and to the presence of counsel. Events occurring outside of a suspect's presence and entirely unknown to him can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. Once it is demonstrated that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law. The level of the police's culpability—whether intentional or inadvertent—in failing to inform respondent of the telephone call has no bearing on the validity of the waivers. Pp. 421–424.

(b) *Miranda*'s reach will not be extended so as to require the reversal of a conviction if the police are less than forthright in their dealings with an attorney or if they fail to tell a suspect of an attorney's unilateral efforts to contact him. Reading *Miranda* to forbid police deception of an *attorney* would cut that decision loose from its rationale of guarding against abridgment of the *suspect's* Fifth Amendment rights. And, while a rule requiring that the police inform a suspect of an attorney's efforts to reach him might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation, overriding practical considerations—particularly the ease and clarity of *Miranda*'s application—counsel against adoption of the rule. Moreover, such a rule would work a substantial and inappropriate shift in the subtle balance struck in *Miranda* between society's legitimate law enforcement interests and the protection of the accused's Fifth Amendment rights. Pp. 424–428.

2. The conduct of the police did not violate respondent's Sixth Amendment right to counsel. That right initially attaches only after the first formal charging procedure, whereas the challenged police conduct here occurred prior to respondent's arraignment. The contention that the right to noninterference with an attorney's dealings with a criminal suspect arises the moment that the relationship is formed, or, at the very least, once the suspect is placed in custodial interrogation is not supported by precedent. Moreover, such contention is both practically

and theoretically unsound. By its very terms, the Sixth Amendment becomes applicable only when the government's role shifts from investigation to accusation through the initiation of adversary judicial proceedings. The possibility that custodial interrogation may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel. Pp. 428–432.

3. Nor was the asserted misconduct of the police—particularly the conveying of false information to the attorney—so offensive as to deprive respondent of the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment. Although on facts more egregious than those presented here police deception might rise to a level of a due process violation, the conduct challenged here falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States. Pp. 432–434.

753 F. 2d 178, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 434.

Constance L. Messore, Special Assistant Attorney General of Rhode Island, argued the cause for petitioner. With her on the briefs was *Arlene Violet*, Attorney General.

Deputy Solicitor General Frey argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Fried*, *Assistant Attorney General Trott*, *Andrew J. Pincus*, and *Sara Criscitelli*.

Robert B. Mann argued the cause for respondent. With him on the brief was *William F. Reilly*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Steve White*, Chief Assistant Attorney General, *Karl S. Mayer*, Assistant Attorney General, and *Ann K. Jensen* and *Dane R. Gillette*, Deputy Attorneys General, *Charles A. Graddick*, Attorney General of Alabama, *Norman C. Gorsuch*, Attorney General of Alaska, *Robert K. Corbin*, Attorney General of Arizona, *Duane Woodard*, Attorney General of Colorado, *Austin J. McGuigan*, Chief State's Attorney of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Neil F. Hartigan*, Attorney General

JUSTICE O'CONNOR delivered the opinion of the Court.

After being informed of his rights pursuant to *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and after executing a series of written waivers, respondent confessed to the murder of a young woman. At no point during the course of the interrogation, which occurred prior to arraignment, did he request an attorney. While he was in police custody, his sister attempted to retain a lawyer to represent him. The attorney telephoned the police station and received assurances that respondent would not be questioned further until the next day. In fact, the interrogation session that yielded the inculpatory statements began later that evening. The question presented is whether either the conduct of the police or respond-

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of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Stephen H. Sachs*, Attorney General of Maryland, *Stanley D. Steinborn*, Attorney General of Michigan, *William L. Webster*, Attorney General of Missouri, *Mike Greeley*, Attorney General of Montana, *Stephen E. Merrill*, Attorney General of New Hampshire, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Leroy S. Zimmerman*, Attorney General of Pennsylvania, *Travis Medlock*, Attorney General of South Carolina, *Mark V. Meierhenry*, Attorney General of South Dakota, *W. J. Michael Cody*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, *Gerald L. Baliles*, Attorney General of Virginia, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Charlie Brown*, Attorney General of West Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, *A. G. McClintock*, Attorney General of Wyoming, *Richard G. Opper*, Attorney General of Guam, *J'Ada M. Finch-Sheen*, Attorney General of the Virgin Islands, and *Jack E. Yelverton*; and for Americans for Effective Law Enforcement, Inc., by *David Crump*, *Daniel B. Hales*, *Fred E. Inbau*, *Wayne W. Schmidt*, and *James P. Manak*.

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *William W. Falsgraf*, *Steven H. Goldblatt*, and *Charles G. Cole*; for the National Association of Criminal Defense Lawyers et al. by *Judith H. Mizner*, *Nancy Gertner*, and *Scott Baldwin*; and for the National Legal Aid and Defender Association et al. by *Kim R. Faucett*, *James R. Neuhard*, *Jack D. Novik*, and *John A. MacFadyen*.

ent's ignorance of the attorney's efforts to reach him taints the validity of the waivers and therefore requires exclusion of the confessions.

I

On the morning of March 3, 1977, Mary Jo Hickey was found unconscious in a factory parking lot in Providence, Rhode Island. Suffering from injuries to her skull apparently inflicted by a metal pipe found at the scene, she was rushed to a nearby hospital. Three weeks later she died from her wounds.

Several months after her death, the Cranston, Rhode Island police arrested respondent and two others in connection with a local burglary. Shortly before the arrest, Detective Ferranti of the Cranston police force had learned from a confidential informant that the man responsible for Ms. Hickey's death lived at a certain address and went by the name of "Butch." Upon discovering that respondent lived at that address and was known by that name, Detective Ferranti informed respondent of his *Miranda* rights. When respondent refused to execute a written waiver, Detective Ferranti spoke separately with the two other suspects arrested on the breaking and entering charge and obtained statements further implicating respondent in Ms. Hickey's murder. At approximately 6 p. m., Detective Ferranti telephoned the police in Providence to convey the information he had uncovered. An hour later, three officers from that department arrived at the Cranston headquarters for the purpose of questioning respondent about the murder.

That same evening, at about 7:45 p. m., respondent's sister telephoned the Public Defender's Office to obtain legal assistance for her brother. Her sole concern was the breaking and entering charge, as she was unaware that respondent was then under suspicion for murder. She asked for Richard Casparian who had been scheduled to meet with respondent earlier that afternoon to discuss another charge unrelated to either the break-in or the murder. As soon as the conversa-

tion ended, the attorney who took the call attempted to reach Mr. Casparian. When those efforts were unsuccessful, she telephoned Allegra Munson, another Assistant Public Defender, and told her about respondent's arrest and his sister's subsequent request that the office represent him.

At 8:15 p. m., Ms. Munson telephoned the Cranston police station and asked that her call be transferred to the detective division. In the words of the Supreme Court of Rhode Island, whose factual findings we treat as presumptively correct, 28 U. S. C. § 2254(d), the conversation proceeded as follows:

> "A male voice responded with the word 'Detectives.' Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the Providence Police were at the Cranston police station or that Burbine was a suspect in Mary's murder." *State* v. *Burbine*, 451 A. 2d 22, 23–24 (1982).

At all relevant times, respondent was unaware of his sister's efforts to retain counsel and of the fact and contents of Ms. Munson's telephone conversation.

Less than an hour later, the police brought respondent to an interrogation room and conducted the first of a series of interviews concerning the murder. Prior to each session, respondent was informed of his *Miranda* rights, and on three separate occasions he signed a written form acknowledging that he understood his right to the presence of an attorney and explicitly indicating that he "[did] not want an attorney

called or appointed for [him]" before he gave a statement. App. to Pet. for Cert. 94, 103, 107. Uncontradicted evidence at the suppression hearing indicated that at least twice during the course of the evening, respondent was left in a room where he had access to a telephone, which he apparently declined to use. Tr. of Suppression Hearing 23, 85. Eventually, respondent signed three written statements fully admitting to the murder.

Prior to trial, respondent moved to suppress the statements. The court denied the motion, finding that respondent had received the *Miranda* warnings and had "knowingly, intelligently, and voluntarily waived his privilege against self-incrimination [and] his right to counsel." App. to Pet. for Cert. 116. Rejecting the contrary testimony of the police, the court found that Ms. Munson did telephone the detective bureau on the evening in question, but concluded that "there was no . . . conspiracy or collusion on the part of the Cranston Police Department to secrete this defendant from his attorney." *Id.*, at 114. In any event, the court held, the constitutional right to request the presence of an attorney belongs solely to the defendant and may not be asserted by his lawyer. Because the evidence was clear that respondent never asked for the services of an attorney, the telephone call had no relevance to the validity of the waiver or the admissibility of the statements.

The jury found respondent guilty of murder in the first degree, and he appealed to the Supreme Court of Rhode Island. A divided court rejected his contention that the Fifth and Fourteenth Amendments to the Constitution required the suppression of the inculpatory statements and affirmed the conviction. Failure to inform respondent of Ms. Munson's efforts to represent him, the court held, did not undermine the validity of the waivers. "It hardly seems conceivable that the additional information that an attorney whom he did not know had called the police station would have added significantly to the quantum of information necessary for the

accused to make an informed decision as to waiver." 451 A. 2d, at 29. Nor, the court concluded, did *Miranda* v. *Arizona*, or any other decision of this Court independently require the police to honor Ms. Munson's request that interrogation not proceed in her absence. In reaching that conclusion, the court noted that because two different police departments were operating in the Cranston station house on the evening in question, the record supported the trial court's finding that there was no "conspiracy or collusion" to prevent Ms. Munson from seeing respondent. 451 A. 2d, at 30, n. 5. In any case, the court held, the right to the presence of counsel belongs solely to the accused and may not be asserted by "benign third parties, whether or not they happen to be attorneys." *Id.*, at 28.

After unsuccessfully petitioning the United States District Court for the District of Rhode Island for a writ of habeas corpus, 589 F. Supp. 1245 (1984), respondent appealed to the Court of Appeals for the First Circuit. That court reversed. 753 F. 2d 178 (1985). Finding it unnecessary to reach any arguments under the Sixth and Fourteenth Amendments, the court held that the police's conduct had fatally tainted respondent's "otherwise valid" waiver of his Fifth Amendment privilege against self-incrimination and right to counsel. *Id.*, at 184. The court reasoned that by failing to inform respondent that an attorney had called and that she had been assured that no questioning would take place until the next day, the police had deprived respondent of information crucial to his ability to waive his rights knowingly and intelligently. The court also found that the record would support "no other explanation for the refusal to tell Burbine of Attorney Munson's call than . . . deliberate or reckless irresponsibility." *Id.*, at 185. This kind of "blameworthy action by the police," the court concluded, together with respondent's ignorance of the telephone call, "vitiate[d] any claim that [the] waiver of counsel was knowing and voluntary." *Id.*, at 185, 187.

We granted certiorari to decide whether a prearraignment confession preceded by an otherwise valid waiver must be suppressed either because the police misinformed an inquiring attorney about their plans concerning the suspect or because they failed to inform the suspect of the attorney's efforts to reach him. 471 U. S. 1098 (1985). We now reverse.

II

In *Miranda* v. *Arizona*, the Court recognized that custodial interrogations, by their very nature, generate "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U. S., at 467. To combat this inherent compulsion, and thereby protect the Fifth Amendment privilege against self-incrimination, *Miranda* imposed on the police an obligation to follow certain procedures in their dealings with the accused. In particular, prior to the initiation of questioning, they must fully apprise the suspect of the State's intention to use his statements to secure a conviction, and must inform him of his rights to remain silent and to "have counsel present . . . if [he] so desires." *Id.*, at 468–470. Beyond this duty to inform, *Miranda* requires that the police respect the accused's decision to exercise the rights outlined in the warnings. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, [or if he] states that he wants an attorney, the interrogation must cease." *Id.*, at 473–474. See also *Edwards* v. *Arizona*, 451 U. S. 477 (1981).

Respondent does not dispute that the Providence police followed these procedures with precision. The record amply supports the state-court findings that the police administered the required warnings, sought to assure that respondent understood his rights, and obtained an express written waiver prior to eliciting each of the three statements. Nor does respondent contest the Rhode Island courts' determination that he at no point requested the presence of a lawyer.

He contends instead that the confessions must be suppressed because the police's failure to inform him of the attorney's telephone call deprived him of information essential to his ability to knowingly waive his Fifth Amendment rights. In the alternative, he suggests that to fully protect the Fifth Amendment values served by *Miranda*, we should extend that decision to condemn the conduct of the Providence police. We address each contention in turn.

A

Echoing the standard first articulated in *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), *Miranda* holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." 384 U. S., at 444, 475. The inquiry has two distinct dimensions. *Edwards* v. *Arizona*, *supra*, at 482; *Brewer* v. *Williams*, 430 U. S. 387, 404 (1977). First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. *Fare* v. *Michael C.*, 442 U. S. 707, 725 (1979). See also *North Carolina* v. *Butler*, 441 U. S. 369, 374–375 (1979).

Under this standard, we have no doubt that respondent validly waived his right to remain silent and to the presence of counsel. The voluntariness of the waiver is not at issue. As the Court of Appeals correctly acknowledged, the record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements. 753 F. 2d, at 184. Indeed it appears that it was respondent, and not the

police, who spontaneously initiated the conversation that led to the first and most damaging confession. *Id.*, at 180. Cf. *Edwards* v. *Arizona*, *supra*. Nor is there any question about respondent's comprehension of the full panoply of rights set out in the *Miranda* warnings and of the potential consequences of a decision to relinquish them. Nonetheless, the Court of Appeals believed that the "[d]eliberate or reckless" conduct of the police, in particular their failure to inform respondent of the telephone call, fatally undermined the validity of the otherwise proper waiver. 753 F. 2d, at 187. We find this conclusion untenable as a matter of both logic and precedent.

Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. Under the analysis of the Court of Appeals, the same defendant, armed with the same information and confronted with precisely the same police conduct, would have knowingly waived his *Miranda* rights had a lawyer not telephoned the police station to inquire about his status. Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result. No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. See, *e. g.*, *Oregon* v. *Elstad*, 470 U. S. 298, 316–317 (1985); *United States* v. *Washington*, 431 U. S. 181, 188 (1977). Cf. *Hill* v. *Lockhart*, 474 U. S. 52, 56 (1985); *McMann* v. *Richardson*, 397 U. S. 759, 769 (1970). Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis

is complete and the waiver is valid as a matter of law.[1] The Court of Appeals' conclusion to the contrary was in error.

Nor do we believe that the level of the police's culpability in failing to inform respondent of the telephone call has any bearing on the validity of the waivers. In light of the state-court findings that there was no "conspiracy or collusion" on the part of the police, 451 A. 2d, at 30, n. 5, we have serious doubts about whether the Court of Appeals was free to conclude that their conduct constituted "deliberate or reckless irresponsibility." 753 F. 2d, at 185; see 28 U. S. C. § 2254(d). But whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights. Although highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident. Compare *Escobedo* v. *Illinois*, 378 U. S. 478, 481 (1964) (excluding confession where police incorrectly told the *suspect* that his lawyer "'didn't want to see' him"). Nor was the failure to inform respondent of the telephone call the kind of "trick[ery]" that can vitiate the validity of a waiver. *Miranda*, 384 U. S., at 476. Granting that the "deliberate or reckless" withholding of information is objectionable as a

[1] The dissent incorrectly reads our analysis of the components of a valid waiver to be inconsistent with the Court's holding in *Edwards* v. *Arizona*, 451 U. S. 477 (1981). *Post*, at 452. When a suspect *has* requested counsel, the interrogation must cease, regardless of any question of waiver, unless the suspect himself initiates the conversation. In the course of its lengthy exposition, however, the dissent never comes to grips with the crucial distinguishing feature of this case—that Burbine at no point requested the presence of counsel, as was his right under *Miranda* to do. We do not quarrel with the dissent's characterization of police interrogation as a "privilege terminable at the will of the suspect." *Post*, at 458. We reject, however, the dissent's entirely undefended suggestion that the Fifth Amendment "right to counsel" requires anything more than that the police inform the suspect of his right to representation and honor his request that the interrogation cease until his attorney is present. See, *e. g.*, *Michigan* v. *Mosley*, 423 U. S. 96, 104, n. 10 (1975).

matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. Because respondent's voluntary decision to speak was made with full awareness and comprehension of all the information *Miranda* requires the police to convey, the waivers were valid.

B

At oral argument respondent acknowledged that a constitutional rule requiring the police to inform a suspect of an attorney's efforts to reach him would represent a significant extension of our precedents. Tr. of Oral Arg. 32–33. He contends, however, that the conduct of the Providence police was so inimical to the Fifth Amendment values *Miranda* seeks to protect that we should read that decision to condemn their behavior. Regardless of any issue of waiver, he urges, the Fifth Amendment requires the reversal of a conviction if the police are less than forthright in their dealings with an attorney or if they fail to tell a suspect of a lawyer's unilateral efforts to contact him. Because the proposed modification ignores the underlying purposes of the *Miranda* rules and because we think that the decision as written strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights, we decline the invitation to further extend *Miranda*'s reach.

At the outset, while we share respondent's distaste for the deliberate misleading of an officer of the court, reading *Miranda* to forbid police deception of an *attorney* "would cut [the decision] completely loose from its own explicitly stated rationale." *Beckwith* v. *United States*, 425 U. S. 341, 345 (1976). As is now well established, "[t]he . . . *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the [suspect's] right against compulsory self-incrimination [is] pro-

tected.'" *New York* v. *Quarles*, 467 U. S. 649, 654 (1984), quoting *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974). Their objective is not to mold police conduct for its own sake. Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege. The purpose of the *Miranda* warnings instead is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights. Clearly, a rule that focuses on how the police treat an attorney—conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation—would ignore both *Miranda*'s mission and its only source of legitimacy.

Nor are we prepared to adopt a rule requiring that the police inform a suspect of an attorney's efforts to reach him. While such a rule might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation, overriding practical considerations counsel against its adoption. As we have stressed on numerous occasions, "[o]ne of the principal advantages" of *Miranda* is the ease and clarity of its application. *Berkemer* v. *McCarty*, 468 U. S. 420, 430 (1984); see also *New York* v. *Quarles*, *supra*, at 662–664 (concurring opinion); *Fare* v. *Michael C.*, 442 U. S., at 718. We have little doubt that the approach urged by respondent and endorsed by the Court of Appeals would have the inevitable consequence of muddying *Miranda*'s otherwise relatively clear waters. The legal questions it would spawn are legion: To what extent should the police be held accountable for knowing that the accused has counsel? Is it enough that someone in the station house knows, or must the interrogating officer himself know of counsel's efforts to contact the suspect? Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter? We are unwilling to modify *Miranda* in a

manner that would so clearly undermine the decision's central "virtue of informing police and prosecutors with specificity . . . what they may do in conducting [a] custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Fare* v. *Michael C.*, *supra*, at 718.

Moreover, problems of clarity to one side, reading *Miranda* to require the police in each instance to inform a suspect of an attorney's efforts to reach him would work a substantial and, we think, inappropriate shift in the subtle balance struck in that decision. Custodial interrogations implicate two competing concerns. On the one hand, "the need for police questioning as a tool for effective enforcement of criminal laws" cannot be doubted. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 225 (1973). Admissions of guilt are more than merely "desirable," *United States* v. *Washington*, 431 U. S., at 186; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. On the other hand, the Court has recognized that the interrogation process is "inherently coercive" and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. *New York* v. *Quarles*, *supra*, at 656. *Miranda* attempted to reconcile these opposing concerns by giving the *defendant* the power to exert some control over the course of the interrogation. Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation, see Brief for American Civil Liberties Union as *Amicus Curiae* in *Miranda* v. *Arizona*, O. T. 1965, No. 759, pp. 22–31, the Court found that the suspect's Fifth Amendment rights could be adequately protected by less intrusive means. Police questioning, often an essential part of the investigatory process, could continue in its traditional form, the Court held, but only if the suspect clearly under-

stood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators.

The position urged by respondent would upset this carefully drawn approach in a manner that is both unnecessary for the protection of the Fifth Amendent privilege and injurious to legitimate law enforcement. Because, as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process, a rule requiring the police to inform the suspect of an attorney's efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all. This minimal benefit, however, would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt. Indeed, the very premise of the Court of Appeals was not that awareness of Ms. Munson's phone call would have dissipated the coercion of the interrogation room, but that it might have convinced respondent not to speak at all. 753 F. 2d, at 185. Because neither the letter nor purposes of *Miranda* require this additional handicap on otherwise permissible investigatory efforts, we are unwilling to expand the *Miranda* rules to require the police to keep the suspect abreast of the status of his legal representation.

We acknowledge that a number of state courts have reached a contrary conclusion. Compare *State* v. *Jones*, 19 Wash. App. 850, 578 P. 2d 71 (1978), with *State* v. *Beck*, 687 S. W. 2d 155 (Mo. 1985) (en banc). We recognize also that our interpretation of the Federal Constitution, if given the dissent's expansive gloss, is at odds with the policy recommendations embodied in the American Bar Association Standards of Criminal Justice. Cf. ABA Standards for Criminal Justice 5–7.1 (2d ed. 1980). Notwithstanding the dissent's protestations, however, our interpretive duties go well beyond deferring to the numerical preponderance of lower court decisions or to the subconstitutional recommen-

dations of even so esteemed a body as the American Bar Association. See *Nix* v. *Whiteside*, *ante*, at 189 (BLACKMUN, J., concurring in judgment). Nothing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law. We hold only that the Court of Appeals erred in construing the Fifth Amendment to the Federal Constitution to require the exclusion of respondent's three confessions.

III

Respondent also contends that the Sixth Amendment requires exclusion of his three confessions.[2] It is clear, of course, that, absent a valid waiver, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches. *United States* v. *Gouveia*, 467 U. S. 180, 187 (1984); *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (opinion of Stewart, J.). See *Brewer* v. *Williams*, 430 U. S., at 400–401. And we readily agree that once the right *has* attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a "'medium' between [the suspect] and the State" during the interrogation. *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985); see *Brewer* v. *Williams*, *supra*, at 401, n. 8. The difficulty for respondent is that the interrogation sessions that yielded the inculpatory statements took place *before* the initiation of "adversary judicial proceedings." *United States* v. *Gouveia*, *supra*, at 192. He contends, however, that this circumstance is not fatal to his Sixth Amendment claim. At least in some situations, he argues, the Sixth Amendment protects the integrity of the

[2] Petitioner does not argue that respondent's valid waiver of his Fifth Amendment right to counsel necessarily served to waive his parallel rights under the Sixth Amendment. Accordingly, we have no occasion to consider whether a waiver for one purpose necessarily operates as a general waiver of the right to counsel for all purposes.

attorney-client relationship[3] regardless of whether the prosecution has in fact commenced "by way of formal charge, preliminary hearing, indictment, information or arraignment." 467 U. S., at 188. Placing principal reliance on a footnote in *Miranda*, 384 U. S., at 465, n. 35, and on *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), he maintains that *Gouveia*, *Kirby*, and our other "critical stage" cases, concern only the narrow question of when the right *to* counsel—that is, to the appointment or presence of counsel—attaches. The right to noninterference with an attorney's dealings with a criminal suspect, he asserts, arises the moment that the relationship is formed, or, at the very least, once the defendant is placed in custodial interrogation.

We are not persuaded. At the outset, subsequent decisions foreclose any reliance on *Escobedo* and *Miranda* for the proposition that the Sixth Amendment right, in any of its manifestations, applies prior to the initiation of adversary judicial proceedings. Although *Escobedo* was originally decided as a Sixth Amendment case, "the Court in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination . . . .'" *Kirby* v. *Illinois*, *supra*,

[3] Notwithstanding the Rhode Island Supreme Court's finding that, as a matter of state law, no attorney-client relationship existed between respondent and Ms. Munson, the Sixth Amendment issue is properly before us. *State* v. *Burbine*, 451 A. 2d 22, 29 (1982). Petitioner now concedes that such a relationship existed and invites us to decide the Sixth Amendment question based on that concession. Of course, a litigant's concession cannot be used to circumvent the rule that this Court may not disregard a state court's interpretation of state law. Respondent's argument, however, does not focus on whether an attorney-client relationship actually existed as a formal matter of state law. He argues instead that, on the particular facts of this case, the Sixth Amendment right to counsel has been violated. In any event, even if the existence of an attorney-client relationship could somehow independently trigger the Sixth Amendment right to counsel, a position we reject, the type of circumstances that would give rise to the right would certainly have a federal definition.

at 689, quoting *Johnson* v. *New Jersey*, 384 U. S. 719, 729 (1966). Clearly then, *Escobedo* provides no support for respondent's argument. Nor, of course, does *Miranda*, the holding of which rested exclusively on the Fifth Amendment. Thus, the decision's brief observation about the reach of *Escobedo*'s Sixth Amendment analysis is not only dictum, but reflects an understanding of the case that the Court has expressly disavowed. See also, *United States* v. *Gouveia*, *supra*, at 188, n. 5; Y. Kamisar, Police Interrogation and Confessions 217–218, n. 94 (1980).

Questions of precedent to one side, we find respondent's understanding of the Sixth Amendment both practically and theoretically unsound. As a practical matter, it makes little sense to say that the Sixth Amendment right to counsel attaches at different times depending on the fortuity of whether the suspect or his family happens to have retained counsel prior to interrogation. Cf. *id.*, at 220–221. More importantly, the suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purposes of the right to counsel. The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor. Its purpose, rather, is to assure that in any "criminal prosecutio[n]," U. S. Const., Amdt. 6, the accused shall not be left to his own devices in facing the "'prosecutorial forces of organized society.'" *Maine* v. *Moulton*, *supra*, at 170 (quoting *Kirby* v. *Illinois*, 406 U. S., at 689). By its very terms, it becomes applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the "intricacies . . . of law," *ibid.*, is needed to assure that the prosecution's case encounters "the crucible of meaningful adversarial testing." *United States* v. *Cronic*, 466 U. S. 648, 656 (1984).

Indeed, in *Maine* v. *Moulton*, decided this Term, the Court again confirmed that looking to the initiation of adversary judicial proceedings, far from being mere formalism, is fundamental to the proper application of the Sixth Amendment right to counsel. There, we considered the constitutional implications of a surreptitious investigation that yielded evidence pertaining to two crimes. For one, the defendant had been indicted; for the other, he had not. Concerning the former, the Court reaffirmed that after the first charging proceeding the government may not deliberately elicit incriminating statements from an accused out of the presence of counsel. See also *Massiah* v. *United States*, 377 U. S. 201 (1964). The Court made clear, however, that the evidence concerning the crime for which the defendant had not been indicted—evidence obtained in precisely the same manner from the identical suspect—would be admissible at a trial limited to those charges. *Maine* v. *Moulton*, 474 U. S., at 180, and n. 16. The clear implication of the holding, and one that confirms the teaching of *Gouveia*, is that the Sixth Amendment right to counsel does not attach until after the initiation of formal charges. Moreover, because Moulton already had legal representation, the decision all but forecloses respondent's argument that the attorney-client relationship itself triggers the Sixth Amendment right.

Respondent contends, however, that custodial interrogations require a different rule. Because confessions elicited during the course of police questioning often seal a suspect's fate, he argues, the need for an advocate—and the concomitant right to noninterference with the attorney-client relationship—is at its zenith, regardless of whether the State has initiated the first adversary judicial proceeding. We do not doubt that a lawyer's presence could be of value to the suspect; and we readily agree that if a suspect confesses, his attorney's case at trial will be that much more difficult. But these concerns are no more decisive in this context than they were for the equally damaging preindictment lineup

at issue in *Kirby*, or the statements pertaining to the unindicted crime elicted from the defendant in *Maine* v. *Moulton*. Compare *United States* v. *Wade*, 388 U. S. 218, 226–227 (1967) (Sixth Amendment attaches at postindictment lineup); *Massiah* v. *United States*, *supra* (after indictment, police may not elicit statements from suspect out of the presence of counsel). For an interrogation, no more or less than for any other "critical" pretrial event, the possibility that the encounter may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel. As *Gouveia* made clear, until such time as the "'government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified'" the Sixth Amendment right to counsel does not attach. 467 U. S., at 189 (quoting *Kirby* v. *Illinois*, 406 U. S., at 689).

Because, as respondent acknowledges, the events that led to the inculpatory statements preceded the formal initiation of adversary judicial proceedings, we reject the contention that the conduct of the police violated his rights under the Sixth Amendment.

IV

Finally, respondent contends that the conduct of the police was so offensive as to deprive him of the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment. Focusing primarily on the impropriety of conveying false information to an attorney, he invites us to declare that such behavior should be condemned as violative of canons fundamental to the "'traditions and conscience of our people.'" *Rochin* v. *California*, 342 U. S. 165, 169 (1952), quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934). We do not question that on facts more egregious than those presented here police deception might rise to a level of a due process violation. Accordingly, JUSTICE STE-

VENS' apocalyptic suggestion that we have approved any and all forms of police misconduct is demonstrably incorrect.[4] We hold only that, on these facts, the challenged conduct falls short of the kind of misbehavior that so shocks the sensibil-

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[4] Among its other failings, the dissent declines to follow *Oregon* v. *Elstad*, 470 U. S. 298 (1985), a decision that categorically forecloses JUSTICE STEVENS' major premise—that *Miranda* requires the police to inform a suspect of any and all information that would be useful to a decision whether to remain silent or speak with the police. See also *United States* v. *Washington*, 431 U. S. 181, 188 (1977). The dissent also launches a novel "agency" theory of the Fifth Amendment under which any perceived deception of a lawyer is automatically treated as deception of his or her client. This argument entirely disregards the elemental and established proposition that the privilege against compulsory self-incrimination is, by hypothesis, a personal one that can only be invoked by the individual whose testimony is being compelled.

Most importantly, the dissent's misreading of *Miranda* itself is breathtaking in its scope. For example, it reads *Miranda* as creating an undifferentiated right to the presence of an attorney that is triggered automatically by the initiation of the interrogation itself. *Post*, at 463. Yet, as both *Miranda* and subsequent decisions construing *Miranda* make clear beyond refute, "'the interrogation must cease until an attorney is present' *only* '[i]f the individual states that he wants an attorney.'" *Michigan* v. *Mosley*, 423 U. S. 96, 104, n. 10 (1975) (emphasis added), quoting *Miranda*, 384 U. S., at 474. The dissent condemns us for embracing "incommunicado questioning . . . as a societal goal of the highest order that justifies police deception of the shabbiest kind." *Post*, at 439. We, of course, do nothing of the kind. As any reading of *Miranda* reveals, the decision, rather than proceeding from the premise that the rights and needs of the defendant are paramount to all others, embodies a carefully crafted balance designed to fully protect *both* the defendant's and society's interests. The dissent may not share our view that the Fifth Amendment rights of the defendant are amply protected by application of *Miranda as written*. But the dissent is "simply wrong," *post*, at 452, in suggesting that exclusion of Burbine's three confessions follows perfunctorily from *Miranda*'s mandate. Y. Kamisar, Police Interrogation and Confessions 217–218, n. 94 (1980).

Quite understandably, the dissent is outraged by the very idea of police deception of a lawyer. Significantly less understandable is its willingness to misconstrue this Court's constitutional holdings in order to implement its subjective notions of sound policy.

ities of civilized society as to warrant a federal intrusion into the criminal processes of the States.

We hold therefore that the Court of Appeals erred in finding that the Federal Constitution required the exclusion of the three inculpatory statements. Accordingly, we reverse and remand for proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This case poses fundamental questions about our system of justice. As this Court has long recognized, and reaffirmed only weeks ago, "ours is an accusatorial and not an inquisitorial system." *Miller* v. *Fenton*, 474 U. S. 104, 110 (1985).[1] The Court's opinion today represents a startling departure from that basic insight.

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[1] Justice Frankfurter succinctly explained the character of that distinction in his opinion in *Watts* v. *Indiana*, 338 U. S. 49, 54 (1949):

"Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. See Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 Harv. L. Rev. 433, 457–58, 467–473 (1935). Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.' 2 Hawkins, Pleas of the Crown, c. 46, § 34 (8th ed. 1824). The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands. Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confession is subversive of the accusatorial system."

The Court concludes that the police may deceive an attorney by giving her false information about whether her client will be questioned, and that the police may deceive a suspect by failing to inform him of his attorney's communications and efforts to represent him.[2] For the majority, this conclusion, though "distaste[ful]," *ante*, at 424, is not even debatable. The deception of the attorney is irrelevant because the attorney has no right to information, accuracy, honesty, or fairness in the police response to her questions about her client. The deception of the client is acceptable, because, although the information would affect the client's assertion of his rights, the client's actions in ignorance of the availability of his attorney are voluntary, knowing, and intelligent; additionally, society's interest in apprehending, prosecuting, and punishing criminals outweighs the suspect's interest in information regarding his attorney's efforts to communicate with him. Finally, even mendacious police interference in the communications between a suspect and his lawyer does not violate any notion of fundamental fairness because it does not shock the conscience of the majority.

The case began in March 1977 with the discovery of Mary Jo Hickey, unconscious and disheveled in a deserted parking lot, lying in a pool of blood, with semen on her clothes, her dentures broken, and a piece of heavy, bloodstained metal nearby. Days later, Brian Burbine, then 20 years old, went to Maine and stayed with friends. According to the friends' testimony at trial, he was upset, and described a night out with Hickey, who was then 35. After several drinks,

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See generally *Malloy* v. *Hogan*, 378 U. S. 1, 7–8 (1964); *Rogers* v. *Richmond*, 365 U. S. 534, 540–541 (1961); *Bram* v. *United States*, 168 U. S. 532, 543–545 (1897).

[2] I agree with the majority that, in considering "the type of circumstances" that give rise to constitutional rights in this area, the relationship between an attorney and suspect has "a federal definition." *Ante*, at 429, n. 3. In my view, for federal constitutional purposes, members of a suspect's family may provide a lawyer with authority to act on a suspect's behalf while the suspect is in custody.

Burbine told them, a ride home turned into a violent encounter; he hit Hickey several times and threw her out of the car. Three weeks after she was discovered in the parking lot, Hickey died. Three months later, after the 21-hour period of detention by the Cranston and Providence, Rhode Island, police that is the focus of this dispute, Burbine was charged with her murder, and ultimately found guilty of it.

The murder of Mary Jo Hickey was a vicious crime, fully meriting a sense of outrage and a desire to find and prosecute the perpetrator swiftly and effectively. Indeed, by the time Burbine was arrested on an unrelated breaking-and-entering charge, the Hickey murder had been the subject of a local television special.[3] Not surprisingly, Detective Ferranti, the Cranston Detective who "broke" the case, was rewarded with a special commendation for his efforts.[4]

The recognition that ours is an accusatorial, and not an inquisitorial system nevertheless requires that the government's actions, even in responding to this brutal crime, respect those liberties and rights that distinguish this society from most others. As Justice Jackson observed shortly after his return from Nuremberg, cases of this kind present "a real dilemma in a free society . . . for the defendant is shielded by such safeguards as no system of law except the Anglo-American concedes to him."[5] Justice Frankfurter similarly

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[3] Tr. of Suppression Hearing 167 (S. H.).

[4] *Id.*, at 168.

[5] "Amid much that is irrelevant or trivial, one serious situation seems to me to stand out in these cases. The suspect neither had nor was advised of his right to get counsel. This presents a real dilemma in a free society. To subject one without counsel to questioning which may and is intended to convict him is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.

emphasized that it is "a fair summary of history to say that the safeguards of liberty have been forged in controversies involving not very nice people."[6] And, almost a century and a half ago, Macaulay observed that the guilt of Titus Oates could not justify his conviction by improper methods: "That Oates was a bad man is not a sufficient excuse; for the guilty are almost always the first to suffer those hardships which are afterwards used as precedents against the innocent."[7]

The Court's holding focuses on the period after a suspect has been taken into custody and before he has been charged with an offense. The core of the Court's holding is that police interference with an attorney's access to her client during that period is not unconstitutional. The Court reasons that a State has a compelling interest, not simply in custodial interrogation, but in lawyer-free, incommunicado custodial interrogation. Such incommunicado interrogation is so important that a lawyer may be given false information that prevents her presence and representation; it is so important that police may refuse to inform a suspect of his attorney's

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"If the State may arrest on suspicion and interrogate without counsel, there is no denying the fact that it largely negates the benefits of the constitutional guaranty of the right to assistance of counsel. Any lawyer who has ever been called into a case after his client has 'told all' and turned any evidence he has over to the Government, knows how helpless he is to protect his client against the facts thus disclosed.

"I suppose the view one takes will turn on what one thinks should be the right of an accused person against the State. Is it his right to have the judgment on the facts? Or is it his right to have a judgment based on only such evidence as he cannot conceal from the authorities, who cannot compel him to testify in court and also cannot question him before? Our system comes close to the latter by any interpretation, for the defendant is shielded by such safeguards as no system of law except the Anglo-American concedes to him." *Watts* v. *Indiana*, 338 U. S. 49, 59 (1949) (Jackson, J., concurring in result).

[6] *United States* v. *Rabinowitz*, 339 U. S. 56, 69 (1950) (Frankfurter, J., dissenting).

[7] 1 T. Macaulay, The History of England 482 (1968 ed.).

communications and immediate availability.[8] This conclusion flies in the face of this Court's repeated expressions of deep concern about incommunicado questioning.[9] Until

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[8] This kind of police-maintained incommunicado questioning becomes, in the Court's rendition, "an essential part of the investigatory process." *Ante*, at 426. Police interference in communications between a lawyer and her client are justified because "[a]dmissions of guilt . . . are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Ibid.* It is this overriding interest in obtaining self-incriminatory statements in the lawyer-free privacy of the police interrogation room that motivates the Court's willingness to swallow its admitted "distaste for the deliberate misleading of an officer of the court." *Ante*, at 424.

[9] See, *e. g.*, *Tague* v. *Louisiana*, 444 U. S. 469, 470 (1980) *(per curiam)* (State bears "'heavy burden'" in proving validity of waivers given "'during incommunicado interrogation'"); *Beckwith* v. *United States*, 425 U. S. 341, 346 (1976) ("special safeguards" are required for "incommunicado interrogation of individuals in a police-dominated atmosphere"); *Darwin* v. *Connecticut*, 391 U. S. 346, 349 (1968) *(per curiam)* (prolonged "incommunicado" interrogation renders confession involuntary); *Miranda* v. *Arizona*, 384 U. S. 436, 475 (1966) (State has "heavy burden" in proving validity of waiver of rights in "incommunicado interrogation"); *Haynes* v. *Washington*, 373 U. S. 503, 514 (1963) ("incommunicado detention" rendered confession involuntary); *Ashcraft* v. *Tennessee*, 322 U. S. 143, 153, n. 8 (1944) ("'Holding incommunicado is objectionable because arbitrary—at the mere will and unregulated pleasure of a police officer'"); *Ward* v. *Texas*, 316 U. S. 547, 555 (1942) ("This Court has set aside convictions based upon confessions extorted from ignorant persons . . . who have been unlawfully held incommunicado without advice of friends or counsel"); *Lisenba* v. *California*, 314 U. S. 219, 240 (1941) ("[W]here a prisoner, held incommunicado, is subjected to questioning by officers for long periods, and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by the use of his confession, he is deprived of liberty or life through tyrannical or oppressive means"); *Wan* v. *United States*, 266 U. S. 1, 11 (1924) (holding of suspect "incommunicado" contributes to suppression of confession).

To be sure, in many of these cases, the evidence showed that the suspect had requested, and was denied access to, a lawyer. Until today, however, the Court has never viewed "incommunicado" as applying only to the denial of the suspect's efforts to reach the attorney, and not to the attorney's efforts to reach the suspect. See, *e. g.*, *Darwin* v. *Connecticut*, 391 U. S.,

today, incommunicado questioning has been viewed with the strictest scrutiny by this Court; today, incommunicado questioning is embraced as a societal goal of the highest order that justifies police deception of the shabbiest kind.

It is not only the Court's ultimate conclusion that is deeply disturbing; it is also its manner of reaching that conclusion. The Court completely rejects an entire body of law on the subject—the many carefully reasoned state decisions that have come to precisely the opposite conclusion.[10] The Court

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at 349 *(per curiam)* (referring *both* to fact that "petitioner's lawyers made numerous attempts to communicate with petitioner or with the officer in charge" and to fact that "petitioner on three separate occasions sought and was denied permission to communicate with the outside world" in reaching the "inescapable" conclusion that "the officers kept petitioner incommunicado"). It is also true that many of these cases involved incommunicado interrogations for very long periods of time; not one of those cases suggested that incommunicado interrogation for shorter periods, maintained by misinforming attorney and client of each other's actions, was supported by a compelling societal interest that justified police deception and misinformation about attorney communications.

[10] The American Bar Association has summarized the relevant cases:

"In all but the last two of the following cases, the Court excluded the statement(s) obtained. *Elfadl* v. *Maryland*, 61 Md. App. 132, 485 A. 2d 275, *cert. denied*, 303 Md. 42, 491 A. 2d 1197, *petition for cert. filed*, 54 U. S. L. W. 3019 (U. S. June 21, 1985) (No. 85–24) (lawyer retained by defendant's wife refused permission to communicate with defendant or have him informed of counsel's presence); *Lodowski* v. *Maryland*, 302 Md. 691, 490 A. 2d 1228 (1985), *petition for cert. filed*, 54 U. S. L. W. 3019 (U. S. June 21, 1985) (No. 85–23) (police prevented communication between lawyer and defendant and did not tell defendant that lawyer was present); *Dunn* v. *State*, No. 248–84 (Tex. June 26, 1985), summarized, 37 Crim. L. Rep. (BNA) 2274 (July 17, 1985) (suspect not told that his wife had retained an attorney who was close at hand); *Lewis* v. *State*, 695 P. 2d 528 (Okla. 1984) (lawyer hired by defendant's parents misdirected by sheriff throughout jail and courthouse while defendant, unaware that parents had retained attorney, was being interrogated in another part of the building); *Commonwealth* v. *Sherman*, 389 Mass. 287, 450 N. E. 2d 566 (1983) (police failed to honor lawyer's request to be present during interrogation and failed to inform suspect of the request); *Weber* v. *State*, 457 A. 2d 674 (Del. 1983) (defendant's father and attorney hired by the father refused

similarly dismisses the fact that the police deception which it sanctions quite clearly violates the American Bar Association's Standards for Criminal Justice[11]—Standards which

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access to defendant; police failed to inform defendant of lawyer's presence); *People* v. *Smith*, 93 Ill. 2d 179, 442 N. E. 2d 1325 (1982) (associate of defendant's retained lawyer denied access to client based on fabricated claim that defendant was undergoing drug withdrawal and would not be interrogated in the near future; individual never told of lawyer's attempt to see him although he was given card lawyer left for him); *State* v. *Matthews*, 408 So. 2d 1274 (La. 1982) (attorney's request to speak with defendant refused and instruction to cease interrogation ignored); *State* v. *Haynes*, 288 Or. 59, 602 P. 2d 272 (1979), *cert. denied*, 446 U. S. 945 (1980) (lawyer retained by defendant's wife was told where defendant was being held but the police moved him before lawyer could offer counsel and defendant never told of lawyer's request to offer counsel); *State* v. *Jones*, 19 Wash. App. 850, [5]78 P. 2d 71 (1978) (defendant not informed that counsel had been retained for him or that attorney had instructed client not to speak); *Commonwealth* v. *Hilliard*, 471 Pa. 318, 370 A. 2d 322 (1977) (lawyer first misinformed that defendant was not in custody and later denied access to defendant until he confessed; defendant was not told of lawyer's presence until he confessed); *State* v. *Jackson*, 303 So. 2d 734 (La. 1974) (lawyer retained by defendant's family denied permission to see defendant who was not told of the lawyer's presence); *Commonwealth* v. *McKenna*, 355 Mass. 313, 244 N. E. 2d 560 (1969) (lawyer retained by suspect's mother asked to see client; police misinformed lawyer of suspect's whereabouts and did not indicate that he was already being interrogated); *Blanks* v. *State*, [254 Ga. 420], 330 S. E. 2d 575 (1985) (police finished taking confession before advising defendant that a lawyer was present who wished to see him); *State* v. *Beck*, 687 S. W. 2d 155 (Mo. 1985) (en banc) (lawyer obtained by defendant's mother at defendant's direction given before he was in custody; lawyer called the police and asked to be notified when defendant was arrested but at prosecutor's suggestion police did not so notify lawyer when defendant was arrested in Florida, nor did they advise defendant of lawyer's request)." Brief for American Bar Association as *Amicus Curiae* 4, n. 2.

Since the filing of the ABA brief, still another State Supreme Court has expressed this prevailing view that statements obtained through police interference in communications between an attorney and a suspect must be suppressed. See *Haliburton* v. *Florida*, 476 So. 2d 192 (Fla. 1985) (police continued questioning suspect without telling him that an attorney retained by his sister was at the police station seeking to speak with him).

[11] See ABA Standards for Criminal Justice 5–5.1 (2d ed. 1980) ("Counsel should be provided to the accused as soon as feasible after custody be-

THE CHIEF JUSTICE has described as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history,"[12] and which this Court frequently finds helpful.[13] And, of course, the Court dismisses the fact that the American Bar Association has emphatically endorsed the prevailing state-court position and expressed its serious concern about the effect that a contrary view—a view, such as the Court's, that exalts incommunicado interrogation, sanctions police deception, and demeans the right to consult with an attorney—will have in police stations and courtrooms throughout this Nation.[14] Of greatest importance, the Court misapprehends or rejects the central principles that have, for several decades, animated this Court's decisions concerning incommunicado interrogation.[15]

Police interference with communications between an attorney and his client is a recurrent problem. The factual variations in the many state-court opinions condemning this interference as a violation of the Federal Constitution suggest the

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gins"); ABA Standards for Criminal Justice 5-7.1 (2d ed. 1980) ("At the earliest opportunity, a person in custody should be effectively placed in communication with a lawyer").

[12] Burger, Introduction: The ABA Standards for Criminal Justice, 12 Am. Crim. L. Rev. 251 (1974). See also *id.*, at 253 ("Everyone connected with criminal justice should become totally familiar with the substantive content of the Standards. . . . [T]he Justices of the Supreme Court and hundreds of other judges . . . consult the Standards and make use of them whenever they are relevant").

[13] See, *e. g.*, *Caldwell* v. *Mississippi*, 472 U. S. 320, 334, n. 6 (1985); *Holloway* v. *Arkansas*, 435 U. S. 475, 480, n. 4 (1978); *Dickey* v. *Florida*, 398 U. S. 30, 37–38, nn. 7 and 8 (1970). Cf. *Nix* v. *Whiteside*, *ante*, at 167–168 (emphasizing ABA Model Code and Model Rules in Sixth Amendment analysis).

[14] See Brief for American Bar Association as *Amicus Curiae* 4 ("The ABA is deeply concerned that, if the police may constitutionally prevent any communication between a lawyer and an individual held in isolation, an important right to legal representation will be lost. . . . Many cases decided across the country demonstrate that there is cause for concern as to such police tactics").

[15] See n. 9, *supra*.

variety of contexts in which the problem emerges. In Oklahoma, police led a lawyer to several different locations while they interrogated the suspect;[16] in Oregon, police moved a suspect to a new location when they learned that his lawyer was on his way;[17] in Illinois, authorities failed to tell a suspect that his lawyer had arrived at the jail and asked to see him;[18] in Massachusetts, police did not tell suspects that their lawyers were at or near the police station.[19] In all these cases, the police not only failed to inform the suspect, but also misled the attorneys. The scenarios vary, but the core problem of police interference remains. "Its recurrence suggests that it has roots in some condition fundamental and general to our criminal system." *Watts* v. *Indiana*, 338 U. S. 49, 57 (1949) (Jackson, J., concurring in result).

The near-consensus of state courts and the legal profession's Standards about this recurrent problem lends powerful support to the conclusion that police may not interfere with communications between an attorney and the client whom they are questioning. Indeed, at least two opinions from this Court seemed to express precisely that view.[20] The Court today flatly rejects that widely held view and responds to this recurrent problem by adopting the most restrictive interpretation of the federal constitutional restraints on police

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[16] *Lewis* v. *State*, 695 P. 2d 528 (Okla. Crim. App. 1984).

[17] *State* v. *Haynes*, 288 Ore. 59, 602 P. 2d 272 (1979), cert. denied, 446 U. S. 945 (1980).

[18] *People* v. *Smith*, 93 Ill. 2d 179, 442 N. E. 2d 1325 (1982).

[19] *Commonwealth* v. *McKenna*, 355 Mass. 313, 244 N. E. 2d 560 (1969).

[20] See *Miranda* v. *Arizona*, 384 U. S., at 465, n. 35 (In *Escobedo*, "[t]he police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake"); *Escobedo* v. *Illinois*, 378 U. S. 478, 487 (1964) ("[I]t 'would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police' "), quoting *People* v. *Donovan*, 13 N. Y. 2d 148, 152, 193 N. E. 2d 628, 629 (1963).

deception, misinformation, and interference in attorney-client communications.

The exact reach of the Court's opinion is not entirely clear because, on the one hand, it indicates that more egregious forms of police deception might violate the Constitution, *ante*, at 432, while on the other hand it endeavors to make its disposition of this case palatable by making findings of fact concerning the voluntariness of Burbine's confessions that the trial judge who heard the evidence declined to make.[21] Before addressing the legal issues, it therefore seems appropriate to make certain additional comments about what the record discloses concerning the incriminating statements made by Burbine during the 21-hour period that he was detained by the Cranston and Providence police on June 29 and June 30, 1977.

I

As the majority points out, with respect to attorney Munson's telephone call, the Rhode Island Supreme Court's summary of factual findings provides the common ground for analysis:

> "At approximately 8:15 [on June 29, 1977], Ms. Munson called the Cranston police station and asked that her call be transferred to the detective division. A male voice responded with the word 'Detectives.' Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were

[21] See *infra*, at 447–448; n. 25, *infra*.

> through with him for the night. Ms. Munson was not informed that the Providence police were at the Cranston police station or that Burbine was a suspect in Mary's murder. The trial justice found as a fact that Ms. Munson did make the call, but further found that there was no collusion or conspiracy on the part of the police 'to secrete [Burbine] from his attorney . . . .'" *State* v. *Burbine*, 451 A. 2d 22, 23–24 (1982).[22]

Although this paragraph accurately describes attorney Munson's 8:15 call, the significance of the false response to her inquiry is best understood in the context of the events that were then proceeding in the police station. The difficulty in reconstructing some of those events illustrates the need for strict presumptions regarding the consequences of custodial interrogation—a need this Court has repeatedly recognized.[23]

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[22] The Court of Appeals, see 753 F. 2d 178, 185 (CA1 1985), and the dissenting opinion of Justice Kelleher of the Rhode Island Supreme Court, see 451 A. 2d, at 38–39, were concerned by the apparent inconsistency between the finding that there was no conspiracy to "secrete" Burbine, and the unequivocal finding that attorney Munson's call had been made. I see no inconsistency, however, because the officer who gave the false information to attorney Munson acknowledged that Burbine was at the station—he did not "secrete" him. The state court's finding that the call was answered by "Detectives" is especially significant in light of Lieutenant Ricard's undisputed testimony that, at the time in question, only he or Detective Ferranti would have answered a call to the detectives division. S. H. 142. Thus, the state-court finding, and the evidence in the record on which it was based, make it perfectly clear that either Ricard or Ferranti must have known of the call. Both categorically denied any such knowledge in their testimony.

[23] See, *e. g.*, *Edwards* v. *Arizona*, 451 U. S. 477 (1981); *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Cf. Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality opinion of REHNQUIST, J.) (*Edwards* articulated "a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was").

On June 27, 1977, an unidentified person advised Detective Ferranti that a man known as "Butch," who lived at 306 New York Avenue in Providence, was responsible for the death of Mary Jo Hickey. The record does not explain why Ferranti, who was a member of the Cranston Police Force, was informed about a crime that occurred in Providence.

At about 3 p. m. on June 29, 1977, Cranston police officers apprehended respondent Burbine and two other men (DiOrio and Sparks) in "a burned out building in the Cranston area." S. H. 6, 180. The three men were taken to the Cranston police station, charged with "breaking and entering," and placed in separate rooms. After noticing that DiOrio and Burbine lived at 306 New York Avenue in Providence, Detective Ferranti talked to DiOrio and was told that Burbine was the only "Butch" at that address. *Id.*, at 146–147.

At approximately 4:30, Ferranti "went in the room where Burbine was" and asked him "if there was anybody that he knew by the name of Butch on the street, and he said he was the only Butch." *Id.*, at 148.[24] After the brief questioning about the identity of "Butch," Detective Ferranti left Burbine in the interrogation room—where he remained until about 9 p. m.[25]—and interrogated DiOrio and Sparks. They both "made damaging statements relative to Burbine being involved in the murder in Providence"; Ferranti therefore "immediately contacted Providence Police." *Id.*, at 149–150. The Providence officers—Captain Wilson (the Chief of Detectives), Lieutenant Gannon, and Detective Trafford—responded promptly, and arrived at the Cranston station be-

[24] In his police report completed the night of June 29, Detective Ferranti stated, in contrast to his testimony, that he questioned Burbine before questioning DiOrio. Defendant Ex. D.

[25] The Court makes its own findings about Burbine's access to a telephone during this period. *Ante*, at 418. No state court made such a finding, and the record contains no evidence indicating whether Burbine was told he could use the phone, whether an outside line was available without use of the police switchboard, or any number of other possibly relevant factors.

tween 6 and 7 p. m. Lieutenant Gannon testified that, as he drove to the Cranston police station, he knew that he might not be able to question Burbine "[i]f for some reason he didn't want to give me a statement, if for some reason he chose to get an attorney and the attorney informed us that he didn't want him to give a statement." Trial Tr. 407.

After arriving at the station, the three Providence officers, as well as Ferranti and a second Cranston officer (Lieutenant Ricard), either remained in the large central room in the basement of the Cranston police station, or participated in the questioning of DiOrio and Sparks in interrogation rooms adjacent to that large central room.

It was at this point—with Burbine alone in another adjacent room, with Providence police on hand, with police from two Departments questioning Sparks and DiOrio about Burbine's involvement in the Hickey homicide—that attorney Munson telephoned. Her call arrived at 8:15; she asked for "Detectives," and was told that the police "would not be questioning Burbine" and that they were "through" with him for the night. These statements were false. Moreover, she was not told that Burbine would be questioned about a homicide rather than the breaking-and-entering charge on which he had been arrested, and she was not told that Providence police were at the Cranston police station preparing to question Burbine about a Providence crime.

At about 9, some 45 minutes after Munson received the assurance that the police were "through" with Burbine, the officers completed their questioning of DiOrio and Sparks and were prepared to question Burbine. There is no dispute about the fact that Burbine was brought into the central room at about 9, that all five police officers were then present, and that Burbine appeared somewhat upset and professed that he "'didn't do anything wrong.'" S. H. 21. Detective Ferranti testified that this statement was in response to questions from the Providence police about the Hickey

homicide;[26] Lieutenant Gannon of the Providence police testified that the statement was about the Hickey homicide, but that Providence police did not question Burbine and that they merely saw Burbine being escorted by Ferranti.[27] Burbine was not told that attorney Munson had called and had asked about him; nor was he told that Munson had been informed that the police were through with him for the night. After his protestations, Burbine was taken into another interrogation room.

Detective Ferranti then went into that room and, according to the testimony of the Providence officers, spent either "ten minutes" or from "five to ten minutes" alone with Burbine.[28] The record does not tell us whether he told Burbine that Sparks and DiOrio had just given statements implicating him in the Hickey homicide. Nor does it resolve the question whether Burbine's decision to confess was made *before* his session with Ferranti or *as a result* of that session. The Court evidently makes the former assumption, for it asserts that Burbine "initiated" this encounter. *Ante*, at 421–422. However, the state courts made no finding about this

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[26] See Testimony of Detective Ferranti, S. H. 152 (Providence police "started to question him relative to the murder in Providence"). See also Defendant Ex. D (Detective Ferranti's contemporaneous account) (Burbine "was confronted with this murder by Lt. Gan[n]on and other members of the PPD Det. Div. Lt. Ricard and myself. He flatly denied being involved or having any knowledge of this murder, although he did state that he had been in the bar with this girl and that he knew her from his mother who was friendly with her in the past").

[27] See, *e. g.*, Testimony of Lieutenant Gannon, S. H. 21 (agreeing with questioner's statement that "none of these police officers said anything to Brian Burbine before he said those things"). Cf. Testimony of Detective Trafford, *id.*, at 79 (Burbine "passed through the detective division and he was brought to, I believe, one of their interview rooms. . . . He was muttering something. I really don't know what he was saying").

[28] See *id.*, at 22, 57. Detective Ferranti testified that he was alone with Burbine for "a couple of minutes." *Id.*, at 174. He also testified that he went into the room, that Burbine told him to summon the Providence police, and that he complied "immediately." *Id.*, at 155.

"initiation" by Burbine. Detective Ferranti testified that Burbine banged and kicked on the door, S. H. 153–154; Lieutenant Gannon testified that he "believed" there was a knocking or some communication from Burbine, *id.*, at 22, but he was "not sure." *Id.*, at 63.[29] None of the other officers, who were apparently in the large room adjacent to Burbine's, corroborated this testimony by mentioning any "banging," "kicking," or other noise from Burbine's direction. In all events, some minutes later, Detective Ferranti came back out of the room and indicated that Burbine wanted to talk.

Lieutenant Gannon and Detective Trafford of the Providence police accompanied Detective Ferranti "back into the room." During the period between 9:30 and 10:20 p. m., they administered *Miranda* warnings and typed out a four-page statement which Burbine signed, waiving his constitutional rights, acknowledging his responsibility for the death of Hickey, and reciting his version of that event. Ferranti alternately testified that Burbine was "coherent" and "incoherent" at the time of this questioning. *Id.*, at 157–158; Trial Tr. 198, 208–209. Apparently for the first time since his arrival at the station in the afternoon, the police then brought Burbine some food. S. H. 160, Trial Tr. 205.

After obtaining Burbine's signature on the first written statement at 10:20 p. m., the police were still not "through" with Burbine. Burbine's first statement included no mention of the clothes that he had been wearing, or of a glass that was found with Hickey's purse a few blocks from the homicide. Soon after the completion of the first statement, and after the Providence and Cranston officers had discussed the first statement and expressed pleasure with their success,[30]

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[29] See also Lieutenant Gannon's testimony, *id.*, at 63 ("I don't know if he knocked on the door. I'm not sure how we were re-summoned back into the room").

[30] See Testimony of Lieutenant Gannon, *id.*, at 62 (noting that, after first statement, officers discussed it and that "we were all collectively pleased that we did obtain a statement from him"). Major Leyden, a high-ranking

Gannon, Trafford, and Ferranti again questioned Burbine. They ascertained that he was wearing his "red toke" and "black windbreaker" at the time, and that Hickey had left the bar with a glass in hand.[31] At 11:20 p. m., Burbine signed the second statement.

The following morning, the officers obtained a warrant, conducted a search of Burbine's residence, and seized the clothing that he had described in the second statement. In the meantime, Burbine was arraigned in Cranston court on the charge for which he had been arrested. Still without counsel, Burbine pleaded guilty to malicious damage. After the Cranston proceeding, Providence officers instantly arrested him for the Hickey homicide. Trial Tr. 501. Burbine was taken to the Providence police station, where he executed a third waiver of rights and identified the coat and jacket that the officers had seized. Shortly after noon, Major Leyden called the Public Defender's Office and requested counsel for Burbine because he would be placed in a lineup. *Id.*, at 423.

Thus, although there are a number of ambiguities in the record, the state-court findings established (1) that attorney Munson made her call at about 8:15 p. m.; (2) that she was given false information; (3) that Burbine was not told of her

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Providence officer, had been told about the break in the case, and he arrived at the Cranston station toward the end of Burbine's statement.

[31] According to Lieutenant Gannon, "in the second statement the questions about the glass and the clothes were Captain Wilson's ideas." Trial Tr. 387. The state courts made no finding about the initiation of the conversation leading to the second statement. According to the signed statement, Lieutenant Gannon stated that Burbine "remembered something concerning a glass," App. to Pet. for Cert. 105, and Burbine did not contest that account. Detective Ferranti testified that Providence police told him Burbine initiated the conversation. Trial Tr. 252. In contrast, Providence Detective Trafford testified that he was "not sure" how they concluded Burbine wished to speak again, but he "believe[d] Detective Ferranti notified us." *Id.*, at 443. Lieutenant Gannon testified that he "believe[d]" Burbine "indicated by knocking on the door." *Id.*, at 409.

call; and (4) that he was thereafter given the *Miranda* warnings, waived his rights, and signed three incriminating statements without receiving any advice from an attorney. The remainder of the record underscores two points. The first is the context of the call—a context in which two Police Departments were on the verge of resolving a highly publicized, hauntingly brutal homicide and in which, as Lieutenant Gannon testified, the police were aware that counsel's advice to remain silent might be an obstacle to obtaining a confession. The second is the extent of the uncertainty about the events that motivated Burbine's decision to waive his rights. The lawyer-free privacy of the interrogation room, so exalted by the majority, provides great difficulties in determining what actually transpired. It is not simply the ambiguity that is troublesome; if so, the problem would be not unlike other difficult evidentiary problems. Rather, the particularly troublesome aspect is that the ambiguity arises in the very situation—incommunicado interrogation—for which this Court has developed strict presumptions and for which this Court has, in the past, imposed the heaviest burden of justification on the goverment. It is in this context, and the larger context of our accusatorial system, that the deceptive conduct of the police must be evaluated.

II

Well-settled principles of law lead inexorably to the conclusion that the failure to inform Burbine of the call from his attorney makes the subsequent waiver of his constitutional rights invalid. Analysis should begin with an acknowledgment that the burden of proving the validity of a waiver of constitutional rights is always on the *government*.[32] When

[32] See, *e. g.*, *Brewer* v. *Williams*, 430 U. S. 387, 404 (1977) ("[C]ourts indulge in every reasonable presumption against waiver"); *Miranda* v. *Arizona*, 384 U. S., at 475 ("If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or

such a waiver occurs in a custodial setting, that burden is an especially heavy one because custodial interrogation is inherently coercive,[33] because disinterested witnesses are seldom available to describe what actually happened,[34] and because history has taught us that the danger of overreaching during incommunicado interrogation is so real.[35]

In applying this heavy presumption against the validity of waivers, this Court has sometimes relied on a case-by-case totality of the circumstances analysis.[36] We have found, however, that some custodial interrogation situations require strict presumptions against the validity of a waiver. *Miranda* established that a waiver is not valid in the absence of certain warnings. *Edwards* v. *Arizona*, 451 U. S. 477 (1981), similarly established that a waiver is not valid if police

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appointed counsel. . . . Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders"); *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938) ("'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we 'do not presume acquiescence in the loss of fundamental rights'") (footnotes omitted).

[33] See *Miranda*, 384 U. S., at 455 ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals").

[34] There is a natural tendency to discredit the testimony of the suspect because of his obvious interest, but it is also true that there have been cases in which the desire to insure a conviction of an apparently guilty suspect has led police officers to color their testimony. As Judge Wilkey observed in a different context, a police officer may "feel that he has a 'higher duty' than the truth. He may perjure himself to convict the defendant." Wilkey, The Exclusionary Rule, 62 Judicature 215, 226 (1978).

[35] See *United States* v. *Carignan*, 342 U. S. 36, 46 (1951) (Douglas, J., concurring) ("What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country—the free as well as the despotic, the modern as well as the ancient").

[36] See, *e. g.*, *Fare* v. *Michael C.*, 442 U. S. 707, 724–725 (1979); *North Carolina* v. *Butler*, 441 U. S. 369, 374–375 (1979); *Faretta* v. *California*, 422 U. S. 806, 835 (1975).

initiate questioning after the defendant has invoked his right to counsel. In these circumstances, the waiver is invalid as a matter of law even if the evidence overwhelmingly establishes, as a matter of fact, that "a suspect's decision not to rely on his rights was uncoerced, that he at all times knew that he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction," see *ante*, at 422. In light of our decision in *Edwards*, the Court is simply wrong in stating that "the analysis is complete and the waiver is valid as a matter of law" when these facts have been established. *Ante*, at 422–423.[37] Like the failure to give warnings and like police initiation of interrogation after a request for counsel, police deception of a suspect through omission of information regarding attorney communications greatly exacerbates the inherent problems of incommunicado interrogation and requires a clear principle to safeguard the presumption against the waiver of constitutional rights. As in those situations, the police deception should render a subsequent waiver invalid.

Indeed, as *Miranda* itself makes clear, proof that the required warnings have been given is a necessary, but by no means sufficient, condition for establishing a valid waiver. As the Court plainly stated in *Miranda*, "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth

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[37] See also *Solem* v. *Stumes*, 465 U. S. 638, 641, 647–648 (1984) (Under *Edwards*, "once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him. . . . It does not in any way cast doubt on the legitimacy or necessity of *Edwards* to acknowledge that in some cases, a waiver could be knowing, voluntary, and intelligent even though it occurred when the police recommenced questioning after an accused had invoked the right to counsel").

Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." 384 U. S., at 476.

In this case it would be perfectly clear that Burbine's waiver was invalid if, for example, Detective Ferranti had "threatened, tricked, or cajoled" Burbine in their private pre-confession meeting—perhaps by misdescribing the statements obtained from DiOrio and Sparks—even though, under the Court's truncated analysis of the issue, Burbine fully understood his rights. For *Miranda* clearly condemns threats or trickery that cause a suspect to make an unwise waiver of his rights even though he fully understands those rights. In my opinion there can be no constitutional distinction—as the Court appears to draw, *ante*, at 423–424—between a deceptive misstatement and the concealment by the police of the critical fact that an attorney retained by the accused or his family has offered assistance, either by telephone or in person.[38]

Thus, the Court's truncated analysis, which relies in part on a distinction between deception accomplished by means of an omission of a critically important fact and deception by means of a misleading statement, is simply untenable. If, as the Court asserts, "the analysis is at an end" as soon as the suspect is provided with enough information to have the *capacity* to understand and exercise his rights, I see no reason why the police should not be permitted to make the same kind of misstatements to the suspect that they are apparently allowed to make to his lawyer. *Miranda*, however, clearly

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[38] The Court cites *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), a case involving a claim that a defendant had waived his right to trial counsel. I find it inconceivable that, in such a situation, an otherwise sufficient series of questions and answers can support a valid waiver if the government misinforms an attorney about the defendant's trial date, and if the government fails to tell the defendant of the attorney's communications. Yet that would be the consequence of the Court's "what the suspect doesn't know can't hurt him" approach to this case.

establishes that both kinds of deception vitiate the suspect's waiver of his right to counsel.[39]

As the Court notes, the question is whether the deceptive police conduct "deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Ante*, at 424. This question has been resoundingly answered time and time again by the state courts that, with rare exceptions,[40] have correctly understood the meaning of the *Miranda* opinion.[41] The ma-

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[39] It is thus clear that the majority's comparison of a suspect in Burbine's position with "the same defendant . . . had a lawyer not telephoned the police station," *ante*, at 422, sets up a false comparison. For *Miranda*'s condemnation of trickery and cajolery requires that an assessment of police conduct figure importantly in the assessment of a suspect's decision to waive his fundamental constitutional rights. In the majority's comparison, however, the police conduct is irrelevant. In contrast, the appropriate comparison is between a suspect in Burbine's position and a suspect who is otherwise tricked and deceived into a waiver of his rights. *Miranda* itself, as well as the long-established presumption against the waiver of constitutional rights, requires that both kinds of waiver be held invalid.

[40] See n. 10, *supra*. Aside from this case, the only two exceptions were decided in 1985. Those recent cases may reflect a recognition that this Court is increasingly less than faithful to *Miranda*'s clear teachings. See, *e. g.*, *New York* v. *Quarles*, 467 U. S. 649 (1984); *Oregon* v. *Elstad*, 470 U. S. 298 (1985). Cf. *New York* v. *Quarles*, 467 U. S., at 660 (O'CONNOR, J., dissenting in part) ("*Miranda* is now the law and, in my view, the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures").

[41] See *Lodowski* v. *State*, 302 Md. 691, 721, 490 A. 2d 1228, 1243 (1985) ("We have stated our view that a suspect must be fully informed of the actual presence and availability of counsel who seeks to confer with him, in order that any waiver of a right to counsel, as established by *Miranda*, can be knowing and intelligent"); *Haliburton* v. *Florida*, 476 So. 2d, at 194 ("In order for the right to counsel to be meaningful, a defendant must be told when an attorney who has been retained on his behalf is trying to advise him"); *Lewis* v. *State*, 695 P. 2d, at 529 ("The dispositive issue on this appeal is . . . whether a defendant's waiver of his rights to counsel and against self-incrimination is knowingly and intelligently made when the defendant is not informed of his attorney's availability at police headquarters. We hold today that such a waiver is constitutionally invalid"); *Common-*

jority's blithe assertion of "no doubt" about the outcome of this case, *ante*, at 421, simply ignores the prevailing view of the state courts that have considered this issue. Particularly in an opinion that relies on a desire to avoid "a federal intrusion into the criminal processes of the States," *ante*, at 434, one would expect at least some indication why, in the majority's view, so many state courts have been so profoundly wrong on this precise issue. Unlike the majority, the state courts have realized that attorney communication to the police

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wealth v. *Sherman*, 389 Mass. 287, 296, 450 N. E. 2d 566, 571 (1983) ("we conclude that the statement of the defendant must be suppressed because, under principles of construction of Miranda, the failure of the police to inform the defendant of the attorney's request [to see him] vitiated the defendant's waiver of his Miranda rights"); *Weber* v. *State*, 457 A. 2d 674, 685 (Del. 1983) ("When a suspect does not know that an attorney, who has been retained or properly designated to represent him, is actually present in the police station seeking an opportunity to render legal assistance, and the police do not inform him of that fact, there can be no intelligent and knowing waiver"); *People* v. *Smith*, 93 Ill. 2d, at 189, 442 N. E. 2d, at 1329 ("We hold that when police, prior to or during custodial interrogation, refuse an attorney appointed or retained to assist a suspect access to the suspect, there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him"); *State* v. *Haynes*, 288 Ore., at 70, 602 P. 2d, at 277 ("We hold only that when unknown to the person in this situation an identified attorney is actually available and seeking an opportunity to consult with him, and the police do not inform him of that fact, any statement or the fruits of any statement obtained after the police themselves know of the attorney's efforts to reach the arrested person cannot be rendered admissible on the theory that the person knowingly and intelligently waived counsel").

As noted, two state courts besides the Rhode Island Supreme Court have reached a contrary conclusion. See *State* v. *Beck*, 687 S. W. 2d 155, 159 (Mo. 1985) ("In light of the careful attention the deputies gave to insuring that defendant was properly informed of his *Miranda* rights, his unequivocal responses and determined conduct, evince nothing less than a deliberate, firm, knowing, and intelligent choice to speak without the prior counsel of Ms. Hendrix or any other attorney"); *Blanks* v. *State*, 254 Ga. 420, 423, 330 S. E. 2d 575, 579 (1985) ("In this case, Blanks was advised of his right to legal assistance on numerous occasions. The record shows overwhelmingly that he knowingly, intelligently, and voluntarily waived this right and spoke willingly to law enforcement officers").

about the client is an event that has a direct "bearing" on the knowing and intelligent waiver of constitutional rights. As the Oregon Supreme Court has explained: "To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second." *State* v. *Haynes*, 288 Ore. 59, 72, 602 P. 2d 272, 278 (1979), cert. denied, 446 U. S. 945 (1980).[42]

In short, settled principles about construing waivers of constitutional rights and about the need for strict presumptions in custodial interrogations, as well as a plain reading of the *Miranda* opinion itself, overwhelmingly support the conclusion reached by almost every state court that has considered the matter—a suspect's waiver of his right to counsel is invalid if police refuse to inform the suspect of his counsel's communications.

III

The Court makes the alternative argument that requiring police to inform a suspect of his attorney's communications to

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[42] See also *People* v. *Smith*, 93 Ill. 2d, at 187, 442 N. E. 2d, at 1328–1329; *Commonwealth* v. *Sherman*, 389 Mass., at 291, 450 N. E. 2d, at 568.

The majority mischaracterizes this dissent by stating that its "major premise" is that "*Miranda* requires the police to inform a suspect of any and all information that would be useful to a decision whether to remain silent or speak with the police." *Ante*, at 433, n. 4. The majority's response ignores the fact that the police action here is not simply a failure to provide "useful" information; rather, it is affirmative police interference in a communication between an attorney and a suspect. Moreover, the "information" intercepted by the police bears directly on the right to counsel that police are asking the suspect to waive. The "information" at issue is thus far different from information about "the nature and quality of the evidence," *Oregon* v. *Elstad*, 470 U. S., at 317, or about a grand jury witness' possible target status, *United States* v. *Washington*, 431 U. S. 181, 188–189 (1977).

and about him is not required because it would upset the careful "balance" of *Miranda*. Despite its earlier notion that the attorney's call is an "outside event" that has "no bearing" on a knowing and intelligent waiver, the majority does acknowledge that information of attorney Munson's call "would have been useful to respondent" and "might have affected his decision to confess." *Ante*, at 422.[43] Thus, a rule requiring the police to inform a suspect of an attorney's call would have two predictable effects. It would serve "*Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation," *ante*, at 425, and it would disserve the goal of custodial interrogation because it would result in fewer confessions. By a process of balancing these two concerns, the Court finds the benefit to the individual outweighed by the "substantial cost to society's legitimate and substantial interest in securing admissions of guilt." *Ante*, at 427.

The Court's balancing approach is profoundly misguided. The cost of suppressing evidence of guilt will always make the value of a procedural safeguard appear "minimal," "marginal," or "incremental." Indeed, the value of any trial at all seems like a "procedural technicality" when balanced against the interest in administering prompt justice to a murderer or a rapist caught redhanded. The individual interest in procedural safeguards that minimize the risk of error is easily discounted when the fact of guilt appears certain beyond doubt.

What is the cost of requiring the police to inform a suspect of his attorney's call? It would decrease the likelihood that custodial interrogation will enable the police to obtain a confession. This is certainly a real cost, but it is the same cost that this Court has repeatedly found necessary to preserve

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[43] In contrast, the theory of the Rhode Island Supreme Court's decision was that, as a matter of fact, knowledge of attorney Munson's call would not have affected Burbine's decision to confess. 451 A. 2d, at 29.

the character of our free society and our rejection of an inquisitorial system. Three examples illustrate the point.

In *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), we excluded a confession by a defendant who had not been permitted to consult with his lawyer, and whose lawyer had not been permitted to see him. We emphasized the "lesson of history" that our system of justice is not founded on a fear that a suspect will exercise his rights. "If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." *Id.*, at 490. In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), we similarly stressed this character of our system, despite its "cost," by unequivocally holding that an individual has an absolute right to refuse to respond to police interrogation and to have the assistance of counsel during any questioning.[44] Thus, as a matter of law, the assumed right of the police to interrogate a suspect is no right at all; at best, it is a mere privilege terminable at the will of the suspect. And, more recently in *Dunaway* v. *New York*, 442 U. S. 200 (1979), the Court corrected the long-held but mistaken view of the police that they have some sort of right to take any sus-

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[44] After endorsing the statement by "one of our country's distinguished jurists" that the quality of a Nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law, the Court wrote:

"If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so, an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution." *Miranda* v. *Arizona*, 384 U. S., at 480–481.

pect into custody for the purpose of questioning him even though they may not have probable cause to arrest.[45]

Just as the "cost" does not justify taking a suspect into custody or interrogating him without giving him warnings simply because police desire to question him, so too the "cost" does not justify permitting police to withhold from a suspect knowledge of an attorney's communication, even though that communication would have an unquestionable effect on the suspect's exercise of his rights. The "cost" that concerns the Court amounts to nothing more than an acknowledgment that the law enforcement interest in obtaining convictions suffers whenever a suspect exercises the rights that are afforded by our system of criminal justice. In other words, it is the fear that an individual may exercise his rights that tips the scales of justice for the Court today. The principle that ours is an accusatorial, not an inquisitorial, system, however, has repeatedly led the Court to reject that fear as a valid reason for inhibiting the invocation of rights.

If the Court's cost-benefit analysis were sound, it would justify a repudiation of the right to a warning about counsel itself. There is only a difference in degree between a presumption that advice about the immediate availability of a lawyer would not affect the voluntariness of a decision to confess, and a presumption that every citizen knows that he has a right to remain silent and therefore no warnings of any kind are needed. In either case, the withholding of information serves precisely the same law enforcement interests. And in both cases, the cost can be described as nothing more than

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[45] A recent treatise describes the significant effect of *Dunaway:*

"Over the years, the impression generally prevailed that the police could 'pick-up' suspects for questioning. In 1979, however, the Supreme Court of the United States held, in *Dunaway* v. *New York*, that a confession obtained after a 'pick-up' without probable cause (i. e., without reasonable grounds) to make an actual arrest could not be used as evidence." F. Inbau, J. Reid, & J. Buckley, Criminal Interrogation and Confessions 211 (3d ed. 1986).

an incremental increase in the risk that an individual will make an unintelligent waiver of his rights.

In cases like *Escobedo*, *Miranda*, and *Dunaway*, the Court has viewed the balance from a much broader perspective. In all these cases—indeed, whenever the distinction between an inquisitorial and an accusatorial system of justice is implicated—the law enforcement interest served by incommunicado interrogation has been weighed against the interest in individual liberty that is threatened by such practices. The balance has never been struck by an evaluation of empirical data of the kind submitted to legislative decisionmakers—indeed, the Court relies on no such data today. Rather, the Court has evaluated the quality of the conflicting rights and interests. In the past, that kind of balancing process has led to the conclusion that the police have *no right* to compel an individual to respond to custodial interrogation, and that the interest in liberty that is threatened by incommunicado interrogation is so precious that special procedures must be followed to protect it. The Court's contrary conclusion today can only be explained by its failure to appreciate the value of the liberty that an accusatorial system seeks to protect.

IV

The Court also argues that a rule requiring the police to inform a suspect of an attorney's efforts to reach him would have an additional cost: it would undermine the "clarity" of the rule of the *Miranda* case. *Ante*, at 425–426. This argument is not supported by any reference to the experience in the States that have adopted such a rule. The Court merely professes concern about its ability to answer three quite simple questions.[46]

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[46] Thus, the Court asks itself:

(1) "To what extent should the police be held accountable for knowing that the accused has counsel?" *Ante*, at 425. The simple answer is that police should be held accountable to the extent that the attorney or the suspect informs the police of the representation.

Moreover, the Court's evaluation of the interest in "clarity" is rather one-sided. For a police officer with a printed card containing the exact text he is supposed to recite, perhaps the rule is clear. But the interest in clarity that the *Miranda* decision was intended to serve is not merely for the benefit of the police. Rather, the decision was also, and primarily, intended to provide adequate guidance to the person in custody who is being asked to waive the protections afforded by the Constitution.[47] Inevitably, the *Miranda* decision also serves the judicial interest in clarifying the inquiry

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(2) "Is it enough that someone in the station house knows, or must the interrogating officer himself know of counsel's efforts to contact the suspect?" *Ibid.* Obviously, police should be held responsible for getting a message of this importance from one officer to another.

(3) "Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter?" *Ibid.* As the facts of this case forcefully demonstrate, the answer is "yes."

[47] Two examples will illustrate the one-sided character of the Court's conception of the clarity of the *Miranda* warnings. Although a suspect is told that a lawyer will be appointed if he "cannot afford one," he may have no way of determining whether his resources are adequate to pay an attorney; even Members of this Court cannot agree when a person is too poor to pay his own legal costs. See, *e. g.*, *Pfeil* v. *Rogers*, 474 U. S. 812 (1985) (Court splits 5–4 on whether to grant petitioner leave to proceed *in forma pauperis*); *Barrett* v. *United States Customs Service*, 474 U. S. 812 (1985) (same). Similarly, although a suspect is entitled to rely on the implicit promise that his silence will not be used against him, *Wainwright* v. *Greenfield*, 474 U. S. 284 (1986); *Doyle* v. *Ohio*, 426 U. S. 610 (1976), it is by no means clear that every suspect will understand that promise; many may fear that silence or a request for counsel will be construed as an admission of guilt. Cf. *Griffin* v. *California*, 380 U. S. 609, 610–611 (1965) (prosecutor argued that defendant's silence was probative of his guilt); App. in *Michigan* v. *Jackson*, O. T. 1985, No. 84–1531, pp. 157–158 (police statement to suspect) ("I think you need a brick to hit you against a wall to realize that your in serious trouble here and that the only way that you have any hope is by us. I don't know what your gonna think, how if you want an attorney, I'll tell you what an attorney is gonna tell ya, an attorney is gonna tell ya don't talk to police. . . . But, the attorney doesn't go to jail, does he?").

into what actually transpired during a custodial interrogation.[48] Under the Court's conception of the interest in clarity, however, the police would presumably prevail whenever they could convince the trier of fact that a required ritual was performed before the confession was obtained.

V

At the time attorney Munson made her call to the Cranston police station, she was acting as Burbine's attorney. Under ordinary principles of agency law the deliberate deception of Munson was tantamount to deliberate deception of her client.[49] If an attorney makes a mistake in the course of her representation of her client, the client must accept the consequences of that mistake.[50] It is equally clear that when an attorney makes an inquiry on behalf of her client, the client is entitled to a truthful answer. Surely the client must have the same remedy for a false representation to his lawyer that he would have if he were acting *pro se* and had propounded the question himself.

The majority brushes aside the police deception involved in the misinformation of attorney Munson. It is irrelevant to the Fifth Amendment analysis, concludes the majority, because that right is personal; it is irrelevant to the Sixth

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[48] Indeed, in contrast to the majority's remarks about clarity, the operation of the principle expressed by almost all the state courts would be far clearer than the operation of the Court's contrary principle. For it is surely easier to administer a rule that applies to an external event, such as an attorney's telephone call or a visit to the police station, than a rule that requires an evaluation of the state of mind of a person undergoing custodial interrogation.

[49] In contrast to the Court's opinion today, the Court in the past has had no problems applying principles of agency to the invocation of constitutional rights. See *Brewer* v. *Williams*, 430 U. S., at 405 (the accused "had effectively asserted his right to counsel by having secured attorneys at both ends of the automobile trip, both of whom, *acting as his agents*, had made clear to the police that no interrogation was to occur during the journey") (emphasis added).

[50] See, *e. g.*, *Engle* v. *Isaac*, 456 U. S. 107, 134 (1982).

Amendment analysis, continues the majority, because the Sixth Amendment does not apply until formal adversary proceedings have begun.

In my view, as a matter of law, the police deception of Munson was tantamount to deception of Burbine himself. It constituted a violation of Burbine's right to have an attorney present during the questioning that began shortly thereafter. The existence of that right is undisputed.[51] Whether the source of that right is the Sixth Amendment, the Fifth Amendment, or a combination of the two is of no special importance, for I do not understand the Court to deny the existence of the right.

The pertinent question is whether police deception of the attorney is utterly irrelevant to that right. In my judgment, it blinks at reality to suggest that misinformation which prevented the presence of an attorney has no bearing on the protection and effectuation of the right to counsel in custodial interrogation. The majority parses the role of attorney and suspect so narrowly that the deception of the attorney is of no

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[51] See *Edwards* v. *Arizona*, 451 U. S., at 482 ("*Miranda* . . . declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation"); *Miranda*, 384 U. S. at 479. In his *Miranda* dissent, Justice Harlan correctly noted that the Court had held that a person in custody "has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge." *Id.*, at 504. The standard written waiver form used by the police in this case recited: "I have the right to the presence of an attorney prior to and during any questioning by the police."

In his argument for the United States as *amicus curiae*, the Solicitor General advanced the remarkable suggestion that *Miranda*'s requirement that an individual be told that he has a right to consult with counsel while in custody is "a sort of a white lie" that is "harmless" and "useful." Tr. of Oral Arg. 21. He contended that "police do not have to provide a lawyer if he asks for a lawyer. They need simply terminate the interrogation." *Ibid.* I find this view completely untenable, and I take it that the Court's opinion, in today's sanctioning of police deception, does not in any way accept the suggestion that this Court's required warnings are themselves a constitutionally compelled form of deception, or "white lie."

constitutional significance. In other contexts, however, the Court does not hesitate to recognize an identity between the interest of attorney and accused.[52] The character of the attorney-client relationship requires rejection of the Court's notion that the attorney is some entirely distinct, completely severable entity and that deception of the attorney is irrelevant to the right of counsel in custodial interrogation.[53]

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[52] See, *e. g.*, *Strickland* v. *Washington*, 466 U. S. 668, 690 (1984) (when client challenges effectiveness of assistance, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"); *Wainwright* v. *Sykes*, 433 U. S. 72, 91, n. 14 (1977) ("[D]ecisions of counsel relating to trial strategy, even when made without the consultation of the defendant, would bar direct federal review of claims thereby forgone, except where 'the circumstances are exceptional' ").

[53] Prevailing norms of legal practice prevent a lawyer from communicating with a party, rather than a lawyer. See Disciplinary Rule 7–104(A)(1), ABA Code of Professional Responsibility (1980) ("During the course of his representation of a client a lawyer shall not: Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so"). Cf. *United States* v. *Foley*, 735 F. 2d 45, 48 (CA2 1984) (prosecutorial practice of interviewing defendants in the absence of counsel before arraignment "raises serious constitutional questions" and "contravene[s] the principles of DR7–104(A)(1)), cert. denied *sub nom. Edler* v. *United States*, 469 U. S. 1161 (1985); *State* v. *Yatman*, 320 So. 2d 401, 403 (Fla. App. 1975) ("Disciplinary Rule 7–104 of the Code of Professional Responsibility applies equally to lawyers involved in the prosecution of criminal cases as in civil cases. . . . If any communication with a person represented by counsel on the subject under litigation is prohibited, then taking the deposition of an individual charged with a criminal offense without notice to his counsel regarding matters which are relevant to the criminal charges pending against said represented individual is also clearly prohibited by the foregoing disciplinary rule"); *United States* v. *Springer*, 460 F. 2d 1344, 1354–1355 (CA7 1972) (Stevens, J., dissenting) (interview of defendant in absence of counsel would have violated DR7–104(A) in civil context and violated "procedural regularity" required by Due Process Clause in criminal context). These cases suggest the established legal principle that an attorney and his client frequently share a common identity for purposes related to the client's legal interests.

The possible reach of the Court's opinion is stunning. For the majority seems to suggest that police may deny counsel all access to a client who is being held. At least since *Escobedo* v. *Illinois*, it has been widely accepted that police may not simply deny attorneys access to their clients who are in custody. This view has survived the recasting of *Escobedo* from a Sixth Amendment to a Fifth Amendment case that the majority finds so critically important. That this prevailing view is shared *by the police* can be seen in the state-court opinions detailing various forms of police deception of attorneys.[54] For, if there were no obligation to give attorneys access, there would be no need to take elaborate steps to avoid access, such as shuttling the suspect to a different location,[55] or taking the lawyer to different locations;[56] police could simply refuse to allow the attorneys to see the suspects. But the law enforcement profession has apparently believed, quite rightly in my view, that denying lawyers access to their clients is impermissible. The Court today seems to assume that this view was error—that, from the federal constitutional perspective, the lawyer's access is, as a question from the Court put it in oral argument, merely "a matter of prosecutorial grace." Tr. of Oral Arg. 32. Certainly, nothing in the Court's Fifth and Sixth Amendment analysis acknowledges that there is *any* federal constitutional bar to an absolute denial of lawyer access to a suspect who is in police custody.

In sharp contrast to the majority, I firmly believe that the right to counsel at custodial interrogation is infringed by police treatment of an attorney that prevents or impedes the attorney's representation of the suspect at that interrogation.

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[54] See n. 10, *supra*.

[55] *State* v. *Haynes*, 288 Ore. 59, 602 P. 2d 272 (1979), cert. denied, 446 U. S. 945 (1980).

[56] *Lewis* v. *State*, 695 P. 2d 528 (Okla. Crim. App. 1984).

VI

The Court devotes precisely five sentences to its conclusion that the police interference in the attorney's representation of Burbine did not violate the Due Process Clause. In the majority's view, the due process analysis is a simple "shock the conscience" test. Finding its conscience troubled,[57] but not shocked, the majority rejects the due process challenge.

In a variety of circumstances, however, the Court has given a more thoughtful consideration to the requirements of due process. For instance, we have concluded that use of a suspect's post-*Miranda* warnings silence against him violates the due process requirement of fundamental fairness because such use breaches an implicit promise that "silence will carry no penalty."[58] Similarly, we have concluded that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."[59] We have also concluded that vindictive prosecution violates due process;[60] so too does vindictive sentencing.[61] Indeed, we have emphasized that analysis of the "voluntariness" of a confession is frequently a "convenient shorthand" for reviewing objectionable police methods under the rubric of the due process requirement of fundamental fairness.[62] What emerges from

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[57] See *ante*, at 424 ("[W]e share respondent's distaste for the deliberate misleading of an officer of the court").

[58] See *Wainwright* v. *Greenfield*, 474 U. S., at 295; *Doyle* v. *Ohio*, 426 U. S., at 618.

[59] *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963). See also *United States* v. *Bagley*, 473 U. S. 667 (1985); *United States* v. *Agurs*, 427 U. S. 97 (1976); *Moore* v. *Illinois*, 408 U. S. 786 (1972).

[60] *Blackledge* v. *Perry*, 417 U. S. 21 (1974).

[61] *North Carolina* v. *Pearce*, 395 U. S. 711 (1969).

[62] "This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. *Brown* v. *Mississippi*, 297 U. S. 278 (1936), was the wellspring of this no-

these cases is not the majority's simple "shock the conscience" test, but the principle that due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections.

In my judgment, police interference in the attorney-client relationship is the type of governmental misconduct on a matter of central importance to the administration of justice that the Due Process Clause prohibits. Just as the police cannot impliedly promise a suspect that his silence will not be used against him and then proceed to break that promise, so too police cannot tell a suspect's attorney that they will not question the suspect and then proceed to question him. Just as the government cannot conceal from a suspect material and exculpatory evidence, so too the government cannot conceal from a suspect the material fact of his attorney's communication.

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tion, now deeply embedded in our criminal law. Faced with statements extracted by beatings and other forms of physical and psychological torture, the Court held that confessions procured by means 'revolting to the sense of justice' could not be used to secure a conviction. *Id.*, at 286. On numerous subsequent occasions the Court has set aside convictions secured through the admission of an improperly obtained confession. . . . Although these decisions framed the legal inquiry in a variety of different ways, usually through the 'convenient shorthand' of asking whether the confession was 'involuntary,' *Blackburn* v. *Alabama*, 361 U. S. 199, 207 (1960), the Court's analysis has consistently been animated by the view that 'ours is an accusatorial and not an inquisitorial system,' *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961), and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness. Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations, . . . and is binding on the States, . . . the Court has continued to measure confessions against the requirements of due process. See, *e. g.*, *Mincey* v. *Arizona*, *supra*, at 402; *Beecher* v. *Alabama*, 389 U. S. 35, 38 (1967) *(per curiam)*." *Miller* v. *Fenton*, 474 U. S. 104, 109–110 (1985).

Police interference with communications between an attorney and his client violates the due process requirement of fundamental fairness. Burbine's attorney was given completely false information about the lack of questioning; moreover, she was not told that her client would be questioned regarding a murder charge about which she was unaware. Burbine, in turn, was not told that his attorney had phoned and that she had been informed that he would not be questioned. Quite simply, the Rhode Island police effectively drove a wedge between an attorney and a suspect through misinformation and omissions.

The majority does not "question that on facts more egregious than those presented here police deception might rise to a level of a due process violation." *Ante*, at 432. In my view, the police deception disclosed by this record plainly does rise to that level.

VII

This case turns on a proper appraisal of the role of the lawyer in our society. If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers—as in an inquisitorial society—then the Court's decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of constitutional rights—as in an accusatorial society—then today's decision makes no sense at all.

Like the conduct of the police in the Cranston station on the evening of June 29, 1977, the Court's opinion today serves the goal of insuring that the perpetrator of a vile crime is punished. Like the police on that June night as well, however, the Court has trampled on well-established legal principles and flouted the spirit of our accusatorial system of justice.

I respectfully dissent.

PEMBAUR *v.* CITY OF CINCINNATI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-1160. Argued December 2, 1985—Decided March 25, 1986

Petitioner, a physician and the proprietor of a clinic in Cincinnati, Ohio, that provided medical services primarily to welfare recipients, was indicted by a grand jury for fraudulently accepting payments from state welfare agencies. During the grand jury investigation, subpoenas were issued for the appearance of two of petitioner's employees. When the employees failed to appear, the Assistant County Prosecutor obtained capiases for their detention. But when two County Deputy Sheriffs attempted to serve the capiases at petitioner's clinic, he barred the door and refused to let them enter the part of the clinic where the employees presumably were located. Thereafter, Cincinnati police officers, whom petitioner had called, appeared and told petitioner to allow the Deputy Sheriffs to enter. Petitioner continued to refuse. The Deputy Sheriffs then called their superior who told them to call the County Prosecutor's Office and to follow his instructions. The Deputy Sheriffs spoke to the Assistant Prosecutor assigned to the case. He in turn conferred with the County Prosecutor, who told him to instruct the Deputy Sheriffs to "go in and get" the employees. The Assistant Prosecutor relayed these instructions to the Deputy Sheriffs. After the Deputy Sheriffs tried unsuccessfully to force the door, city police officers obtained an axe and chopped down the door. The Deputy Sheriffs then entered and searched the clinic but were unable to locate the employees sought. Although petitioner was acquitted of the fraud charges, he was indicted and convicted for obstructing police in the performance of an authorized act. His conviction was upheld by the Ohio Supreme Court. Petitioner then filed a damages action in Federal District Court under 42 U. S. C. § 1983 against the county, among other defendants, alleging that the county had violated his rights under the Fourth and Fourteenth Amendments. The District Court dismissed the claim against the county on the ground that the individual officers were not acting pursuant to the kind of "official policy" that is the predicate for municipal liability under *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658. The Court of Appeals affirmed, holding that petitioner had failed to prove the existence of a county policy because he had shown nothing more than that on "this one occasion" the Prosecutor and the Sheriff decided to force entry into petitioner's clinic.

Held: The judgment is reversed, and the case is remanded.

746 F. 2d 337, reversed and remanded.

JUSTICE BRENNAN delivered the opinion of the Court with respect to Parts I, II–A, and II–C, concluding that:

1. The "official policy" requirement of *Monell* was intended to distinguish acts of the *municipality* from acts of the municipality's *employees*, and thereby make clear that municipal liability is limited to actions for which the municipality is actually responsible. *Monell* held that recovery from a municipality is limited to acts that are, properly speaking, "of the municipality," *i. e.*, acts that the municipality has officially sanctioned or ordered. With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. If the decision to adopt a particular course of action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. Pp. 477–481.

2. It was error to dismiss petitioner's claim against the county. Ohio law authorizes the County Sheriff to obtain instructions from the County Prosecutor. The Sheriff followed the practice of delegating certain decisions to the Prosecutor where appropriate. In this case, the Deputy Sheriffs received instructions from the Sheriff's Office to follow the orders of the County Prosecutor, who made a considered decision based on his understanding of the law and commanded the Deputy Sheriffs to enter petitioner's clinic. That decision directly caused a violation of petitioner's Fourth Amendment rights. In ordering the Deputy Sheriffs to enter petitioner's clinic to serve the capiases on the employees, the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983. Pp. 484–485.

JUSTICE BRENNAN, joined by JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concluded in Part II–B that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. The fact that a particular official has discretion in the exercise of particular functions does not give rise to municipal liability based on an exercise of that discretion unless the official is also responsible, under state law, for establishing final governmental policy respecting such activity. Municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. Pp. 481–484.

BRENNAN, J., delivered the opinion of the Court with respect to Parts I, II–A, and II–C, in which WHITE, MARSHALL, BLACKMUN, STEVENS, and

O'CONNOR (except for Part II–C), JJ., joined, and an opinion with respect to Part II–B, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 485. STEVENS, J., *post*, p. 487, and O'CONNOR, J., *post*, p. 491, filed opinions concurring in part and concurring in the judgment. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 492.

Robert E. Manley argued the cause for petitioner. With him on the briefs was *Andrew S. Lipton*.

Roger E. Friedmann argued the cause for respondents. With him on the brief was *Arthur M. Ney, Jr.**

JUSTICE BRENNAN delivered the opinion of the Court, except as to Part II–B.

In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), the Court concluded that municipal liability under 42 U. S. C. § 1983 is limited to deprivations of federally protected rights caused by action taken "pursuant to official municipal policy of some nature . . . ." *Id.*, at 691. The question presented is whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement.

I

Bertold Pembaur is a licensed Ohio physician and the sole proprietor of the Rockdale Medical Center, located in the city of Cincinnati in Hamilton County. Most of Pembaur's patients are welfare recipients who rely on government assistance to pay for medical care. During the spring of 1977, Simon Leis, the Hamilton County Prosecutor, began investigating charges that Pembaur fraudulently had accepted payments from state welfare agencies for services not actually provided to patients. A grand jury was convened, and the case was assigned to Assistant Prosecutor William Whalen.

**Jack D. Novik*, *Burt Neuborne*, and *Bruce Campbell* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

In April, the grand jury charged Pembaur in a six-count indictment.

During the investigation, the grand jury issued subpoenas for the appearance of two of Pembaur's employees. When these employees failed to appear as directed, the Prosecutor obtained capiases for their arrest and detention from the Court of Common Pleas of Hamilton County.[1]

On May 19, 1977, two Hamilton County Deputy Sheriffs attempted to serve the capiases at Pembaur's clinic. Although the reception area is open to the public, the rest of the clinic may be entered only through a door next to the receptionist's window. Upon arriving, the Deputy Sheriffs identified themselves to the receptionist and sought to pass through this door, which was apparently open. The receptionist blocked their way and asked them to wait for the doctor. When Pembaur appeared a moment later, he and the receptionist closed the door, which automatically locked from the inside, and wedged a piece of wood between it and the wall. Returning to the receptionist's window, the Deputy Sheriffs identified themselves to Pembaur, showed him the capiases and explained why they were there. Pembaur refused to let them enter, claiming that the police had no legal authority to be there and requesting that they leave. He told them that he had called the Cincinnati police, the local media, and his lawyer. The Deputy Sheriffs decided not to take further action until the Cincinnati police arrived.

Shortly thereafter, several Cincinnati police officers appeared. The Deputy Sheriffs explained the situation to them and asked that they speak to Pembaur. The Cincinnati police told Pembaur that the papers were lawful and that he should allow the Deputy Sheriffs to enter. When Pembaur refused, the Cincinnati police called for a superior officer. When he too failed to persuade Pembaur to open the door,

[1] A capias is a writ of attachment commanding a county official to bring a subpoenaed witness who has failed to appear before the court to testify and to answer for civil contempt. See Ohio Rev. Code Ann. § 2317.21 (1981).

the Deputy Sheriffs decided to call their supervisor for further instructions. Their supervisor told them to call Assistant Prosecutor Whalen and to follow his instructions. The Deputy Sheriffs then telephoned Whalen and informed him of the situation. Whalen conferred with County Prosecutor Leis, who told Whalen to instruct the Deputy Sheriffs to "go in and get [the witnesses]." Whalen in turn passed these instructions along to the Deputy Sheriffs.

After a final attempt to persuade Pembaur voluntarily to allow them to enter, the Deputy Sheriffs tried unsuccessfully to force the door. City police officers, who had been advised of the County Prosecutor's instructions to "go in and get" the witnesses, obtained an axe and chopped down the door. The Deputy Sheriffs then entered and searched the clinic. Two individuals who fit descriptions of the witnesses sought were detained, but turned out not to be the right persons.

After this incident, the Prosecutor obtained an additional indictment against Pembaur for obstructing police in the performance of an authorized act. Although acquitted of all other charges, Pembaur was convicted for this offense. The Ohio Court of Appeals reversed, reasoning that Pembaur was privileged under state law to exclude the deputies because the search of his office violated the Fourth Amendment. *State* v. *Pembaur*, No. C–790380 (Hamilton County Court of Appeals Nov. 3, 1982). The Ohio Supreme Court reversed and reinstated the conviction. *State* v. *Pembaur*, 9 Ohio St. 3d 136, 459 N. E. 2d 217, cert. denied, 467 U. S. 1219 (1984). The Supreme Court held that the state-law privilege applied only to bad-faith conduct by law enforcement officials, and that, under the circumstances of this case, Pembaur was obliged to acquiesce to the search and seek redress later in a civil action for damages. 9 Ohio St. 3d, at 138, 459 N. E. 2d, at 219.

On April 20, 1981, Pembaur filed the present action in the United States District Court for the Southern District of Ohio against the city of Cincinnati, the County of Hamilton,

the Cincinnati Police Chief, the Hamilton County Sheriff, the members of the Hamilton Board of County Commissioners (in their official capacities only), Assistant Prosecutor Whalen, and nine city and county police officers.[2] Pembaur sought damages under 42 U. S. C. § 1983, alleging that the county and city police had violated his rights under the Fourth and Fourteenth Amendments. His theory was that, absent exigent circumstances, the Fourth Amendment prohibits police from searching an individual's home or business without a search warrant even to execute an arrest warrant for a third person. We agreed with that proposition in *Steagald* v. *United States*, 451 U. S. 204 (1981), decided the day after Pembaur filed this lawsuit. Pembaur sought $10 million in actual and $10 million in punitive damages, plus costs and attorney's fees.

Much of the testimony at the 4-day trial concerned the practices of the Hamilton County Police in serving capiases. Frank Webb, one of the Deputy Sheriffs present at the clinic on May 19, testified that he had previously served capiases on the property of third persons without a search warrant, but had never been required to use force to gain access. Assistant Prosecutor Whalen was also unaware of a prior instance in which police had been denied access to a third person's property in serving a capias and had used force to gain entry. Lincoln Stokes, the County Sheriff, testified that the Department had no written policy respecting the serving of capiases on the property of third persons and that the proper response in any given situation would depend upon the circumstances. He too could not recall a specific instance in

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[2] Hamilton County Prosecutor Leis was not made a defendant because counsel for petitioner believed that Leis was absolutely immune. Tr., Mar. 14–Mar. 17., p. 267. We express no view as to the correctness of this evaluation. Cf. *Imbler* v. *Pachtman*, 424 U. S. 409, 430–431 (1976) (leaving open the question of a prosecutor's immunity when he acts "in the role of an administrator or investigative officer rather than that of an advocate").

which entrance had been denied and forcibly gained. Sheriff Stokes did testify, however, that it was the practice in his Department to refer questions to the County Prosecutor for instructions under appropriate circumstances and that "it was the proper thing to do" in this case.

The District Court awarded judgment to the defendants and dismissed the complaint in its entirety. The court agreed that the entry and search of Pembaur's clinic violated the Fourth Amendment under *Steagald*, *supra*, but held *Steagald* inapplicable since it was decided nearly four years after the incident occurred. Because it construed the law in the Sixth Circuit in 1977 to permit law enforcement officials to enter the premises of a third person to serve a capias, the District Court held that the individual municipal officials were all immune under *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982).

The claims against the county and the city were dismissed on the ground that the individual officers were not acting pursuant to the kind of "official policy" that is the predicate for municipal liability under *Monell*. With respect to Hamilton County, the court explained that, even assuming that the entry and search were pursuant to a governmental policy, "it was not a policy of Hamilton County *per se*" because "[t]he Hamilton County Board of County Commissioners, acting on behalf of the county, simply does not establish or control the policies of the Hamilton County Sheriff." With respect to the city of Cincinnati, the court found that "the only policy or custom followed . . . was that of aiding County Sheriff's Deputies in the performance of their duties." The court found that any participation by city police in the entry and search of the clinic resulted from decisions by individual officers as to the permissible scope of assistance they could provide, and not from a city policy to provide this particular kind of assistance.

On appeal, Pembaur challenged only the dismissal of his claims against Whalen, Hamilton County, and the city of Cin-

cinnati. The Court of Appeals for the Sixth Circuit upheld the dismissal of Pembaur's claims against Whalen and Hamilton County, but reversed the dismissal of his claim against the city of Cincinnati on the ground that the District Court's findings concerning the policies followed by the Cincinnati police were clearly erroneous. 746 F. 2d 337 (1984).[3]

The Court of Appeals affirmed the District Court's dismissal of Pembaur's claim against Hamilton County, but on different grounds. The court held that the County Board's lack of control over the Sheriff would not preclude county liability if "the nature and duties of the Sheriff are such that his acts may fairly be said to represent the county's official policy with respect to the specific subject matter." *Id.*, at 340–341. Based upon its examination of Ohio law, the Court of Appeals found it "clea[r]" that the Sheriff and the Prosecutor were both county officials authorized to establish "the official policy of Hamilton County" with respect to matters of law enforcement. *Id.*, at 341. Notwithstanding these conclusions, however, the court found that Pembaur's claim against the county had been properly dismissed:

> "We believe that Pembaur failed to prove the existence of a county policy in this case. Pembaur claims that the deputy sheriffs acted pursuant to the policies of the Sheriff and Prosecutor by forcing entry into the medical center. Pembaur has failed to establish, however, anything more than that, on this *one occasion*, the Prosecutor and the Sheriff decided to force entry into his office. . . . That single, discrete decision is insufficient,

[3] The court found that there was a city policy respecting the use of force in serving capiases as well as a policy of aiding county police. It based this conclusion on the testimony of Cincinnati Chief of Police Myron Leistler, who stated that it was the policy of his Department to take whatever steps were necessary, including the forcing of doors, to serve an arrest document. 746 F. 2d, at 341–342; see also, Tr., Mar. 14–Mar. 17, pp. 43–45, 46–47. The court remanded the case for a determination whether Pembaur's injury was incurred as a result of the execution of this policy. 746 F. 2d, at 342.

by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy." *Ibid.* (footnote omitted) (emphasis in original).

Pembaur petitioned for certiorari to review only the dismissal of his claim against Hamilton County. The decision of the Court of Appeals conflicts with holdings in several other Courts of Appeals,[4] and we granted the petition to resolve the conflict. 472 U. S. 1016 (1985). We reverse.

II

A

Our analysis must begin with the proposition that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 691.[5] As we read its opinion, the Court of Appeals held that a single decision to

[4] See, *e. g.*, *McKinley* v. *City of Eloy*, 705 F. 2d 1110, 1116–1117 (CA9 1983); *Berdin* v. *Duggan*, 701 F. 2d 909, 913–914 (CA11), cert. denied, 464 U. S. 893 (1983); *Van Ooteghem* v. *Gray*, 628 F. 2d 488, 494–495 (CA5 1980), cert. denied, 455 U. S. 909 (1982); *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F. 2d 438, 448 (CA2 1980). See also *Sanders* v. *St. Louis County*, 724 F. 2d 665, 668 (CA8 1983) *(per curiam)* ("It may be that one act of a senior county official is enough to establish the liability of the county, if that official was in a position to establish policy and if that official himself directly violated another's constitutional rights"). But see *Losch* v. *Borough of Parkesburg, Pa.*, 736 F. 2d 903, 910–911 (CA3 1984) ("[E]ven if [the Police Chief] were the final authority with regard to police activities, . . . there is no regulation or evidence of any repeated action by [the chief] . . . that can transmute his actions in the Losch incident into a general Borough policy").

[5] There is no question in this case that petitioner suffered a constitutional deprivation. The Court of Appeals found, and respondent concedes, that the entry and search of petitioner's clinic violated the Fourth Amendment under *Steagald* v. *United States*, 451 U. S. 204 (1981). See 746 F. 2d, at 340, n. 1; Brief for Respondents 11. Respondent never challenged and has in fact also conceded that *Steagald* applies retroactively to this case. See Tr. of Oral Arg. 26–27. We decide this case in light of respondent's concessions.

take particular action, although made by municipal policymakers, cannot establish the kind of "official policy" required by *Monell* as a predicate to municipal liability under § 1983.[6] The Court of Appeals reached this conclusion without referring to *Monell*—indeed, without any explanation at all. However, examination of the opinion in *Monell* clearly demonstrates that the Court of Appeals misinterpreted its holding.

Monell is a case about responsibility. In the first part of the opinion, we held that local government units could be made liable under § 1983 for deprivations of federal rights, overruling a contrary holding in *Monroe* v. *Pape*, 365 U. S. 167 (1961). In the second part of the opinion, we recognized a limitation on this liability and concluded that a municipality cannot be made liable by application of the doctrine of *respondeat superior*. See *Monell*, 436 U. S., at 691. In part, this conclusion rested upon the language of § 1983, which imposes liability only on a person who "subjects, or causes to be subjected," any individual to a deprivation of federal rights; we noted that this language "cannot easily be read to impose liability vicariously on government bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.*, at 692. Primarily,

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[6] The opinion below also can be read as holding that municipal liability cannot be imposed for a single incident of unconstitutional *conduct* by municipal employees whether or not that conduct is pursuant to municipal *policy*. Such a conclusion is unsupported by either the language or reasoning of *Monell*, or by any of our subsequent decisions. As we explained last Term in *Oklahoma City* v. *Tuttle*, 471 U. S. 808 (1985), once a municipal policy is established, "it requires only one application . . . to satisfy fully *Monell*'s requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy." *Id.*, at 822 (plurality opinion); see also, *id.*, at 831–832 (BRENNAN, J., concurring in part and concurring in judgment.). The only issue before us, then, is whether petitioner satisfied *Monell*'s requirement that the tortious conduct be pursuant to "official municipal policy."

however, our conclusion rested upon the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*. *Id.*, at 665–683.[7] We found that, because of these doubts, Congress chose not to create such obligations in § 1983. Recognizing that this would be the effect of a federal law of *respondeat superior*, we concluded that § 1983 could not be interpreted to incorporate doctrines of vicarious liability. *Id.*, at 692–694, and n. 57.

The conclusion that tortious conduct, to be the basis for municipal liability under § 1983, must be pursuant to a municipality's "official policy" is contained in this discussion. The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsi-

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[7] This legislative history is discussed at length in *Monell* and need only be summarized here. The distinction between imposing liability on municipalities for their own violations and imposing liability to force municipalities to prevent violations by others was made by Members of the House of Representatives who successfully opposed the "Sherman amendment" to the Civil Rights Act of 1871, 17 Stat. 13, the precursor of § 1983. The Sherman amendment sought to impose civil liability on municipalities for damage done to the person or property of its inhabitants by private persons "riotously and tumultuously assembled." Cong. Globe, 42d Cong., 1st Sess., 749 (1871) (quoted in *Monell*, 436 U. S., at 664). Opponents of the amendment argued that, in effect, it imposed an obligation on local governments to keep the peace, and that the Federal Government could not constitutionally require local governments to keep the peace if state law did not. This argument succeeded in blocking passage of the amendment. However, even the opponents of the Sherman amendment recognized Congress' power to impose civil liability on a local government already obligated to keep the peace by state law if that government failed to do so and thereby violated the Fourteenth Amendment. See *id.*, at 665–683.

ble.[8] *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality"—that is, acts which the municipality has officially sanctioned or ordered.

With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy. See, *e. g.*, *Owen* v. *City of Independence*, 445 U. S. 622 (1980) (City Council passed resolution firing plaintiff without a pretermination hearing); *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981) (City Council canceled license permitting concert because of dispute over content of performance). But the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Monell*'s language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," *Monell*, *supra*, at 694, and whose decisions therefore may give rise to municipal liability under § 1983.

Indeed, any other conclusion would be inconsistent with the principles underlying § 1983. To be sure, "official policy" often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar cir-

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[8] Thus, our statement of the conclusion juxtaposes the policy requirement with imposing liability on the basis of *respondeat superior:*

"We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy . . . , whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.*, at 694.

cumstances consistently and over time. That was the case in *Monell* itself, which involved a written rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary. However, as in *Owen* and *Newport*, a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood.[9] More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

B

Having said this much, we hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered.[10] The fact that a particular official—even a policy-

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[9] While the dictionary is not the source definitively to resolve legal questions, we note that this description of "policy" is consistent with the word's ordinary definition. For example, Webster's defines the word as "a specific decision or set of decisions designed to carry out such a chosen course of action." Webster's Third New International Dictionary 1754 (1981). Similarly, the Oxford English Dictionary defines "policy" as "[a] course of action adopted and pursued by a government, party, ruler, statesman, etc.; any course of action adopted as advantageous or expedient." VII Oxford English Dictionary 1071 (1933). See also, Webster's New Twentieth Century Dictionary 1392 (2d ed. 1979) ("any governing principle, plan, or course of action"); Random House Dictionary 1113 (1966) ("a course of action adopted and pursued by a government, ruler, political party, etc.").

[10] Section 1983 also refers to deprivations under color of a state "custom or usage," and the Court in *Monell* noted accordingly that "local govern-

making official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. See, *e. g.*, *Oklahoma City* v. *Tuttle*, 471 U. S., at 822–824.[11] The offi-

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ments, like every other § 1983 'person,' . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." 436 U. S., at 690–691. A § 1983 plaintiff thus may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers if able to prove that the challenged action was pursuant to a state "custom or usage." Because there is no allegation that the action challenged here was pursuant to a local "custom," this aspect of *Monell* is not at issue in this case.

[11] Respondent argues that the holding in *Tuttle* is far broader than this. It relies on the statement near the end of JUSTICE REHNQUIST's plurality opinion that "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell* unless proof of the incident includes proof that it was caused by an *existing*, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." 471 U. S., at 823–824 (emphasis added). Respondent contends that a policy cannot be said to be "existing" unless similar action has been taken in the past.

This reading of the *Tuttle* plurality is strained, and places far too much weight on a single word. The plaintiff in *Tuttle* alleged that a police officer's use of excessive force deprived her decedent of life without due process of law. The plaintiff proved only a single instance of unconstitutional action by a nonpolicymaking employee of the city. She argued that the city had "caused" the constitutional deprivation by adopting a "policy" of inadequate training. The trial judge instructed the jury that a single, unusually excessive use of force may warrant an inference that it was attributable to grossly inadequate training, and that the municipality could be held liable on this basis. We reversed the judgment against the city. Although there was no opinion for the Court on this question, both the plurality and the opinion concurring in the judgment found plaintiff's submission inadequate because she failed to establish that the unconstitutional act was taken *pursuant to* a municipal policy rather than simply resulting from such a policy in a "but for" sense. *Id.*, at 822–824 (plurality opinion), 829–830 (BRENNAN, J., concurring in part and concurring in judgment). That conclusion is entirely consistent with our holding today that the policy which ordered or authorized an unconstitutional act can be established by a single decision by proper municipal policymakers.

cial must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.[12] Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law. However, like other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. To hold a municipality liable for actions ordered by such officers exercising their policymaking authority is no more an application of the theory of *respondeat superior* than was holding the municipalities liable for the decisions of the City Councils in *Owen* and *Newport*. In each case municipal liability attached to a single decision to take unlawful action made by municipal policymakers. We hold that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in ques-

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[12] Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability.

tion. See *Tuttle*, *supra*, at 823 ("'policy' generally implies a course of action consciously chosen from among various alternatives").

C

Applying this standard to the case before us, we have little difficulty concluding that the Court of Appeals erred in dismissing petitioner's claim against the county. The Deputy Sheriffs who attempted to serve the capiases at petitioner's clinic found themselves in a difficult situation. Unsure of the proper course of action to follow, they sought instructions from their supervisors. The instructions they received were to follow the orders of the County Prosecutor. The Prosecutor made a considered decision based on his understanding of the law and commanded the officers forcibly to enter petitioner's clinic. That decision directly caused the violation of petitioner's Fourth Amendment rights.

Respondent argues that the County Prosecutor lacked authority to establish municipal policy respecting law enforcement practices because only the County Sheriff may establish policy respecting such practices. Respondent suggests that the County Prosecutor was merely rendering "legal advice" when he ordered the Deputy Sheriffs to "go in and get" the witnesses. Consequently, the argument concludes, the action of the individual Deputy Sheriffs in following this advice and forcibly entering petitioner's clinic was not pursuant to a properly established municipal policy.

We might be inclined to agree with respondent if we thought that the Prosecutor had only rendered "legal advice." However, the Court of Appeals concluded, based upon its examination of Ohio law, that both the County Sheriff and the County Prosecutor could establish county policy under appropriate circumstances, a conclusion that we do not question here.[13] Ohio Rev. Code Ann. § 309.09(A) (1979)

[13] We generally accord great deference to the interpretation and application of state law by the courts of appeals. *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U. S. 797, 815, n. 12 (1984); *Brockett*

provides that county officers may "require . . . instructions from [the County Prosecutor] in matters connected with their official duties." Pursuant to standard office procedure, the Sheriff's office referred this matter to the Prosecutor and then followed his instructions. The Sheriff testified that his Department followed this practice under appropriate circumstances and that it was "the proper thing to do" in this case. We decline to accept respondent's invitation to overlook this delegation of authority by disingenuously labeling the Prosecutor's clear command mere "legal advice." In ordering the Deputy Sheriffs to enter petitioner's clinic the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983.

The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring.

The forcible entry made in this case was not then illegal under federal, state, or local law. The city of Cincinnati frankly conceded that forcible entry of third-party property to effect otherwise valid arrests was standard operating procedure. There is no reason to believe that the respondent county would abjure using lawful means to execute the capiases issued in this case or had limited the authority of its officers to use force in executing capiases. Further, the county officials who had the authority to approve or disapprove such entries opted for the forceful entry, a choice that was later held to be inconsistent with the Fourth Amendment. Vesting discretion in its officers to use force and its use in this case sufficiently manifested county policy to warrant reversal of the judgment below.

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v. *Spokane Arcades, Inc.*, 472 U. S. 491, 499–500 (1985) (citing cases); see also *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976).

This does not mean that every act of municipal officers with final authority to effect or authorize arrests and searches represents the policy of the municipality. It would be different if *Steagald* v. *United States*, 451 U. S. 204 (1981), had been decided when the events at issue here occurred, if the State Constitution or statutes had forbidden forceful entries without a warrant, or if there had been a municipal ordinance to this effect. Local law enforcement officers are expected to obey the law and ordinarily swear to do so when they take office. Where the controlling law places limits on their authority, they cannot be said to have the authority to make contrary policy. Had the Sheriff or Prosecutor in this case failed to follow an existing warrant requirement, it would be absurd to say that he was nevertheless executing county policy in authorizing the forceful entry in this case and even stranger to say that the county would be liable if the Sheriff had secured a warrant and it turned out that he and the Magistrate had mistakenly thought there was probable cause for the warrant. If deliberate or mistaken acts like this, admittedly contrary to local law, expose the county to liability, it must be on the basis of *respondeat superior* and not because the officers' acts represent local policy.

Such results would not conform to *Monell* and the cases following it. I do not understand the Court to hold otherwise in stating that municipal liability attaches where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Ante*, at 483–484. A sheriff, for example, is not the final policymaker with respect to the probable-cause requirement for a valid arrest. He has no alternative but to act in accordance with the established standard; and his deliberate or mistaken departure from the controlling law of arrest would not represent municipal policy.

In this case, however, the Sheriff and the Prosecutor chose a course that was not forbidden by any applicable law, a

choice that they then had the authority to make. This was county policy, and it was no less so at the time because a later decision of this Court declared unwarranted forceful entry into third-party premises to be violation of the Fourth Amendment.* Hence, I join the Court's opinion and judgment.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

This is not a hard case. If there is any difficulty, it arises from the problem of obtaining a consensus on the meaning of the word "policy"—a word that does not appear in the text of 42 U. S. C. § 1983, the statutory provision that we are supposed to be construing. The difficulty is thus a consequence of this Court's lawmaking efforts rather than the work of the Congress of the United States.[1]

With respect to both the merits of the constitutional claim and the county's liability for the unconstitutional activities of its agents performed in the course of their official duties, there can be no doubt that the Congress that enacted the Ku Klux Act in 1871 intended the statute to authorize a recovery in a case of this kind. When police officers chopped down the door to petitioner's premises in order to serve capiases on two witnesses, they violated petitioner's constitutional rights. *Steagald* v. *United States*, 451 U. S. 204 (1981),

*The county has not challenged the retroactivity of *Steagald* v. *United States*, 451 U. S. 204 (1981), and I do not address that issue.

[1] See *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 841 (1985) (STEVENS, J., dissenting) ("While the Court purports to answer a question of statutory construction . . . its opinion actually provides us with an interpretation of the word 'policy' as it is used in Part II of the opinion in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 690–695 (1978). The word 'policy' does not appear in the text of § 1983, but it provides the theme for today's decision"). It may be significant that the issue has apparently become, not the purpose and scope of 42 U. S. C. § 1983, but the nature of the liability "envisioned" by this Court "in *Monell*." *Post*, at 491 (O'CONNOR, J., concurring in part and concurring in judgment); *post*, at 499 (POWELL, J., dissenting).

makes it perfectly clear that forcible entry to a third party's premises to execute an arrest warrant is unconstitutional if the entry is without a search warrant and in the absence of consent or exigent circumstances.[2] In my view, it is not at all surprising that respondents have "conceded" the retroactivity of *Steagald*. For *Steagald* plainly presented its holding as compelled by, and presaged in, well-established precedent.[3]

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[2] Indeed, it can be argued that the justification for a forcible entry to serve a capias, as in this case, is even weaker than the justification for a forcible entry to execute an arrest warrant, as in *Steagald*. Since the Sixth Circuit in this action, 746 F. 2d 337 (1984), and the Ohio Supreme Court in reviewing petitioner's conviction, *State* v. *Pembaur*, 9 Ohio St. 3d 136, 459 N. E. 2d 217, cert. denied, 467 U. S. 1219 (1984), did not distinguish between the two situations, however, and since the forcible entry was unconstitutional under either conception, it is unnecessary to rest on that possible difference.

[3] See 451 U. S., at 211 ("Except in [cases of consent or exigent circumstances], we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant"); *id.*, at 213–214 ("In the absence of exigent circumstances, we have consistently held that such judicially untested determinations are not reliable enough to justify an entry into a person's home to arrest him without a warrant, or a search of a home for objects in the absence of a search warrant. . . . We see no reason to depart from this settled course when the search of a home is for a person rather than an object"); *id.*, at 216 ("Since warrantless searches of a home are impermissible absent consent or exigent circumstances, we conclude that the instant search violated the Fourth Amendment"); *id.*, at 219 ("[I]f anything, the little guidance that can be gleaned from common-law authorities undercuts the Government's position. The language of *Semayne's Case*, [5 Co. Rep. 91a, 77 Eng. Rep. 194 (K. B. 1603)], . . . suggests that although the subject of an arrest warrant could not find sanctuary in the home of the third party, the home remained a 'castle or privilege' for its residents. Similarly several [common-law] commentators suggested that a search warrant, rather than an arrest warrant, was necessary to fully insulate a constable from an action for trespass brought by a party whose home was searched"); *id.*, at 220 ("[T]he history of the Fourth Amendment strongly suggests that its Framers would not have sanctioned the instant search").

The fact that the Sixth Circuit and two other Circuits had reached a contrary conclusion does not transform *Steagald* into a nonretroactive opinion. This Court has never suggested that resolution of a split in the Circuits

Similarly, if we view the question of municipal liability from the perspective of the Legislature that enacted the Ku Klux Act of 1871, the answer is clear. The legislative history indicating that Congress did not intend to impose civil liability on municipalities for the conduct of third parties, *ante*, at 478–479, and n. 7, merely confirms the view that it did intend to impose liability for the governments' own illegal acts—including those acts performed by their agents in the course of their employment. In other words, as I explained in my dissent in *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 835–840 (1985), both the broad remedial purpose of the statute and the fact that it embodied contemporaneous common-law doctrine, including *respondeat superior*, require a conclusion that Congress intended that a governmental entity be liable for the constitutional deprivations committed by its agents in the course of their duties.[4]

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somehow means that a holding is presumptively nonretroactive in the Circuits that have disagreed with the Court's ultimate conclusion. Furthermore, the suggestion that there is a more compelling need for nonretroactivity in a civil context than in a criminal context, *post*, at 492–496 (POWELL, J., dissenting), ignores the fact that, in a civil context, there is not the societal cost of reversing convictions. Cf. *Johnson* v. *New Jersey*, 384 U. S. 719, 731 (1966) ("[R]etroactive application of *Escobedo* [v. *Illinois*, 378 U. S. 478 (1964),] and *Miranda* [v. *Arizona*, 384 U. S. 436 (1966),] would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards"). Additionally, *Payton* v. *New York*, 445 U. S. 573 (1980), which *Steagald* cites and discusses, has, of course, been held retroactive in the only context in which the Court has considered the issue. See *United States* v. *Johnson*, 457 U. S. 537 (1982).

[4] Several commentators have concluded that the dicta in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), regarding *respondeat superior* misreads the legislative history of § 1983. See, *e. g.*, Blum, From *Monroe* to *Monell*: Defining the Scope of Municipal Liability in Federal Courts, 51 Temp. L.Q. 409, 413, n. 15 (1978) ("The interpretation adopted by the Court with respect to the rejection of vicarious liability under § 1983 had been espoused prior to *Monell* by one author who drew a distinction between 'political' § 1983 cases, in which a city itself causes the constitutional violation, and 'constitutional tort' § 1983 cases, in which an

Finally, in construing the scope of § 1983, the Court has sometimes referred to "considerations of public policy."[5] To the extent that such "policy" concerns are relevant, they also support a finding of county liability. A contrary construction would produce a most anomalous result. The primary responsibility for protecting the constitutional rights of the residents of Hamilton County from the officers of Hamilton County should rest on the shoulders of the county itself, rather than on the several agents who were trying to perform their jobs. Although I recognize that the county may provide insurance protection for its agents, I believe that the primary party against whom the judgment should run is the county itself. The county has the resources and the authority that can best avoid future constitutional violations and provide a fair remedy for those that have occurred in the past. Thus, even if "public policy" concerns should inform the construction of § 1983, those considerations, like the statute's remedial purpose and common-law background, support

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attempt is made to impose vicarious liability on the city for the misconduct of its employees. . . . Although this view of § 1983 may represent a sensitive response to the fiscal plight of municipal corporations today, it should not be acknowledged as a legitimate interpretation of congressional intent in 1871"); Note, Section 1983 Municipal Liability and the Doctrine of Respondeat Superior, 46 U. Chi. L. Rev. 935, 936 (1979) ("[T]he purposes and legislative history of the provision demand a scheme of respondeat superior liability"); Note, *Monell v. Department of Social Services:* One Step Forward and a Half Step Back for Municipal Liability Under Section 1983, 7 Hofstra L. Rev. 893, 921 (1979) ("Analysis of the legislative history of section 1983 does not indicate that Congress intended to exclude respondeat superior from the act. The language of the statute similarly offers no such proof. Since both were relied on by the Court in *Monell*, the dicta in that decision is, at best, poorly reasoned authority for the proposition that a municipality is not liable for the unauthorized acts of its employees"); Comment, Municipal Liability under Section 1983 for Civil Rights Violations After *Monell*, 64 Iowa L. Rev. 1032, 1045 (1979) ("The Court's *[respondeat superior]* limitation . . . is not justified by the legislative history of section 1983 or by policy considerations").

[5] *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266 (1981); *Owen* v. *City of Independence*, 445 U. S. 622, 650 (1980).

a conclusion of county liability for the unconstitutional, axe-swinging entry in this case.

Because I believe that Parts I, II–A, and II–C are consistent with the purpose and policy of § 1983, as well as with our precedents, I join those Parts of the Court's opinion[6] and concur in the judgment.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

For the reasons stated by JUSTICE WHITE, I agree that the municipal officers here were acting as policymakers within the meaning of *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). As the city of Cincinnati freely conceded, forcible entry of third-party property to effect an arrest was standard operating procedure in May 1977. Given that this procedure was consistent with federal, state, and local law at the time the case arose, it seems fair to infer that respondent county's policy was no different. Moreover, under state law as definitively construed by the Court of Appeals, the county officials who opted for the forcible entry "had the authority to approve or disapprove such entries." *Ante*, at 485 (WHITE J., concurring). Given this combination of circumstances, I agree with JUSTICE WHITE that the decision to break down the door "sufficiently manifested county policy to warrant reversal of the judgment below." *Ibid.* Because, however, I believe that the reasoning of the majority goes beyond that necessary to decide the case, and because I fear that the standard the majority articulates may be misread to expose municipalities to liability beyond that envisioned by the Court in *Monell*, I join only Parts I and II–A of the Court's opinion and the judgment.

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[6] The reasons for my not joining Parts II and IV of *Monell*, 436 U. S. at 714 (STEVENS, J., concurring in part), are also applicable to my decision not to join Part II–B of this opinion.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

The Court today holds Hamilton County liable for the forcible entry in May 1977 by Deputy Sheriffs into petitioner's office. The entry and subsequent search were pursuant to capiases for third parties—petitioner's employees—who had failed to answer a summons to appear as witnesses before a grand jury investigating petitioner. When petitioner refused to allow the Sheriffs to enter, one of them, at the request of his supervisor, called the office of the County Prosecutor for instructions. The Assistant County Prosecutor received the call, and apparently was in doubt as to what advice to give. He referred the question to the County Prosecutor, who advised the Deputy Sheriffs to "go in and get them [the witnesses]" pursuant to the capiases.

This five-word response to a single question over the phone is now found by this Court to have created an official county policy for which Hamilton County is liable under § 1983. This holding is wrong for at least two reasons. First, the Prosecutor's response and the Deputies' subsequent actions did not violate any constitutional right that existed at the time of the forcible entry. Second, no official county policy could have been created solely by an offhand telephone response from a busy County Prosecutor.

I

Petitioner's allegation of a constitutional violation rests exclusively on *Steagald* v. *United States*, 451 U. S. 204 (1981), decided four years after the entry here. In *Steagald* we held that an officer may not search for the subject of an arrest warrant in a third party's home without first obtaining a search warrant, unless the search is consensual or justified by exigent circumstances. In 1977, the law in the Sixth Circuit was that a search warrant was not required in such situations if the police had an arrest warrant and reason to believe that the person to be arrested was within the home to be

searched. *United States* v. *McKinney*, 379 F. 2d 259, 262–263 (1967). That view was shared by at least two other Circuits. See *United States* v. *Gaultney*, 606 F. 2d 540, 544–545 (CA5 1979); *United States* v. *Harper*, 550 F. 2d 610, 612–614 (CA10), cert. denied, 434 U. S. 837 (1977). Another Circuit had favored that view in dicta. See *United States* v. *Manley*, 632 F. 2d 978, 983 (CA2 1980). Thus, under the governing law in the applicable Circuit, uncontradicted by any opinion of this Court, the entry into petitioner's office pursuant to an arrest warrant was not a violation of petitioner's Fourth Amendment rights.

The only way to transform this search—legitimate at the time—into a constitutional violation is to apply *Steagald* retroactively. This would not be a startling proposition if all that petitioner sought was retroactive application of a new rule of criminal law to a direct appeal from his criminal conviction.[1] But petitioner seeks something very different—retroactive application of the new rule of criminal law announced in *Steagald* to his subsequent civil lawsuit. Even if one accepts the proposition that a new rule of criminal law should be applied retroactively to create a basis for civil liability under § 1983,[2] existing principles of retroactivity for

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[1] In fact, on direct appeal from his criminal conviction, petitioner did enjoy retroactive application of the rule in *Steagald*, although it did not entitle him to reversal of his conviction. *State* v. *Pembaur*, 9 Ohio St. 3d 136, 459 N. E. 2d 217 (1984). While the Ohio Supreme Court did not specifically address the retroactivity issue, it did discuss the applicability of *Steagald* to petitioner's criminal appeal. 9 Ohio St. 3d, at 137–138, 459 N. E. 2d, at 218–219. The court reasoned, however, that because no "substantive" offense was involved, but only a conviction for obstructing the police, petitioner could not rely on the unconstitutionality of the search as a defense. *Id.*, at 138, 459 N. E. 2d, at 219.

[2] If new criminal rules are so applied, it is possible that a person could obtain the benefit of retroactive application of a new criminal rule to his civil § 1983 case, even though he could not use the new rule to attack his conviction collaterally. A prisoner literally could be forced to remain in prison while collecting his civil damages award. In *Shea* v. *Louisiana*, 470 U. S. 51 (1985), the Court created a distinction between retroactivity on

civil cases show that *Steagald* should not be applied retroactively to this action.

The leading case explaining the framework of analysis for civil retroactivity is *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971). Under *Chevron*, a court must assess: (i) whether the new decision "establish[ed] a new principle of law . . . by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed," *id.*, at 106; (ii) "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation," *id.*, at 107; and (iii) the respective inequities of retroactive or nonretroactive application, *ibid.*

When viewed in light of these factors, retroactive application of *Steagald* is not justified. First, *Steagald* overruled past Courts of Appeals precedent, and the decision had not been foreshadowed in opinions of this Court. The governing law in three Federal Circuits permitted searches of third parties' homes pursuant to an arrest warrant, see *supra*, at 493, and earlier decisions of this Court arguably supported such searches.[3] Second, the "purpose" of *Steagald* was to clarify the application of the Fourth Amendment to such searches, not to provide for money damages. Finally, retro-

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direct review of a conviction and on collateral attack of a conviction that has become final. On collateral attack the principles of *Solem* v. *Stumes*, 465 U. S. 638 (1984), apply, which make it less likely that a new rule would be applied retroactively. A key factor under *Stumes* is the extent of the reliance by law enforcement authorities on the old standards. *Id.*, at 643.

[3] In *Dalia* v. *United States*, 441 U. S. 238 (1979), the Court rejected the argument that a separate search warrant was required before police could enter a business office to install an eavesdropping device when officers already had a warrant authorizing the eavesdropping itself. The Court noted that "in executing a warrant the police may find it necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant." *Id.*, at 257. In *Payton* v. *New York*, 445 U. S. 573 (1980), the Court rejected the suggestion that a separate search warrant was required before police could execute an arrest warrant by entering the home of the subject of the warrant.

active application of *Steagald* in this context would produce substantial inequitable results by imposing liability on local government units for law enforcement practices that were legitimate at the time they were undertaken. See *Griffin* v. *Illinois*, 351 U. S. 12, 26 (1956) (Frankfurter, J., concurring in judgment) ("We should not indulge in the fiction that the law now announced has always been the law . . ."). Civil liability should not attach unless there was notice that a constitutional right was at risk. *Procunier* v. *Navarette*, 434 U. S. 555, 562 (1978).

We ought to be even more wary of applying new rules of Fourth Amendment law retroactively to civil cases than we are with new rules of civil law. The primary reason for imposing § 1983 liability on local government units is deterrence, so that if there is any doubt about the constitutionality of their actions, officials will "err on the side of protecting citizens' rights." *Owen* v. *City of Independence*, 445 U. S. 622, 652 (1980). But law enforcement officials, particularly prosecutors, are in a much different position with respect to deterrence than other local government officials. Cf. *Imbler* v. *Pachtman*, 424 U. S. 409, 425 (1976). Their affirmative duty to enforce the law vigorously often requires them to take actions that legitimately intrude on individual liberties, often acting "under serious constraints of time and even information." *Ibid.* While law enforcement officials, as much as any other official, ought to "err on the side of protecting citizens' rights" when they have legitimate doubts about the constitutionality of their actions, they should not be deterred from doing their duty to enforce the criminal law when they have no such doubts. In this case, for example, Sixth Circuit law expressly authorized the Prosecutor's decision. Because a court engages in the same balancing of interests in a Fourth Amendment case that is required, with much less deliberation, of law enforcement officials, they are justified in relying on the judgment of the applicable federal court. Under these circumstances, there was nothing that should

have caused the officials to "harbor doubts about the lawfulness of their intended actions," *Owen*, *supra*, at 652, and therefore nothing to deter.

Moreover, there is a significant cost to unwarranted deterrence of law enforcement officials. We recognized in *Imbler* a strong state interest in "vigorous and fearless" prosecution, and found that to be "essential to the proper functioning of the criminal justice system." 424 U. S., at 427–428. Those same general concerns apply to other law enforcement officials. Unwarranted deterrence has the undesirable effect of discouraging conduct that is essential to our justice system and protects the State's interest in public safety. In that sense, this case is different from *Owen*. It is no answer to say that some officials are entitled either to absolute or qualified immunity. It ignores reality to say that if petitioner is successful in his $20-million suit it will not have a chilling effect on law enforcement practices in Hamilton County.[4]

For these reasons, *Steagald* should not be applied retroactively. Consequently, petitioner has no constitutional violation of which to complain. I therefore would affirm the decision of the Court of Appeals.[5]

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[4] JUSTICE STEVENS misunderstands the unique posture of this case. This is not a question of retroactivity of a new civil rule to civil cases versus retroactivity of a new criminal rule to criminal cases. The special concerns discussed in the text above arise in part out of the retroactive application of a new rule of criminal law to civil cases. I see little to be gained by comparing the societal costs of civil and criminal retroactivity, see concurring opinion of STEVENS, J., *ante*, at 488–489, n. 3, because they can be severe in either case. Today's opinion could result in even a nonnegligent mistake in judgment imposing heavy liability on units of local government, especially now in view of the skyrocketing cost—or unavailability—of liability insurance. See also *Malley* v. *Briggs*, *ante*, p. 335.

[5] The Court's only response to these concerns is to note that respondent has "never challenged and has in fact also conceded that *Steagald* applied retroactively to this case. . . . We decide this case in light of respondent's concessions." *Ante*, at 477, n. 5. The retroactivity issue, however, is central to this case. We need not reach the difficult federal issues in this case if the Court correctly resolved *Steagald*'s retroactivity.

II

Even if *Steagald* is applied retroactively, petitioner has failed to demonstrate the existence of an official policy for which Hamilton County can be liable. The action said to have created policy here was nothing more than a brief response to a single question over the telephone. The Deputy Sheriffs sought instructions concerning a situation that had never occurred before, at least in the memory of the participants. *Ante*, at 474–475. That in itself, and the fact that the Assistant Prosecutor had to obtain advice from the County Prosecutor, strongly indicate that no prior policy had been formed. Petitioner therefore argues that the County Prosecutor's reaction *in this case* formed county policy. The sparse facts supporting petitioner's theory—adopted by the Court today—do not satisfy the requirement in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 691 (1978), that local government liability under § 1983 be imposed only when the injury is caused by government policy.

A

Under *Monell*, local government units may be liable only when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U. S., at 690. This case presents the opportunity to define further what was meant in *Monell* by "official policy." Proper resolution of the case calls for identification of the applicable principles for determining when policy is

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Nor are we prevented from doing so by any actual concession of the respondent. See Tr. of Oral Arg. 26–27. JUSTICE WHITE does not address the retroactivity of *Steagald* on the ground that the county had not relied on this contention. In my view, although we need not address this retroactivity issue, there is no question as to our right to do so—especially in view of the unfairness of holding the respondent county liable for not anticipating *Steagald*. *Procunier* v. *Navarette*, 434 U. S. 555, 559, n. 6 (1978); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 320, n. 6 (1971).

created. The Court today does not do this, but instead focuses almost exclusively on the status of the decisionmaker. Its reasoning is circular: it contends that policy is what policymakers make, and policymakers are those who have authority to make policy.

The Court variously notes that if a decision "is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood," *ante*, at 481, and that "where action is directed by those who establish governmental policy, the municipality is equally responsible . . . ," *ibid.* Thus, the Court's test for determining the existence of policy focuses only on whether a decision was made "by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Ante*, at 483–484.

In my view, the question whether official policy—in any normal sense of the term—has been made in a particular case is not answered by explaining who has final authority to make policy. The question here is not "*could* the County Prosecutor make policy?" but rather, "*did* he make policy?" By focusing on the authority granted to the official under state law, the Court's test fails to answer the key federal question presented. The Court instead turns the question into one of state law. Under a test that focuses on the authority of the decisionmaker, the Court has only to look to state law for the resolution of this case. Here the Court of Appeals found that "both the County Sheriff and the County Prosecutor [had authority under Ohio law to] establish county policy under appropriate circumstances." *Ante*, at 484. Apparently that recitation of authority is all that is needed under the Court's test because no discussion is offered to demonstrate that the Sheriff or the Prosecutor actually used that authority to establish official county policy in this case.

Moreover, the Court's reasoning is inconsistent with *Monell*. Today's decision finds that policy is established because a policymaking official made a decision on the telephone that was within the scope of his authority. The Court ignores the fact that no business organization or governmental unit makes binding policy decisions so cavalierly. The Court provides no mechanism for distinguishing those acts or decisions that cannot fairly be construed to create official policy from the normal process of establishing an official policy that would be followed by a responsible public entity. Thus, the Court has adopted in part what it rejected in *Monell:* local government units are now subject to *respondeat superior* liability, at least with respect to a certain category of employees, *i. e.*, those with final authority to make policy. See *Monell*, 436 U. S., at 691; see also *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 818 (1985) (rejecting theories akin to *respondeat superior*) (plurality opinion). The Court's reliance on the status of the employee carries the concept of "policy" far beyond what was envisioned in *Monell*.

B

In my view, proper resolution of the question whether official policy has been formed should focus on two factors: (i) the nature of the decision reached or the action taken, and (ii) the process by which the decision was reached or the action was taken.

Focusing on the nature of the decision distinguishes between policies and mere ad hoc decisions. Such a focus also reflects the fact that most policies embody a rule of general applicability. That is the tenor of the Court's statement in *Monell* that local government units are liable under § 1983 when the action that is alleged to be unconstitutional "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U. S., at 690. The clear implication is that policy is created when a rule is formed that applies to all simi-

lar situations—a "governing principle [or] plan." Webster's New Twentieth Century Dictionary 1392 (2d ed. 1979).[6] When a rule of general applicability has been approved, the government has taken a position for which it can be held responsible.[7]

Another factor indicating that policy has been formed is the process by which the decision at issue was reached. Formal procedures that involve, for example, voting by elected officials, prepared reports, extended deliberation, or official records indicate that the resulting decisions taken "may fairly be said to represent official policy," *Monell*, *supra*, at 694. *Owen* v. *City of Independence*, 445 U. S. 622 (1980), provides an example. The City Council met in a regularly scheduled meeting. One member of the Council made a motion to release to the press certain reports that cast an employee in a bad light. After deliberation, the Council passed the motion with no dissents and one abstention. *Id.*, at 627–629. Although this official action did not establish a rule of general applicability, it is clear that policy was formed because of the process by which the decision was reached.

Applying these factors to the instant case demonstrates that no official policy was formulated. Certainly, no rule of general applicability was adopted. The Court correctly

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[6] The focus on a rule of general applicability does not mean that more than one instance of its application is required. The local government unit may be liable for the first application of a duly constituted unconstitutional policy.

[7] An example of official policy in the form of a rule of general applicability is *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981). While the Court in that case was not called on to define the scope of the word "policy," the complaint was based on a rule of general applicability. The city canceled a scheduled concert pursuant to its rule of not allowing rock concerts. Plaintiffs alleged that the general rule against rock concerts violated their First Amendment rights. Even if the cancellation was the first implementation of the rule, it was clear that the city had committed itself to a general position that would govern future cases.

notes that the Sheriff "testified that the Department had no written policy respecting the serving of capiases on the property of third persons and that the proper response in any given situation would depend upon the circumstances." *Ante*, at 474. Nor could he recall a specific instance in which entrance had been denied and forcibly gained. The Court's result today rests on the implicit conclusion that the Prosecutor's response—"go in and get them"—altered the prior case-by-case approach of the Department and formed a new rule to apply in all similar cases. Nothing about the Prosecutor's response to the inquiry over the phone, nor the circumstances surrounding the response, indicates that such a rule of general applicability was formed.[8]

Similarly, nothing about the way the decision was reached indicates that official policy was formed. The prosecutor, without time for thoughtful consideration or consultation, simply gave an off-the-cuff answer to a single question. There was no *process* at all. The Court's holding undercuts

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[8] There is nothing in the record to support the inference relied on by JUSTICES WHITE and O'CONNOR. Nor has this Court ever held that because a policy has been adopted by one city or county we may *assume* that a similar policy has been adopted by neighboring cities or counties. After all, the city and county in this case are separate governmental entities.

Moreover, and again contrary to the views of my colleagues, this Court has never held—at least to my knowledge—that we may assume that simply because certain conduct is permitted by existing law, it must have been adopted as county policy. The undisputed facts in this case refute these *assumptions* by JUSTICES WHITE and O'CONNOR. Neither the Sheriffs who had been denied entry nor the Assistant County Prosecutor knew of any such policy. Otherwise, one of the Sheriffs would not have called the Prosecutor's office, and certainly the Assistant Prosecutor would not have thought it necessary to put the question to the Prosecutor. Nor did the Prosecutor, when asked, say that the county's policy was to force an entry when necessary to serve a valid arrest warrant. Rather, he simply said "go in and get them"—the sort of spontaneous reply that a busy official might make quite thoughtlessly. As noted above, the Sheriff testified that the proper response would depend on the circumstances.

the basic rationale of *Monell*, and unfairly increases the risk of liability on the level of government least able to bear it. I dissent.

GOLDMAN v. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1097. Argued January 14, 1986—Decided March 25, 1986

Petitioner, an Orthodox Jew and ordained rabbi, was ordered not to wear a yarmulke while on duty and in uniform as a commissioned officer in the Air Force at March Air Force Base, pursuant to an Air Force regulation that provides that authorized headgear may be worn out of doors but that indoors "[h]eadgear [may] not be worn . . . except by armed security police in the performance of their duties." Petitioner then brought an action in Federal District Court, claiming that the application of the regulation to prevent him from wearing his yarmulke infringed upon his First Amendment freedom to exercise his religious beliefs. The District Court permanently enjoined the Air Force from enforcing the regulation against petitioner. The Court of Appeals reversed.

Held: The First Amendment does not prohibit the challenged regulation from being applied to petitioner even though its effect is to restrict the wearing of the headgear required by his religious beliefs. That Amendment does not require the military to accommodate such practices as wearing a yarmulke in the face of its view that they would detract from the uniformity sought by dress regulations. Here, the Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and the challenged regulation reasonably and evenhandedly regulates dress in the interest of the military's perceived need for uniformity. Pp. 506-510.

236 U. S. App. D. C. 248, 734 F. 2d 1531, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, in which WHITE and POWELL, JJ., joined, *post*, p. 510. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 513. BLACKMUN, J., filed a dissenting opinion, *post*, p. 524. O'CONNOR, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 528.

Nathan Lewin argued the cause for petitioner. With him on the brief were *David J. Butler* and *Dennis Rapps*.

Kathryn A. Oberly argued the cause for respondents. With her on the brief were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller,* and *Anthony J. Steinmeyer.**

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner S. Simcha Goldman contends that the Free Exercise Clause of the First Amendment to the United States Constitution permits him to wear a yarmulke while in uniform, notwithstanding an Air Force regulation mandating uniform dress for Air Force personnel. The District Court for the District of Columbia permanently enjoined the Air Force from enforcing its regulation against petitioner and from penalizing him for wearing his yarmulke. The Court of Appeals for the District of Columbia Circuit reversed on the ground that the Air Force's strong interest in discipline justified the strict enforcement of its uniform dress requirements. We granted certiorari because of the importance of the question, 472 U. S. 1016 (1985), and now affirm.

Petitioner Goldman is an Orthodox Jew and ordained rabbi. In 1973, he was accepted into the Armed Forces Health Professions Scholarship Program and placed on inactive reserve status in the Air Force while he studied clinical psychology at Loyola University of Chicago. During his three years in the scholarship program, he received a monthly stipend and an allowance for tuition, books, and fees. After completing his Ph.D. in psychology, petitioner

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*Briefs of *amici curiae* urging reversal were filed for the American Jewish Committee et al. by *Samuel Eric Hans Ericsson, Kimberlee Wood Colby, Samuel Rabinove,* and *Richard T. Foltin;* for the American Jewish Congress et al. by *Ronald A. Krauss* and *Marc D. Stern;* for the Anti-Defamation League of B'nai B'rith by *Daniel P. Levitt, Justin J. Finger,* and *Jeffrey P. Sinensky;* and for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell.*

W. Charles Bundren, Guy O. Farley, Jr., John W. Whitehead, Thomas O. Kotouc, Wendell R. Bird, and *William B. Hollberg* filed a brief for the Rutherford Institute et al. as *amici curiae.*

entered active service in the United States Air Force as a commissioned officer, in accordance with a requirement that participants in the scholarship program serve one year of active duty for each year of subsidized education. Petitioner was stationed at March Air Force Base in Riverside, California, and served as a clinical psychologist at the mental health clinic on the base.

Until 1981, petitioner was not prevented from wearing his yarmulke on the base. He avoided controversy by remaining close to his duty station in the health clinic and by wearing his service cap over the yarmulke when out of doors. But in April 1981, after he testified as a defense witness at a court-martial wearing his yarmulke but not his service cap, opposing counsel lodged a complaint with Colonel Joseph Gregory, the Hospital Commander, arguing that petitioner's practice of wearing his yarmulke was a violation of Air Force Regulation (AFR) 35–10. This regulation states in pertinent part that "[h]eadgear will not be worn . . . [w]hile indoors except by armed security police in the performance of their duties." AFR 35–10, ¶ 1–6.h(2)(f) (1980).

Colonel Gregory informed petitioner that wearing a yarmulke while on duty does indeed violate AFR 35–10, and ordered him not to violate this regulation outside the hospital. Although virtually all of petitioner's time on the base was spent in the hospital, he refused. Later, after petitioner's attorney protested to the Air Force General Counsel, Colonel Gregory revised his order to prohibit petitioner from wearing the yarmulke even in the hospital. Petitioner's request to report for duty in civilian clothing pending legal resolution of the issue was denied. The next day he received a formal letter of reprimand, and was warned that failure to obey AFR 35–10 could subject him to a court-martial. Colonel Gregory also withdrew a recommendation that petitioner's application to extend the term of his active service be approved, and substituted a negative recommendation.

Petitioner then sued respondent Secretary of Defense and others, claiming that the application of AFR 35–10 to prevent him from wearing his yarmulke infringed upon his First Amendment freedom to exercise his religious beliefs. The United States District Court for the District of Columbia preliminarily enjoined the enforcement of the regulation, *Goldman* v. *Secretary of Defense*, 530 F. Supp. 12 (1981), and then after a full hearing permanently enjoined the Air Force from prohibiting petitioner from wearing a yarmulke while in uniform. *Goldman* v. *Secretary of Defense*, 29 EPD ¶32, 753 (1982). Respondents appealed to the Court of Appeals for the District of Columbia Circuit, which reversed. *Goldman* v. *Secretary of Defense*, 236 U. S. App. D. C. 248, 734 F. 2d 1531 (1984). As an initial matter, the Court of Appeals determined that the appropriate level of scrutiny of a military regulation that clashes with a constitutional right is neither strict scrutiny nor rational basis. *Id.*, at 252, 734 F. 2d, at 1535–1536. Instead, it held that a military regulation must be examined to determine whether "legitimate military ends are sought to be achieved," *id.*, at 253, 734 F. 2d, at 1536, and whether it is "designed to accommodate the individual right to an appropriate degree." *Ibid.* Applying this test, the court concluded that "the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible." *Id.*, at 257, 734 F. 2d, at 1540. The full Court of Appeals denied a petition for rehearing en banc, with three judges dissenting. 238 U. S. App. D. C. 267, 739 F. 2d 657 (1984).

Petitioner argues that AFR 35–10, as applied to him, prohibits religiously motivated conduct and should therefore be analyzed under the standard enunciated in *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963). See also *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U. S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972). But we have repeatedly held that "the military is, by necessity, a specialized society separate from civilian society."

Parker v. *Levy*, 417 U. S. 733, 743 (1974). See also *Chappell* v. *Wallace*, 462 U. S. 296, 300 (1983); *Schlesinger* v. *Councilman*, 420 U. S. 738, 757 (1975); *Orloff* v. *Willoughby*, 345 U. S. 83, 94 (1953). "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life," *Schlesinger* v. *Councilman*, *supra*, at 757, in order to prepare for and perform its vital role. See also *Brown* v. *Glines*, 444 U. S. 348, 354 (1980).

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. See, *e. g.*, *Chappell* v. *Wallace*, *supra*, at 300; *Greer* v. *Spock*, 424 U. S. 828, 843–844 (1976) (POWELL, J., concurring); *Parker* v. *Levy*, *supra*, at 744. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service." *Orloff* v. *Willoughby*, *supra*, at 92.

These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment. See, *e. g.*, *Chappell* v. *Wallace*, *supra*, at 304. But "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." *Parker* v. *Levy*, *supra*, at 751. In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. See *Chappell* v. *Wallace*, *supra*, at 305; *Orloff* v. *Willoughby*, *supra*, 93–94. Not only are courts "'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have,'" *Chappell* v. *Wallace*,

supra, at 305, quoting Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 187 (1962), but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy. "[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker* v. *Goldberg*, 453 U. S. 57, 70 (1981).

The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble. We have acknowledged that "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." *Chappell* v. *Wallace*, *supra*, at 300.

To this end, the Air Force promulgated AFR 35–10, a 190-page document, which states that "Air Force members will wear the Air Force uniform while performing their military duties, except when authorized to wear civilian clothes on duty." AFR §35–10, ¶1–6 (1980). The rest of the document describes in minute detail all of the various items of apparel that must be worn as part of the Air Force uniform. It authorizes a few individualized options with respect to certain pieces of jewelry and hair style, but even these are subject to severe limitations. See AFR 35–10, Table 1–1, and ¶1–12.b(1)(b) (1980). In general, authorized headgear may

be worn only out of doors. See AFR § 35–10, ¶ 1–6.h (1980). Indoors, "[h]eadgear [may] not be worn . . . except by armed security police in the performance of their duties." AFR 35–10, ¶ 1–6.h(2)(f) (1980). A narrow exception to this rule exists for headgear worn during indoor religious ceremonies. See AFR 35–10, ¶ 1–6.h(2)(d) (1980). In addition, military commanders may in their discretion permit visible religious headgear and other such apparel in designated living quarters and nonvisible items generally. See Department of Defense Directive 1300.17 (June 18, 1985).

Petitioner Goldman contends that the Free Exercise Clause of the First Amendment requires the Air Force to make an exception to its uniform dress requirements for religious apparel unless the accouterments create a "clear danger" of undermining discipline and esprit de corps. He asserts that in general, visible but "unobtrusive" apparel will not create such a danger and must therefore be accommodated. He argues that the Air Force failed to prove that a specific exception for his practice of wearing an unobtrusive yarmulke would threaten discipline. He contends that the Air Force's assertion to the contrary is mere *ipse dixit*, with no support from actual experience or a scientific study in the record, and is contradicted by expert testimony that religious exceptions to AFR 35–10 are in fact desirable and will increase morale by making the Air Force a more humane place.

But whether or not expert witnesses may feel that religious exceptions to AFR 35–10 are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment. Quite obviously, to the extent the regulations do not permit the wearing of religious apparel such as a yarmulke, a practice described by petitioner as silent devotion akin to prayer, military life may be more objectionable for petitioner and probably others. But the First Amendment does not require the military to accommodate

such practices in the face of its view that they would detract from the uniformity sought by the dress regulations. The Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity. The First Amendment therefore does not prohibit them from being applied to petitioner even though their effect is to restrict the wearing of the headgear required by his religious beliefs.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE POWELL join, concurring.

Captain Goldman presents an especially attractive case for an exception from the uniform regulations that are applicable to all other Air Force personnel. His devotion to his faith is readily apparent. The yarmulke is a familiar and accepted sight.[1] In addition to its religious significance for the wearer, the yarmulke may evoke the deepest respect and admiration—the symbol of a distinguished tradition[2] and an

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[1] Captain Goldman states in his brief:

"Yarmulkes are generally understood to be a form of religious observance. They are commonly seen and accepted in today's society wherever Orthodox Jews are found. University campuses—particularly on the East Coast—have substantial numbers of young men who wear yarmulkes. On the streets of New York City, Los Angeles, Chicago, or Miami, yarmulkes are commonplace. They are increasingly visible in centers of commerce, including retail businesses, brokerage houses, and stock exchanges. Attorneys wearing yarmulkes can be found in the state and federal courthouses of New York, and attorneys wearing yarmulkes have been permitted to sit in the Bar Section of this Court and attend oral arguments." Brief for Petitioner 11.

[2] In dissenting from the Court of Appeals' denial of rehearing en banc, Judge Starr was moved to describe the yarmulke as the "symbol of [a] faith whose roots are as deep and venerable as Western civilization itself" and the "symbol of a great faith from which Western morality and the Judaeo-

eloquent rebuke to the ugliness of anti-Semitism.[3] Captain Goldman's military duties are performed in a setting in which a modest departure from the uniform regulation creates almost no danger of impairment of the Air Force's military mission. Moreover, on the record before us, there is reason to believe that the policy of strict enforcement against Captain Goldman had a retaliatory motive—he had worn his yarmulke while testifying on behalf of a defendant in a court-martial proceeding.[4] Nevertheless, as the case has been argued,[5]

Christian tradition have arisen." 238 U. S. App. D. C. 267, 268, 739 F. 2d 657, 658 (1984).

[3] Cf. N. Belth, A Promise to Keep (1979) (recounting history of anti-Semitism in the United States). The history of intolerance in our own country can be glimpsed by reviewing Justice Story's observation that the purpose of the First Amendment was "not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects," 2 J. Story, Commentaries on the Constitution of the United States § 1877, p. 594 (1851)—a view that the Court has, of course, explicitly rejected. See *Wallace* v. *Jaffree*, 472 U. S. 38, 52–55 (1985).

[4] Before the testimony at the court-martial that provoked this confrontation, Captain Goldman had received extremely high ratings in his performance evaluations. App. 214–225. Indeed, one of the evaluators noted: "He maintains appropriate military dress and bearing." *Id.*, at 217. Although the Air Force stated that an officer had received one or two complaints about Captain Goldman's wearing of the yarmulke, *id.*, at 15, 22, no complaint was acted upon until the court-martial incident. See *Goldman* v. *Secretary of Defense*, 29 EPD ¶ 32,753, p. 25,539 (1982) (District Court finding that, until the court-martial, "no objection was raised to Goldman's wearing his yarmulke while in uniform").

[5] Captain Goldman has mounted a broad challenge to the prohibition on visible religious wear as it applies to yarmulkes. He has not argued the far narrower ground that, even if the general prohibition is valid, its application in his case was retaliatory and impermissible. See, *e. g.*, Brief for Petitioner i (stating the Question Presented as "Whether the Air Force may constitutionally prohibit an Orthodox Jewish psychologist from wearing a 'yarmulke'—an unobtrusive skullcap which is part of his religious observance—while he is in uniform on duty at a military hospital"); *id.*, at 8 ("The Air Force's asserted grounds for barring yarmulkes are patently unsound. . . . Indeed the symbolic significance of our Nation's military

I believe we must test the validity of the Air Force's rule not merely as it applies to Captain Goldman but also as it applies to all service personnel who have sincere religious beliefs that may conflict with one or more military commands.

JUSTICE BRENNAN is unmoved by the Government's concern that "while a yarmulke might not seem obtrusive to a Jew, neither does a turban to a Sikh, a saffron robe to a Satchidananda Ashram-Integral Yogi, nor do dreadlocks to a Rastafarian." *Post*, at 519. He correctly points out that "turbans, saffron robes, and dreadlocks are not before us in this case," and then suggests that other cases may be fairly decided by reference to a reasonable standard based on "functional utility, health and safety considerations, and the goal of a polished, professional appearance." *Post*, at 519. As the Court has explained, this approach attaches no weight to the separate interest in uniformity itself. Because professionals in the military service attach great importance to that plausible interest, it is one that we must recognize as legitimate and rational even though personal experience or admiration for the performance of the "rag-tag band of soldiers" that won us our freedom in the Revolutionary War might persuade us that the Government has exaggerated the importance of that interest.

The interest in uniformity, however, has a dimension that is of still greater importance for me. It is the interest in uniform treatment for the members of all religious faiths. The very strength of Captain Goldman's claim creates the danger that a similar claim on behalf of a Sikh or a Rastafarian might readily be dismissed as "so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed." *Post*, at 518. If exceptions from dress code regulations are to be granted on the basis of a multifactored test such as that proposed by JUSTICE BRENNAN, inevitably the decisionmaker's evaluation of the charac-

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services and the educational role of the military in teaching the young defenders of our country the principles of liberty require acceptance of petitioner's religious observance").

ter and the sincerity of the requestér's faith—as well as the probable reaction of the majority to the favored treatment of a member of that faith—will play a critical part in the decision. For the difference between a turban or a dreadlock on the one hand, and a yarmulke on the other, is not merely a difference in "appearance"—it is also the difference between a Sikh or a Rastafarian, on the one hand, and an Orthodox Jew on the other. The Air Force has no business drawing distinctions between such persons when it is enforcing commands of universal application.[6]

As the Court demonstrates, the rule that is challenged in this case is based on a neutral, completely objective standard—visibility. It was not motivated by hostility against, or any special respect for, any religious faith. An exception for yarmulkes would represent a fundamental departure from the true principle of uniformity that supports that rule. For that reason, I join the Court's opinion and its judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Simcha Goldman invokes this Court's protection of his First Amendment right to fulfill one of the traditional religious obligations of a male Orthodox Jew—to cover his head before an omnipresent God. The Court's response to Gold-

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[6] See *United States* v. *Lee*, 455 U. S. 252, 263, n. 2 (1982) (STEVENS, J., concurring in judgment) ("In my opinion, the principal reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims"). Cf. *Wallace* v. *Jaffree*, 472 U. S., at 60 (referring to "the established principle that the government must pursue a course of complete neutrality toward religion"); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 792–793 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion"); *Abington School District* v. *Schempp*, 374 U. S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality").

man's request is to abdicate its role as principal expositor of the Constitution and protector of individual liberties in favor of credulous deference to unsupported assertions of military necessity. I dissent.

I

In ruling that the paramount interests of the Air Force override Dr. Goldman's free exercise claim, the Court overlooks the sincere and serious nature of his constitutional claim. It suggests that the desirability of certain dress regulations, rather than a First Amendment right, is at issue. The Court declares that in selecting dress regulations, "military officials . . . are under no constitutional mandate to abandon their considered professional judgment." *Ante*, at 509. If Dr. Goldman wanted to wear a hat to keep his head warm or to cover a bald spot I would join the majority. Mere personal preferences in dress are not constitutionally protected. The First Amendment, however, restrains the Government's ability to prevent an Orthodox Jewish serviceman from, or punish him for, wearing a yarmulke.[1]

The Court also attempts, unsuccessfully, to minimize the burden that was placed on Dr. Goldman's rights. The fact that "the regulations do not permit the wearing of . . . a yarmulke," does not simply render military life for observant Orthodox Jews "objectionable." *Ibid.* It sets up an almost absolute bar to the fulfillment of a religious duty. Dr. Goldman spent most of his time in uniform indoors, where the dress code forbade him even to cover his head with his service cap. Consequently, he was asked to violate the tenets of his faith virtually every minute of every workday.

II

A

Dr. Goldman has asserted a substantial First Amendment claim, which is entitled to meaningful review by this Court.

[1] The yarmulke worn by Dr. Goldman was a dark-colored skullcap measuring approximately 5½ inches in diameter. Brief for Petitioner 3.

The Court, however, evades its responsibility by eliminating, in all but name only, judicial review of military regulations that interfere with the fundamental constitutional rights of service personnel.

Our cases have acknowledged that in order to protect our treasured liberties, the military must be able to command service members to sacrifice a great many of the individual freedoms they enjoyed in the civilian community and to endure certain limitations on the freedoms they retain. See, *e. g.*, *Brown* v. *Glines*, 444 U. S. 348, 354–357 (1980); *Greer* v. *Spock*, 424 U. S. 828, 848 (1976) (POWELL, J., concurring); *Parker* v. *Levy*, 417 U. S. 733, 743–744, 751 (1974). Notwithstanding this acknowledgment, we have steadfastly maintained that "'our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.'" *Chappell* v. *Wallace*, 462 U. S. 296, 304 (1983) (quoting Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 188 (1962)); see also, *Glines*, *supra*, at 354. And, while we have hesitated, due to our lack of expertise concerning military affairs and our respect for the delegated authority of a coordinate branch, to strike down restrictions on individual liberties which could reasonably be justified as necessary to the military's vital function, see, *e. g.*, *Rostker* v. *Goldberg*, 453 U. S. 57, 66–67 (1981) (citing cases), we have never abdicated our obligation of judicial review. See, *e. g.*, *id.*, at 67.

Today the Court eschews its constitutionally mandated role. It adopts for review of military decisions affecting First Amendment rights a subrational-basis standard—absolute, uncritical "deference to the professional judgment of military authorities." *Ante*, at 507. If a branch of the military declares one of its rules sufficiently important to outweigh a service person's constitutional rights, it seems that the Court will accept that conclusion, no matter how absurd or unsupported it may be.

A deferential standard of review, however, need not, and should not, mean that the Court must credit arguments that defy common sense. When a military service burdens the free exercise rights of its members in the name of necessity, it must provide, as an initial matter and at a minimum, a *credible* explanation of how the contested practice is likely to interfere with the proffered military interest.[2] Unabashed *ipse dixit* cannot outweigh a constitutional right.

In the present case, the Air Force asserts that its interests in discipline and uniformity would be undermined by an exception to the dress code permitting observant male Orthodox Jews to wear yarmulkes. The Court simply restates these assertions without offering any explanation how the exception Dr. Goldman requests reasonably could interfere with the Air Force's interests. Had the Court given actual consideration to Goldman's claim, it would have been compelled to decide in his favor.

B

1

The Government maintains in its brief that discipline is jeopardized whenever exceptions to military regulations are granted. Service personnel must be trained to obey even the most arbitrary command reflexively. Non-Jewish personnel will perceive the wearing of a yarmulke by an Orthodox Jew as an unauthorized departure from the rules and will begin to question the principle of unswerving obedience. Thus shall our fighting forces slip down the treacherous slope

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[2] I continue to believe that Government restraints on First Amendment rights, including limitations placed on military personnel, may be justified only upon showing a compelling state interest which is precisely furthered by a narrowly tailored regulation. See, *e. g.*, *Brown* v. *Glines*, 444 U. S. 348, 367 (1980) (BRENNAN, J., dissenting). I think that any special needs of the military can be accommodated in the compelling-interest prong of the test. My point here is simply that even under a more deferential test Dr. Goldman should prevail.

toward unkempt appearance, anarchy, and, ultimately, defeat at the hands of our enemies.

The contention that the discipline of the Armed Forces will be subverted if Orthodox Jews are allowed to wear yarmulkes with their uniforms surpasses belief. It lacks support in the record of this case, and the Air Force offers no basis for it as a general proposition. While the perilous slope permits the services arbitrarily to refuse exceptions requested to satisfy mere personal preferences, before the Air Force may burden free exercise rights it must advance, at the *very least*, a rational reason for doing so.

Furthermore, the Air Force cannot logically defend the content of its rule by insisting that discipline depends upon absolute adherence to whatever rule is established. If, as General Usher admitted at trial, App. 52, the dress code codified religious exemptions from the "no-headgear-indoors" regulation, then the wearing of a yarmulke would be sanctioned by the code and could not be considered an unauthorized deviation from the rules.

2

The Government also argues that the services have an important interest in uniform dress, because such dress establishes the pre-eminence of group identity, thus fostering esprit de corps and loyalty to the service that transcends individual bonds. In its brief, the Government characterizes the yarmulke as an assertion of individuality and as a badge of religious and ethnic identity, strongly suggesting that, as such, it could drive a wedge of divisiveness between members of the services.

First, the purported interests of the Air Force in complete uniformity of dress and in elimination of individuality or visible identification with any group other than itself are belied by the service's own regulations. The dress code expressly abjures the need for total uniformity:

> "(1) The American public and its elected representatives draw certain conclusions on military effectiveness based on what they see; that is, the image the Air Force presents. The image must instill public confidence and leave no doubt that the service member lives by a common standard and responds to military order and discipline.
>
> "(2) Appearance in uniform is an important part of this image. . . . Neither the Air Force nor the public expects absolute uniformity of appearance. Each member has the right, within limits, to express individuality through his or her appearance. However, the image of a disciplined service member who can be relied on to do his or her job excludes the extreme, the unusual, and the fad." AFR 35-10, ¶¶ 1-12a(1) and (2) (1978).[3]

It cannot be seriously contended that a serviceman in a yarmulke presents so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed. Under the Air Force's own standards, then, Dr. Goldman should have and could have been granted an exception to wear his yarmulke.

The dress code also allows men to wear up to three rings and one identification bracelet of "neat and conservative," but nonuniform, design. AFR 35-10, ¶ 1-12b(1)(b) (1978). This jewelry is apparently permitted even if, as is often the case with rings, it associates the wearer with a denominational school or a religious or secular fraternal organization. If these emblems of religious, social, and ethnic identity are not deemed to be unacceptably divisive, the Air Force cannot rationally justify its bar against yarmulkes on that basis.

Moreover, the services allow, and rightly so, other manifestations of religious diversity. It is clear to all service personnel that some members attend Jewish services, some

[3] The 1978 and 1980 editions of AFR 35-10 governed, sequentially, the Air Force dress code during Dr. Goldman's period of service. The two editions are substantially identical in all respects relevant to this case.

Christian, some Islamic, and some yet other religious services. Barracks mates see Mormons wearing temple garments, Orthodox Jews wearing tzitzit, and Catholics wearing crosses and scapulars. That they come from different faiths and ethnic backgrounds is not a secret that can or should be kept from them.

I find totally implausible the suggestion that the overarching group identity of the Air Force would be threatened if Orthodox Jews were allowed to wear yarmulkes with their uniforms. To the contrary, a yarmulke worn with a United States military uniform is an eloquent reminder that the shared and proud identity of United States serviceman embraces and unites religious and ethnic pluralism.

Finally, the Air Force argues that while Dr. Goldman describes his yarmulke as an "unobtrusive" addition to his uniform, obtrusiveness is a purely relative, standardless judgment. The Government notes that while a yarmulke might not seem obtrusive to a Jew, neither does a turban to a Sikh, a saffron robe to a Satchidananda Ashram-Integral Yogi, nor do dreadlocks to a Rastafarian. If the Court were to require the Air Force to permit yarmulkes, the service must also allow all of these other forms of dress and grooming.

The Government dangles before the Court a classic parade of horribles, the specter of a brightly-colored, "rag-tag band of soldiers." Brief for Respondents 20. Although turbans, saffron robes, and dreadlocks are not before us in this case and must each be evaluated against the reasons a service branch offers for prohibiting personnel from wearing them while in uniform, a reviewing court could legitimately give deference to dress and grooming rules that have a *reasoned* basis in, for example, functional utility, health and safety considerations, and the goal of a polished, professional appearance.[4] AFR 35-10, ¶¶1-12a and 1-12a(1) (1978)

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[4] For example, the Air Force could no doubt justify regulations ordering troops to wear uniforms, prohibiting garments that could become entan-

(identifying neatness, cleanliness, safety, and military image as the four elements of the dress code's "high standard of dress and personal appearance"). It is the lack of any reasoned basis for prohibiting yarmulkes that is so striking here.

Furthermore, contrary to its intimations, the Air Force has available to it a familiar standard for determining whether a particular style of yarmulke is consistent with a polished, professional military appearance—the "neat and conservative" standard by which the service judges jewelry. AFR 35–10, ¶ 1–12b(1)(b) (1978). No rational reason exists why yarmulkes cannot be judged by the same criterion. Indeed, at argument Dr. Goldman declared himself willing to wear whatever style and color yarmulke the Air Force believes best comports with its uniform. Tr. 18.

3

Department of Defense Directive 1300.17 (June 18, 1985) grants commanding officers the discretion to permit service personnel to wear religious items and apparel that are not visible with the uniform, such as crosses, temple garments, and scapulars. JUSTICE STEVENS favors this "visibility test" because he believes that it does not involve the Air Force in drawing distinctions among faiths. *Ante*, at 512–513. He rejects functional utility, health, and safety considerations, and similar grounds as criteria for religious exceptions to the dress code, because he fears that these standards will allow some service persons to satisfy their religious dress and grooming obligations, while preventing others from fulfilling theirs. *Ibid.* But, the visible/not visible standard has that same effect. Furthermore, it restricts the free exercise rights of a larger number of service persons. The visibility test permits *only* individuals whose outer garments and grooming are indistinguishable from those of mainstream Christians to fulfill their religious duties. In my view, the

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gled in machinery, and requiring hair to be worn short so that it may not be grabbed in combat and may be kept louse-free in field conditions.

Constitution requires the selection of criteria that permit the greatest possible number of persons to practice their faiths freely.

Implicit in JUSTICE STEVENS' concurrence, and in the Government's arguments, is what might be characterized as a fairness concern. It would be unfair to allow Orthodox Jews to wear yarmulkes, while prohibiting members of other minority faiths with visible dress and grooming requirements from wearing their saffron robes, dreadlocks, turbans, and so forth. While I appreciate and share this concern for the feelings and the free exercise rights of members of these other faiths, I am baffled by this formulation of the problem. What puzzles me is the implication that a neutral standard that could result in the disparate treatment of Orthodox Jews and, for example, Sikhs is *more* troublesome or unfair than the existing neutral standard that does result in the different treatment of Christians, on the one hand, and Orthodox Jews and Sikhs on the other. *Both* standards are constitutionally suspect; before either can be sustained, it must be shown to be a narrowly tailored means of promoting important military interests.

I am also perplexed by the related notion that for purposes of constitutional analysis religious faiths may be divided into two categories—those with visible dress and grooming requirements and those without. This dual category approach seems to incorporate an assumption that fairness, the First Amendment, and, perhaps, equal protection, require all faiths belonging to the same category to be treated alike, but permit a faith in one category to be treated differently from a faith belonging to the other category. The practical effect of this categorization is that, under the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths. This dual category analysis is fundamentally flawed and leads to a result that the First Amendment was intended to prevent. Under the Constitution there is only *one* relevant category—*all* faiths. Bur-

dens placed on the free exercise rights of members of one faith must be justified independently of burdens placed on the rights of members of another religion. It is not enough to say that Jews cannot wear yarmulkes simply because Rastafarians might not be able to wear dreadlocks.

Unless the visible/not visible standard for evaluating requests for religious exceptions to the dress code promotes a significant military interest, it is constitutionally impermissible. JUSTICE STEVENS believes that this standard advances an interest in the "uniform treatment" of all religions. *Ante*, at 512. As I have shown, that uniformity is illusory, unless uniformity means uniformly accommodating majority religious practices and uniformly rejecting distinctive minority practices. But, more directly, Government agencies are not free to define their own interests in uniform treatment of different faiths. That function has been assigned to the First Amendment. The First Amendment requires that burdens on free exercise rights be justified by independent and important interests that promote the function of the agency. See, *e. g.*, *United States* v. *Lee*, 455 U. S. 252, 257–258 (1982); *Thomas* v. *Review Bd. of Indiana Employment Security Division*, 450 U. S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Sherbert* v. *Verner*, 374 U. S. 398 (1963). The only independent military interest furthered by the visibility standard is uniformity of dress. And, that interest, as I demonstrated in Part II–B (2), *supra*, does not support a prohibition against yarmulkes.

The Air Force has failed utterly to furnish a credible explanation why an exception to the dress code permitting Orthodox Jews to wear neat and conservative yarmulkes while in uniform is likely to interfere with its interest in discipline and uniformity. We cannot "distort the Constitution to approve all that the military may deem expedient." *Korematsu* v. *United States*, 323 U. S. 214, 244 (1944) (Jackson, J., dissenting). Under any meaningful level of judicial review, Simcha Goldman should prevail.

III

Through our Bill of Rights, we pledged ourselves to attain a level of human freedom and dignity that had no parallel in history. Our constitutional commitment to religious freedom and to acceptance of religious pluralism is one of our greatest achievements in that noble endeavor. Almost 200 years after the First Amendment was drafted, tolerance and respect for all religions still set us apart from most other countries and draws to our shores refugees from religious persecution from around the world.

Guardianship of this precious liberty is not the exclusive domain of federal courts. It is the responsibility as well of the States and of the other branches of the Federal Government. Our military services have a distinguished record of providing for many of the religious needs of their personnel. But that they have satisfied much of their constitutional obligation does not remove their actions from judicial scrutiny. Our Nation has preserved freedom of religion, not through trusting to the good faith of individual agencies of government alone, but through the constitutionally mandated vigilant oversight and checking authority of the judiciary.

It is not the province of the federal courts to second-guess the professional judgments of the military services, but we are bound by the Constitution to assure ourselves that there exists a rational foundation for assertions of military necessity when they interfere with the free exercise of religion. "The concept of military necessity is seductively broad," *Glines*, 444 U. S., at 369 (BRENNAN, J., dissenting), and military decisionmakers themselves are as likely to succumb to its allure as are the courts and the general public. Definitions of necessity are influenced by decisionmakers' experiences and values. As a consequence, in pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those

of the majority. The military, with its strong ethic of conformity and unquestioning obedience, may be particularly impervious to minority needs and values. A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar. It is the constitutional role of this Court to ensure that this purpose of the First Amendment be realized.

The Court and the military services[5] have presented patriotic Orthodox Jews with a painful dilemma—the choice between fulfilling a religious obligation and serving their country. Should the draft be reinstated, compulsion will replace choice. Although the pain the services inflict on Orthodox Jewish servicemen is clearly the result of insensitivity rather than design, it is unworthy of our military because it is unnecessary. The Court and the military have refused these servicemen their constitutional rights; we must hope that Congress will correct this wrong.

JUSTICE BLACKMUN, dissenting.

I would reverse the judgment of the Court of Appeals, but for reasons somewhat different from those respectively enunciated by JUSTICE BRENNAN and JUSTICE O'CONNOR. I feel that the Air Force is justified in considering not only the costs of allowing Captain Goldman to cover his head indoors, but also the cumulative costs of accommodating constitutionally indistinguishable requests for religious exemptions. Because, however, the Government has failed to make any

[5] I refer to all of the military services rather than just to the Air Force because, as the Government emphasizes in its brief, Brief for Respondents 20, n. 11, all of the uniformed services have dress and appearance regulations comparable to AFR 35-10, and the Court's decision in this case will apply to all the services. Furthermore, all Military Departments are subject to the recent Department of Defense Directive 1300.17 (June 18, 1985) which deals with the accommodation of religious practices. This Directive does not provide for the type of exception sought by Dr. Goldman.

meaningful showing that either set of costs is significant, I dissent from the Court's rejection of Goldman's claim.

The Government concedes that Goldman wears his yarmulke out of sincere religious conviction. For Goldman, as for many other Jews, "a yarmulke is an expression of respect for God . . . intended to keep the wearer aware of God's presence." App. 156 (petitioner's deposition). If the Free Exercise Clause of the First Amendment means anything, it must mean that an individual's desire to follow his or her faith is not simply another personal preference, to be accommodated by government when convenience allows. Indeed, this Court has read the Clause, I believe correctly, to require that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U. S. 205, 215 (1972). In general, government "may justify an inroad on religious liberty [only] by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas* v. *Review Board of Indiana Employment Security Div.*, 450 U. S. 707, 718 (1981); see also *Sherbert* v. *Verner*, 374 U. S. 398 (1963). The clear import of *Sherbert*, *Yoder*, and *Thomas* is that this showing must be made even when the inroad results from the "evenhanded" application of a facially neutral requirement. "Rules are rules" is not by itself a sufficient justification for infringing religious liberty.

Nor may free exercise rights be compromised simply because the military says they must be. To be sure, application of the First Amendment to members of the Armed Services must take into account "the different character of the military community and of the military mission." *Parker* v. *Levy*, 417 U. S. 733, 758 (1974). As JUSTICE BRENNAN and JUSTICE O'CONNOR point out, however, military personnel do not forfeit their constitutional rights as a price of enlistment. Except as otherwise required by "interests of the highest order," soldiers as well as civilians are entitled to follow the dictates of their faiths.

In my view, this case does not require us to determine the extent to which the ordinary test for inroads on religious freedom must be modified in the military context, because the Air Force has failed to produce even a minimally credible explanation for its refusal to allow Goldman to keep his head covered indoors. I agree with the Court that deference is due the considered judgment of military professionals that, as a general matter, standardized dress serves to promote discipline and esprit de corps. But Goldman's modest supplement to the Air Force uniform clearly poses by itself no threat to the Nation's military readiness. Indeed, the District Court specifically found that Goldman has worn a yarmulke on base for years without any adverse effect on his performance, any disruption of operations at the base, or any complaints from other personnel. *Goldman* v. *Secretary of Defense*, 29 EPD ¶ 32,753, pp. 25,540–25,541 (1982).

The Air Force argues that it has no way of distinguishing fairly between Goldman's request for an exemption and the potential requests of others whose religious practices may conflict with the appearance code, perhaps in more conspicuous ways. In theory, this argument makes some sense. Like any rules prescribing a uniform, the Air Force dress code is by nature arbitrary; few of its requirements could be defended on purely functional grounds. Particularly for personnel such as Goldman who serve in noncombat roles, variations from the prescribed attire frequently will interfere with no military goals other than those served by uniformity itself. There thus may be no basis on which to distinguish some variations from others, aside from the degree to which they detract from the overall image of the service, a criterion that raises special constitutional problems when applied to religious practices. To allow noncombat personnel to wear yarmulkes but not turbans or dreadlocks because the latter seem more obtrusive—or, as JUSTICE BRENNAN suggests, less "polished" and "professional," *ante*, at 519–520—would be to discriminate in favor of this country's more established,

mainstream religions, the practices of which are more familiar to the average observer. Not only would conventional faiths receive special treatment under such an approach; they would receive special treatment precisely *because* they are conventional. In general, I see no constitutional difficulty in distinguishing between religious practices based on how difficult it would be to accommodate them, but favoritism based on how unobtrusive a practice appears to the majority could create serious problems of equal protection and religious establishment, problems the Air Force clearly has a strong interest in avoiding by drawing an objective line at visibility.

The problem with this argument, it seems to me, is not doctrinal but empirical. The Air Force simply has not shown any reason to fear that a significant number of enlisted personnel and officers would request religious exemptions that could not be denied on neutral grounds such as safety, let alone that granting these requests would noticeably impair the overall image of the service. Cf. *Thomas* v. *Review Board of Indiana Employment Security Div.*, 450 U. S., at 719; *Sherbert* v. *Verner*, 374 U. S., at 407. The Air Force contends that the potential for such disruption was demonstrated at trial through the introduction of an Army publication discussing the beliefs and practices of a variety of religious denominations, some of which have traditions or requirements involving attire. See Department of the Army Pamphlet No. 165-13-1, Religious Requirements and Practices of Certain Selected Groups: A Handbook Supplement for Chaplains (1980). But that publication provides no indication whatsoever as to how many soldiers belong to the denominations it describes, or as to how many are likely to seek religious exemptions from the dress code.

In these circumstances, deference seems unwarranted. Reasoned military judgments, of course, are entitled to respect, but the military has failed to show that this particular judgment with respect to Captain Goldman is a reasoned one. If, in the future, the Air Force is besieged with requests for

religious exemptions from the dress code, and those reque
cannot be distinguished on functional grounds from Go
man's, the service may be able to argue credibly that c
cumstances warrant a flat rule against any visible religio
apparel. That, however, would be a case different from t
one at hand.

JUSTICE O'CONNOR, with whom JUSTICE MARSHALL joi
dissenting.

The issue posed in this case is whether, consistent w
the Free Exercise Clause of the First Amendment, the A
Force may prohibit Captain Goldman, an Orthodox Jew
psychologist, from wearing a yarmulke while he is in unifo
on duty inside a military hospital.

The Court rejects Captain Goldman's claim without ev
the slightest attempt to weigh his asserted right to the fr
exercise of his religion against the interest of the Air Fo
in uniformity of dress within the military hospital. No t
for free exercise claims in the military context is even ar
ulated, much less applied. It is entirely sufficient for t
Court if the military perceives a need for uniformity.

JUSTICE STEVENS acknowledges that "Captain Goldma
military duties are performed in a setting in which a mod
departure from the uniform regulation creates almost
danger of impairment of the Air Force's military missio
Ante, at 511 (concurring). Nevertheless, JUSTICE STEVE
is persuaded that a governmental regulation based on a
"neutral, completely objective standard," *ante*, at 513, w
survive a free exercise challenge.

In contrast, JUSTICE BRENNAN recognizes that the Co
"overlooks the sincere and serious nature of [the] const
tional claim." *Ante*, at 514 (dissenting). He properly no
that, even with respect to military rules and regulations,
courts have a duty to weigh sincere First Amendment cla
of its members against the necessity of the particular ap
cation of the rule. But JUSTICE BRENNAN applies no p
ticular test or standard to determine such claims.

JUSTICE BLACKMUN focuses on the particular ways in which the military may pursue its interest in uniformity, *ante*, at 526–527 (dissenting), but nonetheless declines "to determine the extent to which the ordinary test for inroads on religious freedom must be modified in the military context," *ante*, at 526.

I believe that the Court should attempt to articulate and apply an appropriate standard for a free exercise claim in the military context, and should examine Captain Goldman's claim in light of that standard.

Like the Court today in this case involving the military, the Court in the past has had some difficulty, even in the civilian context, in articulating a clear standard for evaluating free exercise claims that result from the application of general state laws burdening religious conduct. In *Sherbert* v. *Verner*, 374 U. S. 398 (1963), and *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U. S. 707 (1981), the Court required the States to demonstrate that their challenged policies were "the least restrictive means of achieving some compelling state interest" in order to deprive claimants of unemployment benefits when the refusal to work was based on sincere religious beliefs. *Thomas*, *supra*, at 718. See also *Sherbert*, *supra*, at 406–408. In *Wisconsin* v. *Yoder*, 406 U. S. 205, 215 (1972), the Court noted that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion" in deciding that the Amish were exempt from a State's requirement that children attend school through the age of 16. In *United States* v. *Lee*, 455 U. S. 252, 257–258 (1982), the Court stated that "[t]he State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest," and held that the Amish could not exempt themselves from the Social Security system on religious grounds. See also *Gillette* v. *United States*, 401 U. S. 437 (1971) (rejecting challenges under the Establishment and Free Exercise Clauses to the

Federal Government's refusal to give conscientious-objector status to those objecting on religious grounds only to a particular war rather than to all wars).

These tests, though similar, are not identical. One can, however, glean at least two consistent themes from this Court's precedents. First, when the government attempts to deny a free exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated "compelling," "of the highest order," or "overriding." Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the "least restrictive" or "essential," or that the interest will not "otherwise be served." These two requirements are entirely sensible in the context of the assertion of a free exercise claim. First, because the government is attempting to override an interest specifically protected by the Bill of Rights, the government must show that the opposing interest it asserts is of especial importance before there is any chance that its claim can prevail. Second, since the Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state, the government must show that the interest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual.

There is no reason why these general principles should not apply in the military, as well as the civilian, context. As this Court has stated unanimously, "'our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.'" *Chappell* v. *Wallace*, 462 U. S. 296, 304 (1983) (quoting Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 188 (1962)). Furthermore, the test that one can glean from this Court's decisions in the civilian context is sufficiently flexible to take into account the special importance of defending our Nation with-

out abandoning completely the freedoms that make it worth defending.

The first question that the Court should face here, therefore, is whether the interest that the Government asserts against the religiously based claim of the individual is of unusual importance. It is perfectly appropriate at this step of the analysis to take account of the special role of the military. The mission of our Armed Services is to protect our Nation from those who would destroy all our freedoms. I agree that, in order to fulfill that mission, the military is entitled to take some freedoms from its members. As the Court notes, the military "'must insist upon a respect for duty and a discipline without counterpart in civilian life.'" *Ante*, at 507 (quoting *Schlesinger* v. *Councilman*, 420 U. S. 738, 757 (1975)). The need for military discipline and esprit de corps is unquestionably an especially important governmental interest.

But the mere presence of such an interest cannot, as the majority implicitly believes, end the analysis of whether a refusal by the Government to honor the free exercise of an individual's religion is constitutionally acceptable. A citizen pursuing even the most noble cause must remain within the bounds of the law. So, too, the Government may, even in pursuing its most compelling interests, be subject to specific restraints in doing so. The second question in the analysis of a free exercise claim under this Court's precedents must also be reached here: will granting an exemption of the type requested by the individual do substantial harm to the especially important governmental interest?

I have no doubt that there are many instances in which the unique fragility of military discipline and esprit de corps necessitates rigidity by the Government when similar rigidity to preserve an assertedly analogous interest would not pass constitutional muster in the civilian sphere. Compare *Greer* v. *Spock*, 424 U. S. 828 (1976), with *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490 (1981), and *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 630–634 (1943).

Nonetheless, as JUSTICE BRENNAN persuasively argues, the Government can present no sufficiently convincing proof in *this* case to support an assertion that granting an exemption of the type requested here would do substantial harm to military discipline and esprit de corps. *Ante*, at 517–520 (dissenting).

First, the Government's asserted need for absolute uniformity is contradicted by the Government's own exceptions to its rule. As JUSTICE BRENNAN notes, *ante*, at 518, an Air Force dress code in force at the time of Captain Goldman's service states:

> "Neither the Air Force nor the public expects absolute uniformity of appearance. Each member has the right, within limits, to express individuality through his or her appearance. However, the image of a disciplined service member who can be relied on to do his or her job excludes the extreme, the unusual, and the fad." AFR 35–10, ¶ 1–12.a.(2) (1978).

Furthermore, the Government does not assert, and could not plausibly argue, that petitioner's decision to wear his yarmulke while indoors at the hospital presents a threat to health or safety. And finally, the District Court found as fact that in this particular case, far from creating discontent or indiscipline in the hospital where Captain Goldman worked, "[f]rom September 1977 to May 7, 1981, *no objection* was raised to Goldman's wearing of his yarmulke while in uniform." See *Goldman* v. *Secretary of Defense*, 29 EPD ¶ 32,753, p. 25,539 (1982) (emphasis added).

In the rare instances where the military has not consistently or plausibly justified its asserted need for rigidity of enforcement, and where the individual seeking the exemption establishes that the assertion by the military of a threat to discipline or esprit de corps is in his or her case completely unfounded, I would hold that the Government's policy of uniformity must yield to the individual's assertion of the right of free exercise of religion. On the facts of this case, therefore,

I would require the Government to accommodate the sincere religious belief of Captain Goldman. Napoleon may have been correct to assert that, in the military sphere, morale is to all other factors as three is to one,* but contradicted assertions of necessity by the military do not on the scales of justice bear a similarly disproportionate weight to sincere religious beliefs of the individual.

I respectfully dissent.

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*See Letter, Aug. 27, 1808 ("In war, moral considerations account for three-quarters, the balance of actual forces only for the other quarter"), as translated and quoted in J. Cohen & M. Cohen, The Penguin Dictionary of Quotations 268 (1962).

BENDER ET AL. *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-773. Argued October 15, 1985—Decided March 25, 1986

When a group of high school students in Williamsport, Pennsylvania, formed a club for the purpose of promoting "spiritual growth and positive attitudes in the lives of its members," they asked the Principal for permission to hold club meetings on the school premises during student activity periods. The matter was referred to the School Superintendent, who denied permission on the basis of an opinion of the School District Solicitor, and the School Board upheld the denial. The students then filed suit in Federal District Court against the School District, members of the School Board, the Superintendent, and the Principal, alleging that the refusal to allow the club to meet on the same basis as other student groups because of its religious activities violated the First Amendment, and seeking declaratory and injunctive relief. The District Court, on motions for summary judgment, ruled in the students' favor, but entered no injunction and granted no relief against any defendant in his individual capacity. The School District took no appeal, but complied with the judgment and allowed the students' club to conduct the meetings as requested. However, respondent Youngman (hereafter respondent), who was then still a member of the School Board, did appeal. No one raised any question about his standing to appeal, and the Court of Appeals held in his favor.

Held: Respondent had no standing to appeal, and therefore the Court of Appeals had no jurisdiction to hear his appeal. Pp. 541-549.

(a) Federal courts have only the power that is authorized by Article III of the Constitution and the federal statutes enacted pursuant thereto. Every federal appellate court must satisfy itself that the party seeking to invoke its jurisdiction has a sufficient stake in the outcome of the litigation to support that jurisdiction. Pp. 541-543.

(b) Respondent had no standing to appeal in his individual capacity. Although the complaint alleged that the action was brought against the defendants "in their individual and official capacities," there is nothing else in the complaint or in the record to support the suggestion that relief was sought or awarded against any School Board member in his *individual* capacity. P. 543.

(c) As a member of the School Board sued in his official capacity, respondent had no personal stake in the outcome of the litigation and

therefore had no standing to appeal in that capacity. His status as a Board member did not permit him to "step into the shoes of the Board" and invoke its right to appeal. Pp. 543–545.

(d) Nor did respondent have standing to appeal in his capacity as a parent of a student attending the high school. There is nothing in the record to indicate anything about his status as a parent or to indicate that he or his children have suffered any injury as a result of the District Court's judgment or of the activities of the club in question subsequent to the entry of that judgment. Respondent was not sued as a parent and thus was plainly not a "party" in that capacity in the District Court. Pp. 545–549.

741 F. 2d 538, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. MARSHALL, J., filed a concurring opinion, *post*, p. 549. BURGER, C. J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 551. POWELL, J., filed a dissenting opinion, *post*, p. 555.

James M. Smart, Jr., argued the cause for petitioners. With him on the briefs were *Samuel Eric Hans Ericsson, Lynn Robert Buzzard, Kimberlee Wood Colby, Curran Tiffany, Gerald W. Seevers*, and *Michael Joseph Woodruff*.

Deputy Solicitor General Fried argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Acting Assistant Attorney General Willard, Michael W. McConnell, Anthony J. Steinmeyer*, and *Robert V. Zener*.

John C. Youngman, Jr., pro se, argued the cause for respondents and filed a brief for himself.*

*Briefs of *amici curiae* urging reversal were filed for the Ad Hoc Group of State Education Officials, School Administrators, and School Board Members by *William H. Ellis;* for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the Concerned Women for America Education and Legal Defense Foundation by *Michael P. Farris* and *Jordan W. Lorence;* for the Inter-Varsity Christian Fellowship of the U. S. A. by *George R. Grange II;* and for the United States Catholic Conference by *Wilfred R. Caron* and *Mark E. Chopko*.

Briefs of *amici curiae* urging affirmance were filed for the American Association of School Administrators by *David S. Tatel* and *Elliot M. Mincberg;* for the American Civil Liberties Union et al. by *Jack D. Novik, Charles S. Sims, Burt Neuborne, Stefan Presser*, and *Joy L. Koletsky;* for

JUSTICE STEVENS delivered the opinion of the Court.

This case raises an important question of federal appellate jurisdiction that was not considered by the Court of Appeals: Whether one member of a School Board has standing to appeal from a declaratory judgment against the Board. We conclude that although the School Board itself had a sufficient stake in the outcome of the litigation to appeal, an individual Board member cannot invoke the Board's interest in the case to confer standing upon himself.

I

In September 1981 a group of high school students in Williamsport, Pennsylvania, formed a club called "Petros" for the purpose of promoting "spiritual growth and positive attitudes in the lives of its members." App. 46. The group asked the Principal of the high school for permission to meet on school premises during student activity periods scheduled during the regular schoolday on Tuesdays and Thursdays. The Principal allowed Petros to hold an organizational meeting that was attended by approximately 45 students. At that meeting passages of scripture were read and some students prayed. There is no evidence that any students, or parents, expressed any opposition or concern about future meetings of Petros. The Principal nevertheless advised the group that they could not hold any further meetings until he had discussed the matter with the School Superintendent.

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the American Jewish Committee et al. by *Samuel Rabinove, Richard T. Foltin, William B. Duffy, Jr.*, and *William S. Ellis;* for the American Jewish Congress et al. by *Robert Reinstein, Jeffrey I. Pasek, Theodore R. Mann*, and *Nathan Z. Dershowitz;* and for the Anti-Defamation League of B'nai B'rith et al. by *Ruti G. Teitel, Justin J. Finger, Meyer Eisenberg, Jeffrey P. Sinensky*, and *Steven M. Freeman.*

Briefs of *amici curiae* were filed for the Baptist Joint Committtee on Public Affairs et al. by *Donald R. Brewer;* for Kiwanis International et al. by *Stanley C. Fickle;* and for the Rutherford Institute et al. by *Larry L. Crain, Guy O. Farley, Jr., John W. Whitehead, James J. Knicely, Thomas S. Neuberger, Thomas O. Kotouc*, and *William B. Hollberg.*

The Superintendent, in turn, advised the students that he would respond to their written request for recognition after he received "competent legal advice [from the School District's Solicitor] as to the propriety of approving establishment of the proposed prayer club" on school premises. *Id.*, at 42.

On November 16, 1981, the Principal and the Superintendent met with representatives of Petros and advised them that "based on the Solicitor's legal opinion, their request must be denied." 563 F. Supp. 697, 701 (MD Pa. 1983). The legal opinion is not a part of the record; nor does the record contain any evidence that the Principal, the Superintendent, or any other person except the Solicitor had voiced any opposition to the proposed meetings by Petros. Indeed, Petros was informed that it could meet off school premises and "would be given released time during the activity period" if it could secure "a location and an adult supervisor, preferably a clergyman" for their meetings. *Ibid.*

The students thereafter wrote a letter to the Chairman of the Williamsport Area School Board appealing the Superintendent's decision. At a meeting held January 19, 1982, the Board upheld the Superintendent's decision and "denied the appeal on the basis of the Solicitor's opinion." *Ibid.* (citations omitted).

II

On June 2, 1982, 10 of the students filed suit in the United States District Court against the Williamsport Area School District, the 9 members of the School Board, the Superintendent of the District, and the Principal of the high school. Although there is a general allegation in the first paragraph of the complaint that the action was brought against the defendants "in their individual and official capacities," App. 13, the specific allegation concerning each of the named members of the Board was in this form: "John C. Youngman, Jr., is a member of the Williamsport Area School Board and is sued in that capacity," *id.*, at 16. The complaint alleged that the

defendants' refusal to recognize Petros and to allow it to meet on the same basis as other student groups because of its religious activities violated the First Amendment. The complaint prayed for declaratory and injunctive relief.

One answer was filed on behalf of all the defendants. Although they admitted most of the material allegations of the complaint, they alleged that they had "requested and received in writing an opinion from the school district solicitor and legal counsel that it would be unlawful, improper and unconstitutional to recognize said group as a student organization." *Id.*, at 33.

After plaintiffs completed their discovery (defendants took no depositions), the parties filed cross-motions for summary judgment supported by affidavits, the deposition testimony, and statements of material fact not in dispute. On November 9, 1982, the District Court entered an order finding that the record was incomplete. It thereupon directed the parties to submit affidavits or other documentation concerning "the exact nature of the activity period, the type of activities or clubs that have been, and would be, approved, and what proposed groups, if any, have been denied approval." *Id.*, at 101. After that additional information was supplied, and after the case had been fully briefed, the District Court on May 12, 1983, filed a detailed and carefully written opinion in which it stated:

> "Presently before the court are the parties' cross-motions for summary judgment. . . . Although the case presents only a question of law, this is not to say that the facts are unimportant. On the contrary, the undisputed facts are of paramount importance to the resolution of the legal question presented in this case. A slight change in the facts could very well have dictated a contrary decision.
>
> "After carefully reviewing those facts, and after giving full consideration to all pertinent legal authority,

> the court concludes that because the defendant school district is not constitutionally required to deny the plaintiffs the opportunity to meet, by doing so solely on constitutional grounds it has impermissibly burdened their free-speech rights. Accordingly, summary judgment will be granted in favor of the plaintiffs." 563 F. Supp., at 699–700.

The final order entered by the District Court was a ruling "in favor of the plaintiffs and against the defendants on plaintiffs' freedom of speech claim."[1] No injunction was entered, and no relief was granted against any defendant in his individual capacity. The District Court, in effect, merely held that the Board's attorney was incorrect in his legal advice.

The School District did not challenge the judgment of the District Court in any way. It made no motion for a stay and took no appeal. Instead, it decided to comply with the judgment and to allow Petros to conduct the meetings it had requested.

However, John C. Youngman, Jr., who was then still a member of the Board, did file a timely notice of appeal.[2]

III

In the Court of Appeals no one raised any question about Mr. Youngman's standing to appeal. The court did note that all of the original plaintiffs had graduated from high school, but it granted a motion to add additional plaintiffs who were

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[1] The full text of the court's order read as follows:

"NOW, this 12th day of May, 1983, in accordance with the reasoning set forth in the accompanying Opinion, it is hereby ordered that:

"(1) Summary judgment is granted in favor of the defendants and against the plaintiffs on plaintiffs' free exercise claim;

"(2) Summary judgment is granted in favor of the plaintiffs and against the defendants on plaintiffs' freedom of speech claim; and,

"(3) The Clerk of the Court shall close this case." App. to Pet. for Cert. 105a.

[2] We are advised that his term of office expired while the case was pending before the Court of Appeals.

currently enrolled students in order to prevent the case from becoming moot. 741 F. 2d 538, 542, n. 4 (CA3 1984). Neither the majority nor the dissenting opinion even mentioned Mr. Youngman.

After repeatedly stressing "the crucial role which the particular facts play in every first amendment analysis," *id.*, at 541–542,[3] the majority of the Court of Appeals held "that the particular circumstances disclosed by this record and present at the Williamsport Area High School lead to the inexorable conclusion that the constitutional balance of interests tilts against permitting the Petros activity to be conducted within the school as a general activity program," *id.*, at 561.

In dissent, Judge Adams suggested that the majority had implicitly adopted a *per se* rule because of its concern about "the possibility of unconstitutional extensions of the Williamsport arrangement elsewhere," instead of performing the "more difficult adjudicative task [of carefully sifting the facts] on a case-by-case basis." *Id.*, at 569.

The importance of the question presented by the students' petition for certiorari persuaded us that the case merited plenary review. 469 U. S. 1206 (1985). After granting certiorari, however, we noticed that neither the Board nor any of the defendants except Mr. Youngman opposed the students' position and that only Mr. Youngman had challenged the District Court's judgment by invoking the jurisdiction of the Court of Appeals. We therefore find it necessary to answer the question whether Mr. Youngman had a sufficient

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[3] In this regard, consider also the Court of Appeals' emphasis on "the specific facts of the case," 741 F. 2d, at 559 (emphasis deleted); its statement that the "facts of this case concededly present a close question," *ibid.*; its reference to "the unique situation presented here," *id.*, at 559, n. 28; and the following statement:

"Because each additional fact and factor impacts so heavily upon a school prayer analysis in a determination as to whether the particular circumstances pass constitutional muster, we feel it necessary to be precise in considering the relevant facts leading to a particular conclusion." *Id.*, at 560, n. 30.

stake in the outcome of the litigation to support appellate jurisdiction. The parties and the *amici* have identified three different capacities in which Mr. Youngman may have had standing to appeal—as an individual, as a member of the Board, and as a parent.

IV

Before considering each of the standing theories, it is appropriate to restate certain basic principles that limit the power of every federal court. Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. See, *e. g.*, *Marbury* v. *Madison*, 1 Cranch 137, 173–180 (1803). For that reason, every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934). See *Juidice* v. *Vail*, 430 U. S. 327, 331–332 (1977) (standing). "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States* v. *Corrick*, 298 U. S. 435, 440 (1936) (footnotes omitted).[4]

This obligation to notice defects in a court of appeals' subject-matter jurisdiction assumes a special importance

[4] See also, *e. g.*, *Sumner* v. *Mata*, 449 U. S. 539, 547–548, n. 2 (1981); *City of Kenosha* v. *Bruno*, 412 U. S. 507, 511 (1973); *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 588 (1939); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 287–288, n. 10 (1938); *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10, 13 (1930); *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152 (1908) (citing cases); *Cameron* v. *Hodges*, 127 U. S. 322, 325 (1888). Cf. *Capron* v. *Van Noorden*, 2 Cranch 126, 127 (1804).

when a constitutional question is presented. In such cases we have strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts.[5] Thus, as we emphasized in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982):

> "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 38, 41 (1976). . . .
>
> "The requirement of 'actual injury redressable by the court,' *Simon, supra*, at 39, serves several of the 'implicit policies embodied in Article III,' *Flast* [v. *Cohen*, 392 U. S. 83,] 96 [(1968)]. It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. The 'standing' requirement serves other purposes. Because it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the

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[5] We have frequently recognized the importance of the facts and the fact-finding process in constitutional adjudication. See, *e. g.*, *Minnick* v. *California Dept. of Corrections*, 452 U. S. 105, 120–127 (1981); *England* v. *Louisiana Board of Medical Examiners*, 375 U. S. 411, 416 (1964) ("How the facts are found will often dictate the decision of federal claims"); *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963) ("It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues"). Cf. *supra*, at 538–540, and n. 3.

case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court."

V

The first paragraph of the complaint alleged that the action was brought against the defendants "in their individual and official capacities." App. 13. There is, however, nothing else in the complaint, or in the record on which the District Court's judgment was based, to support the suggestion that relief was sought against any School Board member in his or her *individual* capacity. Certainly the District Court's judgment granted no such relief. See n. 1, *supra*. Accordingly, to paraphrase our holding in *Brandon* v. *Holt*, 469 U. S. 464, 469 (1985), "[t]he course of proceedings . . . make it abundantly clear that the action against [Mr. Youngman] was in his official capacity and only in that capacity." See *Kentucky* v. *Graham*, 473 U. S. 159, 167, n. 14 (1985). Since the judgment against Mr. Youngman was not in his individual capacity, he had no standing to appeal in that capacity.[6]

VI

As a member of the School Board sued in his official capacity Mr. Youngman has no personal stake in the outcome of

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[6] The fact that Mr. Youngman was sued in his official capacity does not give him standing to appeal in his individual capacity. Acts performed by the same person in two different capacities "are generally treated as the transactions of two different legal personages." F. James & G. Hazard, Civil Procedure § 11.6, p. 594 (3d ed. 1985).

The fact that Mr. Youngman is named in a petition for attorney's fees that was filed in the District Court after the appeal was taken clearly cannot affect his standing to appeal. Moreover, as we held in *Kentucky* v. *Graham*, 473 U. S., at 165 (footnote and citation omitted), "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, [42 U. S. C.] § 1988 does not authorize a fee award against that defendant." Accord, *id.*, at 164, 168–170.

the litigation and therefore did not have standing to file the notice of appeal. As we held in *Brandon* v. *Holt*, *supra*, "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond." *Id.*, at 471–472. We repeated this point in *Kentucky* v. *Graham:*

> "Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 690, n. 55 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon*, *supra*, at 471–472. It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." 473 U. S., at 165–166 (emphasis in original, footnote omitted).

Mr. Youngman's status as a School Board member does not permit him to "step into the shoes of the Board" and invoke its right to appeal. In this case, Mr. Youngman was apparently the lone dissenter in a decision by the other eight members of the School Board to forgo an appeal. Tr. of Oral Arg. 7. Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take.[7] The Court of Appeals for the District of Co-

[7] It might be an entirely different case if, for example, state law authorized School Board action solely by unanimous consent, in which event Mr. Youngman might claim that he was legally entitled to protect "the effectiveness of [his] vot[e]." *Coleman* v. *Miller*, 307 U. S. 433, 438 (1939). See *id.*, at 438–446; *id.*, at 456 (Black, J., concurring). But in

lumbia Circuit so held in *Smuck* v. *Hobson*, 132 U. S. App. D. C. 372, 374–375, 408 F. 2d 175, 177–178 (1969) (en banc) (footnote omitted):

> "We also find that Mr. Smuck has no appealable interest as a member of the Board of Education. While he was in that capacity a named defendant, the Board of Education was undeniably the principal figure and could have been sued alone as a collective entity. Appellant Smuck had a fair opportunity to participate in its defense, and in the decision not to appeal. Having done so, he has no separate interest as an individual in the litigation. The order directs the Board to take certain actions. But since its decisions are made by vote as a collective whole, there is no apparent way in which Smuck as an individual could violate the decree and thereby become subject to enforcement proceedings."

See *id.*, at 387, 408 F. 2d, at 190 (McGowan, J., concurring in part and concurring in result).

VII

At oral argument Mr. Youngman advised the Court that he is the parent of at least one student attending the Williams-

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that event Mr. Youngman would have to allege that his vote was diluted or rendered nugatory under state law and even then he would have a mandamus or like remedy against the Secretary of the School Board, cf. *id.*, at 436–437 (mandamus action "to compel a proper record of legislative action"); he would not be entitled to take legal action in the Board's authority in his own name. For the same reason, Mr. Youngman does not have standing on the rationale employed in *Board of Education* v. *Allen*, 392 U. S. 236, 241, n. 5 (1968), that he was forced to violate his constitutional oath. Unlike the members of the School Board *majority* in *Allen* who were put "in the position of having to choose between violating their oath and taking a step . . . that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts," *ibid.*, Mr. Youngman has voted his conscience and, as a member of the Board, must abide by its decision not to appeal absent some state-law provision to the contrary.

port Area High School and that as a matter of conscience he is opposed to prayer activities on school premises during regular school hours. The Solicitor General submits that Mr. Youngman's status as a parent provides an adequate predicate for federal appellate jurisdiction.

Mr. Youngman's status as an aggrieved parent, however, like any other kindred fact showing the existence of a justiciable "case" or "controversy" under Article III, must affirmatively appear in the record.[8] As the first Justice Harlan observed, "the presumption . . . is that the court below was without jurisdiction" unless "the contrary appears affirmatively from the record." *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226 (1887). Accord, *Thomas* v. *Board of Trustees*, 195 U. S. 207, 210 (1904); *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62–63 (1904). That lack of standing was not noticed by either party matters not, for as we said in *Mansfield C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884):

> "[T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise

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[8] "The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth* v. *Seldin*, 422 U. S. 490, 517–518 (1975). See *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 190 (1936) ("Here, the allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue of fact, and the record contains no evidence to support the allegation of the bill. There was thus no showing that the District Court had jurisdiction and the bill should have been dismissed upon that ground"); *Jackson* v. *Ashton*, 8 Pet. 148, 149 (1834); *Bingham* v. *Cabot*, 3 Dall. 382, 383–384 (1798).

> of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

Accord, *Chicago, B. & Q. R. Co.* v. *Willard*, 220 U. S. 413, 419 (1911); *Kentucky* v. *Powers*, 201 U. S. 1, 35–36 (1906); *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 453 (1900). See *Thomson* v. *Gaskill*, 315 U. S. 442, 446 (1942). Moreover, because it is not "sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings," *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 284 (1883); *Thomas* v. *Board of Trustees*, 195 U. S., at 210, it follows that the necessary factual predicate may not be gleaned from the briefs and arguments themselves. This "first principle of federal jurisdiction" applies "whether the case is at the trial stage or the appellate stage." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 835–836 (2d ed. 1973).

There is nothing in the record indicating anything about Mr. Youngman's status as a parent. Nor is there anything in the record to indicate that he or his children have suffered any injury as a result of the District Court's judgment, or as a result of the activities of Petros subsequent to the entry of that judgment. For all that appears in the record, Mr. Youngman and his children might even be active supporters of Petros.

The reasons why Mr. Youngman may not take an appeal in his individual capacity also foreclose an appeal in his capacity as a parent. His interest as a parent in the outcome of the

litigation differs from his interest as a member of the School Board which, as we have already noted, is legally that of a "different legal personage." See n. 6, *supra*. Since Mr. Youngman was not sued as a parent in the District Court, he had no right to participate in the proceedings in that court in that capacity without first filing an appropriate motion or pleading setting forth the claim or defense that he desired to assert.[9] Thus, even if one were amenable to the dissent's unprecedented (and unexplained) suggestion that the principle governing determination of subject-matter jurisdiction should be relaxed on appeal, the proposed exception for litigants who were "proper part[ies]" in the District Court, *post*, at 552, would not help Mr. Youngman because he could not perfect an appeal in either capacity in which he was a "party" in the District Court, *i. e.*, as a School Board member sued in his individual capacity or as a Board member sued in his official capacity. Tacitly conceding Mr. Youngman's lack of standing on these two bases, the dissent instead would confer standing on Mr. Youngman as a parent—a capacity in which he plainly was not a party in the District Court and to which, therefore, the dissent's reasoning does not apply. Having

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[9] Because his status as a parent was obviously different from his official status as a member of the Board, in order to participate as a parent in the District Court litigation it was incumbent upon Mr. Youngman under Rule 24 of the Federal Rules of Civil Procedure to make "timely application" by an appropriate motion "stat[ing] the grounds" for intervention and "setting forth the claim or defense for which intervention is sought." Fed. Rules Civ. Proc. 24(a), (c). No such pleading was filed in either of the courts below. It is particularly important to observe these requirements in cases in which the interest of the litigant seeking to appeal diverges from the interest of the party to the suit. In this case, Mr. Youngman's interest as a parent was not necessarily parallel to the interest of the School Board. For although the record plainly demonstrates that the School Board was interested in obeying the law—it dutifully followed its lawyer's advice when he concluded that group worship conducted on school premises would violate the Establishment Clause—it also decided not to appeal the District Court's contrary ruling, and the record does not indicate that the Board disfavored (or favored) groups such as Petros.

failed to assert his parental interest in the District Court—or to adduce any factual support for that interest in this Court—Mr. Youngman has no right to prosecute an appeal in his capacity as a parent.

We therefore hold that because the Court of Appeals was without jurisdiction to hear the appeal, it was without authority to decide the merits. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded with instructions to dismiss the appeal for want of jurisdiction.

It is so ordered.

JUSTICE MARSHALL, concurring.

I join JUSTICE STEVENS' opinion for the Court. I write separately to emphasize that the parties cannot, contrary to the contention of the Solicitor General and THE CHIEF JUSTICE, invoke the Article III jurisdiction of this Court through a belated nontestimonial statement by Mr. Youngman that he is a parent of a child in the Williamsport Area High School.

This lawsuit on appeal was *not* "the same dispute between the same parties," *post*, at 551, as the one conducted in the District Court. The dispute litigated in the District Court was one between certain students wishing to conduct prayer group activities as part of an official school activity period, on the one hand, and a School Board that refused them permission to do so, on the other. Mr. Youngman participated in that lawsuit only as a member of the School Board, sued in his official capacity. The real party in interest in that lawsuit was the Board. *Kentucky* v. *Graham*, 473 U. S. 159, 165–166 (1985). That controversy ended with the entry of the District Court judgment; the School Board, voting 8–1 with Mr. Youngman in the minority, abandoned its earlier position and agreed to allow plaintiffs to conduct the prayer group activities they sought. There was therefore nothing left to litigate between those parties.

The lawsuit sought to be litigated on appeal is a different one. This dispute, under THE CHIEF JUSTICE's theory, is

one between Mr. Youngman, asserting that he is a parent of a child in the Williamsport Area High School whose First Amendment rights would be infringed by his attendance at a school whose activities impermissibly advance religion, on the one hand, and students seeking to conduct prayer group activities, on the other. The School Board itself is nowhere to be found. I do not contest that Mr. Youngman could pursue this dispute on appeal had he intervened in the lawsuit in his capacity as a parent. Absent such intervention, it is conceivable that Mr. Youngman might bottom his standing to raise such an argument on facts in the record setting out his status as a parent. There are, however, no such facts anywhere in the extensive record in this case. There is not one word in the *record* indicating that Mr. Youngman is a father at all. Nor did Mr. Youngman claim such status in his notice of appeal. App. 166.

In fact, the brief for respondent filed in this Court suggests that Mr. Youngman did *not* have a child in the Williamsport Area High School when he filed his notice of appeal from the District Court's decision on June 10, 1983. Benjamin Youngman, rather, apparently is claimed to have begun studying at that school several months later, in the fall of 1983. Brief for Respondent Youngman 6, and n. 3. Assertions in the parties' briefs are not part of the record for purposes of determining our jurisdiction. This discrepancy, however, illustrates the wisdom of our long-established rule requiring that the facts supporting our Article III jurisdiction "appea[r] affirmatively from the record." *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226 (1887).

Because no facts appear in the record supporting Mr. Youngman's status as the parent of a child enrolled in the Williamsport Area High School opposed to petitioners' activities, I join the opinion and judgment of the Court vacating the judgment below and remanding with instructions to dismiss the appeal for want of jurisdiction.

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

I agree with the Court that the judgment of the District Court allowing Petros to meet during the student extracurricular activity period must be reinstated. Because respondent Youngman had standing to appeal, however, I would reach the merits of this dispute and reverse the judgment of the Court of Appeals.

I

Mr. Youngman is a parent of a student at Williamsport High School; as a matter of conscience he is opposed to prayer activities on school premises during school hours. As this Court has repeatedly held, parents have standing to challenge conditions in public schools that their children attend. See *Engel* v. *Vitale*, 370 U. S. 421 (1962); *Zorach* v. *Clauson*, 343 U. S. 306 (1952). The Court's principal objection to Youngman's standing as a parent stems from his failure "'to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Ante*, at 545–547, and n. 8 (quoting *Warth* v. *Seldin*, 422 U. S. 490, 518 (1975)). It is, of course, perfectly sensible to impose such pleading burdens upon the plaintiff who initiates the litigation. These burdens, however, need not be placed upon a properly named defendant, like Mr. Youngman, who seeks to invoke the jurisdiction of the Court of Appeals. Once the jurisdiction of the district court over a particular dispute is established, it seems clear that the same dispute between the same parties will remain within the Article III powers of the courts on appeal. To be sure, we require that the case or controversy requirement be met throughout the course of the litigation. But the method for determining whether the case or controversy exists and the burdens placed on the parties should not, indeed cannot, be the same on appeal as in the district court. At the district court stage, the facts required by

Warth, supra, should normally appear on the face of the complaint. At the appellate stage, however, the "complaining party" does not allege any facts but merely identifies himself as a party to the case in the district court and challenges the validity of that decision. Only if the appellant's standing is challenged must he allege facts sufficient to convince the court of appeals that he is a proper party to pursue the appeal. Here, petitioners not only failed to challenge Youngman's standing before the Court of Appeals, they also conceded that, had they challenged Youngman's standing, he would have satisfied the *Warth* standing test. Tr. of Oral Arg. 5.

II

I would reach the issue the Court granted certiorari to address: whether the Establishment Clause requires a public high school to prevent a student-initiated, student-led group from meeting during an extracurricular activity period.

The Establishment Clause prohibits Congress and, through the Fourteenth Amendment, the States from passing any law "respecting an establishment of religion." As we have observed on other occasions, the precise contours of this prohibition remain unclear. But it is common ground that nothing in the Establishment Clause requires the State to suppress a person's speech merely because the *content* of the speech is religious in character. In *McDaniel* v. *Paty*, 435 U. S. 618, 641 (1978), JUSTICE BRENNAN emphasized in his opinion concurring in the judgment that "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." And more recently, in *Widmar* v. *Vincent*, 454 U. S. 263 (1981), we held that the Establishment Clause did not justify a university's content-based exclusion of religious speech from a forum generally open to student groups.

Widmar clearly controls the resolution of this case. Petros is a student-initiated and student-led group seeking the same forum available to other student extracurricular activity groups. The students would have been allowed to meet to discuss moral philosophy or Marxism, to practice French, or to play chess; but, since they chose to worship, the school decided that it could not allow the group to meet without violating the Establishment Clause.

The Court of Appeals agreed that the Establishment Clause prohibited Petros from meeting on school premises because to allow it to meet could have been misinterpreted by other students as active state support of religion. Under that analysis, because an individual's discussion of religious beliefs may be confused by others as being that of the State, both must be viewed as the same. Yet the several commands of the First Amendment require vision capable of distinguishing between *state* establishment of religion, which is prohibited by the Establishment Clause, and *individual* participation and advocacy of religion which, far from being prohibited by the Establishment Clause, is affirmatively protected by the Free Exercise and Free Speech Clauses of the First Amendment. If the latter two commands are to retain any vitality, utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform *individual* expression of religious belief into *state* advancement of religion.

No one would contend that the State would be authorized to dismantle a church erected by private persons on private property because overwhelming evidence showed that other members of the community *thought* the church was owned and operated by the State. That the "primary effect" of state inaction might turn out to advance the cause of organized religion has no bearing upon the threshold question of whether the challenged activity is conducted by the State or by individuals.

The Establishment Clause mandates state neutrality, not hostility, toward religion. As Justice Black stated for the Court in *Everson* v. *Board of Education*, 330 U. S. 1, 18 (1947), the First Amendment "requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." In *Zorach* v. *Clauson*, 343 U. S. 306 (1952), the Court upheld a state law allowing schools to release students, during school hours, so that they could receive religious instruction elsewhere. Although the State did not compel students to go to religious classes, the program undoubtedly advanced the cause of religion. Justice Douglas, writing for the Court, eloquently rejected the suggestion that the program thereby violated the Establishment Clause:

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups." *Id.*, at 313–314.

By granting the student prayer group equal access to the student activity forum, the order of the District Court "follows the best of our traditions," *id.*, at 314, and is wholly

consistent with the Constitution. Although I would have reached this issue on the merits, it is appropriate that the Court, by vacating the judgment of the Court of Appeals, restores the sound analysis and judgment of the District Court.

JUSTICE POWELL, dissenting.

I agree with THE CHIEF JUSTICE that respondent Youngman has standing to appeal, and also agree with much of his dissenting opinion. I write briefly to say that on its merits, this case is controlled by *Widmar* v. *Vincent*, 454 U. S. 263 (1981).

As in that case, respondent School District simply had "created a forum generally open for use by student groups." *Id.*, at 267. The School District provided 30-minute periods on Tuesdays and Thursdays for high school students to meet in groups in separate school rooms for extracurricular activities, including discussion or debate on any subject of their choosing. A religious group was formed for reading passages of scripture and for prayer. Although there were no complaints by students, faculty, or parents, on the basis of a legal opinion the Principal advised the group that it could not meet during these periods. As THE CHIEF JUSTICE observes in his dissent, this is "a student-initiated and student-led group seeking the same forum available to other student extracurricular activity groups." *Ante*, at 553. At the time of this suit, there was a total of 25 identified groups, each organized by students. All of these groups were free to discuss any subject other than a religious one.

In *Widmar*, under essentially the same circumstances, we held that the University of Missouri at Kansas City had "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment." 454 U. S., at 269. The only arguable distinction between *Widmar* and this case is that *Widmar* involved university students while the groups here are composed of high school

students. We did note in *Widmar* that university students are "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.*, at 274, n. 14. Other decisions, however, have recognized that the First Amendment rights of speech and association extend also to high school students. See, *e. g.*, *Board of Education* v. *Pico*, 457 U. S. 853, 864 (1982) (opinion of BRENNAN, J.); *Tinker* v. *Des Moines School District*, 393 U. S. 503, 506–507 (1969) (citing cases). I do not believe—particularly in this age of massive media information—that the few years difference in age between high school and college students justifies departing from *Widmar*. I accordingly dissent.

PAULUSSEN v. HERION

APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA

No. 85–88. Argued March 5, 1986—Decided March 25, 1986

In 1980, appellant filed a paternity and child support petition in a Pennsylvania court on behalf of her 7-year-old daughter, who had been born out of wedlock, alleging that appellee was the natural father and had ceased making contributions to the daughter's support in 1975. The court held that the action was barred under the state statute of limitations, which then required that paternity actions be commenced within six years of the child's birth or within two years of the putative father's last voluntary support contribution or written acknowledgment of paternity. Appellant's contention that the statute violated the Equal Protection Clause of the Fourteenth Amendment was rejected. The Pennsylvania Superior Court affirmed.

Held: The judgment below is vacated, and the case is remanded for further consideration in light of Pennsylvania's intervening enactment of a new statute providing that a paternity action may be commenced at any time within 18 years of the child's birth. Appellee conceded that he was subject to the new statute and would be liable for child support from the date paternity was established, but he contended that he would not be liable for support payments dating back to when the petition was filed in 1980. If the Pennsylvania court were to interpret the new statute to require payments dating back to 1980, the constitutionality of the 6-year statute of limitations would be irrelevant.

334 Pa. Super. 585, 483 A. 2d 892, vacated and remanded.

Esther L. Hornik argued the cause for appellant. With her on the brief were *Angela L. Martinez* and *Donald J. Martin.*

Joseph N. Onek argued the cause for appellee. On the brief was *Neil H. Stein.**

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*Briefs of *amici curiae* urging reversal were filed for the Children's Defense Fund et al. by *Constance Jean Chatwood, Jane Howard-Martin, Marian Wright Edelman, James D. Weill,* and *Judith L. Lichtman;* and for the Neighborhood Legal Services Association by *Daniel L. Haller* and *Eileen D. Yacknin.*

PER CURIAM.

On February 17, 1980, appellant Barbara Paulussen filed a paternity and child support petition in a Bucks County, Pennsylvania, court on behalf of her daughter, who was then seven years old. The petition alleged that the daughter had been born out of wedlock, that appellee George Herion was her natural father, and that he had ceased making contributions to her support in April 1975. Appellee offered as a defense the time bar of the Pennsylvania statute of limitations, which at the time required that paternity actions be commenced within six years of the child's birth or within two years of the putative father's last voluntary support contribution or written acknowledgment of paternity. 42 Pa. Cons. Stat. Ann., § 6704(e) (Purdon 1982) (repealed). The defense was sustained against appellant's contention that the statute violated the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. The Superior Court affirmed, 334 Pa. Super. 585, 483 A. 2d 892 (1985), and the Supreme Court of Pennsylvania denied discretionary review. Appellant sought appeal in this Court, and, on October 15, 1985, we noted probable jurisdiction. 474 U. S. 899 (1985).

On October 30, 1985, Pennsylvania enacted 1985 Pa. Laws, Act No. 66, to be codified as 23 Pa. Cons. Stat. Ann. § 4343(b), which provides that a child born out of wedlock may commence a paternity action at any time within 18 years of birth. Appellee now concedes that he is subject to § 4343(b) and that, upon a showing of paternity, he would be liable for child support payments from the date paternity was established. Brief for Appellee 5. He contends, however, that, even on such a showing, he would not be liable for payments dating back to the date the initial petition was filed in 1980.

Our examination of Pennsylvania law leaves us uncertain as to the legal consequences of the enactment of the new 18-year statute of limitations. If, however, Pennsylvania were

to interpret § 4343(b) to require support payments dating back to the filing of the original petition, the constitutionality of the 6-year statute of limitations would be irrelevant. Because Pennsylvania should have an opportunity in the first instance to resolve this issue of state law, and because we are reluctant to address a federal constitutional question until it is clearly necessary to do so, we vacate the judgment below and remand for further consideration in light of the intervening change in state law.

It is so ordered.

HOLBROOK, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, ET AL. *v.* FLYNN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84-1606. Argued January 14, 1986—Decided March 26, 1986

After respondent and others were indicted for armed robbery in Rhode Island Superior Court, they were held without bail. When the trial was about to begin, four uniformed state troopers were sitting in the front row of the spectators' section of the courtroom to supplement the customary security force, which was overextended at the time. Respondent's counsel objected to the troopers' presence, but this objection was overruled by the trial justice, primarily on the basis of *voir dire* responses during the selection of the jury indicating that the troopers' presence would not affect the defendants' ability to receive a fair trial. Respondent was convicted, and the Rhode Island Supreme Court affirmed. Respondent then brought a habeas corpus proceeding in Federal District Court, which also rejected his objections to the troopers' presence. The Court of Appeals reversed, holding that the trial justice had failed to consider whether the particular circumstances of respondent's trial had called for the troopers' presence and that the justice had improperly relied on the jurors' *voir dire* responses to rebut any suggestion of prejudice to respondent.

Held: The troopers' presence at respondent's trial was not so inherently prejudicial that he was thereby denied his constitutional right to a fair trial. Pp. 567–572.

(a) While an accused is entitled to have his guilt or innocence determined solely on the basis of evidence introduced at trial, this does not mean that every practice tending to single out an accused from everyone else in the courtroom must be struck down. Pp. 567–568.

(b) The conspicuous, or at least noticeable, presence of guards in a courtroom during trial is not the sort of inherently prejudicial practice that should be permitted only where justified by an essential state interest. Such presence need not be interpreted as a sign that the defendant is particularly dangerous or culpable. Jurors may just as easily believe that the guards are there to prevent outside disruptions or eruptions of violence in the courtroom. Reason, principle, and human experience counsel against a presumption that any use of identifiable guards in a courtroom is inherently prejudicial. In view of the variety of ways

in which such guards can be deployed, a case-by-case approach is more appropriate. Pp. 568–569.

(c) Whenever a courtroom arrangement is challenged as inherently prejudicial, the question is not whether the jurors articulated a consciousness of some prejudicial effect, but rather whether there was an unacceptable risk of prejudice. In this case, there is no justification for finding such an unacceptable risk based on the troopers' presence. Even if the jurors had been aware that the deployment of troopers was not common practice, there is no reason to believe that the troopers' presence tended to brand respondent with guilt. Their presence was unlikely to have been taken as a sign of anything other than a normal official concern for safety and order. Moreover, even if a slight degree of prejudice could be attributed to the troopers' presence, sufficient cause for their presence could be found in the State's need to maintain custody over defendants who had been denied bail. The troopers' presence was intimately related to the State's legitimate interest in maintaining such custody and thus did not offend the Equal Protection Clause by arbitrarily discriminating against those unable to post bail or to whom bail has been denied. Pp. 570–572.

(d) Since this case involves a federal court's review of a constitutional challenge to a state-court proceeding, the federal court's task is not to determine whether it might have been feasible for the State to have employed less conspicuous security measures in the courtroom, but only whether what the jurors saw was so inherently prejudicial as to pose an unacceptable threat to the defendants' right to a fair trial. Respondent has failed to show the existence of such inherent prejudice and has not shown actual prejudice. P. 572.

749 F. 2d 961, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court. BURGER, C. J., filed a concurring opinion, *post*, p. 572.

Thomas More Dickinson, Special Assistant Attorney General of Rhode Island, argued the cause for petitioners. With him on the brief were *Arlene Violet*, Attorney General, and *John Austin Murphy*.

George Kannar argued the cause for respondent. With him on the brief were *Charles S. Sims* and *Burt Neuborne*.*

**John K. Van de Kamp*, Attorney General, *Karl S. Mayer*, Assistant Attorney General, and *Robert E. Niver*, Deputy Attorney General, filed a brief for the State of California as *amicus curiae* urging reversal.

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented in this case is whether a criminal defendant was denied his constitutional right to a fair trial when, at his trial with five codefendants, the customary courtroom security force was supplemented by four uniformed state troopers sitting in the first row of the spectators' section.

I

On August 14, 1975, nine masked men entered the Bonded Vault Co. in Providence, Rhode Island, robbed several employees at gunpoint, broke into most of the safe-deposit boxes in the vault, and escaped with approximately $4 million in cash and valuables. In January 1976, respondent and eight others were indicted in Providence County Superior Court for that crime. After a hearing in Superior Court, respondent and five of his alleged accomplices were ordered held without bail in the custody of the Warden of the State's Adult Correctional Institution.[1]

In April 1976, respondent and his five codefendants were brought to trial in Superior Court before Associate Justice Anthony A. Giannini. Upon entering the courtroom, respondent's counsel noted the presence of four uniformed state troopers, sitting in the first row of the spectators' section; the officers were not far behind, but were separated by the "bar" from, the seats assigned to the defendants for the duration of the trial.[2] Counsel immediately complained to the

[1] Of the remaining three defendants, two were fugitives at the time of respondent's trial, and the third appeared at that proceeding as a witness for the State.

[2] Although the record could have been clearer on this point, all the colloquies in the record corroborate the statement, made by respondent's counsel later in pretrial proceedings, that "sitting behind the defendants, taking the first row, vacating the first row where the spectators sit, are four uniformed state police guards, armed. . . ." Tr. 80; see *id.*, at 71–72. The troopers appear to have maintained this position throughout the course of the trial, although at times there might have been only three of them in the courtroom. See, *e. g.*, *id.*, at 109, 146.

judge that "the defendants would object to uniformed police, uniformed state police, sitting in the court as a display of 'strength' in the presence of the jury." Tr. 48–49. While counsel observed that he would have no objection to the use of any number of plainclothed security personnel, he argued that the presence of uniformed officers would suggest to the jury that defendants were of "bad character." *Id.*, at 48. Justice Giannini replied that the troopers were present because the Committing Squad, which usually supplied courtroom security personnel in such cases, was overextended at that time. Noting that he had not personally requested the assistance of the troopers, the judge agreed to see whether they might be made to wear civilian clothes for their future appearances in the courtroom.

The following week, Justice Giannini announced that he had "received a report that it is not practical, both from an organization point of view and also from a contractual point of view with the union representing the state troopers," for the four troopers to dress in civilian clothes. *Id.*, at 71. In the face of these constraints and in view of the need for adequate security, the justice ruled that the troopers could remain in the courtroom, in full uniform. He noted that because the troopers would be seated behind the bar, defendants would in no way be prejudiced. The next day, denying defendants' motion for reconsideration, Justice Giannini asserted that though he himself had not made the decision to deploy the troopers, he thought defendants "overly sensitive" to the danger of prejudice. *Id.*, at 84. At any rate, the justice went on, an examination of prospective jurors would reveal whether they were likely to draw adverse inference from the troopers' presence, and would thereby guarantee the rights of the defendants. Jury selection began.

In the meantime, respondent sought interlocutory review in the Rhode Island Supreme Court of Justice Giannini's ruling. After initially declining review, the Supreme Court read a transcript of the ruling and granted respondent's peti-

tion. Noting that "[t]he presence of armed, uniformed police officers acting as a security force in criminal courtrooms in this jurisdiction is a departure from the practice usually found in the trial courts of this state," the court concluded: "The trial justice may not delegate responsibility that is his to the so-called security committee or its advisors. The presence of the State Police is a decision that must be resolved solely by the trial justice after consideration of all relevant factors." *State* v. *Byrnes*, 116 R. I. 925, 927, 357 A. 2d 448, 449 (1976).

Upon the State's request, Justice Giannini conducted a hearing at which the first witness was Captain Robert Melucci, the principal officer of the Committing Squad, the group charged with maintaining courtroom security during the trials of defendants in pretrial detention.[3] He testified that, because of other commitments in the courthouse, the force of 12 officers available for deployment in the building was insufficient to maintain the preferred ratio of 2 officers to every defendant in this 6-defendant trial. Since any ratio approaching one-to-one posed a "security risk," Tr. 120, and he could spare only six officers for respondent's trial, Captain Melucci had contacted the Superior Court's presiding justice and informed him of the need for additional security personnel. As a result, Captain Melucci testified, additional help had been sought from the State Police.

The next witness, Major Lionel Benjamin, Executive Officer of the Rhode Island State Police, explained that any time his force was charged with transporting prisoners from the Adult Correctional Institution to the courthouse and maintaining custody during trial, he was contractually obligated to use officers from the uniformed division. That same contract with the Fraternal Order of Police, according to Major Benjamin, precluded him from asking members of the uni-

[3] The name of the Committing Squad has been changed to "Rhode Island state marshals." 1976 R. I. Pub. Laws, ch. 259, § 1 (codified at R. I. Gen. Laws § 42–56–3) (1984 reenactment).

formed division to perform their duties in civilian clothing. The Major went on to note that even were there no contractual bar, the force's plainclothes detective division lacked the personnel to provide security for the duration of respondent's trial. He concluded by saying that if the court required his troopers to wear civilian clothes, he would withdraw them. *Id.*, at 161.

After completing jury selection, Justice Giannini gave his final ruling on respondent's motion. He noted that "if these defendants were admitted to bail, there would be no state policemen and there would be no committing squad officers in this courtroom." *Id.*, at 229. But bail having been denied, it became the responsibility of the Warden and the Committing Squad to maintain custody of the detainees. The justice found that because the Committing Squad lacked the resources, the necessary level of security could be ensured only with the help of the uniformed troopers. Having held the presence of the troopers "justified by the evidence," Justice Giannini considered whether the presence of the troopers had prejudiced the defendants. He observed that of the 54 prospective jurors who had not been struck before they were asked about the troopers, 51 had responded that the troopers' presence "created no inference of guilt with regard to the defendants in their mind"; the remaining 3 had not precisely addressed the question. *Id.*, at 230–231. When asked to speculate why the troopers were present, many had given vague response as to the need for security. In view of the *voir dire* responses, the justice concluded that the presence of the troopers would not affect defendants' ability to receive a fair trial.

The trial lasted more than two months and ended with verdicts acquitting three defendants and convicting respondent and two others. On appeal, the Rhode Island Supreme Court affirmed the convictions. *State* v. *Byrnes*, 433 A. 2d 658 (1981). With respect to respondent's objection to the troopers, the court concluded:

> "[T]he trial justice gave a reasoned and careful consideration of the issues raised by the presence of the uniformed troopers and, after consideration of all relevant factors, found that the presence of the troopers in no way prejudiced defendants. We have read the record, and we find no reason whatsoever to fault his conclusion." *Id.*, at 663.

Respondent then brought this habeas proceeding in Federal District Court. After certain procedural complications not relevant here, the District Court for the District of Rhode Island entertained the petition and rejected all the claims therein. With respect to respondent's objection to the presence of the troopers throughout the trial, the court held: "Less totalitarian alternatives appear to have been explored and rejected on rational grounds. The security measures approved here, extreme though they might have been, did not, under the totality of the circumstances, deny due process or equal protection to the petitioner." 581 F. Supp. 990, 998 (1984).

The Court of Appeals, however, reversed this dismissal. 749 F. 2d 961 (CA1 1984). Seizing upon the Rhode Island Supreme Court's observation that the presence of uniformed and armed troopers had been an "extraordinary" event, the Court of Appeals concluded that Justice Giannini had failed to consider whether the particular circumstances of respondent's trial had called for such measures.

> "Rather, with no threats shown to safety, he balanced nothing, but simply indicated a fear that since the defendants had not been bailed, they might flee from the courtroom. There was no evidence even suggesting any unusual likelihood of this; nor had anything whatever made 'manifest' the 'necessity for heightened security.' As for the exploration of less 'totalitarian alternatives,' the exploration was limited, notwithstanding defendants' suggestions, to inquiring whether regular commitment officers were available without inconveniencing the Pre-

> siding Justice, and whether the union contract permitted the state police to appear out of uniform and unarmed." *Id.*, at 964.

Dismissing the trial judge's reliance on jurors' *voir dire* responses to rebut any suggestion of prejudice to respondent, the Court of Appeals asserted: "Even if all jurors had indicated an unreserved opinion that the troopers' presence would not affect them, such expression, on a case as extreme as this, where there was no need to rely on it, is totally unacceptable." *Id.*, at 965. The court ordered that the writ of habeas corpus be granted.

We granted certiorari, 472 U. S. 1026 (1985), and now reverse.

II

A

Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor* v. *Kentucky*, 436 U. S. 478, 485 (1978). This does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down. Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct. To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence. When defense counsel vigorously represents his client's interests and the trial judge

assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair result can be obtained.

Our faith in the adversary system and in jurors' capacity to adhere to the trial judge's instructions has never been absolute, however. We have recognized that certain practices pose such a threat to the "fairness of the fact-finding process" that they must be subjected to "close judicial scrutiny." *Estelle* v. *Williams*, 425 U. S. 501, 503–504 (1976). Thus, in *Estelle* v. *Williams*, we noted that where a defendant is forced to wear prison clothes when appearing before the jury, "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Id.*, at 504–505. Since no "essential state policy" is served by compelling a defendant to dress in this manner, *id.*, at 505, this Court went no further and concluded that the practice is unconstitutional. This close scrutiny of inherently prejudicial practices has not always been fatal, however. In *Illinois* v. *Allen*, 397 U. S. 337 (1970), the Court emphasized that a defendant may be prejudiced if he appears before the jury bound and gagged. "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id.*, at 344. Yet the Court nonetheless observed that in certain extreme situations, "binding and gagging might possibly be the fairest and most reasonable way to handle" a particularly obstreperous and disruptive defendant. *Ibid.*

B

The first issue to be considered here is thus whether the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial is the sort of inherently prejudicial practice that, like shackling, should be permitted

only where justified by an essential state interest specific to each trial. We do not believe that it is.

The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm. See *Hardee* v. *Kuhlman*, 581 F. 2d 330, 332 (CA2 1978).

To be sure, it is possible that the sight of a security force within the courtroom might under certain conditions "create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." *Kennedy* v. *Cardwell*, 487 F. 2d 101, 108 (CA6 1973), cert. denied, 416 U. S. 959 (1974). However, "reason, principle, and common human experience," *Williams*, *supra*, at 504, counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate.

III

A

The courtroom security force in this case consisted of four uniformed state troopers, two Deputy Sheriffs, and six Committing Squad officers. Though respondent does not concede that the deployment of the uniformed Committing Squad officers was proper, his focus at every stage of his habeas proceedings has been exclusively on the prejudice he attributes to the four state troopers. The only question we need answer is thus whether the presence of these four uniformed and armed officers was so inherently prejudicial that respondent was thereby denied his constitutional right to a fair trial.

The Court of Appeals was correct to find that Justice Giannini's assessment of jurors' states of mind cannot be dispositive here. If "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process," *Estes* v. *Texas*, 381 U. S. 532, 542–543 (1965), little stock need be placed in jurors' claims to the contrary. See *Sheppard* v. *Maxwell*, 384 U. S. 333, 351–352 (1966); *Irvin* v. *Dowd*, 366 U. S. 717, 728 (1961). Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial. Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "an unacceptable risk is presented of impermissible factors coming into play," *Williams*, 425 U. S., at 505.

We do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of

receiving a fair trial. See ABA Standards for Criminal Justice 15–3.1(c) (2d ed. 1980). But we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section.[4] Even had the jurors been aware that the deployment of troopers was not common practice in Rhode Island, we cannot believe that the use of the the four troopers tended to brand respondent in their eyes "with an unmistakable mark of guilt." *Williams, supra*, at 518 (BRENNAN, J., dissenting). Cf. *Dorman* v. *United States*, 140 U. S. App. D. C. 313, 327, 435 F. 2d 385, 397 (1970) (greater danger of prejudice if jury aware that arrangements are extraordinary). Four troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings. Indeed, any juror who for some other reason believed defendants particularly dangerous might well have wondered why there were only four armed troopers for the six defendants.

We note, moreover, that even were we able to discern a slight degree of prejudice attributable to the troopers' presence at respondent's trial, sufficient cause for this level of security could be found in the State's need to maintain custody over defendants who had been denied bail after an individualized determination that their presence at trial could not otherwise be ensured. Unlike a policy requiring detained defendants to wear prison garb, the deployment of troopers

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[4] The only social science study to which respondent has pointed us addresses the effects of prison clothes and courtroom guards upon jury verdicts. Its tentative conclusion is that defendants clad in prison garb or accompanied by guards are more likely to be found guilty than unsupervised defendants wearing their own clothes. However, the study also found that favored treatment was accorded defendants who had *both* supervision *and* prison clothing. Fontaine & Kiger, The Effects of Defendant Dress and Supervision on Judgments of Simulated Jurors: An Exploratory Study, 2 Law and Human Behavior 63, 69–70 (1978). In view of these curious and concededly tentative results, we will, at least for now, rely on our own experience and common sense.

was intimately related to the State's legitimate interest in maintaining custody during the proceedings and thus did not offend the Equal Protection Clause by arbitrarily discriminating against those unable to post bail or to whom bail had been denied. See *Williams*, *supra*, at 505–506.

B

The Court of Appeals rejected as wholly inadequate the reasons advanced by state authorities and accepted by Justice Giannini to explain why the four uniformed troopers had to be present at respondent's trial. However, our task here is not to determine whether it might have been feasible for the State to have employed less conspicuous security measures in the courtroom. While, in our supervisory capacity, we might express a preference that officers providing courtroom security in federal courts not be easily identifiable by jurors as guards,[5] we are much more constrained when reviewing a constitutional challenge to a state-court proceeding. All a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over. Respondent has failed to carry his burden here.

The judgment of the Court of Appeals is

Reversed.

CHIEF JUSTICE BURGER, concurring.

I write only to explain my reading of the Court's statement that "in our supervisory capacity, we *might* express a prefer-

[5] See, *e. g.*, *United States* v. *Jackson*, 549 F. 2d 517, 526–527 (CA8), cert. denied *sub nom. Muhammed* v. *United States*, 430 U. S. 985 (1977); *United States* v. *Clardy*, 540 F. 2d 439, 442–443 (CA9), cert. denied, 429 U. S. 963 (1976); *Kennedy* v. *Cardwell*, 487 F. 2d 101, 109 (CA6 1973), cert. denied, 416 U. S. 959 (1974). See also N. Dorsen & L. Friedman, Disorder in the Court 249 (1973).

ence that officers providing courtroom security in federal courts not be easily identifiable by jurors as guards . . . ." *Ante*, at 572 (emphasis added). In joining the opinion, I interpret the Court's carefully qualified statement in this case—a state case—as containing no suggestion that federal officers providing security must doff their uniforms before entering federal courtrooms, and certainly none of the three cases the Court cites, *ante*, at 572, n. 5, would require any such arbitrary action. Moreover, the issue of what kind of security arrangements some might "prefer" is, of course, quite distinct from issues such as whether a federal defendant would become entitled to a new trial because of an alleged prejudicial effect of the security measures used at his trial. On this understanding, I join the Court's opinion.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD, ET AL. *v.* ZENITH RADIO CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-2004. Argued November 12, 1985—Decided March 26, 1986

Petitioners are 21 Japanese corporations or Japanese-controlled American corporations that manufacture and/or sell "consumer electronic products" (CEPs) (primarily television sets). Respondents are American corporations that manufacture and sell television sets. In 1974, respondents brought an action in Federal District Court, alleging that petitioners, over a 20-year period, had illegally conspired to drive American firms from the American CEP market by engaging in a scheme to fix and maintain artificially high prices for television sets sold by petitioners in Japan and, at the same time, to fix and maintain low prices for the sets exported to and sold in the United States. Respondents claim that various portions of this scheme violated, *inter alia*, §§ 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, and § 73 of the Wilson Tariff Act. After several years of discovery, petitioners moved for summary judgment on all claims. The District Court then directed the parties to file statements listing all the documentary evidence that would be offered if the case went to trial. After the statements were filed, the court found the bulk of the evidence on which respondents relied was inadmissible, that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy, and that any inference of conspiracy was unreasonable. Summary judgment therefore was granted in petitioners' favor. The Court of Appeals reversed. After determining that much of the evidence excluded by the District Court was admissible, the Court of Appeals held that the District Court erred in granting a summary judgment and that there was both direct and circumstantial evidence of a conspiracy. Based on inferences drawn from the evidence, the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market.

Held: The Court of Appeals did not apply proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment. Pp. 582-598.

(a) The "direct evidence" on which the Court of Appeals relied—petitioners' alleged supracompetitive pricing in Japan, the "five company

rule" by which each Japanese producer was permitted to sell only to five American distributors, and the "check prices" (minimum prices fixed by agreement with the Japanese Government for CEPs exported to the United States) insofar as they established minimum prices in the United States—cannot by itself give respondents a cognizable claim against petitioners for antitrust damages. Pp. 582–583.

(b) To survive petitioners' motion for a summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. If the factual context renders respondents' claims implausible, *i. e.*, claims that make no economic sense, respondents must offer more persuasive evidence to support their claims than would otherwise be necessary. To survive a motion for a summary judgment, a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. Thus, respondents here must show that the inference of a conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. Pp. 585–588.

(c) Predatory pricing conspiracies are by nature speculative. They require the conspirators to sustain substantial losses in order to recover uncertain gains. The alleged conspiracy is therefore implausible. Moreover, the record discloses that the alleged conspiracy has not succeeded in over two decades of operation. This is strong evidence that the conspiracy does not in fact exist. The possibility that petitioners have obtained supracompetitive profits in the Japanese market does not alter this assessment. Pp. 588–593.

(d) Mistaken inferences in cases such as this one are especially costly, because they chill the very conduct that the antitrust laws are designed to protect. There is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage conspiracies. Pp. 593–595.

(e) The Court of Appeals erred in two respects: the "direct evidence" on which it relied had little, if any, relevance to the alleged predatory pricing conspiracy, and the court failed to consider the absence of a plausible motive to engage in predatory pricing. In the absence of any rational motive to conspire, neither petitioners' pricing practices, their conduct in the Japanese market, nor their agreements respecting prices and distributions in the American market sufficed to create a "genuine issue for trial" under Federal Rule of Civil Procedure 56(e). On remand, the Court of Appeals may consider whether there is other, unambiguous evidence of the alleged conspiracy. Pp. 595–598.

723 F. 2d 238, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 598.

Donald J. Zoeller argued the cause for petitioners. With him on the briefs were *John L. Altieri, Jr.*, *Harold G. Levison*, *Peter J. Gartland*, *James S. Morris*, *Kevin R. Keating*, *Charles F. Schirmeister*, *Ira M. Millstein*, *A. Paul Victor*, *Jeffrey L. Kessler*, *Carl W. Schwarz*, *Michael E. Friedlander*, *William H. Barrett*, *Donald F. Turner*, and *Henry T. Reath*.

Charles F. Rule argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Wallace*, *Charles S. Stark*, *Robert B. Nicholson*, *Edward T. Hand*, *Richard P. Larm*, *Abraham D. Sofaer*, and *Elizabeth M. Teel*.

Edwin P. Rome argued the cause for respondents. With him on the brief were *William H. Roberts*, *Arnold I. Kalman*, *Philip J. Curtis*, and *John Borst, Jr.**

JUSTICE POWELL delivered the opinion of the Court.

This case requires that we again consider the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case.

I

Stating the facts of this case is a daunting task. The opinion of the Court of Appeals for the Third Circuit runs to 69 pages; the primary opinion of the District Court is more than three times as long. *In re Japanese Electronic Products*

*Briefs of *amici curiae* urging reversal were filed for the Government of Japan by *Stephen M. Shapiro;* and for the American Association of Exporters and Importers et al. by *Robert Herzstein* and *Hadrian R. Katz*.

Briefs of *amici curiae* were filed for the Government of Australia et al. by *Mark R. Joelson* and *Joseph P. Griffin;* and for the Semiconductor Industry Association by *Joseph R. Creighton*.

Antitrust Litigation, 723 F. 2d 238 (CA3 1983); 513 F. Supp. 1100 (ED Pa. 1981). Two respected District Judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a 40-volume appendix in this Court that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions.

We will not repeat what these many opinions have stated and restated, or summarize the mass of documents that constitute the record on appeal. Since we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence, we find it unnecessary to state the facts in great detail. What follows is a summary of this case's long history.

A

Petitioners, defendants below, are 21 corporations that manufacture or sell "consumer electronic products" (CEPs)—for the most part, television sets. Petitioners include both Japanese manufacturers of CEPs and American firms, controlled by Japanese parents, that sell the Japanese-manufactured products. Respondents, plaintiffs below, are Zenith Radio Corporation (Zenith) and National Union Electric Corporation (NUE). Zenith is an American firm that manufactures and sells television sets. NUE is the corporate successor to Emerson Radio Company, an American firm that manufactured and sold television sets until 1970, when it withdrew from the market after sustaining substantial losses. Zenith and NUE began this lawsuit in 1974,[1] claiming that petitioners had illegally conspired to drive

[1] NUE had filed its complaint four years earlier, in the District Court for the District of New Jersey. Zenith's complaint was filed separately in 1974, in the Eastern District of Pennsylvania. The two cases were consolidated in the Eastern District of Pennsylvania in 1974.

American firms from the American CEP market. According to respondents, the gist of this conspiracy was a "'scheme to raise, fix and maintain artificially *high* prices for television receivers sold by [petitioners] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States.'" 723 F. 2d, at 251 (quoting respondents' preliminary pretrial memorandum). These "low prices" were allegedly at levels that produced substantial losses for petitioners. 513 F. Supp., at 1125. The conspiracy allegedly began as early as 1953, and according to respondents was in full operation by sometime in the late 1960's. Respondents claimed that various portions of this scheme violated §§ 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, § 73 of the Wilson Tariff Act, and the Antidumping Act of 1916.

After several years of detailed discovery, petitioners filed motions for summary judgment on all claims against them. The District Court directed the parties to file, with preclusive effect, "Final Pretrial Statements" listing all the documentary evidence that would be offered if the case proceeded to trial. Respondents filed such a statement, and petitioners responded with a series of motions challenging the admissibility of respondents' evidence. In three detailed opinions, the District Court found the bulk of the evidence on which Zenith and NUE relied inadmissible.[2]

The District Court then turned to petitioners' motions for summary judgment. In an opinion spanning 217 pages, the court found that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged

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[2] The inadmissible evidence included various government records and reports, *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 505 F. Supp. 1125 (ED Pa. 1980), business documents offered pursuant to various hearsay exceptions, *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 505 F. Supp. 1190 (ED Pa. 1980), and a large portion of the expert testimony that respondents proposed to introduce. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 505 F. Supp. 1313 (ED Pa. 1981).

conspiracy. At bottom, the court found, respondents' claims rested on the inferences that could be drawn from petitioners' parallel conduct in the Japanese and American markets, and from the effects of that conduct on petitioners' American competitors. 513 F. Supp., at 1125–1127. After reviewing the evidence both by category and *in toto*, the court found that any inference of conspiracy was unreasonable, because (i) some portions of the evidence suggested that petitioners conspired in ways that did not injure respondents, and (ii) the evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it. Summary judgment therefore was granted on respondents' claims under § 1 of the Sherman Act and the Wilson Tariff Act. Because the Sherman Act § 2 claims, which alleged that petitioners had combined to monopolize the American CEP market, were functionally indistinguishable from the § 1 claims, the court dismissed them also. Finally, the court found that the Robinson-Patman Act claims depended on the same supposed conspiracy as the Sherman Act claims. Since the court had found no genuine issue of fact as to the conspiracy, it entered judgment in petitioners' favor on those claims as well.[3]

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[3] The District Court ruled separately that petitioners were entitled to summary judgment on respondents' claims under the Antidumping Act of 1916. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 494 F. Supp. 1190 (ED Pa. 1980). Respondents appealed this ruling, and the Court of Appeals reversed in a separate opinion issued the same day as the opinion concerning respondents' other claims. *In re Japanese Electronic Products Antitrust Litigation*, 723 F. 2d 319 (CA3 1983).

Petitioners ask us to review the Court of Appeals' Antidumping Act decision along with its decision on the rest of this mammoth case. The Antidumping Act claims were not, however, mentioned in the questions presented in the petition for certiorari, and they have not been independently argued by the parties. See this Court's Rule 21.1(a). We therefore decline the invitation to review the Court of Appeals' decision on those claims.

B

The Court of Appeals for the Third Circuit reversed.[4] The court began by examining the District Court's evidentiary rulings, and determined that much of the evidence excluded by the District Court was in fact admissible. 723 F. 2d, at 260–303. These evidentiary rulings are not before us. See 471 U. S. 1002 (1985) (limiting grant of certiorari).

On the merits, and based on the newly enlarged record, the court found that the District Court's summary judgment decision was improper. The court acknowledged that "there are legal limitations upon the inferences which may be drawn from circumstantial evidence," 723 F. 2d, at 304, but it found that "the legal problem . . . is different" when "there is direct evidence of concert of action." *Ibid.* Here, the court concluded, "there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred." *Id.*, at 304–305. Thus, the court reasoned, cases concerning the limitations on inferring conspiracy from ambiguous evidence were not dispositive. *Id.*, at 305. Turning to the evidence, the court determined that a factfinder reasonably could draw the following conclusions:

1. The Japanese market for CEPs was characterized by oligopolistic behavior, with a small number of producers meeting regularly and exchanging information on price and other matters. *Id.*, at 307. This created the opportunity for a stable combination to raise both prices and profits in Japan. American firms could not attack such a combination because the Japanese Government imposed significant barriers to entry. *Ibid.*

2. Petitioners had relatively higher fixed costs than their American counterparts, and therefore needed to

[4] As to 3 of the 24 defendants, the Court of Appeals affirmed the entry of summary judgment. Petitioners are the 21 defendants who remain in the case.

operate at something approaching full capacity in order to make a profit. *Ibid.*

3. Petitioners' plant capacity exceeded the needs of the Japanese market. *Ibid.*

4. By formal agreements arranged in cooperation with Japan's Ministry of International Trade and Industry (MITI), petitioners fixed minimum prices for CEPs exported to the American market. *Id.*, at 310. The parties refer to these prices as the "check prices," and to the agreements that require them as the "check price agreements."

5. Petitioners agreed to distribute their products in the United States according to a "five company rule": each Japanese producer was permitted to sell only to five American distributors. *Ibid.*

6. Petitioners undercut their own check prices by a variety of rebate schemes. *Id.*, at 311. Petitioners sought to conceal these rebate schemes both from the United States Customs Service and from MITI, the former to avoid various customs regulations as well as action under the antidumping laws, and the latter to cover up petitioners' violations of the check-price agreements.

Based on inferences from the foregoing conclusions,[5] the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial.

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[5] In addition to these inferences, the court noted that there was expert opinion evidence that petitioners' export sales "generally were at prices which produced losses, often as high as twenty-five percent on sales." 723 F. 2d, at 311. The court did not identify any direct evidence of below-cost pricing; nor did it place particularly heavy reliance on this aspect of the expert evidence. See n. 19, *infra*.

The court found it unnecessary to address petitioners' claim that they could not be held liable under the antitrust laws for conduct that was compelled by a foreign sovereign. The claim, in essence, was that because MITI required petitioners to enter into the check-price agreements, liability could not be premised on those agreements. The court concluded that this case did not present any issue of sovereign compulsion, because the check-price agreements were being used as "evidence of a low export price conspiracy" and not as an independent basis for finding antitrust liability. The court also believed it was unclear that the check prices in fact were mandated by the Japanese Government, notwithstanding a statement to that effect by MITI itself. *Id.*, at 315.

We granted certiorari to determine (i) whether the Court of Appeals applied the proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment, and (ii) whether petitioners could be held liable under the antitrust laws for a conspiracy in part compelled by a foreign sovereign. 471 U. S. 1002 (1985). We reverse on the first issue, but do not reach the second.

II

We begin by emphasizing what respondents' claim is *not*. Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 443 (CA2 1945) (L. Hand, J.); 1 P. Areeda & D. Turner, Antitrust Law ¶236d (1978).[6] Nor can respondents recover damages for

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[6] The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 704 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"). The effect

any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act, *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223 (1940), but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price in CEPs. Cf. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 488–489 (1977). Finally, for the same reason, respondents cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supracompetitive pricing more attractive. Thus, neither petitioners' alleged supracompetitive pricing in Japan, nor the five company rule that limited distribution in this country, nor the check prices insofar as they established minimum prices in this country, can by themselves give respondents a cognizable claim against petitioners for antitrust damages. The Court of Appeals therefore erred to the extent that it found evidence of these alleged conspiracies to be "direct evidence" of a conspiracy that injured respondents. See 723 F. 2d, at 304–305.

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on which respondents rely is the artificially depressed level of prices for CEPs in the United States.

Petitioners' alleged cartelization of the Japanese market could not have caused that effect over a period of some two decades. Once petitioners decided, as respondents allege, to reduce output and raise prices in the Japanese market, they had the option of either producing fewer goods or selling more goods in other markets. The most plausible conclusion is that petitioners chose the latter option because it would be more profitable than the former. That choice does not flow from the cartelization of the Japanese market. On the contrary, were the Japanese market perfectly competitive petitioners would still have to choose whether to sell goods overseas, and would still presumably make that choice based on their profit expectations. For this reason, respondents' theory of recovery depends on proof of the asserted price-cutting conspiracy in this country.

Respondents nevertheless argue that these supposed conspiracies, if not themselves grounds for recovery of antitrust damages, are circumstantial evidence of another conspiracy that *is* cognizable: a conspiracy to monopolize the American market by means of pricing below the market level.[7] The thrust of respondents' argument is that petitioners used their monopoly profits from the Japanese market to fund a concerted campaign to price predatorily and thereby drive respondents and other American manufacturers of CEPs out of business. Once successful, according to respondents, petitioners would cartelize the American CEP market, restricting output and raising prices above the level that fair competition would produce. The resulting monopoly profits, respondents contend, would more than compensate petitioners for the losses they incurred through years of pricing below market level.

The Court of Appeals found that respondents' allegation of a horizontal conspiracy to engage in predatory pricing,[8]

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[7] Respondents also argue that the check prices, the five company rule, and the price fixing in Japan are all part of one large conspiracy that includes monopolization of the American market through predatory pricing. The argument is mistaken. However one decides to describe the contours of the asserted conspiracy—whether there is one conspiracy or several—respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. *Associated General Contractors of California, Inc.* v. *Carpenters*, 459 U. S. 519, 538–540 (1983); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 488–489 (1977); see also Note, Antitrust Standing, Antitrust Injury, and the Per Se Standard, 93 Yale L. J. 1309 (1984). That showing depends in turn on proof that petitioners conspired to price predatorily in the American market, since the other conduct involved in the alleged conspiracy cannot have caused such an injury.

[8] Throughout this opinion, we refer to the asserted conspiracy as one to price "predatorily." This term has been used chiefly in cases in which a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in. *E. g., Southern Pacific Communications Co.* v. *American Telephone & Telegraph Co.*, 238 U. S. App. D. C. 309, 331–336, 740 F. 2d 980, 1002–1007 (1984), cert. denied, 470 U. S. 1005

if proved,[9] would be a *per se* violation of § 1 of the Sherman Act. 723 F. 2d, at 306. Petitioners did not appeal from that conclusion. The issue in this case thus becomes whether respondents adduced sufficient evidence in support of their theory to survive summary judgment. We therefore examine the principles that govern the summary judgment determination.

III

To survive petitioners' motion for summary judgment,[10] respondents must establish that there is a genuine issue of ma-

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(1985). In such cases, "predatory pricing" means pricing below some appropriate measure of cost. *E. g., Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F. 2d 227, 232–235 (CA1 1983); see *Utah Pie Co.* v. *Continental Baking Co.*, 386 U. S. 685, 698, 701, 702, n. 14 (1967).

There is a good deal of debate, both in the cases and in the law reviews, about what "cost" is relevant in such cases. We need not resolve this debate here, because unlike the cases cited above, this is a Sherman Act § 1 case. For purposes of this case, it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost. An agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices. Respondents therefore may not complain of conspiracies that, for example, set maximum prices above market levels, or that set minimum prices at *any* level.

[9] We do not consider whether recovery should *ever* be available on a theory such as respondents' when the pricing in question is above some measure of incremental cost. See generally Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 709–718 (1975) (discussing cost-based test for use in § 2 cases). As a practical matter, it may be that only direct evidence of below-cost pricing is sufficient to overcome the strong inference that rational businesses would not enter into conspiracies such as this one. See Part IV–A, *infra*.

[10] Respondents argued before the District Court that petitioners had failed to carry their initial burden under Federal Rule of Civil Procedure 56(c) of demonstrating the absence of a genuine issue of material fact. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 157 (1970). Cf. *Catrett* v. *Johns-Manville Sales Corp.*, 244 U. S. App. D. C. 160, 756 F. 2d 181,

terial fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. Fed. Rule Civ. Proc. 56(e);[11] *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253, 288–289 (1968). This showing has two components. First, respondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. Respondents charge petitioners with a whole host of conspiracies in restraint of trade. *Supra*, at 582–583. Except for the alleged conspiracy to monopolize the American market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an "antitrust injury," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S., at 489, because they actually tended to benefit respondents. *Supra*, at 582–583. Therefore, unless, in context, evidence of these "other" conspiracies raises a genuine issue concerning the existence of a predatory pricing conspiracy, that evidence cannot defeat petitioners' summary judgment motion.

Second, the issue of fact must be "genuine." Fed. Rules Civ. Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c),[12] its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. See *DeLuca* v. *Atlantic Refining Co.*, 176 F. 2d 421, 423 (CA2 1949) (L. Hand, J.), cert. denied, 338 U. S. 943 (1950); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (1983); Clark, Special Prob-

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cert. granted, 474 U. S. 944 (1985). That issue was resolved in petitioners' favor, and is not before us.

[11] Rule 56(e) provides, in relevant part:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

[12] See n. 10, *supra*.

lems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand. L. Rev. 493, 504–505 (1950). Cf. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 627 (1944). In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" Fed. Rule Civ. Proc. 56(e) (emphasis added). See also Advisory Committee Note to 1963 Amendment of Fed. Rule Civ. Proc. 56(e), 28 U. S. C. App., p. 626 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Cities Service, supra*, at 289.

It follows from these settled principles that if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. *Cities Service* is instructive. The issue in that case was whether proof of the defendant's refusal to deal with the plaintiff supported an inference that the defendant willingly had joined an illegal boycott. Economic factors strongly suggested that the defendant had no motive to join the alleged conspiracy. 391 U. S., at 278–279. The Court acknowledged that, in isolation, the defendant's refusal to deal might well have sufficed to create a triable issue. *Id.*, at 277. But the refusal to deal had to be evaluated in its factual context. Since the defendant lacked any rational motive to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability. *Id.*, at 280.

Respondents correctly note that "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 369

U. S. 654, 655 (1962). But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.*, at 764. See also *Cities Service, supra*, at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U. S., at 764. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. See *Cities Service, supra*, at 280.

Petitioners argue that these principles apply fully to this case. According to petitioners, the alleged conspiracy is one that is economically irrational and practically infeasible. Consequently, petitioners contend, they had no motive to engage in the alleged predatory pricing conspiracy; indeed, they had a strong motive *not* to conspire in the manner respondents allege. Petitioners argue that, in light of the absence of any apparent motive and the ambiguous nature of the evidence of conspiracy, no trier of fact reasonably could find that the conspiracy with which petitioners are charged actually existed. This argument requires us to consider the nature of the alleged conspiracy and the practical obstacles to its implementation.

IV

A

A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment to be rational,

the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered. As then-Professor Bork, discussing predatory pricing by a single firm, explained:

> "Any realistic theory of predation recognizes that the predator as well as his victims will incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits (where rivals are to be killed) or in future undisturbed profits (where rivals are to be disciplined). The future flow of profits, appropriately discounted, must then exceed the present size of the losses." R. Bork, The Antitrust Paradox 145 (1978).

See also McGee, Predatory Pricing Revisited, 23 J. Law & Econ. 289, 295–297 (1980). As this explanation shows, the success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, "[t]he predator must make a substantial investment with no assurance that it will pay off." Easterbrook, Predatory Strategies and Counterstrategies, 48 U. Chi. L. Rev. 263, 268 (1981). For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful. See, *e. g.*, Bork, *supra*, at 149–155; Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 699 (1975); Easterbrook, *supra;* Koller, The Myth of Predatory Pricing—An Empirical Study,

4 Antitrust Law & Econ. Rev. 105 (1971); McGee, Predatory Price Cutting: The *Standard Oil (N. J.) Case*, 1 J. Law & Econ. 137 (1958); McGee, Predatory Pricing Revisited, 23 J. Law & Econ., at 292–294. See also *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F. 2d 76, 88 (CA2 1981) ("[N]owhere in the recent outpouring of literature on the subject do commentators suggest that [predatory] pricing is either common or likely to increase"), cert. denied, 455 U. S. 943 (1982).

These observations apply even to predatory pricing by a *single firm* seeking monopoly power. In this case, respondents allege that a large number of firms have conspired over a period of many years to charge below-market prices in order to stifle competition. Such a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator. The conspirators must allocate the losses to be sustained during the conspiracy's operation, and must also allocate any gains to be realized from its success. Precisely because success is speculative and depends on a willingness to endure losses for an indefinite period, each conspirator has a strong incentive to cheat, letting its partners suffer the losses necessary to destroy the competition while sharing in any gains if the conspiracy succeeds. The necessary allocation is therefore difficult to accomplish. Yet if conspirators cheat to any substantial extent, the conspiracy must fail, because its success depends on depressing the market price for *all* buyers of CEPs. If there are too few goods at the artificially low price to satisfy demand, the would-be victims of the conspiracy can continue to sell at the "real" market price, and the conspirators suffer losses to little purpose.

Finally, if predatory pricing conspiracies are generally unlikely to occur, they are especially so where, as here, the prospects of attaining monopoly power seem slight. In order to recoup their losses, petitioners must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess prof-

its what they earlier gave up in below-cost prices. See *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co., supra,* at 89; Areeda & Turner, 88 Harv. L. Rev., at 698. Two decades after their conspiracy is alleged to have commenced,[13] petitioners appear to be far from achieving this goal: the two largest shares of the retail market in television sets are held by RCA and respondent Zenith, not by any of the petitioners. 6 App. to Brief for Appellant in No. 81-2331 (CA3), pp. 2575a-2576a. Moreover, those shares, which together approximate 40% of sales, did not decline appreciably during the 1970's. *Ibid.* Petitioners' collective share rose rapidly during this period, from one-fifth or less of the relevant markets to close to 50%. 723 F. 2d, at 316.[14] Neither the District Court nor the Court of Appeals found, however, that petitioners' share presently allows them to charge monopoly prices; to the contrary, respondents contend that the conspiracy is ongoing—that petitioners are still artificially *depressing* the market price in order to drive Zenith out of the market. The data in the record strongly suggest that that goal is yet far distant.[15]

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[13] NUE's complaint alleges that petitioners' conspiracy began as early as 1960; the starting date used in Zenith's complaint is 1953 NUE Complaint ¶ 52; Zenith Complaint ¶ 39.

[14] During the same period, the number of American firms manufacturing television sets declined from 19 to 13. 5 App. to Brief for Appellant in No. 81-2331 (CA3), p. 1961a. This decline continued a trend that began at least by 1960, when petitioners' sales in the United States market were negligible. *Ibid.* See Zenith Complaint ¶¶ 35, 37.

[15] Respondents offer no reason to suppose that entry into the relevant market is especially difficult, yet without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time. Judge Easterbrook, commenting on this case in a law review article, offers the following sensible assessment:

"The plaintiffs [in this case] maintain that for the last fifteen years or more at least ten Japanese manufacturers have sold TV sets at less than cost in order to drive United States firms out of business. Such conduct cannot possibly produce profits by harming competition, however. If the Japanese firms drive some United States firms out of business, they could not

The alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist. Since the losses in such a conspiracy accrue before the gains, they must be "repaid" with interest. And because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup. Maintaining supracompetitive prices in turn depends on the continued cooperation of the conspirators, on the inability of other would-be competitors to enter the market, and (not incidentally) on the conspirators' ability to escape antitrust liability for their *minimum* price-fixing cartel.[16] Each of these factors weighs more heavily as the time needed to recoup losses grows. If the losses have been substantial—as would likely be neces-

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recoup. Fifteen years of losses could be made up only by very high prices for the indefinite future. (The losses are like investments, which must be recovered with compound interest.) If the defendants should try to raise prices to such a level, they would attract new competition. There are no barriers to entry into electronics, as the proliferation of computer and audio firms shows. The competition would come from resurgent United States firms, from other foreign firms (Korea and many other nations make TV sets), and from defendants themselves. In order to recoup, the Japanese firms would need to suppress competition among themselves. On plaintiffs' theory, the cartel would need to last at least thirty years, far longer than any in history, even when cartels were not illegal. None should be sanguine about the prospects of such a cartel, given each firm's incentive to shave price and expand its share of sales. The predation recoupment story therefore does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place. They were just engaged in hard competition." Easterbrook, The Limits of Antitrust, 63 Texas L. Rev. 1, 26–27 (1984) (footnotes omitted).

[16] The alleged predatory scheme makes sense only if petitioners can recoup their losses. In light of the large number of firms involved here, petitioners can achieve this only by engaging in some form of price fixing *after* they have succeeded in driving competitors from the market. Such price fixing would, of course, be an independent violation of § 1 of the Sherman Act. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

sary in order to drive out the competition[17]—petitioners would most likely have to sustain their cartel for years simply to break even.

Nor does the possibility that petitioners have obtained supracompetitive profits in the Japanese market change this calculation. Whether or not petitioners have the *means* to sustain substantial losses in this country over a long period of time, they have no *motive* to sustain such losses absent some strong likelihood that the alleged conspiracy in this country will eventually pay off. The courts below found no evidence of any such success, and—as indicated above—the facts actually are to the contrary: RCA and Zenith, not any of the petitioners, continue to hold the largest share of the American retail market in color television sets. More important, there is nothing to suggest any relationship between petitioners' profits in Japan and the amount petitioners could expect to gain from a conspiracy to monopolize the American market. In the absence of any such evidence, the possible existence of supracompetitive profits in Japan simply cannot overcome the economic obstacles to the ultimate success of this alleged predatory conspiracy.[18]

B

In *Monsanto*, we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. *Monsanto*, 465 U. S., at 762–764.

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[17] The predators' losses must actually *increase* as the conspiracy nears its objective: the greater the predators' market share, the more products the predators sell; but since every sale brings with it a loss, an increase in market share also means an increase in predatory losses.

[18] The same is true of any supposed excess production capacity that petitioners may have possessed. The existence of plant capacity that exceeds domestic demand does tend to establish the ability to sell products abroad. It does not, however, provide a motive for selling at prices lower than necessary to obtain sales; nor does it explain why petitioners would be willing to *lose* money in the United States market without some reasonable prospect of recouping their investment.

Respondents, petitioners' competitors, seek to hold petitioners liable for damages caused by the alleged conspiracy to cut prices. Moreover, they seek to establish this conspiracy indirectly, through evidence of other combinations (such as the check-price agreements and the five company rule) whose natural tendency is to raise prices, and through evidence of rebates and other price-cutting activities that respondents argue tend to prove a combination to suppress prices.[19] But cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. See *Monsanto, supra*, at 763–764. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F. 2d 227, 234 (CA1 1983).

In most cases, this concern must be balanced against the desire that illegal conspiracies be identified and punished. That balance is, however, unusually one-sided in cases such as this one. As we earlier explained, *supra*, at 588–593, predatory pricing schemes require conspirators to suffer losses in order eventually to realize their illegal gains; moreover, the

[19] Respondents also rely on an expert study suggesting that petitioners have sold their products in the American market at substantial losses. The relevant study is not based on actual cost data; rather, it consists of expert opinion based on a mathematical construction that in turn rests on assumptions about petitioners' costs. The District Court analyzed those assumptions in some detail and found them both implausible and inconsistent with record evidence. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 505 F. Supp., at 1356–1363. Although the Court of Appeals reversed the District Court's finding that the expert report was inadmissible, the court did not disturb the District Court's analysis of the factors that substantially undermine the probative value of that evidence. See 723 F. 2d, at 277–282. We find the District Court's analysis persuasive. Accordingly, in our view the expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors, discussed in Part IV–A, *supra*, that suggest that such conduct is irrational.

gains depend on a host of uncertainties, making such schemes more likely to fail than to succeed. These economic realities tend to make predatory pricing conspiracies self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the conspirators. See Easterbrook, The Limits of Antitrust, 63 Texas L. Rev. 1, 26 (1984). Finally, unlike predatory pricing by a single firm, *successful* predatory pricing conspiracies involving a large number of firms can be identified and punished once they succeed, since some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation. Thus, there is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage such conspiracies.

V

As our discussion in Part IV–A shows, petitioners had no motive to enter into the alleged conspiracy. To the contrary, as presumably rational businesses, petitioners had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gains. Cf. *Cities Service*, 391 U. S., at 279. The Court of Appeals did not take account of the absence of a plausible motive to enter into the alleged predatory pricing conspiracy. It focused instead on whether there was "direct evidence of concert of action." 723 F. 2d, at 304. The Court of Appeals erred in two respects: (i) the "direct evidence" on which the court relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing.

The "direct evidence" on which the court relied was evidence of *other* combinations, not of a predatory pricing conspiracy. Evidence that petitioners conspired to raise prices in Japan provides little, if any, support for respondents'

claims: a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another. Evidence that petitioners agreed to fix *minimum* prices (through the "check price" agreements) for the American market actually works in petitioners' favor, because it suggests that petitioners were seeking to place a floor under prices rather than to lower them. The same is true of evidence that petitioners agreed to limit the number of distributors of their products in the American market—the so-called five company rule. That practice may have facilitated a horizontal territorial allocation, see *United States* v. *Topco Associates, Inc.*, 405 U. S. 596 (1972), but its natural effect would be to raise market prices rather than reduce them.[20] Evidence that tends to support any of these collateral conspiracies thus says little, if anything, about the existence of a conspiracy to charge below-market prices in the American market over a period of two decades.

That being the case, the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible ex-

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[20] The Court of Appeals correctly reasoned that the five company rule might tend to insulate petitioners from competition with each other. 723 F. 2d, at 306. But this effect is irrelevant to a conspiracy to price predatorily. Petitioners have no incentive to underprice each other if they already are pricing *below* the level at which they could sell their goods. The far more plausible inference from a customer allocation agreement such as the five company rule is that petitioners were conspiring to *raise* prices, by limiting their ability to take sales away from each other. Respondents—petitioners' competitors—suffer no harm from a conspiracy to raise prices. *Supra*, at 582–583. Moreover, it seems very unlikely that the five company rule had any significant effect of any kind, since the "rule" permitted petitioners to sell to their American subsidiaries, and did not limit the number of distributors to which the subsidiaries could resell. 513 F. Supp., at 1190.

planations, the conduct does not give rise to an inference of conspiracy. See *Cities Service, supra*, at 278–280. Here, the conduct in question consists largely of (i) pricing at levels that succeeded in taking business away from respondents, and (ii) arrangements that may have limited petitioners' ability to compete with each other (and thus kept prices from going even lower). This conduct suggests either that petitioners behaved competitively, or that petitioners conspired to *raise* prices. Neither possibility is consistent with an agreement among 21 companies to price below market levels. Moreover, the predatory pricing scheme that this conduct is said to prove is one that makes no practical sense: it calls for petitioners to destroy companies larger and better established than themselves, a goal that remains far distant more than two decades after the conspiracy's birth. Even had they succeeded in obtaining their monopoly, there is nothing in the record to suggest that they could recover the losses they would need to sustain along the way. In sum, in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a "genuine issue for trial." Fed. Rule Civ. Proc. 56(e).[21]

On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence must "ten[d] to exclude the possibility" that petitioners underpriced respondents to compete for business rather than to implement an eco-

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[21] We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U. S. 752 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. *Id.*, at 763–764. See *supra*, at 588.

nomically senseless conspiracy. *Monsanto*, 465 U. S., at 764. In the absence of such evidence, there is no "genuine issue for trial" under Rule 56(e), and petitioners are entitled to have summary judgment reinstated.

VI

Our decision makes it unnecessary to reach the sovereign compulsion issue. The heart of petitioners' argument on that issue is that MITI, an agency of the Government of Japan, required petitioners to fix minimum prices for export to the United States, and that petitioners are therefore immune from antitrust liability for any scheme of which those minimum prices were an integral part. As we discussed in Part II, *supra*, respondents could not have suffered a cognizable injury from any action that *raised* prices in the American CEP market. If liable at all, petitioners are liable for conduct that is distinct from the check-price agreements. The sovereign compulsion question that both petitioners and the Solicitor General urge us to decide thus is not presented here.

The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

It is indeed remarkable that the Court, in the face of the long and careful opinion of the Court of Appeals, reaches the result it does. The Court of Appeals faithfully followed the relevant precedents, including *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253 (1968), and *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984), and it kept firmly in mind the principle that proof of a conspiracy should not be fragmented, see *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 699 (1962). After surveying the massive record, including very

significant evidence that the District Court erroneously had excluded, the Court of Appeals concluded that the evidence taken as a whole creates a genuine issue of fact whether petitioners engaged in a conspiracy in violation of §§ 1 and 2 of the Sherman Act and § 2(a) of the Robinson-Patman Act. In my view, the Court of Appeals' opinion more than adequately supports this judgment.

The Court's opinion today, far from identifying reversible error, only muddies the waters. In the first place, the Court makes confusing and inconsistent statements about the appropriate standard for granting summary judgment. Second, the Court makes a number of assumptions that invade the factfinder's province. Third, the Court faults the Third Circuit for nonexistent errors and remands the case although it is plain that respondents' evidence raises genuine issues of material fact.

I

The Court's initial discussion of summary judgment standards appears consistent with settled doctrine. I agree that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Ante*, at 587 (quoting *Cities Service*, *supra*, at 289). I also agree that "'[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Ante*, at 587 (quoting *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962)). But other language in the Court's opinion suggests a departure from traditional summary judgment doctrine. Thus, the Court gives the following critique of the Third Circuit's opinion:

> "[T]he Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude

that petitioners' price-cutting behavior was independent and not conspiratorial." *Ante*, at 581.

In a similar vein, the Court summarizes *Monsanto Co.* v. *Spray-Rite Service Corp.*, *supra*, as holding that "courts should not permit factfinders to infer conspiracies when such inferences are implausible . . . ." *Ante*, at 593. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury.[1] These holdings in no way under-

[1] The Court adequately summarizes the quite fact-specific holding in *Cities Service*. *Ante*, at 587.

In *Monsanto*, the Court held that a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is not, *standing alone*, sufficient to create a jury question. 465 U. S., at 763–764. To understand this holding, it is important to realize that under *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), it is permissible for a manufacturer to announce retail prices in advance and terminate those who fail to comply, but that under *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911), it is impermissible for the manufacturer and its distributors to agree on the price at which the distributors will sell the goods. Thus, a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is lawful under *Colgate*, *unless* the termination is pursuant to a shared understanding between the manufacturer and its distributors respecting enforcement of a resale price maintenance scheme. *Monsanto* holds that to establish liability under *Dr. Miles*, more is needed than evidence of behavior that is consistent with a distributor's exercise of its prerogatives under *Colgate*. Thus, "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 465 U. S., at 764. *Monsanto* does *not* hold that if a terminated dealer produces some further evidence of conspiracy beyond the bare fact of postcomplaint termination, the judge hearing a motion for summary judgment should balance all the evidence pointing toward conspiracy against all the evidence pointing toward independent action.

mine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.

II

In defining what respondents must show in order to recover, the Court makes assumptions that invade the fact-finder's province. The Court states with very little discussion that respondents can recover under § 1 of the Sherman Act only if they prove that "petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Ante*, at 585, n. 8. This statement is premised on the assumption that "[a]n agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices." *Ibid.* In making this assumption, the Court ignores the contrary conclusions of respondents' expert DePodwin, whose report in very relevant part was erroneously excluded by the District Court.

The DePodwin Report, on which the Court of Appeals relied along with other material, indicates that respondents were harmed in two ways that are independent of whether petitioners priced their products below "the level necessary to sell their products or . . . some appropriate measure of cost." *Ibid.* First, the Report explains that the price-raising scheme in Japan resulted in lower consumption of petitioners' goods in that country and the exporting of more of petitioners' goods to this country than would have occurred had prices in Japan been at the competitive level. Increas-

ing exports to this country resulted in depressed prices here, which harmed respondents.[2] Second, the DePodwin Report indicates that petitioners exchanged confidential proprietary information and entered into agreements such as the five-company rule with the goal of avoiding intragroup competition in the United States market. The Report explains that petitioners' restrictions on intragroup competition caused respondents to lose business that they would not have lost had petitioners competed with one another.[3]

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[2] Dr. DePodwin summarizes his view of the harm caused by Japanese cartelization as follows:

"When we consider the injuries inflicted on United States producers, we must again look at the Japanese television manufacturers' export agreement as part of a generally collusive scheme embracing the Japanese domestic market as well. This scheme increased the supply of television receivers to the United States market while restricting supply in the Japanese market. If Japanese manufacturers had competed in both domestic and export markets, they would have sold more in the domestic market and less in the United States. A greater proportion of Japanese production capacity would have been devoted to domestic sales. Domestic prices would have been lower and export prices would have been higher. The size of the price differential between domestic and export markets would have diminished practically to the vanishing point. Consequently, competition among Japanese producers in both markets would have resulted in reducing exports to the United States and United States prices would have risen. In addition, investment by the United States industry would have increased. As it was, however, the influx of sets at depressed prices cut the rates of return on television receiver production facilities in the United States to so low a level as to make such investment uneconomic.

"We can therefore conclude that the American manufacturers of television receivers would have made larger sales at higher prices in the absence of the Japanese cartel agreements. Thus, the collusive behavior of Japanese television manufacturers resulted in a very severe injury to those American television manufacturers, particularly to National Union Electric Corporation, which produced a preponderance of television sets with screen sizes of nineteen inches and lower, especially those in the lower range of prices." 5 App. to Brief for Appellants in No. 81-2331 (CA3), pp. 1629a-1630a.

[3] The DePodwin Report has this, among other things, to say in summarizing the harm to respondents caused by the five-company rule, ex-

The DePodwin Report alone creates a genuine factual issue regarding the harm to respondents caused by Japanese cartelization and by agreements restricting competition among petitioners in this country. No doubt the Court prefers its own economic theorizing to Dr. DePodwin's, but that is not a reason to deny the factfinder an opportunity to consider Dr. DePodwin's views on how petitioners' alleged collusion harmed respondents.[4]

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change of production data, price coordination, and other allegedly anti-competitive practices of petitioners:

"The impact of Japanese anti-competitive practices on United States manufacturers is evident when one considers the nature of competition. When a market is fully competitive, firms pit their resources against one another in an attempt to secure the business of individual customers. However, when firms collude, they violate a basic tenet of competitive behavior, i. e., that they act independently. United States firms were confronted with Japanese competitors who collusively were seeking to destroy their established customer relationships. Each Japanese company had targeted customers which it could service with reasonable assurance that its fellow Japanese cartel members would not become involved. But just as importantly, each Japanese firm would be assured that what was already a low price level for Japanese television receivers in the United States market would not be further depressed by the actions of its Japanese associates.

"The result was a phenomenal growth in exports, particularly to the United States. Concurrently, Japanese manufacturers, and the defendants in particular, made large investments in new plant and equipment and expanded production capacity. It is obvious, therefore, that the effect of the Japanese cartel's concerted actions was to generate a larger volume of investment in the Japanese television industry than would otherwise have been the case. This added capacity both enabled and encouraged the Japanese to penetrate the United States market more deeply than they would have had they competed lawfully." *Id.*, at 1628a–1629a.

For a more complete statement of DePodwin's explanation of how the alleged cartel operated, and the harms it caused respondents, see *id.*, at 1609a–1642a. This material is summarized in a chart found *id.*, at 1633a.

[4] In holding that Parts IV and V of the Report had been improperly excluded, the Court of Appeals said:

"The trial court found that DePodwin did not use economic expertise in reaching the opinion that the defendants participated in a Japanese televi-

The Court, in discussing the unlikelihood of a predatory conspiracy, also consistently assumes that petitioners valued profit-maximization over growth. See, *e. g.*, *ante*, at 595. In light of the evidence that petitioners sold their goods in this country at substantial losses over a long period of time, see Part III–B, *infra*, I believe that this is an assumption that should be argued to the factfinder, not decided by the Court.

III

In reversing the Third Circuit's judgment, the Court identifies two alleged errors: "(i) [T]he 'direct evidence on which the [Court of Appeals] relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing." *Ante*, at 595. The Court's position is without substance.

A

The first claim of error is that the Third Circuit treated evidence regarding price fixing in Japan and the so-called five-company rule and check prices as "'direct evidence' of a conspiracy that injured respondents." *Ante*, at 583 (citing *In re Japanese Electronics Products Antitrust Litigation*, 723 F. 2d 238, 304–305 (1983)). The passage from the Third

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sion cartel. 505 F. Supp. at 1342–46. We have examined the excluded portions of Parts IV and V in light of the admitted portions, and we conclude that this finding is clearly erroneous. As a result, the court also held the opinions to be unhelpful to the factfinder. What the court in effect did was to eliminate all parts of the report in which the expert economist, after describing the conditions in the respective markets, the opportunities for collusion, the evidence pointing to collusion, the terms of certain undisputed agreements, and the market behavior, expressed the opinion that there was concert of action consistent with plaintiffs' conspiracy theory. Considering the complexity of the economic issues involved, it simply cannot be said that such an opinion would not help the trier of fact to understand the evidence or determine that fact in issue." *In re Japanese Electronics Products Antitrust Litigation*, 723 F. 2d 238, 280 (1983).

The Court of Appeals had similar views about Parts VI and VII.

Circuit's opinion in which the Court locates this alleged error makes what I consider to be a quite simple and correct observation, namely, that this case is distinguishable from traditional "conscious parallelism" cases, in that there is direct evidence of concert of action among petitioners. *Ibid.* The Third Circuit did not, as the Court implies, jump unthinkingly from this observation to the conclusion that evidence regarding the five-company rule could support a finding of antitrust injury to respondents.[5] The Third Circuit twice specifically noted that horizontal agreements allocating customers, though illegal, do not ordinarily injure competitors of the agreeing parties. *Id.*, at 306, 310–311. However, after reviewing evidence of cartel activity in Japan, collusive establishment of dumping prices in this country, and long-term, below-cost sales, the Third Circuit held that a factfinder could reasonably conclude that the five-company rule was not a simple price-raising device:

> "[A] factfinder might reasonably infer that the allocation of customers in the United States, combined with price-fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market." *Id.*, at 311.

I see nothing erroneous in this reasoning.

B

The Court's second charge of error is that the Third Circuit was not sufficiently skeptical of respondents' allegation that petitioners engaged in predatory pricing conspiracy. But

[5] I use the Third Circuit's analysis of the five-company rule by way of example; the court did an equally careful analysis of the parts the cartel activity in Japan and the check prices could have played in an actionable conspiracy. See generally *id.*, at 303–311.

In discussing the five-company rule, I do not mean to imply any conclusion on the validity of petitioners' sovereign compulsion defense. Since the Court does not reach this issue, I see no need of my addressing it.

the Third Circuit is not required to engage in academic discussions about predation; it is required to decide whether respondents' evidence creates a genuine issue of material fact. The Third Circuit did its job, and remanding the case so that it can do the same job again is simply pointless.

The Third Circuit indicated that it considers respondents' evidence sufficient to create a genuine factual issue regarding long-term, below-cost sales by petitioners. *Ibid.* The Court tries to whittle away at this conclusion by suggesting that the "expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors . . . that suggest that such conduct is irrational." *Ante*, at 594, n. 19. But the question is not whether the Court finds respondents' experts persuasive, or prefers the District Court's analysis; it is whether, viewing the evidence in the light most favorable to respondents, a jury or other fact-finder could reasonably conclude that petitioners engaged in long-term, below-cost sales. I agree with the Third Circuit that the answer to this question is "yes."

It is misleading for the Court to state that the Court of Appeals "did not disturb the District Court's analysis of the factors that substantially undermine the probative value of [evidence in the DePodwin Report respecting below-cost sales]." *Ibid.* The Third Circuit held that the exclusion of the portion of the DePodwin Report regarding below-cost pricing was erroneous because "the trial court ignored DePodwin's uncontradicted affidavit that all data relied on in his report were of the type on which experts in his field would reasonably rely." 723 F. 2d, at 282. In short, the Third Circuit found DePodwin's affidavit sufficient to create a genuine factual issue regarding the correctness of his conclusion that petitioners sold below cost over a long period of time. Having made this determination, the court saw no need—nor do I—to address the District Court's analysis point by point. The District Court's criticisms of De-

Podwin's methods are arguments that a factfinder should consider.

IV

Because I believe that the Third Circuit was correct in holding that respondents have demonstrated the existence of genuine issues of material fact, I would affirm the judgment below and remand this case for trial.

Reporter's Note

Orders commencing with March 6, 1986, begin with page 1062. The preceding orders in 475 U. S., from February 24 through March 3, 1986, were reported in Part 1, at 1001–1062. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

No. 85-5738. COSSETT ET AL. *v.* LEDFORD, TRUSTEE, 474 U. S. 1065;

No. 85-5764. SELLNER *v.* MARYLAND, 474 U. S. 1066;

No. 85-5839. GRAY *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, 474 U. S. 1069; and

No. 85-5889. RISPOLI *v.* UNITED STATES ET AL., 474 U. S. 1069. Petitions for rehearing denied.

No. 85-773. ATLANTIC RICHFIELD CO. ET AL. *v.* ALASKA ET AL., 474 U. S. 1043. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

MARCH 6, 1986

Miscellaneous Order

No. A-653 (85-6448). ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. The order of February 28, 1986 [*ante*, p. 1041], is vacated. The application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is granted until March 25, 1986, or until the disposition by this Court of the petition for writ of certiorari, whichever is earlier, unless otherwise extended by the Court. JUSTICE REHNQUIST and JUSTICE O'CONNOR would deny the application for stay.

MARCH 10, 1986*

Appeals Dismissed

No. 85-353. MICHIGAN DIVERSIFIED BUSINESS PRODUCTS, INC., ET AL. *v.* CITY OF WARREN ET AL. Appeal from Ct. App. Mich. dismissed for want of properly presented federal question. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument.

No. 85-1185. WHEATON *v.* CITY OF OKLAHOMA CITY ET AL. Appeal from Ct. Crim. App. Okla. dismissed for want of substantial federal question.

No. 85-1211. RAJARAM *v.* A. S. ABELL PUBLISHING CO. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction.

*JUSTICE BRENNAN took no part in the consideration or decision of the orders announced on this date with the exception of No. 85-6333, *Egger* v. *Casey, Director, Central Intelligence Agency, et al.*, *infra*, p. 1064.

Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-6206. GAYDOS *v.* STRELECKI ET AL. 'ppeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 774 F. 2d 1151.

Certiorari Granted—Vacated and Remanded

No. 85-498. ABERNATHY ET AL. *v.* SAN JOSE TEACHERS ASSN. Sup. Ct. Cal. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Teachers* v. *Hudson*, *ante*, p. 292. Reported below: 38 Cal. 3d 839, 700 P. 2d 1252.

Vacated and Remanded After Certiorari Granted

No. 85-298. CONNOLLY *v.* BURT. C. A. 10th Cir. [Certiorari granted, 474 U. S. 1004.] Judgment vacated and case remanded to the Court of Appeals with directions that it instruct the United States District Court for the District of Colorado to dismiss the complaint as moot.

*Miscellaneous Orders**

No. ——. ELMWOOD-UTICA HOUSES, INC. *v.* BUFFALO SEWER AUTHORITY. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. D-547. IN RE DISBARMENT OF MAGRUDER. It is ordered that R. Jack Magruder III, of Little Rock, Ark., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 85-701. FEDERAL ELECTION COMMISSION *v.* MASSACHUSETTS CITIZENS FOR LIFE, INC. C. A. 1st Cir. [Probable jurisdiction noted, 474 U. S. 1049.] Motion of Common Cause for leave to file a brief as *amicus curiae* granted.

No. 85-782. IMMIGRATION AND NATURALIZATION SERVICE *v.* CARDOZA-FONSECA. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1009.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

*For the Court's order prescribing amendments to the Federal Rules of Appellate Procedure, see *post*, p. 1155.

No. 85-6124. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner to consolidate this case with No. 85-5189, *McLaughlin* v. *United States* [certiorari granted, 474 U. S. 944], denied.

No. 85-6333. EGGER *v.* CASEY, DIRECTOR, CENTRAL INTELLIGENCE AGENCY, ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 31, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85-6236. IN RE TUCKER. Petition for writ of mandamus denied.

Certiorari Granted

No. 85-1217. CITY OF SPRINGFIELD, MASSACHUSETTS *v.* KIBBE, ADMINISTRATRIX OF THE ESTATE OF THURSTON. C. A. 1st Cir. Certiorari granted. Reported below: 777 F. 2d 801.

Certiorari Denied. (See also Nos. 85-1211 and 85-6206, *supra*.)

No. 84-6050. CURTIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1070.

No. 85-542. ROTH ET AL. *v.* CITY OF VALLEJO. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 167 Cal. App. 3d 1169, 213 Cal. Rptr. 143.

No. 85-697. WAGGONER ET AL. *v.* DALLAIRE, DBA A-JAY EXCAVATING CO. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 589.

No. 85-855. ARKLA, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 487.

No. 85-891. SMITH, AS PERSONAL REPRESENTATIVE OF THE ESTATES OF AUSTIN ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (UNITED STATES,

REAL PARTY IN INTEREST); and SMITH, AS PERSONAL REPRESENTATIVE OF THE ESTATES OF AUSTIN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 85-951. ROBINSON ET AL. *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 769 F. 2d 1556.

No. 85-1036. RUTGERS STATE UNIVERSITY OF NEW JERSEY ET AL. *v.* GALDA ET AL.; and

No. 85-1037. NEW JERSEY PUBLIC INTEREST RESEARCH GROUP, INC. *v.* GALDA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 2d 1060.

No. 85-1052. KUPFERSTEIN *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 85-1145. WILLIAMS ET AL. *v.* WOLFENBARGER, DBA SHADY SAM'S PAWN SHOP; and

No. 85-1203. TANNERY ET AL. *v.* WOLFENBARGER, DBA SHADY SAM'S PAWN SHOP. C. A. 10th Cir. Certiorari denied. Reported below: 774 F. 2d 358.

No. 85-1178. CHATTEM, INC. *v.* BAILEY. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 49.

No. 85-1182. HUMBLE EXPLORATION CO., INC., ET AL. *v.* BROWNING ET AL. Ct. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 690 S. W. 2d 321.

No. 85-1193. MAGEE, INDIVIDUALLY AND T/A COLLEGIATE RESEARCH SYSTEMS *v.* RUVOLDT, PROSECUTOR OF HUDSON COUNTY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85-1202. BRADFORD, AS EXECUTRIX OF THE ESTATE OF BRADFORD *v.* BLUE PEARL MUSIC CORP. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 1067.

No. 85-1204. TERRY *v.* STONE ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-1212. OLEN *v.* PURDUE ET AL. Ct. App. Ariz. Certiorari denied.

No. 85-1215. GATES *v.* SPINKS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 771 F. 2d 916.

No. 85-1216. O'CONNELL *v.* MARYLAND STEEL ERECTORS, INC., ET AL. Ct. App. D. C. Certiorari denied. Reported below: 495 A. 2d 1134.

No. 85-1220. HUGH KNOELL BUILDERS, INC. *v.* FIRST FEDERAL SAVINGS & LOAN ASSN. Ct. App. Ariz. Certiorari denied.

No. 85-1241. LUBBOCK COUNTY, TEXAS, ET AL. *v.* STEWART ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 153.

No. 85-1258. BROWN ET AL. *v.* KERR-MCGEE CHEMICAL CORP. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 1234.

No. 85-1330. WILLIAMS ROCK MINING CO., INC. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1048.

No. 85-5623. WOLFE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 766 F. 2d 1525.

No. 85-5879. UNGAR *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 63 Md. App. 472, 492 A. 2d 1336.

No. 85-6037. AMES *v.* NEW YORK STATE DIVISION OF PAROLE. C. A. 2d Cir. Certiorari denied. Reported below: 772 F. 2d 13.

No. 85-6120. POWELL *v.* DUGGER, SUPERINTENDENT, FLORIDA STATE PRISON. C. A. 11th Cir. Certiorari denied.

No. 85-6151. GIRDNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 773 F. 2d 257.

No. 85-6186. TUCKER ET AL. *v.* MASCHNER, WARDEN, ET AL. Sup. Ct. Kan. Certiorari denied.

No. 85-6192. TAYLOR *v.* BOOKER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 47.

No. 85-6194. RODMAN *v.* REED ET AL. C. A. 6th Cir. Certiorari denied.

No. 85-6196. PARKER *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 85-6197. SMITH *v.* DEBARTOLI. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 2d 451.

No. 85-6201. PRANTIL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 169 Cal. App. 3d 592, 215 Cal. Rptr. 372.

No. 85-6208. BORGE *v.* BOYS AND GIRLS CLUBS OF GREATER WASHINGTON. C. A. D. C. Cir. Certiorari denied. Reported below: 251 U. S. App. D. C. 196, 782 F. 2d 278.

No. 85-6211. MOORE *v.* WELLS, SUPERINTENDENT, MUSKEGON CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1022.

No. 85-6212. SMIGA *v.* DEAN WITTER REYNOLDS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 766 F. 2d 698.

No. 85-6215. BRENNAN *v.* HABERSHAW ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 702.

No. 85-6218. GASPARD *v.* TRANSWORLD DRILLING CO. Sup. Ct. La. Certiorari denied. Reported below: 474 So. 2d 1304.

No. 85-6231. SOMMER *v.* CLINTON COUNTY SUPREME COURT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 39.

No. 85-6237. TOMAS ET AL. *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 136 Ill. App. 3d 1054, 484 N. E. 2d 341.

No. 85-6239. ROBERTS *v.* DILL. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1049.

No. 85-6242. HOWARD *v.* DAVIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6246. WILLIAMS *v.* STATE AUTOMOBILE MUTUAL INSURANCE CO. Ct. App. Ohio, Lawrence County. Certiorari denied.

No. 85-6247. MCGEE *v.* SCREW CONVEYOR CORPORATION OF WINONA, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 699.

No. 85–6249. MIDWIFE *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85–6255. BARTLEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 109 Ill. 2d 273, 486 N. E. 2d 880.

No. 85–6267. GRANT *v.* ABSHIRE, SUPERINTENDENT, RIVERSIDE CORRECTIONAL FACILITY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1162.

No. 85–6298. HUGGARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 788.

No. 85–6328. RIVERA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 778 F. 2d 591.

No. 85–6331. CAROTHERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 311.

No. 85–6336. BERO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1044.

No. 85–6339. AGILAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 123.

No. 85–6353. DENNIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 85–6358. JENKS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 1156.

No. 85–6370. AGUIRRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 85–337. KEMP, WARDEN *v.* POTTS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 734 F. 2d 526 and 764 F. 2d 1369.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting from the denial of certiorari.

Eleven years ago, while in Cobb County, Georgia, Potts and a female companion persuaded Robert Snyder to give them a ride in a pickup truck. After Snyder agreed, Potts shot him through the left ear and nose with a pistol. Snyder acted as if he were unconscious while Potts dragged him out of the truck. Potts robbed

Snyder and then, unable to start the truck, walked to a nearby home. There he told Michael Priest that an accident had occurred. Priest drove Potts back to the truck. Upon their arrival, Priest saw Snyder lying in a ditch and attempted to help him. But Potts ordered Priest to drive him and his companion to the next county, Forsyth County. Once there, he forced Priest out of the car at gunpoint. Priest said, "Oh my God, don't kill me"; Potts retorted that there was no such thing as God, and that he would determine whether Priest would live or die. Potts then put a gun to Priest's head and killed him.

Potts was convicted in the Superior Court of Cobb County of kidnaping Priest with bodily injury, armed robbery of Priest, and armed robbery and aggravated assault of Snyder. Potts was sentenced to death for the kidnaping and for the armed robbery. He was subsequently tried in the Superior Court of Forsyth County for the murder of Priest and received another death sentence. Potts' convictions and sentences were affirmed by the Georgia Supreme Court, although the court vacated Potts' death sentence for armed robbery. *Potts* v. *State*, 241 Ga. 67, 69, 243 S. E. 2d 510, 514 (1978). He then sought and was denied state habeas relief.

Potts next sought a writ of habeas corpus in the United States District Court for the Northern District of Georgia. The District Court ordered a new guilt/innocence trial with respect to the Cobb County kidnaping conviction and a new sentencing trial with respect to the Forsyth County murder conviction. 575 F. Supp. 374 (1983). The Court of Appeals for the Eleventh Circuit affirmed. 734 F. 2d 526 (1984).

Potts' federal habeas petition contained several issues that had never been presented to the Georgia state courts; for the first time in his petition, he argued that he was denied effective assistance of counsel. This issue had not been raised on direct appeal or on state habeas. Indeed, in the District Court Potts moved to amend his federal habeas petition to include this new claim. The State contended that Potts had not exhausted his state remedies, citing this Court's opinion in *Rose* v. *Lundy*, 455 U. S. 509 (1982). The District Court nonetheless granted the motion to amend, stating that it was "hard pressed to see how [the State] would be prejudiced by the granting of the . . . motion." Of course, this was a wholly insufficient basis for ignoring the requirement of exhaustion of state remedies made explicit in *Lundy*. There we ex-

plained that the exhaustion requirement is designed not only to avoid prejudice to state prosecutors but also "to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Id.*, at 518.

In his federal habeas petition, Potts also argued that the trial court erred in not instructing the jury that "bodily injury" was an element of the crime of capital kidnaping. From an examination of the record lodged with this Court, it seems clear that this issue was not presented to the Georgia Supreme Court either on direct appeal from the conviction or in the state habeas petition. Thus, Potts had not exhausted his state remedies when he sought federal habeas relief on this basis. Nonetheless, both the District Court and the Court of Appeals granted relief on this claim without giving the Georgia state courts any opportunity to review it.

Apart from the unnecessary "disruption of state-court proceedings" created by this failure to require Potts to exhaust state remedies, the record that resulted is unusual in several respects. For example, the Court of Appeals embarked on an extended discussion of the meaning of the Georgia capital kidnaping statute without the benefit and guidance of a prior Georgia court construction of the statute in light of Potts' objection. 734 F. 2d, at 529–530. Obviously our decision, and the decision of the court below, would have been aided by such a construction.

The Court of Appeals also acknowledged after parsing the Cobb County jury verdict that "there is . . . some degree of uncertainty as to what the Cobb County jury intended to find with regard to the kidnapping charge." *Id.*, at 530. The court nevertheless confidently declared that the jury had never found "bodily injury" because of defective instructions. The federal question presented on a challenge such as this is "'whether the ailing instruction *by itself* so infected the entire trial that the resulting conviction violates due process,' . . . not merely whether 'the instruction is undesirable, erroneous, or even "universally condemned."'" *Henderson* v. *Kibbe*, 431 U. S. 145, 154, and 157 (1977) (emphasis added) (quoting *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973)). Of course the Georgia state courts, familiar as they are with the nuances of trial procedure in that State, are in a far better position to decide such a question in the first instance than is the Court of Appeals.

By allowing Potts to raise these issues for the first time in his federal habeas petition, the Court of Appeals also effectively

circumvented sound state procedural rules that may have been applicable. Although the trial transcript is not part of the record lodged with this Court, it seems apparent that Potts never contested that the kidnaping here did in fact end with bodily injury. After all, Mr. Priest was found shortly after Potts had kidnaped him—not merely injured, but dead with a bullet through his head—and the whole record here is filled with evidence of mayhem. Accordingly, if the trial court's instructions were in any way defective on need for a jury finding of "bodily injury," it seems extremely unlikely that Potts objected. Indeed, he may have even invited the error or made a tactical decision not to object for the purpose of diverting the jury's attention from the obvious injury that resulted. In such circumstances, the state court might well and properly have concluded that Potts was procedurally barred from raising this claim, had he been required to proceed there first. Such a conclusion could have precluded federal-court review of this issue entirely since generally "if a defendant has an objection, there is an obligation to call the matter to the court's attention so the trial judge will have an opportunity to remedy the situation." *Estelle* v. *Williams*, 425 U. S. 501, 508, n. 3 (1976). This possibility was foreclosed by the Court of Appeals' hasty consideration of Potts' claim. The correct course, clearly mandated by our prior opinions, was to give the Georgia state courts "first crack" at Potts' constitutional objections.

"The exhaustion doctrine seeks to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." *Vasquez* v. *Hillery*, 474 U. S. 254, 257 (1986). Because the District Court and the Court of Appeals entertained a petition contrary to established law, I would vacate and remand with instructions to dismiss the petition to "'allo[w] the State an initial opportunity to pass upon and correct alleged violations of [Potts'] federal rights.'" *Lundy*, *supra*, at 518 (quoting *Duckworth* v. *Serrano*, 454 U. S. 1, 3 (1981)). We have followed essentially this procedure in other cases when we discovered that a petitioner has obtained relief on an unexhausted claim. See, *e. g.*, *Bergman* v. *Burton*, 456 U. S. 953 (1982) (after discovering exhaustion problem, vacating and remanding for reconsideration in light of *Lundy*). Accordingly, I dissent from the Court's denial of certiorari.

No. 85-684. KRAMER *v.* PUBLIC EMPLOYMENT RELATIONS COMMISSION. Sup. Ct. N. J. Certiorari denied. JUSTICE BLACKMUN would grant the petition for writ of certiorari, vacate the judgment, and remand the case for further consideration in light of *Teachers* v. *Hudson*, *ante*, p. 292. Reported below: 99 N. J. 523, 494 A. 2d 279.

Rehearing Denied

No. 85-748. KELLER *v.* UNITED STATES, 474 U. S. 1082;

No. 85-790. CUDDY *v.* CARMEN, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, 474 U. S. 1034;

No. 85-5360. DARWIN *v.* UNITED STATES, 474 U. S. 1110;

No. 85-5619. CAMPBELL *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, 474 U. S. 1084; and

No. 85-5885. TUCKER *v.* UNITED STATES, 474 U. S. 1085. Petitions for rehearing denied.

No. 85-5352. SANDERS *v.* JUNIOR COLLEGE DISTRICT OF METROPOLITAN KANSAS CITY, MISSOURI, 474 U. S. 922; and

No. 85-5413. PETRILLO *v.* NEW JERSEY, 474 U. S. 922. Motions for leave to file petitions for rehearing denied.

MARCH 11, 1986

Miscellaneous Order

No. A-691. BASS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death scheduled for Wednesday, March 12, 1986, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant the application for a stay and a petition for certiorari, and vacate the death sentence in this case. However, even if I did not hold this view, I would grant this application.

The Court of Appeals rejected applicant's conflict-of-interest claim with regard to attorney Sanders based on the trial court's finding that Sanders had not acted as applicant's trial counsel.

784 F. 2d 658 (1986). However, because the determination of whether Sanders acted as applicant's counsel presents a mixed question of fact and law, we are not obliged, as the Court of Appeals apparently believed, simply to defer to the trial court's finding. Cf. *Cuyler* v. *Sullivan*, 446 U. S. 335, 342 (1980) (state court's holding that lawyers had not engaged in multiple representation is mixed question of fact and law).

Sanders represented applicant when he contested extradition from Kentucky to Texas. Upon extradition, the trial court appointed Victor Blaine, a Texas attorney, to represent applicant. However, Sanders continued to play an active role in the case. First, Sanders appeared as *amicus curiae* in support of applicant's motion for a continuance to allow applicant to obtain substitute counsel. Sanders had apparently obtained an agreement from an outside organization to provide applicant with substitute counsel if a continuance could be secured. Second, when applicant balked at testifying at trial without first consulting Sanders, Sanders urged applicant to follow Blaine's advice and to take the stand in his defense. Third, Sanders and Blaine had frequent and direct communication in writing and by telephone, although the trial court characterized the bulk of these as "non-controversial." Fourth, after applicant complained to Sanders about his inability to communicate with Blaine, Sanders gave applicant advice on how to document his complaints with a view towards seeking Blaine's removal or a continuance to obtain new counsel. Fifth, Sanders appeared as *amicus curiae* and filed a motion for reconsideration of applicant's appeal of his conviction. Sixth, Sanders did represent applicant when he filed his petition for certiorari to this Court. Based on these facts, applicant raises a serious question as to whether Sanders was in fact his attorney for purposes of the Sixth Amendment right to effective assistance of counsel. While Sanders did not formally conduct applicant's trial, applicant relied on Sanders' advice in making critical decisions throughout the proceedings. If Sanders was acting as applicant's attorney, Sanders' alleged conflict of interest may have deprived applicant of the effective assistance of counsel under *Cuyler*, *supra*. I would therefore grant the application for a stay in order to provide applicant with time to prepare and file a petition for a writ of certiorari raising this issue.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

MARCH 13, 1986

Dismissal Under Rule 53

No. 85-1361. UNITED GAS PIPE LINE CO. *v.* CITY OF NEW ORLEANS ET AL. Sup. Ct. La. Certiorari dismissed under this Court's Rule 53. Reported below: 478 So. 2d 144.

MARCH 18, 1986

Miscellaneous Orders

No. A-710 (85-6545). JAMES *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Application for stay of execution of sentence of death scheduled for Wednesday, March 19, 1986, presented to JUSTICE POWELL, and by him referred to the Court, is granted until April 7, 1986, or until the disposition by this Court of the petition for writ of certiorari, whichever is earlier, unless otherwise extended by the Court. THE CHIEF JUSTICE, JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would deny the application for stay.

No. A-711 (85-6547). HARICH *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Application for stay of execution of sentence of death scheduled for Wednesday, March 19, 1986, presented to JUSTICE POWELL, and by him referred to the Court, denied.

JUSTICE POWELL, concurring.

The other capital case in which execution was scheduled for tomorrow is *James* v. *Wainwright*, *ante* this page. I voted to grant a stay of execution in that case. Both *James* and this case profess to present claims similar to that pending before the Court in *Lockhart* v. *McCree*, No. 84-1865.

This case, however, presents an issue different from *James* and one without merit. In *James*, the *Lockhart* issue was at least ar-

guably presented when persons on the venire who expressed reservations as to capital punishment were removed by peremptory challenges. In this case, applicant "conced[ed] in this petition [before the Supreme Court of Florida] that at his trial 'no veniremen were excluded' during *voir dire*, either for cause or through peremptory challenge." *Harich* v. *Wainwright*, 484 So. 2d 1237 (1986). Similarly, before this Court applicant makes no allegation that persons on the venire were excluded during *voir dire* because of any objections to capital punishment.

Accordingly, my vote is to deny the application for a stay of execution.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant the application for stay and the petition for writ of certiorari, and vacate the death sentence in this case.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Four Justices of this Court have voted to defer consideration of the petition for certiorari accompanying this application for a stay pending our decision in *Lockhart* v. *McCree*, No. 84–1865. Applicant has raised a claim that would be directly affected by the decision in *McCree*. Although no prospective juror in this case was actually stricken because of expressed scruples against the death penalty, applicant alleges that the jurors' exposure to *voir dire* on their willingness to inflict the death penalty rendered them more likely to convict him. This is identical to a claim at issue in *McCree*. It is also identical to claims raised in *James* v. *Wainwright*, *ante*, p. 1074, and *Adams* v. *Wainwright*, *ante*, p. 1062, both of which were stayed by this Court, the former only hours ago. James, like applicant, relied solely on the jurors' exposure to death qualification; he nowhere claimed that the exclusion of jurors via peremptory strikes brought his case within the scope of *McCree*. See Pet. for Cert. in No. 85–6545, pp. 6–13. Although this Court has deferred consideration of numerous other petitions for certiorari pending our decision in *McCree*, and has issued stays of execution where necessary to permit this deferral, the Court inexplicably refuses to treat the case before us as we have treated these others.

More alarming is the Court's disregard of its own procedures in this case. Because at least three Justices have voted to defer consideration of the petition pending *McCree*, the Court has not, nor under its own procedures can it, dispose of the petition for certiorari. Thus, applicant is in the unusual and manifestly unfair position of facing execution before this Court has considered his petition. This Court has shown a bizarre willingness to ignore standard procedures as it pleases in order to bring about speedy executions. I can only lament this Court's own special contribution to the arbitrariness and freakishness that continues to characterize the implementation of the death penalty.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

Because the Court has not yet acted on the petition for a writ of certiorari, I would stay applicant's execution until that petition is decided.

MARCH 20, 1986

Miscellaneous Order

No. A-721 (85-6557). JONES *v.* SMITH, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death scheduled for Friday, March 21, 1986, presented to JUSTICE POWELL, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant the application for stay and the petition for writ of certiorari, and vacate the death sentence in this case.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner is scheduled to be executed at 12:01 tomorrow morning. In his application for a stay and petition for writ of habeas corpus, he claims that the death-qualification of his jury and the consequent exclusion for cause of one prospective juror from

the panel because of her opposition to the death penalty deprived him of his right to an impartial jury and his right to a jury selected from a representative cross section of the community in violation of the Sixth and Fourteenth Amendments. A case raising an identical claim is now pending before this Court. *Lockhart* v. *McCree*, No. 84-1865.

The District Court denied the petition and denied a certificate of probable cause. It found that petitioner had abused the writ, that petitioner's claims were procedurally barred, and, in any event, that these claims were meritless. The Court of Appeals for the Eleventh Circuit denied petitioner's application for a certificate of probable cause and a stay of execution, finding his claims to lack merit. 772 F. 2d 668 (1985).

Three times in the past six months a stay of execution has been granted in virtually identical circumstances. See *Bowden* v. *Kemp*, 474 U. S. 891 (1985); *Moore* v. *Blackburn*, No. A-261 (85-5555); *Celestine* v. *Blackburn*, 473 U. S. 938 (1985). In light of the disposition of those applications, I can see no justification whatever for the Court's action today. As I noted only two days ago: "I can only lament this Court's own special contribution to the arbitrariness and freakishness that continues to characterize the implementation of the death penalty." *Harich* v. *Wainwright*, *ante*, at 1076.

March 24, 1986

Appeals Dismissed

No. 85-1256. Comstock *v.* Harris County, Texas. Appeal from Ct. App. Tex., 14th Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 687 S. W. 2d 419.

No. 85-5400. Anderson *v.* District Court of Jefferson County et al. Appeal from Sup. Ct. Colo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-6307. Eigenman *v.* California. Appeal from App. Dept., Super. Ct. Cal., County of Tulare, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-1271. COVENANT COMMUNITY CHURCH *v.* LOWE, KNOX COUNTY CLERK. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. Reported below: 698 S. W. 2d 339.

No. 85-1275. YORK *v.* OFFICE OF DISCIPLINARY COUNSEL OF THE SUPERME COURT OF OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 19 Ohio St. 3d 150, 483 N. E. 2d 1179.

No. 85-1296. ROSENBAUM *v.* ROSENBAUM. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. Reported below: 131 Ill. App. 3d 1164, 493 N. E. 2d 1223.

No. 85-1311. GREEN ET AL. *v.* WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES. Appeal from Cir. Ct. W. Va., Jefferson County, dismissed for want of substantial federal question.

No. 85-6217. REDERTH *v.* SOUTH DAKOTA. Appeal from Sup. Ct. S. D. dismissed for want of substantial federal question. Reported below: 376 N. W. 2d 579.

Certiorari Granted—Vacated and Remanded

No. 85-23. MARYLAND *v.* LODOWSKI. Ct. App. Md. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Moran* v. *Burbine*, *ante*, p. 412. Reported below: 302 Md. 691, 490 A. 2d 1228.

No. 85-1074. FLORIDA *v.* HALIBURTON. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Moran* v. *Burbine*, *ante*, p. 412. Reported below: 476 So. 2d 192.

Miscellaneous Orders

No. ——. FITZGERALD *v.* CITY OF PHILADELPHIA. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A-599 (85-1455). PRADO *v.* UNITED STATES. C. A. 5th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A-668 (85-1468). WOODS *v.* SUPERIOR COURT OF ALAMEDA COUNTY (JONES, REAL PARTY IN INTEREST). Ct. App.

Cal., 1st App. Dist. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-709. MILLER ET AL. *v.* HIGGS ET AL. Application to continue the stay of mandate of the Supreme Court of Colorado, presented to JUSTICE WHITE, and by him referred to the Court, denied.

No. D-123. IN RE DISBARMENT OF CHVOSTA. Disbarment entered. [For earlier order herein, see 434 U. S. 979.]

No. D-404. IN RE DISBARMENT OF MIRRER. Disbarment entered. [For earlier order herein, see 465 U. S. 1063.]

No. D-541. IN RE DISBARMENT OF BOULDING. Disbarment entered. [For earlier order herein, see 474 U. S. 1044.]

No. D-548. IN RE DISBARMENT OF MARBLE. It is ordered that John Harrison Marble, of Cincinnati, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-549. IN RE DISBARMENT OF DUKE. It is ordered that Charles Louis Duke, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 105, Orig. KANSAS *v.* COLORADO. Motion for leave to file bill of complaint granted. Defendant is allowed 60 days within which to file an answer.

Nos. 84-6075. TISON *v.* ARIZONA (two cases). Sup. Ct. Ariz. [Certiorari granted, *ante*, p. 1010.] Motions for appointment of counsel granted, and it is ordered that Alan M. Dershowitz, Esquire, of Cambridge, Mass., be appointed to serve as counsel for petitioners in these cases.

No. 85-246. UNITED STATES *v.* DION. C. A. 8th Cir. [Certiorari granted, 474 U. S. 900.] Motion of the Solicitor General to permit Jeffrey P. Minear, Esquire, to present oral argument *pro hac vice* granted.

No. 85-499. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL. *v.* ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL. C. A. 5th Cir.

[Certiorari granted, 474 U. S. 1004.] Motion of the Attorney General of Mississippi to strike brief of respondents Dick Molpus, Secretary of State of Mississippi, et al., denied.

No. 85-519. RANDALL ET AL. *v.* LOFTSGAARDEN ET AL. C. A. 8th Cir. [Certiorari granted, 474 U. S. 978.] Motion of petitioners for divided argument denied.

No. 85-954. JAPAN WHALING ASSN. ET AL. *v.* AMERICAN CETACEAN SOCIETY ET AL.; and

No. 85-955. BALDRIGE, SECRETARY OF COMMERCE, ET AL. *v.* AMERICAN CETACEAN SOCIETY ET AL. C. A. D. C. Cir. [Certiorari granted, 474 U. S. 1053.] Motion of the Solicitor General for divided argument granted.

No. 85-6314. IN RE BONDURANT. Petition for writ of habeas corpus denied.

No. 85-6263. IN RE GALBREATH;

No. 85-6279. IN RE COLBERT; and

No. 85-6287. IN RE BOUDETTE. Petitions for writs of mandamus denied.

No. 85-6320. IN RE MACGUIRE. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 84-2022. 324 LIQUOR CORP., DBA YORKSHIRE WINE & SPIRITS *v.* MCLAUGHLIN ET AL. Appeal from Ct. App. N. Y. Probable jurisdiction noted. Reported below: 64 N. Y. 2d 504, 479 N. E. 2d 779.

Certiorari Granted

No. 85-608. ILLINOIS *v.* KRULL ET AL. Sup. Ct. Ill. Certiorari granted. Reported below: 107 Ill. 2d 107, 481 N. E. 2d 703.

No. 85-1088. BURLINGTON NORTHERN RAILROAD CO. *v.* WOODS ET AL. C. A. 11th Cir. Certiorari granted.

No. 85-1092. KEYSTONE BITUMINOUS COAL ASSN. ET AL. *v.* DUNCAN, SECRETARY, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 771 F. 2d 707.

No. 85-1226. COMMISSIONER OF INTERNAL REVENUE *v.* GROETZINGER. C. A. 7th Cir. Certiorari granted. Reported below: 771 F. 2d 269.

No. 85-792. INTERSTATE COMMERCE COMMISSION *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL.; and

No. 85-793. MISSOURI-KANSAS-TEXAS RAILROAD CO. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 245 U. S. App. D. C. 311, 761 F. 2d 714.

No. 85-889. COLORADO *v.* BERTINE. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 706 P. 2d 411.

No. 85-1233. INTERNATIONAL PAPER CO. *v.* OUELLETTE ET AL. C. A. 2d Cir. Certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 776 F. 2d 55.

Certiorari Denied. (See also Nos. 85-1256, 85-5400, and 85-6307, *supra.*)

No. 85-24. MARYLAND *v.* ELFADL. Ct. Sp. App. Md. Certiorari denied. Reported below: 61 Md. App. 132, 485 A. 2d 275.

No. 85-552. SAKAMOTO ET AL. *v.* DUTY FREE SHOPPERS, LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 764 F. 2d 1285.

No. 85-705. MOLT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 366.

No. 85-874. HACKNEY, INC., ET AL. *v.* BROCK, SECRETARY OF LABOR. C. A. 10th Cir. Certiorari denied. Reported below: 769 F. 2d 650.

No. 85-902. INTERFIRST BANK DALLAS, N. A. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 769 F. 2d 299.

No. 85-913. RESHA ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 285.

No. 85-1007. DICARO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 1314.

No. 85-1051. ROE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 775 F. 2d 43.

No. 85-1063. LIZZA INDUSTRIES, INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 775 F. 2d 492.

No. 85-1079. AMERICAN POUCH FOOD CO., INC. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 2d 1190.

No. 85-1082. HOLBROCK *v.* YOUNG, JUDGE, WARREN COUNTY COMMON PLEAS COURT. Ct. App. Ohio, Warren County. Certiorari denied.

No. 85-1084. CITY OF INDEPENDENCE, OHIO, ET AL. *v.* TYLER, DIRECTOR OF ENVIRONMENTAL PROTECTION OF OHIO, ET AL. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 25 Ohio App. 3d 20, 495 N. E. 2d 444.

No. 85-1095. AAMODT ET UX. *v.* UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 771 F. 2d 720.

No. 85-1096. VAN SANT *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-1117. ASHWOOD MANOR CIVIC ASSN. ET AL. *v.* DOLE, SECRETARY OF TRANSPORTATION, ET AL. (two cases). C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 41.

No. 85-1166. SOUTHWEST MORTGAGE SERVICE CORP. *v.* PEZZULLI. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 917.

No. 85-1169. TERRE DU LAC, INC., ET AL. *v.* TERRE DU LAC ASSN., INC.; and

No. 85-1331. TERRE DU LAC ASSN., INC. *v.* TERRE DU LAC, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 772 F. 2d 467.

No. 85-1171. BRISTOW *v.* DAILY PRESS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 2d 1251.

No. 85-1181. ENNIS *v.* NEW JERSEY BELL TELEPHONE CO. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 396.

No. 85-1184. BROOKLYN UNION GAS CO. *v.* NEW YORK STATE BOARD OF EQUALIZATION AND ASSESSMENT ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 65 N. Y. 2d 472, 482 N. E. 2d 77.

No. 85-1188. ROSE *v.* SUPREME COURT OF COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 85-1189. LONG-AIRDOX CO., DIVISION OF THE MARMON GROUP, INC. *v.* KESSLER ET AL. Cir. Ct. W. Va., Fayette County. Certiorari denied.

No. 85-1198. GROM *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 53.

No. 85-1227. BRIEHLER *v.* SYLVIA'S, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 774 F. 2d 1149.

No. 85-1228. BENTON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 479 So. 2d 83.

No. 85-1230. DANIEL B. ET AL. *v.* WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1051.

No. 85-1238. HOLMES *v.* DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS. Ct. App. D. C. Certiorari denied.

No. 85-1240. DANIEL A. TORRES, M. D., P. C., ET AL. *v.* EASTLICK, TRUSTEE OF NORTH AMERICAN COIN & CURRENCY, LTD. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 1573.

No. 85-1243. NOVICKY *v.* SYNTEX OPHTHALMICS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 767 F. 2d 901.

No. 85-1245. GAF CORP. *v.* WERNER. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 97, 485 N. E. 2d 977.

No. 85-1247. CHMELICKY *v.* MUCHEWICZ. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 85-1248. MALONE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 85-1249. MCCOLLUM *v.* REID. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 151, 485 N. E. 2d 1010.

No. 85-1255. GOSLIN *v.* MCDERMOTT, INC. C. A. 5th Cir. Certiorari denied. Reported below: 776 F. 2d 1046.

No. 85-1260. LOWE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 230 Va. 346, 337 S. E. 2d 273.

No. 85-1263. NEW YORK STATE DEPARTMENT OF TRANSPORTATION *v.* SIERRA CLUB ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 776 F. 2d 383.

No. 85-1264. LAVANT *v.* ST. JOSEPH'S HOSPITAL ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 255 Ga. 60, 335 S. E. 2d 127.

No. 85-1270. KIENAST *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 912.

No. 85-1272. MYER *v.* PACIFIC FEDERAL SAVINGS & LOAN ASSN. App. Dept., Super. Ct. Cal., County of Orange. Certiorari denied.

No. 85-1273. EAGLE *v.* AMERICAN TELEPHONE & TELEGRAPH CO. C. A. 9th Cir. Certiorari denied. Reported below: 769 F. 2d 541.

No. 85-1274. ERNEST *v.* UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 768 F. 2d 596.

No. 85-1276. RAMOS *v.* YIP ET AL. C. A. 9th Cir. Certiorari denied.

No. 85-1286. MESSING *v.* SIMON. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85-1290. GLICKSTEIN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 348 Pa. Super. 631, 501 A. 2d 291.

No. 85-1293. EDUCATIONAL SERVICES, INC., DBA INTERNATIONAL MONTESSORI SOCIETY, ET AL. *v.* MARYLAND STATE BOARD FOR HIGHER EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 799 F. 2d 751.

No. 85-1294. LEBER ET AL. *v.* SMITH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 773 F. 2d 101.

No. 85-1297. MANEGO *v.* ORLEANS BOARD OF TRADE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 773 F. 2d 1.

No. 85–1298. PAYNE ET AL. *v.* WOOD. C. A. 7th Cir. Certiorari denied. Reported below: 775 F. 2d 202.

No. 85–1299. LAURENT ET AL. *v.* WATTS. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 168.

No. 85–1302. SPIEGEL *v.* CONTINENTAL ILLINOIS NATIONAL BANK ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 132 Ill. App. 3d 1158, 494 N. E. 2d 957.

No. 85–1303. KOWALSKI *v.* KOWALSKI ET AL. Sup. Ct. Minn. Certiorari denied.

No. 85–1306. GONZALEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 114 App. Div. 2d 469, 494 N. Y. S. 2d 379.

No. 85–1308. GERACE ET AL. *v.* NEW JERSEY CASINO CONTROL COMMISSION ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 203 N. J. Super. 297, 496 A. 2d 1111.

No. 85–1310. DUPONT *v.* SOUTHERN NATIONAL BANK OF HOUSTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 771 F. 2d 874.

No. 85–1312. UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION LOCAL 1357 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 1016.

No. 85–1313. JERSEY COAST EGG PRODUCERS, INC. *v.* LOCAL 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 773 F. 2d 530.

No. 85–1350. EDGEMON *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 85–1366. HUCKABY *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 776 F. 2d 564.

No. 85–1367. FRANK E. BUSH, INC. *v.* UNITED STATES POSTAL SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 38.

No. 85-1375. BAWCUM *v.* MARSH, SECRETARY OF THE ARMY. C. A. 9th Cir. Certiorari denied. Reported below: 779 F. 2d 56.

No. 85-1390. ARMSTRONG ET AL. *v.* THOMAS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 1163.

No. 85-1398. ALEMANY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 781 F. 2d 229.

No. 85-1416. ARUBA BONAIRE CURACAO TRUST CO. LTD., TRUSTEE OF THE SUPRIANO TRUST, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. Reported below: 250 U. S. App. D. C. 38, 777 F. 2d 38.

No. 85-5213. LODOWSKI *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 302 Md. 691, 490 A. 2d 1228.

No. 85-5214. ELFADL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 61 Md. App. 132, 485 A. 2d 275.

No. 85-5938. GONZALES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-6051. COLE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 499 A. 2d 815.

No. 85-6073. WENTZ *v.* DEPARTMENT OF JUSTICE. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 335.

No. 85-6082. ELLIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1082.

No. 85-6091. WILEY *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-6092. ROGERS *v.* SUPREME COURT OF VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 772 F. 2d 900.

No. 85-6095. CLIPP *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1032.

No. 85-6100. KALYON *v.* NEW YORK. Sup. Ct. N. Y., Kings County. Certiorari denied.

No. 85-6219. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 85-6223. BONGIOVI *v.* LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 85-6224. DRINKWINE *v.* FEDERATED PUBLICATIONS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 735.

No. 85-6250. DIAMONTINEY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 85-6257. DELGADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1028.

No. 85-6260. LYNCH *v.* JOHNSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1029.

No. 85-6266. GREEN *v.* SUPERIOR COURT OF CALIFORNIA, ALAMEDA COUNTY. Sup Ct. Cal. Certiorari denied. Reported below: 40 Cal. 3d 126, 707 P. 2d 248.

No. 85-6281. ROSBERG *v.* COMMODITY CREDIT CORP. ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-6282. ROSBERG *v.* GOERES. C. A. 8th Cir. Certiorari denied.

No. 85-6284. NELSON *v.* VETERANS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 326.

No. 85-6285. WILBANKS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 176 Ga. App. 533, 336 S. E. 2d 312.

No. 85-6286. WALLACE *v.* IOWA. Dist. Ct. Iowa, Scott County. Certiorari denied.

No. 85-6288. FILIPAS *v.* LEMONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 767 F. 2d 920.

No. 85-6289. ARMSTRONG *v.* FAIRMAN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85-6290. WASHINGTON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 923, 489 N. E. 2d 783.

No. 85-6291. KOENIG *v.* BOARD OF CHARITIES AND CORRECTIONS ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-6293. MCDONALD *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 85-6296. CLUTCHETTE *v.* RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 1469.

No. 85-6297. KUNTZELMAN *v.* BLACK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 291.

No. 85-6301. COATES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 109 Ill. 2d 431, 488 N. E. 2d 247.

No. 85-6302. BEAUDETT *v.* CITY OF HAMPTON, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 1274.

No. 85-6303. LAMAR *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 134 Ill. App. 3d 1155, 496 N. E. 2d 366.

No. 85-6305. HAMM *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 136 Ill. App. 3d 11, 482 N. E. 2d 1103.

No. 85-6306. JACKSON *v.* RUSSELL, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1082.

No. 85-6310. GREGORY *v.* SOLEM, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 309.

No. 85-6311. HOUGHTON *v.* CODER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 911.

No. 85-6312. FULFORD *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 85-6313. ADAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 109 Ill. 2d 102, 485 N. E. 2d 339.

No. 85-6316. ROSBERG *v.* COMMERCIAL STATE BANK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 1171.

No. 85-6317. RODRIGUEZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 134 Ill. App. 3d 582, 480 N. E. 2d 1147.

No. 85-6319. STEVENSON *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1558.

No. 85-6323. OSIPOVA *v.* WOLIN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 79.

No. 85-6326. HOSKINS *v.* GARLAND, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1035.

No. 85-6332. AGUILAR *v.* ONION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 789.

No. 85-6334. KLEIN *v.* CIBA GEIGY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 912.

No. 85-6377. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 1295.

No. 85-6411. TELEPO *v.* CAMPEAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1031.

No. 85-587. TEXAS *v.* DUNN. Ct. Crim. App. Tex. Certiorari denied. JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE REHNQUIST would grant the petition for writ of certiorari, vacate the judgment, and remand the case for further consideration in light of *Moran* v. *Burbine*, *ante*, p. 412. Reported below: 696 S. W. 2d 561.

No. 85-969. GRAY ET AL. *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. D. C. Cir. Certiorari denied. Reported below: 248 U. S. App. D. C. 364, 771 F. 2d 1504.

JUSTICE WHITE, dissenting.

In this case the United States Court of Appeals for the District of Columbia Circuit held that the comprehensive remedial scheme established by Congress in the Civil Service Reform Act of 1978[1] (CSRA) indicates a congressional intent to preclude judicial review under the Administrative Procedure Act[2] of claims that could have been reviewed administratively under the CSRA. 248

[1] Pub. L. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U. S. C.).

[2] 5 U. S. C. § 701 *et seq.*

U. S. App. D. C. 364, 771 F. 2d 1504 (1985). While eight other Courts of Appeals have reached a similar conclusion, the United States Court of Appeals for the First Circuit has held to the contrary. *Dugan* v. *Ramsay*, 727 F. 2d 192 (1984). I would grant certiorari to resolve this conflict.

No. 85-1018. SOUTHLAND NEWS CO., INC. *v.* COUNTY OF WINNEBAGO ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 774 F. 2d 1167.

No. 85-1201. FORD MOTOR CO. *v.* WALSH ET AL. C. A. D. C. Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied.

No. 85-1282. IRVING EAR, NOSE, THROAT & ALLERGY CLINIC ET AL. *v.* GROUP HOSPITAL SERVICE, INC., ET AL. C. A. 5th Cir. Motion of respondents for award of damages pursuant to Rule 49.2 denied. Certiorari denied. Reported below: 776 F. 2d 1046.

No. 85-5375. BLANKS *v.* GEORGIA. Sup. Ct. Ga.;
No. 85-6145. GUZMON *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85-6229. COLLINS *v.* GEORGIA. Super. Ct. Ga., Houston County;
No. 85-6259. CURRY *v.* GEORGIA. Sup. Ct. Ga.;
No. 85-6268. ROMAN *v.* FLORIDA. Sup. Ct. Fla.;
No. 85-6270. LANEY *v.* TENNESSEE. Ct. Crim. App. Tenn.; and
No. 85-6275. JONES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: No. 85-5375, 254 Ga. 420, 330 S. E. 2d 575; No. 85-6145, 697 S. W. 2d 404; No. 85-6259, 255 Ga. 215, 336 S. E. 2d 762; No. 85-6268, 475 So. 2d 1228; No. 85-6275, 109 Ill. 2d 19, 485 N. E. 2d 363.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 84-801. MIDLANTIC NATIONAL BANK *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, 474 U. S. 494. Petition for rehearing denied.

No. 84-805. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORP., DEBTOR *v.* CITY OF NEW YORK ET AL.; and O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORP., DEBTOR *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, 474 U. S. 494;

No. 85-529. HOU HAWAIIANS *v.* HAWAII ET AL., 474 U. S. 1055;

No. 85-604. SCARNATI *v.* UNITED STATES, 474 U. S. 1056;

No. 85-826. GOLIN *v.* BROOKHAVEN NATIONAL LABORATORY, 474 U. S. 1059;

No. 85-896. JOHNSON *v.* LINDEN SHORE DISTRICT, 474 U. S. 1102;

No. 85-945. OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION *v.* SOUTH DAKOTA ET AL., 474 U. S. 1102;

No. 85-952. GRASON ELECTRIC CO. ET AL. *v.* SACRAMENTO MUNICIPAL UTILITY DISTRICT, 474 U. S. 1103;

No. 85-5786. DAVIS *v.* FIRST STATE BANK, 474 U. S. 1098;

No. 85-5866. IN RE GRIFFIN, 474 U. S. 1100;

No. 85-5875. IN RE MAY, 474 U. S. 1100;

No. 85-5878. IN RE MAY, 474 U. S. 1100;

No. 85-5896. RUBIN *v.* BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES (WESTERN ILLINOIS UNIVERSITY), 474 U. S. 1104;

No. 85-5959. WHAM *v.* UNITED STATES ET AL., 474 U. S. 1105; and

No. 85-5963. CALVER *v.* OWNERS OF RIDGECREST MOBILE HOME PARK ET AL., 474 U. S. 1105. Petitions for rehearing denied.

No. 84-1070. WITTERS *v.* WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND, 474 U. S. 481. Petition for rehearing or modification of opinion denied.

No. 84-1076. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* STATE OIL AND GAS BOARD OF MISSISSIPPI ET AL., 474 U. S. 409. Motion of Louisiana for leave to file a brief as *amicus curiae* in support of petitions for rehearing denied. Petitions of State Oil and Gas Board of Mississippi, Coastal Exploration, Inc., and Getty Oil Co. for rehearing denied.

No. 85-137. LAVADO *v.* UNITED STATES, 474 U. S. 1054. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

MARCH 25, 1986

Miscellaneous Order

No. A-653 (85-6448). ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. The order heretofore entered March 6, 1986 [*ante*, p. 1062], staying execution of the sentence of death is continued to and including Monday, March 31, 1986.

MARCH 28, 1986

Dismissal Under Rule 53

No. 85-1195. LONAVAT *v.* HARVEY ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 779 F. 2d 35.

MARCH 31, 1986

Appeal Dismissed

No. 85-1261. MEYERS ET AL. *v.* SENECA COUNTY BOARD OF COMMISSIONERS. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 20 Ohio St. 3d 13, 484 N. E. 2d 699.

Miscellaneous Orders

No. A-581 (85-1459). POWELL *v.* POWELL. Ct. App. Tex., 10th Sup. Jud. Dist. Application for recall and stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A-703. FEDORA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Application for stay pending appeal, addressed to JUSTICE POWELL and referred to the Court, denied.

No. D-536. IN RE DISBARMENT OF LOVETT. Disbarment entered. [For earlier order herein, see 474 U. S. 1079.]

No. D-538. IN RE DISBARMENT OF VETTER. Disbarment entered. [For earlier order herein, see 474 U. S. 1044.]

No. D-539. IN RE DISBARMENT OF MUELLER. Disbarment entered [For earlier order herein, see 474 U. S. 1044.]

No. D-540. IN RE DISBARMENT OF CHOSID. Disbarment entered. [For earlier order herein, see 474 U. S. 1044.]

No. D-550. IN RE DISBARMENT OF MICHAELS. It is ordered that Robert Scott Michaels, of Beverly Hills, Cal., be suspended

from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-551. IN RE DISBARMENT OF NICHOLS. It is ordered that Zane Gray Nichols, of Annapolis, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 103, Orig. SOUTH DAKOTA *v.* NEBRASKA ET AL. Motion of North Dakota for leave to intervene as plaintiff granted. Motion for leave to file bill of complaint denied without prejudice. [For earlier order herein, see 474 U. S. 941.]

No. 84-1379. DIAMOND ET AL. *v.* CHARLES ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 471 U. S. 1115.] Motion of appellants for leave to file a supplemental brief after argument granted.

No. 84-1777. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. *v.* BROCK, SECRETARY OF LABOR. C. A. D. C. Cir. [Certiorari granted, 474 U. S. 900.] Motion of Chamber of Commerce of the United States et al. for leave to file a brief as *amici curiae* out of time granted.

No. 85-473. CARGILL, INC., ET AL. *v.* MONFORT OF COLORADO, INC. C. A. 10th Cir. [Certiorari granted, 474 U. S. 1049.] Motion of the parties to permit filing one volume of joint appendix under seal granted. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 85-521. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT ET AL. D. C. E. D. Cal. [Probable jurisdiction noted *sub nom. Heckler* v. *Public Agencies Opposed to Social Security Entrapment*, 474 U. S. 1004.] Motion of appellees Public Agencies Opposed to Social Security Entrapment et al. for leave to file an out-of-time motion for divided argument denied.

No. 85-599. UNITED STATES *v.* AMERICAN BAR ENDOWMENT ET AL. C. A. Fed. Cir. [Certiorari granted, 474 U. S. 1004.]

Motion of California Farm Bureau Federation for leave to file a brief as *amicus curiae* granted. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 85-1377. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES *v.* SYNAR, MEMBER OF CONGRESS, ET AL.;

No. 85-1378. UNITED STATES SENATE *v.* SYNAR, MEMBER OF CONGRESS, ET AL.; and

No. 85-1379. O'NEILL, SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL. *v.* SYNAR, MEMBER OF CONGRESS, ET AL. D. C. D. C. [Probable jurisdiction noted, *ante*, p. 1009.] Motion of National Treasury Employees Union for leave to add an individual party plaintiff granted.

No. 85-6368. IN RE KIERSTEAD. Petition for writ of common-law certiorari denied.

No. 85-6371. IN RE KARRIEM ET AL. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Postponed

No. 85-1200. CALIFORNIA COASTAL COMMISSION ET AL. *v.* GRANITE ROCK CO. Appeal from C. A. 9th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 768 F. 2d 1077.

Certiorari Granted

No. 85-1265. MICHIGAN *v.* SHABAZ. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 424 Mich. 42, 378 N. W. 2d 451.

Certiorari Denied. (See also No. 85-6368, *supra*.)

No. 85-862. HUSTLER MAGAZINE, INC. *v.* DOUGLASS. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 2d 1128.

No. 85-970. THOMPSON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 94.

No. 85-1141. BOARD OF TRUSTEES OF INTERNAL IMPROVEMENT TRUST FUND OF FLORIDA *v.* SAND KEY ASSOCIATES, LTD. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 85-1142. MANUFACTURERS HANOVER TRUST CO., AS EXECUTOR OF THE ESTATE OF WALLACE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 775 F. 2d 459.

No. 85-1158. CRAWFORD ET AL. *v.* UNITED STEELWORKERS, AFL-CIO, ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 230 Va. 217, 335 S. E. 2d 828.

No. 85-1187. DISALVO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 1191.

No. 85-1322. LIGHTMAN ET AL. *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 339 Pa. Super. 359, 489 A. 2d 200.

No. 85-1323. KING *v.* UNIVERSITY OF MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 2d 224.

No. 85-1325. GREEN *v.* OWENS-ILLINOIS CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 50.

No. 85-1326. ANDING *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 135 Ill. App. 3d 1168, 496 N. E. 2d 1278.

No. 85-1327. HARDAWAY CONSTRUCTORS, INC. *v.* BROWNING. Ct. App. Ga. Certiorari denied. Reported below: 176 Ga. App. 530, 336 S. E. 2d 579.

No. 85-1332. CAVALIERI *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 345 Pa. Super. 615, 496 A. 2d 849.

No. 85-1338. WYAND ET AL. *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 304 Md. 721, 501 A. 2d 43.

No. 85-1340. MARCUM *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 85-1342. CHICAGO PARK DISTRICT ET AL. *v.* ALEXANDER ET AL.; and

No. 85-1356. ALEXANDER ET AL. *v.* CHICAGO PARK DISTRICT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 773 F. 2d 850.

No. 85–1348. HAMM *v.* DEKALB COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1567.

No. 85–1355. FLEMING ET AL. *v.* ALLSTATE INSURANCE CO. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 838, 489 N. E. 2d 252.

No. 85–1365. CALIFORNIA *v.* SERNA. Sup. Ct. Cal. Certiorari denied. Reported below: 40 Cal. 3d 239, 707 P. 2d 793.

No. 85–1436. ACOSTA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1082.

No. 85–1455. PRADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 248.

No. 85–1456. GADD *v.* NEWS-PRESS PUBLISHING CO. ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 480 So. 2d 1302.

No. 85–5699. WILSON *v.* SCHILLINGER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 761 F. 2d 921 and 768 F. 2d 554.

No. 85–5821. WADE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 2d 916.

No. 85–5917. EDWARDS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 917.

No. 85–6005. FAIR *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 197 Conn. 106, 496 A. 2d 461.

No. 85–6122. KIDDA *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 769 F. 2d 165.

No. 85–6128. MCCOY *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 170.

No. 85–6280. ABDULLAH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1049.

No. 85-6321. HENTON *v.* JOB SERVICES. C. A. 8th Cir. Certiorari denied.

No. 85-6322. MURRAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 1054.

No. 85-6327. WIDEMON *v.* R. J. REYNOLDS TOBACCO CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1037.

No. 85-6338. KUMAR *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied. Reported below: 774 F. 2d 1.

No. 85-6340. MATUSAVAGE *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 321.

No. 85-6341. SHEHEE *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6344. MACGUIRE *v.* BOARD OF GOVERNORS FOR THE FLORIDA BAR ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6345. TUCKER *v.* ANDERSON ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6351. GALVAN *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 374 N. W. 2d 269.

No. 85-6354. BOND *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 1037, 489 N. E. 2d 1306.

No. 85-6359. DENBY *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 198 Conn. 23, 501 A. 2d 1206.

No. 85-6367. CHOAT *v.* ROME INDUSTRIES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1064.

No. 85-6380. ORTIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 864.

No. 85-6384. MERRIWEATHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 777 F. 2d 503.

No. 85-6387. CLARK ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 47.

No. 85-6414. HOPKINS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 230 Va. 280, 337 S. E. 2d 264.

No. 85-6415. SCHELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 775 F. 2d 559.

No. 85-6429. RORIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 781 F. 2d 903.

No. 85-6438. SCARBOROUGH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 719 and 779 F. 2d 618.

No. 85-6454. MASSUH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 780 F. 2d 534.

No. 85-6457. CALLANAN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 777 F. 2d 1105.

No. 85-6460. PURCELL ET UX. *v.* BOARD OF IMMIGRATION APPEALS. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1048.

No. 85-6468. COX ET AL. *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1051.

No. 84-6778. DAVIS *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 85-5053. DOUGAN *v.* FLORIDA. Sup. Ct. Fla.;
No. 85-5553. KENLEY *v.* MISSOURI. Sup. Ct. Mo.;
No. 85-5651. LOWERY *v.* INDIANA. Sup. Ct. Ind.;
No. 85-5833. NAVE *v.* MISSOURI. Sup. Ct. Mo.;
No. 85-6168. BILLIOT *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 85-6228. HOOPER *v.* FLORIDA. Sup. Ct. Fla.;
No. 85-6342. WILCHER *v.* MISSISSIPPI. Sup. Ct. Miss.; and
No. 85-6382. WOOMER *v.* AIKEN, WARDEN. Sup. Ct. S. C.
Certiorari denied. Reported below: No. 85-5053, 470 So. 2d 697; No. 85-5553, 693 S. W. 2d 79; No. 85-5651, 478 N. E. 2d

1214; No. 85-5833, 694 S. W. 2d 729; No. 85-6168, 478 So. 2d 1043; No. 85-6228, 476 So. 2d 1253; No. 85-6342, 479 So. 2d 710.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85-1. OHIO *v.* ADKINS. Ct. App. Ohio, Highland County. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 85-393. OHIO *v.* COUNTS. Ct. App. Ohio, Pickaway County. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 85-1305. BUNNELL, SUPERINTENDENT, CALIFORNIA CORRECTIONAL INSTITUTION *v.* ARMANT. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 772 F. 2d 552.

No. 85-1346. COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO *v.* ALLIED CHEMICAL INTERNATIONAL CORP. C. A. 2d Cir. Motion of Inter-American Freight Conference, Sections A and D, for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 775 F. 2d 476.

No. 85-6264. STRAIGHT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN dissents. Reported below: 772 F. 2d 674.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 85-6324. WATKINS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 229 Va. 469, 331 S. E. 2d 422.

Opinion of JUSTICE STEVENS respecting the denial of the petition for certiorari.

As JUSTICE MARSHALL explains in his dissenting opinion, the violation of petitioner's Fifth Amendment right to counsel requires that the sentence of death for the shooting of Betty Jean Barker be set aside. However, in view of the fact that, as petitioner has presented the issue, this error would not appear to have affected the validity of the conviction or the death sentence for the murder of Carl Douglas Buchanan, I agree with the Court's decision to deny certiorari and allow the error to be corrected in collateral proceedings.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In the landmark case of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), this Court held that before police institute custodial interrogation of an individual, they must inform him of his right to consult with counsel. *Miranda* further required that the police respect the individual's decision to exercise that right. We stated, in clear and mandatory language:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." *Id.*, at 474.

We reaffirmed that rule in *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979) ("[T]he Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease"); see also *Rhode Island* v. *Innis*, 446 U. S. 291, 298 (1980); *Michigan* v. *Mosley*, 423 U. S. 96, 104, n. 10 (1975); *id.*, at 109–111 (WHITE, J., concurring in result). We refined the rule in *Edwards* v. *Arizona*, 451 U. S. 477, 485 (1981), explaining that the right to counsel, once asserted, cannot be waived "unless the accused himself initiates further communication, exchanges, or conversations with the police." We emphasized: "[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Ibid.*

In this case, the Court acquiesces in a blatant denial of that Fifth Amendment right by the police and the courts of the State of Virginia. Unwilling to ignore that violation, I dissent from the denial of certiorari.

I

Petitioner Johnny Watkins, Jr. was charged with the murder of Betty Jean Barker. The State announced its intention to introduce at the penalty phase of that trial a statement made by Watkins in connection with an unrelated murder. During the pretrial suppression hearing, the following facts emerged.

Watkins was arrested in the evening of November 22, 1983, as a suspect in the murder of Carl Douglas Buchanan. He was questioned about 11 p. m. and signed a waiver-of-rights form, but then told the interrogating officer that he wanted to see a lawyer. Interrogation ceased temporarily.

About two hours later, Watkins was informed that he was being charged with the murder of Buchanan. He asked why he was being charged, and was given a second waiver-of-rights form to execute. The police then told Watkins that his brother Darnell had implicated him in the murder, played for him a portion of Darnell's recorded statement, and took him to see Darnell. Watkins refused to talk to police about the shooting.

The police did not supply Watkins with a lawyer. They instead transferred him to the county jail, held him there until November 28, and then reinterrogated him. Testimony was conflicting as to what happened at the November 28 meeting. The parties agreed that a police officer went to the jail to interrogate Watkins, and had him sign a waiver-of-rights form. Watkins testified that he again asked for a lawyer but that the officer ignored his request, and that the officer "nagg[ed]" him until he admitted to the shooting of Buchanan. The officer testified that Watkins never stated on November 28 that he wanted to stop the questioning or consult with a lawyer, and that he gave his statement without apparent hesitation. The Barker trial court apparently credited the officer's testimony. There was no dispute, however, that Watkins had requested a lawyer five days earlier, had not received one, had not himself reinitiated questioning, and had been questioned again nonetheless.

Watkins' statement implicating himself in the Buchanan killing, along with extensive other evidence of that crime, was admitted over objection in the penalty phase of Watkins' trial for the shoot-

ing of Barker. The jury sentenced Watkins to death. Some months later, Watkins was convicted of the murder of Buchanan, and was given a second death sentence.

The facts of this case constitute a plain violation of petitioner's Fifth Amendment right to counsel. Our law sets out a bright-line rule that all questioning must cease after an accused requests counsel, so that repeated police questioning does not "wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U. S. 91, 98 (1984) *(per curiam)*. The accused may not be found to have waived that right, once he asserts it, unless he himself reinitiates questioning. *Ibid.*

In this case, Watkins made an undisputed and unequivocal request for counsel on November 22, and refused to talk to the authorities in counsel's absence. The response of the police was to hold Watkins without a lawyer for five days and then to interrogate him again. Even if the trial court credited the police officer with respect to the events of November 28, that interrogation was impermissible under *Miranda* and its progeny, and any statement so elicited should not have been admitted in the penalty phase of a capital proceeding. See *Estelle* v. *Smith*, 451 U. S. 454, 462–463 (1981); see also *Del Vecchio* v. *Illinois*, 474 U. S. 883 (1985) (MARSHALL, J., dissenting from denial of certiorari).

II

Respondent State of Virginia contends that petitioner did not adequately present his Fifth Amendment claim to the Supreme Court of Virginia. It focuses on the fact that Watkins did not include the magic words "*Edwards* v. *Arizona*" in his brief to that court. This contention has no merit. *Edwards* merely set out an elaboration of the basic rule of *Miranda*, and Watkins cited expressly to *Miranda* below. He argued to the trial court that the statement had been taken in violation of his Fifth Amendment right to counsel. He argued to the appellate court that his statement had been taken in violation of his Fifth Amendment rights and was involuntary, focusing on his claim that police had ignored an express request for counsel on November 28. While Watkins did not present his argument below as proficiently as he now does in his petition for certiorari, he unmistakably raised below and reasserts here a claim that the November 28 statement was taken in violation of his Fifth Amendment right to counsel. The denial of

his November 22 request for counsel is part and parcel of that claim. See *Eddings* v. *Oklahoma*, 455 U. S. 104, 113–114, n. 9 (1982).

III

The Court today allows Watkins' death sentence to stand notwithstanding the illegality of the evidence introduced before the jury in its sentencing deliberations. The denial of his petition adds to a long line of cases in which the Court has declined to review capital sentences marred by the sort of violation described here. *E. g.*, *Henderson* v. *Florida*, 473 U. S. 916 (1985) (MARSHALL, J., dissenting from denial of certiorari); *James* v. *Arizona*, 469 U. S. 990 (1984) (BRENNAN, J., dissenting from denial of certiorari); *Johnson* v. *Virginia*, 454 U. S. 920 (1981) (MARSHALL, J., dissenting from denial of certiorari). I dissent.

No. 85–6448 (A–653). ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Stay of execution heretofore granted [*ante*, pp. 1062 and 1092] is vacated. Certiorari denied. Reported below: 484 So. 2d 1211.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 85–6470 (A–663). ADAMS *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 484 So. 2d 1216.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 85-6476 (A-664). ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 484 So. 2d 580.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 84-744. UNITED STATES *v.* LANE ET AL., 474 U. S. 438;

No. 85-1179. SONDEREGGER *v.* E. F. HUTTON & CO., INC., ET AL., *ante*, p. 1048;

No. 85-5865. HOWARD *v.* UNITED STATES, *ante*, p. 1022;

No. 85-5893. NICKENS *v.* MISSISSIPPI, 474 U. S. 1104;

No. 85-5931. DYSON *v.* TEXAS, *ante*, p. 1002; and

No. 85-6078. MUZA *v.* UNITED STATES, *ante*, p. 1028. Petitions for rehearing denied.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1104 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

CALIFORNIA *v.* BROWN

ON APPLICATION FOR STAY

No. A-699. Decided March 27, 1986

California's application to stay the enforcement of the California Supreme Court's judgment—which invalidated respondent's death sentence for first-degree murder on the ground that the Eighth Amendment to the Federal Constitution was violated by a jury instruction given during the sentencing phase of his trial that told the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling"—is granted pending disposition of the State's petition for certiorari. It is likely that four Members of this Court will vote to grant certiorari to review the jury-instruction issue, and that the decision below ultimately will be reversed. There is no merit to respondent's argument that the decision below was based on adequate and independent state grounds, and is therefore unreviewable by this Court. Moreover, the State has met its burden of demonstrating irreparable harm if its application for a stay is not granted.

JUSTICE REHNQUIST, Circuit Justice.

Applicant, the State of California, asks that I stay pending disposition of its petition for certiorari the enforcement of the judgment of the California Supreme Court, which invalidated the death sentence imposed on respondent Brown in 1980 for the first-degree murder of a 15-year-old girl. See 40 Cal. 3d 512, 709 P. 2d 440 (1985), modified on rehearing, 41 Cal. 3d 439e, —— P. 2d —— (1986). The California Supreme Court invalidated Brown's death sentence because it believed that a jury instruction given during the sentencing phase of Brown's trial, which told the jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," violated the Eighth

Amendment to the United States Constitution. The court felt that this instruction was incompatible with our decisions in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), which construed the Eighth Amendment to require that the sentencer in a capital case be allowed to consider, "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 110, quoting *Lockett*, *supra*, at 604.

I think it is likely that four Members of this Court would vote to grant certiorari to review the California Supreme Court's holding that the jury instruction at issue in this case violated Brown's Eighth Amendment rights under *Lockett* and *Eddings*, and that the decision below ultimately would be reversed. The California death penalty statute in effect at the time of Brown's trial expressly permitted Brown to introduce evidence, at sentencing, "as to any matter relevant to . . . mitigation . . . including, but not limited to, the nature and circumstances of the present offense, . . . and the defendant's character, background, history, mental condition and physical condition." Cal. Penal Code Ann. § 190.3 (West Supp. 1986). The California statute also provided:

> "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . . .
>
> "(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> "(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects *[sic]* of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Ibid.*

A portion of the jury instructions given at the sentencing phase of Brown's trial tracked the above statutory language, thus clearly informing the jury of its constitutional duty to consider in mitigation all relevant aspects of the defendant's character and the circumstances of his crime. See California Jury Instructions–Criminal No. 8.84.1 (4th ed. 1979). In my view a strong argument can be made that these statutory provisions, and the instructions which explained them to Brown's sentencing jury, fully complied with the dictates of *Lockett* and *Eddings*.[1]

---

[1] In *California* v. *Ramos*, 463 U. S. 992 (1983), we cited these very same provisions of the California statute and noted:

The jury instruction held by the California Supreme Court in this case to be unconstitutional was in no way inconsistent with the aforementioned statutory provisions. Nor did the instruction tell the jury to ignore any relevant evidence or mitigating circumstances. On the contrary, it simply told the jury not to be swayed by "*mere* sentiment, conjecture," and the like. Such an instruction focuses the jury's attention on the evidence and the reasonable inferences to be drawn therefrom. It is consistent with JUSTICE STEVENS' observation in *Gardner* v. *Florida*, 430 U. S. 349 (1977), that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.*, at 358.[2]

Brown argues that the decision below was based on adequate and independent state grounds, and is therefore unreviewable by this Court. It is true that, prior to this Court's 1972 decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), the California Supreme Court had held that a jury instruction identical to the one at issue in this case violated the State Constitution. See *People* v. *Bandhauer*, 1 Cal. 3d 609, 618–619, 463 P. 2d 408, 416 (1970). After this Court's 1976 decision in *Gregg* v. *Georgia*, 428 U. S. 153, however, the

---

"[R]espondent does not, and indeed could not, contend that the California sentencing scheme violates the directive of *Lockett* v. *Ohio*, 438 U. S. 586 (1978). The California statute in question permits the defendant to present any evidence to show that a penalty less than death is appropriate in his case." *Id.*, at 1005, n. 19.

[2] Moreover, in practical terms, I would expect the instruction at issue to generally *help* capital defendants, by reducing the possibility that sentencing juries will be swayed by sympathy *for the victim*, along with other adverse forms of "passion, prejudice, public opinion or public feeling." See *People* v. *Easley*, 34 Cal. 3d 858, 886, 671 P. 2d 813, 831 (1983) (Mosk, J., dissenting) ("In the current climate of public opinion, sympathy is more likely to be aroused for the victim and his family than for a defendant who has been found guilty of a brutal first degree murder. Thus cautioning a jury in the penalty phase of the trial not to be swayed by mere sympathy redounds to the benefit, not the detriment, of the defendant").

California Supreme Court revisited the question, treating it as a matter of federal, not state, constitutional law. See *People* v. *Robertson*, 33 Cal. 3d 21, 56–59, 655 P. 2d 279, 286–287 (1982). In *People* v. *Easley*, 34 Cal. 3d 858, 671 P. 2d 813 (1983), the court explained that "the federal cases following *Furman* and *Gregg* do not undermine [the prior] line of California authority, but, on the contrary, establish that these decisions *are compelled as a matter of federal constitutional law*." *Id.*, at 876, 671 P. 2d, at 824 (emphasis added); see also *People* v. *Lanphear*, 36 Cal. 3d 163, 164, 680 P. 2d 1081, 1082 (1984) ("federal constitutional law forbids" the instruction at issue in this case). Finally, in the instant case, the court did not cite the State Constitution at all, but stated that it was relying on "the individualized sentencing concerns inherent in the Eighth Amendment." 40 Cal. 3d, at 537, 709 P. 2d, at 453. Thus, it seems that this case is one in which, "'at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did.'" *Delaware* v. *Prouse*, 440 U. S. 648, 653 (1979), quoting *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977). As such, we have jurisdiction to review the California Supreme Court's decision. "If the state court misapprehended federal law, '[i]t should be freed to decide . . . these suits according to its own local law.'" *Delaware* v. *Prouse*, *supra*, at 653, quoting *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1, 5 (1950).

I also think the State has met its burden of demonstrating irreparable harm if its application for a stay is not granted. The California Supreme Court denied the State's application for a stay of issuance of its remittitur, and for an order deferring enforcement of its judgment, and issued the remittitur to the California Superior Court for Riverside County on January 30, 1986. The remittitur was filed by the Superior Court on February 3. Under California law, if the State does not hold a new trial on the issue of Brown's penalty

within 60 days of the filing of the remittitur, or by April 4, it will be forever barred from seeking the death penalty in the instant case. See Cal. Penal Code Ann. § 1382(2) (West 1982). On the other hand, since the California Supreme Court affirmed Brown's murder conviction, his status will be unaffected by the issuance of a stay pending disposition of the State's petition for certiorari. Accordingly, I grant the State's application for a stay.[3]

---

[3] The State's petition for certiorari also asks this Court to review a portion of the California Supreme Court's opinion in which it placed a new construction on certain portions of the California death penalty statute in order to avoid what it perceived to be a potential Eighth Amendment problem. See 40 Cal. 3d 512, 538–545, 709 P. 2d 440, 453–459 (1985). I express no view on whether this Court would be likely to grant certiorari on this issue, which was not relied upon by the California Supreme Court as an alternative basis for invalidating Brown's death sentence.

475/pt. 3

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OF

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BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1985

GOLDEN STATE TRANSIT CORP. *v.* CITY OF LOS ANGELES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1644. Argued December 4, 1985—Decided April 1, 1986

While petitioner's application to renew its franchise to operate taxicabs in respondent city of Los Angeles was pending, petitioner's drivers went on strike. The City Council then conditioned renewal of the franchise on settlement of the labor dispute by a certain date. When the dispute was not settled by that date, the franchise expired. Petitioner filed suit in Federal District Court, alleging, *inter alia*, that the city's action was pre-empted by the National Labor Relations Act (NLRA). The District Court granted summary judgment for the city, and the Court of Appeals affirmed.

Held: The city's action in conditioning petitioner's franchise renewal on the settlement of the labor dispute is pre-empted by the NLRA. Pp. 613–620.

(a) The NLRA pre-emption principle precluding state and municipal regulation concerning conduct that Congress intended to be unregulated, *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, is applicable here. Under this principle, States and municipalities are prohibited from imposing restrictions on economic weapons of self-help, unless such restrictions were contemplated by Congress. Pp. 613–615.

(b) Both the language of the NLRA and its legislative history demonstrate that the city's action contravened congressional intent. Pp. 615–619.

(c) The settlement condition imposed by the City Council destroyed the balance of power designed by Congress in the NLRA, and frustrated Congress' decision to leave open the use of economic weapons. Pp. 619–620.

754 F. 2d 830, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 620.

Zachary D. Fasman argued the cause for petitioner. With him on the briefs was *Clifton S. Elgarten*.

John F. Haggerty argued the cause and filed a brief for respondent.*

JUSTICE BLACKMUN delivered the opinion of the Court.

The city of Los Angeles, Cal., refused to renew Golden State Transit Corporation's taxicab franchise after the company's drivers went on strike. We are asked to decide whether, under *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976), the city's action is preempted by the National Labor Relations Act (NLRA), 29 U. S. C. § 151 *et seq.*

I

In 1980, Golden State, which operated taxicabs under the Yellow Cab name, applied to the city for a renewal of its operating franchise eventually scheduled to lapse on March 31, 1981. That franchise had first been acquired in 1977. On September 4, 1980, the city's Board of Transportation Commissioners recommended the renewal of Golden State's franchise—the largest, with approximately 400 cabs, of companies operating in Los Angeles—along with the franchises of 12 other taxi companies.

In October, while the franchise renewal application was pending, Golden State's labor contract with its drivers expired. The company and the drivers, represented by Local

Peter G. Nash, Dixie L. Atwater, and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the National League of Cities et al. by *Rex E. Lee, Benjamin W. Heineman, Jr., Carter G. Phillips, Benna Ruth Solomon,* and *Joyce Holmes Benjamin;* and for the National Institute of Municipal Law Officers by *George Agnost, Roy D. Bates, Benjamin L. Brown, J. Lamar Shelley, John W. Witt,* and *Roger F. Cutler.*

Briefs of *amici curiae* were filed for the National Labor Relations Board by *Acting Solicitor General Fried, Deputy Solicitor General Wallace, Bruce N. Kuhlik, Norton J. Come, Linda Sher,* and *Robert C. Bell, Jr.;* and for the American Federation of Labor and Congress of Industrial Organizations by *David Silberman* and *Laurence Gold.*

572 of the International Brotherhood of Teamsters, signed a short-term contract in order that operations would continue while negotiation and mediation proceeded. This interim contract was to expire at midnight February 10, 1981, the day before the City Council was scheduled to consider action on the franchise renewals.

On February 2, the Council's Transportation and Traffic Committee endorsed franchise renewals recommended by the Board of Transportation Commissioners. The Committee's report stated that Golden State and other companies were "in compliance with all terms and conditions of their franchise[s]." App. 39.

On February 11, the drivers struck Golden State, halting its operations. At the Council meeting that day, Teamster representatives argued against renewal of Golden State's franchise because of the pendency of the labor dispute. The Council postponed decision on Golden State's application until February 17, but, with possibly one exception, approved all other franchise renewal applications. At the February 17 meeting, when the union again opposed the renewal, the Council voted to extend Golden State's franchise from March 31 to April 30, but only if the Council expressly found, on or before March 27, that the extension was in the best interests of the city.

At its March 23 meeting, the Council held a short public hearing on whether it should grant the limited extension. By this time, the labor dispute and the franchise renewal issue had become clearly intertwined. The Teamsters opposed any extension of the Yellow Cab franchise, stating that such action would simply lengthen the strike and keep the drivers out of work. It preferred to see the franchise terminated, and to have the drivers seek jobs from Golden State's successor or from other franchise holders. As others spoke, the discussion turned to whether there was even a need for Yellow Cab, in light of the services performed by the other 12 franchised taxi companies. There were comments regarding

an excess of cabs; the city's policy at the time, however, was not to limit the number of taxi companies or the number of taxis in each fleet. *Id.*, at 81–82.

The strike was central to the discussion. One Council member charged Golden State with negotiating unreasonably, *id.*, at 71, while another accused the company of trying to "brea[k] the back of the union." *Id.*, at 66. The sympathies of the Council members who spoke lay with the union. But rather than defeat the renewal outright, the council reached a consensus for rejection of the extension with a possibility for reopening the issue if the parties settled their labor dispute before the franchise expired the following week. Four Council members endorsed this approach, and the Assistant City Attorney said that he clearly had informed the parties that this was the city's position. *Id.*, at 68. The Council President said: "I find that it will be very difficult to get this ordinance past (sic) to extend this franchise if the labor dispute is not settled by the end of this week." *Id.*, at 75. He added: "I just think that this kind of information should be put out in the open, so everybody understands it." *Ibid.* The Council, by a vote of 11 to 1, defeated the motion to extend the franchise and it expired by its terms on March 31.

II

Golden State filed this action in the United States District Court for the Central District of California, alleging that the city's action was pre-empted by the NLRA and violated the company's rights to due process and equal protection. It sought declaratory and injunctive relief and damages. The District Court found that it was "undisputed that the sole basis for refusing to extend [Golden State's] franchise was its labor dispute with its Teamster drivers," 520 F. Supp. 191, 193 (1981); that the Council had "threaten[ed] to allow Yellow Cab's franchise to terminate unless it entered into a collective bargaining agreement with the Teamsters," *id.*, at 194; and that the Council had denied the company an essential weapon

of economic strength—the ability to wait out a strike. On the basis of the pre-emption claim, the District Court granted Golden State's motion for a preliminary injunction to preserve the franchise. *Ibid.* The Court of Appeals for the Ninth Circuit found "ample evidence" in the record to support the District Court's finding, but nevertheless vacated the injunction. 686 F. 2d 758, 759, 762 (1982). The court reasoned that Golden State had little chance of prevailing on its pre-emption claim or on the other grounds it asserted. This Court denied Golden State's petition for certiorari. 459 U. S. 1105 (1983).

Following litigation on unrelated issues,[1] and with the company having abandoned its equal protection claim, the District Court granted summary judgment for the city. App. to Pet. for Cert. 11a. Golden State had not moved for summary judgment in its favor. The Court of Appeals affirmed, holding that the city's action was not pre-empted. 754 F. 2d 830 (1985). The court felt that, when the activity regulated is only a peripheral or incidental concern of labor policy, traditional municipal regulation is not pre-empted. The court found nothing in the record to suggest that the city's nonrenewal decision "was not concerned with transportation." *Id.*, at 833. Moreover, to avoid undue restriction of local regulation, "only actions seeking to directly alter the substantive outcome of a labor dispute should be pre-empted." Here, the city had not attempted to dictate the terms of the agreement, but had "merely insisted upon resolution of the dispute as a condition to franchise renewal." *Ibid.* The Court of Appeals also rejected Golden State's due

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[1] Antitrust claims were asserted in a second amended complaint filed by Golden State. The District Court granted the city partial summary judgment as to these claims, 563 F. Supp. 169 (CD Cal. 1983), and the Court of Appeals affirmed. 726 F. 2d 1430 (CA9 1984). We again denied certiorari. 471 U. S. 1003 (1985).

process claim. *Id.*, at 833–834.[2] Because of our concern about the propriety of the grant of summary judgment for the city in this factual and labor context, we granted certiorari. 472 U. S. 1016 (1985).[3]

III

A

Last Term, in *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985), we again noted: "The Court has articulated two distinct NLRA pre-emption principles." *Id.*, at 748. See also *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 498–499 (1983). The first, the so-called *Garmon* pre-emption, see *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), prohibits States from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of Industry* v. *Gould Inc.*, *ante*, at 286. The *Garmon* rule is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the "integrated scheme of regulation" established by the NLRA.

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[2] One judge concurred in the majority's due process analysis but otherwise concurred only in the judgment. As to pre-emption, he would have granted summary judgment for the city on the ground that Golden State had failed to provide evidence of the city's motive or of the economic impact on Golden State. 754 F. 2d, at 834.

[3] The city contends that the case is moot because the franchise, if renewed, would have expired on March 31, 1985. But if petitioner's franchise renewal had been granted in 1981, petitioner would have faced a renewal procedure in 1985 rather than the more onerous task of obtaining a franchise through competitive bidding. See Tr. of Oral Arg. 25–26. But for the nonrenewal in 1981, Golden State would be more likely to have an operating franchise now. At oral argument, counsel for Golden State said the company was ready to resume operations, even though it was in Chapter 11 bankruptcy. *Id.*, at 5. It therefore cannot be said that "[i]ntervening events have . . . 'irrevocably eradicated the effects of the alleged violation.'" *Los Angeles* v. *Lyons*, 461 U. S. 95, 101 (1983), quoting *County of Los Angeles* v. *Davis*, 440 U. S. 625, 631 (1979). We conclude, therefore, that the case is not moot.

Ante, at 289. See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at 748, and n. 26.

This case, however, concerns the second pre-emption principle, the so-called *Machinists* pre-emption.[4] See *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976). This precludes state and municipal regulation "concerning conduct that Congress intended to be unregulated." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at 749.[5] Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left "'to be controlled by the free play of economic forces.'" *Machinists*, 427 U. S., at 140, quoting *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 144 (1971). The Court recognized in *Machinists* that "'Congress has been rather specific when it has come to outlaw particular economic weapons,'" 427 U. S., at 143, quoting *NLRB* v. *Insurance Agents*, 361 U. S. 477, 498 (1960), and that Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance "'between the uncontrolled power of management and labor to further their respective interests.'" *Machinists*, 427 U. S., at 146, quoting *Teamsters* v. *Morton*, 377 U. S. 252, 258–259 (1964). States are therefore prohibited from imposing additional restrictions on economic weapons of self-help,

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[4] We do not reach the question whether the city's action in this case is pre-empted under *Garmon*, because Golden State and its supporting *amici*, including the NLRB, rely exclusively on the *Machinists* doctrine, and we find their argument persuasive.

[5] Our pre-emption analysis is not affected by the fact that we are reviewing a city's actions rather than those of a State. See *Fisher* v. *Berkeley*, *ante*, at 265. And the fact that the city acted through franchise procedures rather than a court order or a general law also is irrelevant to our analysis. "[J]udicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243 (1959). See *Wisconsin Dept. of Industry* v. *Gould Inc.*, *ante*, p. 282.

such as strikes or lockouts, see 427 U. S., at 147, unless such restrictions presumably were contemplated by Congress. "Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.'" *Id.*, at 147–148, quoting *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 380 (1969).

B

There is no question that the Teamsters and Golden State employed permissible economic tactics. The drivers were entitled to strike—and to time the strike to coincide with the Council's decision—in an attempt to apply pressure on Golden State. See *NLRB* v. *Insurance Agents*, 361 U. S., at 491, 496. And Golden State was entirely justified in using its economic power to withstand the strike in an attempt to obtain bargaining concessions from the union. See *Belknap, Inc.* v. *Hale*, 463 U. S., at 493, 500 (employer has power to hire replacements during an economic strike); *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318 (1965) (at bargaining impasse employer may use lockout solely to bring economic pressure on union).

The parties' resort to economic pressure was a legitimate part of their collective-bargaining process. *Machinists*, 427 U. S., at 144. But the bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of economic self-help. The District Court found that the Council had conditioned the franchise on a settlement of the labor dispute by March 31. We agree with the Court of Appeals that this finding is amply supported by the record.[6] The city's insistence on a settlement is pre-empted

[6] The District Court's finding is supported by objective factors such as what the city—through the Council and the Assistant City Attorney—told the parties, and its schedule of Council meetings. At the meeting of March 23, 1981, four Council members without contradiction pointedly con-

if the city "'[entered] into the substantive aspects of the bargaining process to an extent Congress has not countenanced.'" *Machinists*, 427 U. S., at 149, quoting *NLRB* v. *Insurance Agents*, 361 U. S., at 498.

That such a condition—by a city or the National Labor Relations Board—contravenes congressional intent is demonstrated by the language of the NLRA and its legislative history. The NLRA requires an employer and a union to bargain in good faith, but it does not require them to reach agreement. § 8(d), as amended, 29 U. S. C. § 158(d) (duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession"); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937) ("The theory of the Act is that free opportunity for negotiation . . . may bring about the adjustments and agreements which the Act in itself does not attempt to compel").

The Act leaves the bargaining process largely to the parties. See *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 103 (1970). It does not purport to set any time limits on negotiations or economic struggle. Instead, the Act provides a framework for the negotiations; it "is concerned primarily with establishing an equitable process for determining terms and conditions of employment." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at 753. See also § 1, as amended, of the NLRA, 29 U. S. C. § 151 (Act achieves

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veyed the settlement condition to the parties as the Council's "bottom line" on the issue. The condition also was announced to the parties by the Council's agent, the Assistant City Attorney, revealing that the condition was city policy. Moreover, the condition was evident from the schedule on which the Council considered the question. Golden State's franchise issue was deferred from February 11 to the 17th, from February 17 to March 23, and from March 23 to the 31st. Only Golden State, among the franchise applicants, was subjected to a conditional 1-month extension of its franchise. The only plausible reason for these repeated short extensions is that the city was giving the franchise holder additional time to comply with a particular requirement. Yet Golden State was in compliance with all the terms of the franchise except the Council's desire for a settlement.

national policy "by encouraging the practice and procedure of collective bargaining").

The legislative history, too, makes clear that the Act and the National Labor Relations Board were intended to facilitate bargaining between the parties. The Senate Report states: "Disputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces . . . . This bill in no respect regulates or even provides for supervision of wages or hours, nor does it establish any form of compulsory arbitration." S. Rep. No. 573, 74th Cong., 1st Sess., 2 (1935). Senator Wagner, sponsor of the NLRA, said that the Board would not usurp the role of free collective action. See 79 Cong. Rec. 6184 (1935). See also *id.*, at 7574 (Sen. Wagner affirming that the Act encourages "voluntary settlement of industrial disputes").

Protecting the free use of economic weapons during the course of negotiations was the rationale for this Court's findings of pre-emption in *Machinists* and in its predecessor, *Teamsters* v. *Morton*, 377 U. S. 252 (1964). In some areas of labor relations that the NLRA left unregulated, we have concluded that Congress contemplated state regulation. See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at 754–758; *New York Tel. Co.* v. *New York Labor Dept.*, 440 U. S. 519, 540–544 (1979) (plurality opinion); *id.*, at 547 and 549 (opinions concurring in result and concurring in judgment). Los Angeles, however, has pointed to no evidence of such congressional intent with respect to the conduct at issue in this case.[7]

Instead, the city argues that it is somehow immune from labor pre-emption solely because of the nature of its con-

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[7] There is no issue here that, rather than regulating the relationship between the employer and the union, the city's action protected innocent third parties from the employer. See *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 500 (1983) (third parties hired as strike replacements based on misrepresentations by the employer had state-law causes of action).

duct.[6] The city contends it was not regulating labor, but simply exercising a traditional municipal function in issuing taxicab franchises. We recently rejected a similar argument to the effect that a State's spending decisions are not subject to pre-emption. See *Wisconsin Dept. of Industry* v. *Gould Inc.*, *ante*, at 287–288. Cf. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at 754–758. Similarly, in the transportation area, a State may not ensure uninterrupted service to the public by prohibiting a strike by the unionized employees of a privately owned local transit company. See *Bus Employees* v. *Missouri*, 374 U. S. 74 (1963); cf. *Bus Employees* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 391–392 (1951). Nor in this case may a city restrict a transportation employer's ability to resist a strike. Although in each *Bus Employees* case the employees' right to strike was protected by § 7, as amended, of the NLRA, 29 U. S. C. § 157, "'[r]esort to economic weapons should more peaceful measures not avail' is the right of the employer as well as the employee," and "the State may not prohibit the use of such weapons . . . any more than in the case of employees." *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S., at 147, quoting *American Ship Building Co.* v. *NLRB*, 380 U. S., at 317. "[F]ederal law intended to leave the employer and the union free to use their economic weapons against one another." *Belknap, Inc.* v. *Hale*, 463 U. S., at 500. We hold, therefore, that the city was pre-empted from conditioning Golden State's franchise renewal on the settlement of the labor dispute.

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[6] The Court of Appeals, in holding that the city's action was not pre-empted, reasoned that what the city did involved merely a peripheral concern of federal labor law. The idea that state action may be upheld under such circumstances is part of the *Garmon* analysis. See *Belknap, Inc.* v. *Hale*, 463 U. S., at 498–499. Because we hold that the city directly interfered with the bargaining process—a central concern of the NLRA—we need not reach the question whether this exception applies to a *Machinists* case. But see *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 754–758 (1985).

The city, however, contends that it was in a no-win situation: having not renewed the franchise and thus permitting it to lapse, it stands accused of favoring the union; had it granted the renewal, it would have been accused of favoring the employer. But the question is not whether the city's action favors one side or the other. Our holding does not require a city to renew or to refuse to renew any particular franchise. We hold only that a city cannot condition a franchise renewal in a way that intrudes into the collective-bargaining process.

C

"Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA." *New York Tel. Co. v. New York Labor Dept.*, 440 U. S., at 551 (POWELL, J., dissenting). Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations. See *H. K. Porter Co. v. NLRB*, 397 U. S., at 103–104. A local government, as well as the National Labor Relations Board, lacks the authority to "'introduce some standard of properly "balanced" bargaining power' . . . or to define 'what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.'" *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U. S., at 149–150, quoting *NLRB v. Insurance Agents*, 361 U. S. 477, 497–500 (1960). The settlement condition imposed by the Los Angeles City Council, as we read the summary-judgment record before us, destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons.

In this case, the District Court and the Court of Appeals found that the city had conditioned the renewal of Golden State's franchise on the company's reaching a labor agreement with the Teamsters, but held that the city's action was not pre-empted by *Machinists*. This was error as a matter of law. Whether summary judgment should have been en-

tered for Golden State is a matter we do not decide, for petitioner made no motion for summary judgment on the issue of pre-emption.

The Court of Appeals' judgment affirming the summary judgment entered for the city is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, dissenting.

The city of Los Angeles refused to renew Golden State's taxicab franchise unless it settled a labor dispute with its drivers. The Court of Appeals for the Ninth Circuit stated that "[n]othing in the record indicates that the City's refusal to renew or extend Golden State's franchise until an agreement was reached and operations resumed was not concerned with transportation." 754 F. 2d 830, 833 (1985). Nonetheless, the Court today holds that "a city cannot condition a franchise renewal in a way that intrudes into the collective-bargaining process." *Ante*, at 619. The extraordinary breadth of the Court's holding is best illustrated by comparing it to this Court's initial cases involving federal labor pre-emption.

In *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767 (1947), this Court addressed the permissible scope of state regulation of labor disputes by examining New York's so-called Little Wagner Act, under which foremen were permitted to unionize. The status of foremen under the federal Act had been a matter of dispute at the time that New York asserted its right to supervise the organization of a union of foremen at the Bethlehem Steel Company plant in that State. See *id.*, at 770. The State argued that its labor relations machinery could operate at least until similar benefits for foremen were sought by the union under the federal Act. See *id.*, at 771. This Court held that the federal law pre-empted the state law on this point; both dealt with exactly the same subject matter and

whether or not they were the same or different with respect to the permissibility of organizing foremen made no difference. *Id.*, at 775. If they were the same, the procedures were duplicative. *Id.*, at 776. If they were different, they were potentially antagonistic. *Ibid.*

Six years later, in *Garner* v. *Teamsters*, 346 U. S. 485 (1953), the Court was presented with a claim of pre-emption under the Taft-Hartley Act, which imposed regulations and duties on labor correlative to the those imposed on management by the Wagner Act. The case involved unionized drivers who had engaged in conduct clearly prohibited by the Taft-Hartley Act, which might have made them subject to a cease-and-desist order by the National Labor Relations Board. See *id.*, at 486–487. But instead of resorting to the federal agency, the employer successfully sought an injunction against the prohibited picketing from a Pennsylvania state court. See *id.*, at 487. This Court held that state duplication of remedies provided by the National Labor Relations Act was pre-empted even though the state remedy was provided by a court rather than a state labor agency. See *id.*, at 487, 499–501.

The opinions in both *Bethlehem Steel* and *Garner* observed that Congress had furnished no guidance to the Court as to whether or not state regulation should be pre-empted:

> "Congress has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action." *Bethlehem Steel*, *supra*, at 771.
>
> "The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much." *Garner*, *supra*, at 488 (footnote omitted).

The Court stated in both that it was forced simply to divine the will of Congress by implication:

> "[The] exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting." *Bethlehem Steel, supra,* at 772.
>
> "We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner, supra,* at 488.

From the acorns of these two very sensible decisions has grown the mighty oak of this Court's labor pre-emption doctrine, which sweeps ever outward though still totally uninformed by any express directive from Congress. The National Labor Relations Board, organized management, and organized labor have vied with each other in urging the Court to sweep into the maw of labor relations law concerns that would have been regarded as totally peripheral to that body of law by the Congresses which enacted the Wagner Act and the Taft-Hartley Act.

Today we are told that a city, not seeking to place its weight on one side or the other of the scales of economic warfare, may not condition the renewal of a taxicab franchise on the settlement of a labor dispute. The settlement of that dispute would have enabled the company to put its taxis back on the streets where the franchise presumably contemplated they would be. The Court says that since the Labor Board may not structure an ideal balance of collective-bargaining weapons, the city may not consider the existence of a labor dispute in deciding whether to renew a franchise. See *ante,* at 619–620. We are further told that because a State may not legislate to provide uninterrupted service to the public by prohibiting a strike of public utility employees, a city may not act upon its views of sound transportation policy to refuse to renew a taxi franchise unless the franchisee settles a labor dispute and returns its cabs to the purpose for which the franchise exists. See *ante,* at 617–618. Such sweeping generalizations commend themselves neither to common sense nor to whatever hypothetical "intent of Congress" as can be

discerned in an area so remote from the core concerns of labor-management relations addressed by federal labor law.

Federal pre-emption of state law is a matter of congressional intent, presumed or expressed. Because Congress cannot foresee the various ways in which state laws might rub up against the operation of federal statutes, the Court in a multitude of cases has held state regulation pre-empted even when Congress has not expressed any intent to pre-empt because of the danger that the existence of federal and state regulations side by side will interfere with the achievement of the objectives of the federal legislation. The entire body of this Court's labor law pre-emption doctrine has been built on a series of implications as to congressional intent in the face of congressional silence, so that we now have an elaborate pre-emption doctrine traceable not to any expression of Congress, but only to statements by this Court in its previous opinions of what Congress must have intended.

The Court today doffs its hat to the legislative history of the Wagner Act and comes up with the following three items:

> "[1] The Senate Report states: 'Disputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces . . . . This bill in no respect regulates or even provides for supervision of wages or hours, nor does it establish any form of compulsory arbitration.'
>
> "[2] Senator Wagner, sponsor of the NLRA, said that the Board would not usurp the role of free collective action.
>
> "[3] Senator Wagner affirm[ed] that the Act encourages 'voluntary settlement of industrial disputes.'" *Ante*, at 617 (citations omitted).

These three bits of legislative history furnish absolutely no support for the result the Court reaches today. The observations that the Wagner Act leaves it to the parties to resolve their disputes by the play of competitive forces, that the Labor Board would not usurp the role of free collective

action, and that the Act encourages voluntary settlement of industrial disputes, simply do not speak to the question whether a city may condition the renewal of a taxicab franchise on the settlement of a labor dispute. I do not believe that Congress intended the labor law net to be cast this far, and I therefore dissent.

MICHIGAN v. JACKSON

CERTIORARI TO THE SUPREME COURT OF MICHIGAN

No. 84-1531. Argued December 9, 1985—Decided April 1, 1986*

Respondents, at separate arraignments in a Michigan trial court on unrelated murder charges, each requested appointment of counsel. But before respondents had an opportunity to consult with counsel, police officers, after advising respondents of their *Miranda* rights, questioned them and obtained confessions. Both respondents were convicted over objections to the admission of the confessions in evidence. The Michigan Court of Appeals reversed and remanded in one case, but affirmed in the other. The Michigan Supreme Court considered both cases together, and held that the confessions were improperly obtained in violation of the Sixth Amendment.

Held: The confessions should have been suppressed. Although the rule of *Edwards* v. *Arizona*, 451 U. S. 477, that once a suspect has invoked his right to counsel, police may not initiate interrogation until counsel has been made available to the suspect, rested on the Fifth Amendment and concerned a request for counsel made during custodial interrogation, the reasoning of that case applies with even greater force to these cases. The assertion of the right to counsel is no less significant, and the need for additional safeguards no less clear, when that assertion is made at an arraignment and when the basis for it is the Sixth Amendment. If police initiate an interrogation after a defendant's assertion of his right to counsel at an arraignment or similar proceeding, as in these cases, any waiver of that right for that police-initiated interrogation is invalid. Pp. 629–635.

421 Mich. 39, 365 N. W. 2d 56, affirmed.

STEVENS, J., delivered the opinion of the Court in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 636. REHNQUIST, J., filed a dissenting opinion, in which POWELL and O'CONNOR, JJ., joined, *post*, p. 637.

Brian E. Thiede argued the cause for petitioner in both cases and filed a brief for petitioner in No. 84-1539. *John D.*

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*Together with No. 84-1539, *Michigan* v. *Bladel*, also on certiorari to the same court.

O'Hair, *Timothy A. Baughman*, and *A. George Best II* filed a brief for petitioner in No. 84–1531.

James Krogsrud, by appointment of the Court, 473 U. S. 903, argued the cause for respondent in No. 84–1531. With him on the brief was *James R. Neuhard*. *Ronald J. Bretz*, by appointment of the Court, 473 U. S. 903, argued the cause and filed a brief for respondent in No. 84–1539.

JUSTICE STEVENS delivered the opinion of the Court.

In *Edwards* v. *Arizona*, 451 U. S. 477 (1981), we held that an accused person in custody who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.*, at 484–485. In *Solem* v. *Stumes*, 465 U. S. 638 (1984), we reiterated that "*Edwards* established a bright-line rule to safeguard pre-existing rights," *id.*, at 646: "once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him." *Id.*, at 641.

The question presented by these two cases is whether the same rule applies to a defendant who has been formally charged with a crime and who has requested appointment of counsel at his arraignment. In both cases, the Michigan Supreme Court held that postarraignment confessions were improperly obtained—and the Sixth Amendment violated—because the defendants had "requested counsel during their arraignments, but were not afforded an opportunity to consult with counsel before the police initiated further interrogations." 421 Mich. 39, 67–68, 365 N. W. 2d 56, 69 (1984). We agree with that holding.

I

The relevant facts may be briefly stated. Respondent Bladel was convicted of the murder of three railroad employees at the Amtrak Station in Jackson, Michigan, on Decem-

ber 31, 1978. Bladel, a disgruntled former employee, was arrested on January 1, 1979, and, after being questioned on two occasions, was released on January 3. He was arrested again on March 22, 1979, and agreed to talk to the police that evening without counsel. On the following morning, Friday, March 23, 1979, Bladel was arraigned. He requested that counsel be appointed for him because he was indigent. The detective in charge of the Bladel investigation was present at the arraignment. A notice of appointment was promptly mailed to a law firm, but the law firm did not receive it until Tuesday, March 27. In the interim, on March 26, 1979, two police officers interviewed Bladel in the county jail and obtained a confession from him. Prior to that questioning, the officers properly advised Bladel of his *Miranda* rights.[1] Although he had inquired about his representation several times since the arraignment, Bladel was not told that a law firm had been appointed to represent him.

The trial court overruled Bladel's objection to the admissibility of all four statements. On appeal from his conviction and sentence, Bladel challenged only the postarraignment confession. The Michigan Court of Appeals first rejected that challenge and affirmed the conviction, 106 Mich. App. 397, 308 N. W. 2d 230 (1981), but, after reconsideration in the light of a recent decision by the State Supreme Court, it reversed and remanded for a new trial. 118 Mich. App. 498, 325 N. W. 2d 421 (1982). The Michigan Supreme Court then granted the prosecutor's application for leave to appeal and considered the case with respondent Jackson's appeal of his conviction. 421 Mich. 39, 365 N. W. 2d 56 (1984).

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[1] See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The *Miranda* warnings were also given prior to the questioning on January 1, January 2, and March 22. Although Bladel made certain inculpatory statements on those occasions, he denied responsibility for the murder until after the arraignment. As the Michigan Supreme Court noted, even without his own statements, the evidence against Bladel was substantial. 421 Mich., at 44, and n. 2, 365 N. W. 2d, at 58–59, and n. 2.

Respondent Jackson was convicted of second-degree murder and conspiracy to commit second-degree murder. He was one of four participants in a wife's plan to have her husband killed on July 12, 1979. Arrested on an unrelated charge on July 30, 1979, he made a series of six statements in response to police questioning prior to his arraignment at 4:30 p. m. on August 1. During the arraignment, Jackson requested that counsel be appointed for him. The police involved in his investigation were present at the arraignment. On the following morning, before he had an opportunity to consult with counsel, two police officers obtained another statement from Jackson to "confirm" that he was the person who had shot the victim. As was true of the six prearraignment statements, the questioning was preceded by advice of his *Miranda* rights and Jackson's agreement to proceed without counsel being present.

The Michigan Court of Appeals held that the seventh statement was properly received in evidence. 114 Mich. App. 649, 319 N. W. 2d 613 (1982). It distinguished *Edwards* on the ground that Jackson's request for an attorney had been made at his arraignment whereas Edwards' request had been made during a custodial interrogation by the police. Accordingly, it affirmed Jackson's conviction of murder, although it set aside the conspiracy conviction on unrelated grounds.

The Michigan Supreme Court held that the postarraignment statements in both cases should have been suppressed. Noting that the Sixth Amendment right to counsel attached at the time of the arraignments, the court concluded that the *Edwards* rule "applies by analogy to those situations where an accused requests counsel before the arraigning magistrate. Once this request occurs, the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police. . . . The police cannot simply ignore a defendant's unequivocal request for counsel." 421 Mich., at 66–67, 365 N. W. 2d, at 68–69

(footnote omitted). We granted certiorari, 471 U. S. 1124 (1985), and we now affirm.[2]

II

The question is not whether respondents had a right to counsel at their postarraignment, custodial interrogations. The existence of that right is clear. It has two sources. The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations. *Edwards*, 451 U. S., at 482; *Miranda* v. *Arizona*, 384 U. S. 436, 470 (1966). The Sixth Amendment guarantee of the assistance of counsel also provides the right to counsel at postarraignment interrogations. The arraignment signals "the initiation of adversary judicial proceedings" and thus the attachment of the Sixth Amendment, *United States* v. *Gouveia*, 467 U. S. 180, 187, 188 (1984);[3] there-

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[2] Respondent Jackson points out that the Michigan Supreme Court also held that his fourth, fifth, and sixth statements should have been suppressed on grounds of prearraignment delay under a state statute. He therefore argues that the decision rests on an adequate and independent state ground and that the writ of certiorari should be dismissed. The state-court opinion, however, does not apply that prearraignment-delay holding to the seventh statement. Thus, although the Michigan court's holding on the other statements does mean that Jackson's conviction must be reversed regardless of this Court's decision, the admissibility of the seventh statement is controlled by that court's Sixth Amendment analysis, and is properly before us.

[3] In *Jackson*, the State concedes that the arraignment represented the initiation of formal legal proceedings, and that the Sixth Amendment attached at that point. Brief for Petitioner in No. 84-1531, p. 10. In *Bladel*, however, the State disputes that contention, Brief for Petitioner in No. 84-1539, pp. 24-26. In view of the clear language in our decisions about the significance of arraignment, the State's argument is untenable. See, *e. g.*, *Brewer* v. *Williams*, 430 U. S. 387, 398 (1977) ("[A] person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, *or arraignment*'") (emphasis added), quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion). See also *United States* v. *Gouveia*, 467 U. S., at 187-188 (quoting

after, government efforts to elicit information from the accused, including interrogation, represent "critical stages" at which the Sixth Amendment applies. *Maine* v. *Moulton*, 474 U. S. 159 (1985); *United States* v. *Henry*, 447 U. S. 264 (1980); *Brewer* v. *Williams*, 430 U. S. 387 (1977); *Massiah* v. *United States*, 377 U. S. 201 (1964). The question in these cases is whether respondents validly waived their right to counsel at the postarraignment custodial interrogations.

In *Edwards*, the request for counsel was made to the police during custodial interrogation, and the basis for the Court's holding was the Fifth Amendment privilege against compelled self-incrimination. The Court noted the relevance of various Sixth Amendment precedents, 451 U. S., at 484, n. 8, but found it unnecessary to rely on the possible applicability of the Sixth Amendment. *Id.*, at 480, n. 7. In these cases, the request for counsel was made to a judge during arraignment, and the basis for the Michigan Supreme Court opinion was the Sixth Amendment's guarantee of the assistance of counsel.[4] The State argues that the *Edwards* rule should not apply to these circumstances because there are legal differences in the basis for the claims; because there are

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Kirby); *Estelle* v. *Smith*, 451 U. S. 454, 469–470 (1981) (quoting *Kirby*); *Moore* v. *Illinois*, 434 U. S. 220, 226 (1977) (quoting *Kirby*). Cf. *Powell* v. *Alabama*, 287 U. S. 45, 57 (1932) ("[T]he most critical period of the proceedings against these defendants" was "*from the time of their arraignment* until the beginning of their trial") (emphasis added). The question whether arraignment signals the initiation of adversary judicial proceedings, moreover, is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel, absent a valid waiver. Cf. *Hamilton* v. *Alabama*, 368 U. S. 52 (1961) (Alabama arraignment is a "critical stage").

[4] The Michigan Supreme Court found that "defendants' request to the arraigning magistrate for appointment of counsel implicated only their Sixth Amendment right to counsel," 421 Mich., at 52, 365 N. W. 2d, at 62, because the request was not made during custodial interrogation. It was for that reason that the Michigan court did not rely on a Fifth Amendment *Edwards* analysis. We express no comment on the validity of the Michigan court's Fifth Amendment analysis.

factual differences in the contexts of the claims; and because respondents signed valid waivers of their right to counsel at the postarraignment custodial interrogations. We consider these contentions in turn.

The State contends that differences in the legal principles underlying the Fifth and Sixth Amendments compel the conclusion that the *Edwards* rule should not apply to a Sixth Amendment claim. *Edwards* flows from the Fifth Amendment's right to counsel at custodial interrogations, the State argues; its relevance to the Sixth Amendment's provision of the assistance of counsel is far less clear, and thus the *Edwards* principle for assessing waivers is unnecessary and inappropriate.

In our opinion, however, the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before. The State's argument misapprehends the nature of the pretrial protections afforded by the Sixth Amendment. In *United States* v. *Gouveia*, we explained the significance of the formal accusation, and the corresponding attachment of the Sixth Amendment right to counsel:

> "[G]iven the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings 'is far from a mere formalism.' *Kirby* v. *Illinois*, 406 U. S., at 689. It is only at that time 'that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" 467 U. S., at 189.

As a result, the "Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." *Maine* v. *Moulton*, 474 U. S., at 176. Thus, the Sixth Amendment right to counsel at a postarraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation.

Indeed, after a formal accusation has been made—and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation. Thus, the surreptitious employment of a cell-mate, see *United States* v. *Henry*, 447 U. S. 264 (1980), or the electronic surveillance of conversations with third parties, see *Maine* v. *Moulton*, *supra*; *Massiah* v. *United States*, 377 U. S. 201 (1964), may violate the defendant's Sixth Amendment right to counsel even though the same methods of investigation might have been permissible before arraignment or indictment.[5] Far from undermining the *Edwards* rule, the difference between the legal basis for the rule applied in *Edwards* and the Sixth Amendment claim asserted in these cases actually provides additional support for the application of the rule in these circumstances.

The State also relies on the factual differences between a request for counsel during custodial interrogation and a request for counsel at an arraignment. The State maintains that respondents may not have actually intended their re-

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[5] Similarly, after the initiation of adversary judicial proceedings, the Sixth Amendment provides a right to counsel at a "critical stage" even when there is no interrogation and no Fifth Amendment applicability. See *United States* v. *Wade*, 388 U. S. 218 (1967) (Sixth Amendment provides right to counsel at postindictment lineup even though Fifth Amendment is not implicated).

quest for counsel to encompass representation during any further questioning by the police. This argument, however, must be considered against the backdrop of our standard for assessing waivers of constitutional rights. Almost a half century ago, in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), a case involving an alleged waiver of a defendant's Sixth Amendment right to counsel, the Court explained that we should "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.*, at 464. For that reason, it is the State that has the burden of establishing a valid waiver. *Brewer* v. *Williams*, 430 U. S., at 404. Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel—we presume that the defendant requests the lawyer's services at every critical stage of the prosecution.[6] We thus reject the State's suggestion that respondents' requests for the appointment of counsel should be construed to apply only to representation in formal legal proceedings.[7]

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[6] In construing respondents' request for counsel, we do not, of course, suggest that the right to counsel turns on such a request. See *Brewer* v. *Williams*, 430 U. S., at 404 ("[T]he right to counsel does not depend upon a request by the defendant"); *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962) ("[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request"). Rather, we construe the defendant's request for counsel as an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation.

[7] We also agree with the comments of the Michigan Supreme Court about the nature of an accused's request for counsel:

"Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a

The State points to another factual difference: the police may not know of the defendant's request for attorney at the arraignment. That claimed distinction is similarly unavailing. In the cases at bar, in which the officers in charge of the investigations of respondents were present at the arraignments, the argument is particularly unconvincing. More generally, however, Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual.[8] One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).

The State also argues that, because of these factual differences, the application of *Edwards* in a Sixth Amendment context will generate confusion. However, we have frequently emphasized that one of the characteristics of *Edwards* is its clear, "bright-line" quality. See, *e. g.*, *Smith* v. *Illinois*, 469 U. S. 91, 98 (1984); *Solem* v. *Stumes*, 465 U. S., at 646; *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality opinion); *id.*, at 1054, n. 2 (MARSHALL, J., dissenting). We do not agree that applying the rule when the accused requests counsel at an arraignment, rather than in the police station, somehow diminishes that clarity. To the extent that there may have been any doubts about interpreting a request

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police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly." 421 Mich., at 63–64, 365 N. W. 2d, at 67.

[8] See, *e. g.*, *Maine* v. *Moulton*, 474 U. S. 159, 170–171 (1985):

"Once the right to counsel has attached and been asserted, *the State* must of course honor it. This means more than simply that *the State* cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on *the State* an affirmative obligation to respect and preserve the accused's choice to seek this assistance" (emphasis added) (footnote omitted).

for counsel at an arraignment, or about the police responsibility to know of and respond to such a request, our opinion today resolves them.

Finally, the State maintains that each of the respondents made a valid waiver of his Sixth Amendment rights by signing a postarraignment confession after again being advised of his constitutional rights. In *Edwards*, however, we rejected the notion that, after a suspect's request for counsel, advice of rights and acquiescence in police-initiated questioning could establish a valid waiver. 451 U. S., at 484. We find no warrant for a different view under a Sixth Amendment analysis. Indeed, our rejection of the comparable argument in *Edwards* was based, in part, on our review of earlier Sixth Amendment cases.[9] Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis.[10]

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[9] After stating our holding that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights," 451 U. S., at 484, we appended this footnote:

"In *Brewer* v. *Williams*, 430 U. S. 387 (1977), where, as in *Massiah* v. *United States*, 377 U. S. 201 (1964), the Sixth Amendment right to counsel had accrued, the Court held that a valid waiver of counsel rights should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information. In *Massiah* and *Brewer*, counsel had been engaged or appointed and the admissions in question were elicited in his absence. But in *McLeod* v. *Ohio*, 381 U. S. 356 (1965), we summarily reversed a decision that the police could elicit information after indictment even though counsel had not yet been appointed." *Id.*, at 484, n. 8.

[10] The State also argues that the Michigan Supreme Court's finding of a valid Fifth Amendment waiver should require the finding of a valid Sixth Amendment waiver. The relationship between the validity of waivers for Fifth and Sixth Amendment purposes has been the subject of considerable attention in the courts, 421 Mich., at 55–62, 365 N. W. 2d, at 63–67 (discussing and collecting cases), and the commentaries, *id.*, at 54, n. 15, 365

III

Edwards is grounded in the understanding that "the assertion of the right to counsel [is] a significant event," 451 U. S., at 485, and that "additional safeguards are necessary when the accused asks for counsel." *Id.*, at 484. We conclude that the assertion is no less significant, and the need for additional safeguards no less clear, when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment. We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

Although the *Edwards* decision itself rested on the Fifth Amendment and concerned a request for counsel made during custodial interrogation, the Michigan Supreme Court correctly perceived that the reasoning of that case applies with even greater force to these cases. The judgments are accordingly affirmed.

It is so ordered.

CHIEF JUSTICE BURGER, concurring in the judgment.

I concurred only in the judgment in *Edwards* v. *Arizona*, 451 U. S. 477, 487–488 (1981), and in doing so I observed:

> "The extraordinary protections afforded a person in custody suspected of criminal conduct are not without a valid basis, but as with all 'good' things they can be carried too far."

The urge for "bright-line" rules readily applicable to a host of varying situations would likely relieve this Court some-

N. W. 2d, at 63, n. 15. In view of our holding that the *Edwards* rule applies to the Sixth Amendment and that the Sixth Amendment requires the suppression of the postarraignment statements, we need not decide either the validity of the Fifth Amendment waiver in this case, see n. 4, *supra*, or the general relationship between Fifth and Sixth Amendment waivers.

what from more than a doubling of the Court's work in recent decades, but this urge seems to be leading the Court to an absolutist, mechanical treatment of the subject. At times, it seems, the judicial mind is in conflict with what behavioral—and theological--specialists have long recognized as a natural human urge of people to confess wrongdoing. See, *e. g.*, T. Reik, The Compulsion to Confess (1959).

We must, of course, protect persons in custody from coercion, but step by step we have carried this concept well beyond sound, common-sense boundaries. The Court's treatment of this subject is an example of the infirmity of trying to perform the rulemaking function on a case-by-case basis, ignoring the reality that the criminal cases coming to this Court, far from typical, are the "hard" cases. This invokes the ancient axiom that hard cases can make bad law.

Stare decisis calls for my following the rule of *Edwards* in this context, but plainly the subject calls for re-examination. Increasingly, to borrow from Justice Cardozo, more and more "criminal[s] . . . go free because the constable has blundered." *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926).

JUSTICE REHNQUIST, with whom JUSTICE POWELL and JUSTICE O'CONNOR join, dissenting.

The Court's decision today rests on the following deceptively simple line of reasoning: *Edwards* v. *Arizona*, 451 U. S. 477 (1981), created a bright-line rule to protect a defendant's Fifth Amendment rights; Sixth Amendment rights are even more important than Fifth Amendment rights; therefore, we must also apply the *Edwards* rule to the Sixth Amendment. The Court prefers this neat syllogism to an effort to discuss or answer the only relevant question: Does the *Edwards* rule make sense in the context of the Sixth Amendment? I think it does not, and I therefore dissent from the Court's unjustified extension of the *Edwards* rule to the Sixth Amendment.

My disagreement with the Court stems from our differing understandings of *Edwards*. In *Edwards*, this Court held that once a defendant has invoked his right under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), to have counsel present during custodial interrogation, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." 451 U. S., at 484. This "prophylactic rule," see *Solem* v. *Stumes*, 465 U. S. 638, 644, 645 (1984), was deemed necessary to prevent the police from effectively "overriding" a defendant's assertion of his *Miranda* rights by "badgering" him into waiving those rights. See *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality opinion of REHNQUIST, J.) (*Edwards* rule "designed to protect an accused in police custody from being badgered by police officers").[1] In short, as we explained in later cases, "*Edwards* did not confer a substantive constitutional right that had not existed before; it 'created a protective umbrella serving to enhance a constitutional guarantee.'" *Solem* v. *Stumes*, *supra*, at 644, n. 4, quoting *Michigan* v. *Payne*, 412 U. S. 47, 54 (1973); see also *Shea* v. *Louisiana*, 470 U. S. 51, 61 (1985) (WHITE, J., dissenting) (describing "prophylactic purpose" of *Edwards* rule).

What the Court today either forgets or chooses to ignore is that the "constitutional guarantee" referred to in *Solem* v. *Stumes* is the Fifth Amendment's prohibition on compelled self-incrimination. This prohibition, of course, is also the constitutional underpinning for the set of prophylactic rules announced in *Miranda* itself. See *Moran* v. *Burbine*, *ante*, at 424–425; *Oregon* v. *Elstad*, 470 U. S. 298, 304–305, 306,

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[1] The four dissenters in *Oregon* v. *Bradshaw* apparently agreed with the plurality's characterization of the *Edwards* rule. See 462 U. S., at 1055, n. 2 (MARSHALL, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ., dissenting) (citing passage from plurality opinion quoted in the text, and noting that "[t]he only dispute between the plurality and the dissent in this case concerns the meaning of 'initiation' for purposes of *Edwards' per se* rule").

and n. 1 (1985).[2] *Edwards*, like *Miranda*, imposes on the police a bright-line standard of conduct intended to help ensure that confessions obtained through custodial interrogation will not be "coerced" or "involuntary." Seen in this proper light, *Edwards* provides nothing more than a second layer of protection, in addition to those rights conferred by *Miranda*, for a defendant who might otherwise be compelled by the police to incriminate himself in violation of the Fifth Amendment.

The dispositive question in the instant cases, and the question the Court should address in its opinion, is whether the same kind of prophylactic rule is needed to protect a defendant's right to counsel under the Sixth Amendment. The answer to this question, it seems to me, is clearly "no." The Court does not even suggest that the police commonly deny defendants their Sixth Amendment right to counsel. Nor, I suspect, would such a claim likely be borne out by empirical evidence. Thus, the justification for the prophylactic rules this Court created in *Miranda* and *Edwards*, namely, the perceived widespread problem that the police were violating, and would probably continue to violate, the Fifth Amendment rights of defendants during the course of custodial interrogations, see *Miranda*, *supra*, at 445–458,[3] is conspicu-

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[2] The Court suggests, in dictum, that the Fifth Amendment also provides defendants with a "right to counsel." See *ante*, at 629. But our cases make clear that the Fifth Amendment itself provides no such "right." See *Moran* v. *Burbine*, *ante*, at 423, n. 1; *Oregon* v. *Elstad*, 470 U. S., at 304–305. Instead, *Miranda* confers upon a defendant a "right to counsel," *but only when such counsel is requested during custodial interrogations.* Even under *Miranda*, the "right to counsel" exists solely as a means of protecting the defendant's Fifth Amendment right not to be compelled to incriminate himself.

[3] In *Miranda*, this Court reviewed numerous instances in which police brutality had been used to coerce a defendant into confessing his guilt. The Court then stated:

"The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. . . .

"The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper

ously absent in the Sixth Amendment context. To put it simply, the prophylactic rule set forth in *Edwards* makes no sense at all except when linked to the Fifth Amendment's prohibition against compelled self-incrimination.

Not only does the Court today cut the *Edwards* rule loose from its analytical moorings, it does so in a manner that graphically reveals the illogic of the Court's position. The Court phrases the question presented in these cases as whether the *Edwards* rule applies "to a defendant who has been formally charged with a crime *and who has requested appointment of counsel at his arraignment.*" *Ante*, at 626 (emphasis added). And the Court ultimately limits its holding to those situations where the police "initiate interrogation *after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel.*" *Ante*, at 636 (emphasis added).

In other words, the Court most assuredly does *not* hold that the *Edwards per se* rule prohibiting all police-initiated interrogations applies from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant. Such a holding would represent, after all, a shockingly dramatic restructuring of the balance this Court has traditionally struck between the rights of the defendant and those of the larger society. Applying the *Edwards* rule to situations in which a defendant has not made an explicit request for counsel would also render completely nugatory the extensive discussion of "waiver" in such prior Sixth Amendment cases as *Brewer* v. *Williams*, 430 U. S. 387, 401–406 (1977). See also *id.*, at 410 (POWELL, J., concurring) ("The critical factual issue is whether there had been a voluntary waiver"); *id.*, at 417 (BURGER, C. J., dissenting) ("[I]t is very clear that Williams had made a valid

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limitation upon custodial interrogation is achieved . . . there can be no assurance that practices of this nature will be eradicated in the foreseeable future." 384 U. S., at 446–447.

waiver of his . . . Sixth Amendment right to counsel); *id.*, at 430, n. 1 (WHITE, J., joined by BLACKMUN and REHNQUIST, JJ., dissenting) ("It does not matter whether the right not to make statements in the absence of counsel stems from *Massiah* v. *United States*, 377 U. S. 201 (1964), or *Miranda* v. *Arizona*, 384 U. S. 436 (1966). In either case the question is one of waiver").[4]

This leaves the Court, however, in an analytical straitjacket. The problem with the limitation the Court places on the Sixth Amendment version of the *Edwards* rule is that, unlike a defendant's "right to counsel" under *Miranda*, which does not arise until affirmatively invoked by the defendant during custodial interrogation, a defendant's Sixth Amendment right to counsel does not depend at all on whether the defendant has requested counsel. See *Brewer* v. *Williams*, *supra*, at 404; *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962). The Court acknowledges as much in footnote six of its opinion, where it stresses that "we do not, of course, suggest that

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[4] See also *Moran* v. *Burbine*, *ante*, at 428 ("It is clear, of course, that, *absent a valid waiver*, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches").

Several of our Sixth Amendment cases have indeed erected virtually *per se* barriers against certain kinds of police conduct. See, *e. g.*, *Maine* v. *Moulton*, 474 U. S. 159 (1985); *United States* v. *Henry*, 447 U. S. 264 (1980); *Massiah* v. *United States*, 377 U. S. 201 (1964). These cases, however, all share one fundamental characteristic that separates them from the instant cases; in each case, the nature of the police conduct was such that it would have been impossible to find a valid waiver of the defendant's Sixth Amendment right to counsel. See *Maine* v. *Moulton*, *supra*, at 176–177 (undisclosed electronic surveillance of conversations with a third party); *United States* v. *Henry*, *supra*, at 265, 273 (use of undisclosed police informant); *Massiah* v. *United States*, *supra*, at 202 (undisclosed electronic surveillance). Here, on the other hand, the conduct of the police was totally open and aboveboard, and could not be said to prevent the defendant from executing a valid Sixth Amendment waiver under the standards set forth in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

the right to counsel turns on . . . a request [for counsel]." *Ante*, at 633, n. 6.

The Court provides no satisfactory explanation for its decision to extend the *Edwards* rule to the Sixth Amendment, yet limit that rule to those defendants foresighted enough, or just plain lucky enough, to have made an explicit request for counsel which we have always understood to be completely unnecessary for Sixth Amendment purposes. The Court attempts to justify its emphasis on the otherwise legally insignificant request for counsel by stating that "we construe the defendant's request for counsel as an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation." *Ibid.* This statement sounds reasonable, but it is flatly inconsistent with the remainder of the Court's opinion, in which the Court holds that there can be no waiver of the Sixth Amendment right to counsel after a request for counsel has been made. See *ante*, at 635–636, n. 10. It is obvious that, for the Court, the defendant's request for counsel is not merely an "extremely important fact"; rather, it is the *only* fact that counts.

The truth is that there is no satisfactory explanation for the position the Court adopts in these cases. The glaring inconsistencies in the Court's opinion arise precisely because the Court lacks a coherent, analytically sound basis for its decision. The prophylactic rule of *Edwards*, designed from its inception to protect a defendant's right under the Fifth Amendment not to be compelled to incriminate himself, simply does not meaningfully apply to the Sixth Amendment. I would hold that *Edwards* has no application outside the context of the Fifth Amendment, and would therefore reverse the judgment of the court below.

AT&T TECHNOLOGIES, INC. v. COMMUNICATIONS WORKERS OF AMERICA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-1913. Argued January 22, 1986—Decided April 7, 1986

Petitioner employer and respondent Union are parties to a collective-bargaining agreement covering telephone equipment installation workers. Article 8 of the agreement provides for arbitration of differences arising over interpretation of the agreement. Article 9 provides that subject to certain limitations, but otherwise not subject to the arbitration clause, petitioner is free to exercise certain management functions, including the hiring, placement, and termination of employees. Article 20 prescribes the order in which employees will be laid off "[w]hen lack of work necessitates Layoff." The Union filed a grievance challenging petitioner's decision to lay off 79 installers from its Chicago location, claiming that there was no lack of work at that location and that therefore the layoffs would violate Article 20. But petitioner laid off the installers and refused to submit the grievance to arbitration on the ground that under Article 9 the layoffs were not arbitrable. The Union then sought to compel arbitration by filing suit in Federal District Court, which, after finding that the Union's interpretation of Article 20 was at least "arguable," held that it was for the arbitrator, not the court, to decide whether that interpretation had merit, and, accordingly, ordered petitioner to arbitrate. The Court of Appeals affirmed.

Held: The issue whether, because of express exclusion or other evidence, the dispute over interpretation of Article 20 was subject to the arbitration clause, should have been decided by the District Court and reviewed by the Court of Appeals, and should not have been referred to the arbitrator. Pp. 648–657.

(a) Under the principles set forth in the *Steelworkers Trilogy* (*Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574; and *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593), it was the District Court's duty to interpret the collective-bargaining agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a "lack of work" determination by petitioner. If the court should determine that the agreement so provides, then it would be for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. Pp. 648–651.

(b) This Court will not examine the collective-bargaining agreement for itself and affirm the Court of Appeals on the ground that the parties had agreed to arbitrate the dispute over the layoffs. It is not this Court's function in the first instance to construe collective-bargaining agreements and arbitration clauses, or to consider any other evidence that might demonstrate that a particular grievance was not subject to arbitration. Pp. 651–652.

751 F. 2d 203, vacated and remanded.

WHITE, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, in which BURGER, C. J., and MARSHALL, J., joined, *post*, p. 652.

Rex E. Lee argued the cause for petitioner. With him on the briefs were *David W. Carpenter, Gerald D. Skoning, Charles C. Jackson, Howard J. Trienens, Alfred A. Green,* and *Joseph Ramirez.*

Laurence Gold argued the cause for respondents. With him on the brief were *Irving M. Friedman, Stanley Eisenstein, Harold A. Katz, David Silberman,* and *James Coppess.**

JUSTICE WHITE delivered the opinion of the Court.

The issue presented in this case is whether a court asked to order arbitration of a grievance filed under a collective-bargaining agreement must first determine that the parties intended to arbitrate the dispute, or whether that determination is properly left to the arbitrator.

I

AT&T Technologies, Inc. (AT&T or the Company), and the Communications Workers of America (the Union) are parties to a collective-bargaining agreement which covers telephone equipment installation workers. Article 8 of this agreement

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States by *John S. Irving, Carl L. Taylor,* and *Stephen A. Bokat;* and for the National Association of Manufacturers by *Jan S. Admundson* and *Gary D. Lipkin.*

David E. Feller filed a brief for the National Academy of Arbitrators as *amicus curiae* urging affirmance.

establishes that "differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder" must be referred to a mutually agreeable arbitrator upon the written demand of either party. This Article expressly does not cover disputes "excluded from arbitration by other provisions of this contract."[1] Article 9 provides that, "subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause," AT&T is free to exercise certain management functions, including the hiring and placement of employees and the termination of employment.[2] "When lack of work necessitates Layoff," Article 20 prescribes the order in which employees are to be laid off.[3]

On September 17, 1981, the Union filed a grievance challenging AT&T's decision to lay off 79 installers from its Chicago base location. The Union claimed that, because there was no lack of work at the Chicago location, the

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[1] Article 8 provides, in pertinent part, as follows:

"If the National and the Company fail to settle by negotiation any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedures as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties." App. 21.

[2] Article 9 states:

"The Union recognizes the right of the Company (subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause) to exercise the functions of managing the business which involve, among other things, the hiring and placement of Employees, the termination of employment, the assignment of work, the determination of methods and equipment to be used, and the control of the conduct of work." *Id.*, at 22.

[3] Article 20 provides, in pertinent part, that "[w]hen lack of work necessitates Layoff, Employees shall be Laid-Off in accordance with Term of Employment and by Layoff groups as set forth in the following [subparagraphs stating the order of layoff]." *Id.*, at 23. Article 1.11 defines the term "Layoff" to mean "a termination of employment arising out of a reduction in the force due to lack of work." *Id.*, at 20.

planned layoffs would violate Article 20 of the agreement. Eight days later, however, AT&T laid off all 79 workers, and soon thereafter, the Company transferred approximately the same number of installers from base locations in Indiana and Wisconsin to the Chicago base. AT&T refused to submit the grievance to arbitration on the ground that under Article 9 the Company's decision to lay off workers when it determines that a lack of work exists in a facility is not arbitrable.

The Union then sought to compel arbitration by filing suit in federal court pursuant to § 301(a) of the Labor Management Relations Act, 29 U. S. C. § 185(a).[4] *Communications Workers of America* v. *Western Electric Co.*, No. 82 C 772 (ND Ill., Nov. 18, 1983). Ruling on cross-motions for summary judgment, the District Court reviewed the provisions of Articles 8, 9, and 20, and set forth the parties' arguments as follows:

> "Plaintiffs interpret Article 20 to require that there be an actual lack of work prior to employee layoffs and argue that there was no such lack of work in this case. Under plaintiffs' interpretation, Article 20 would allow the union to take to arbitration the threshold issue of whether the layoffs were justified by a lack of work. Defendant interprets Article 20 as merely providing a sequence for any layoffs which management, in its exclusive judgment, determines are necessary. Under defendant's interpretation, Article 20 would not allow for an arbitrator to decide whether the layoffs were warranted by a lack of work but only whether the company

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[4] Section 301(a), 61 Stat. 156, 29 U. S. C. § 185(a) states:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect of the amount in controversy or without regard to the citizenship of the parties."

followed the proper order in laying off the employees." App. to Pet. for Cert. 10A.

Finding that "the union's interpretation of Article 20 was at least 'arguable,'" the court held that it was "for the arbitrator, not the court to decide whether the union's interpretation has merit," and accordingly, ordered the Company to arbitrate. *Id.*, at 11A.

The Court of Appeals for the Seventh Circuit affirmed. *Communications Workers of America* v. *Western Electric Co.*, 751 F. 2d 203 (1984). The Court of Appeals understood the District Court to have ordered arbitration of the threshold issue of arbitrability. *Id.*, at 205, n. 4. The court acknowledged the "general rule" that the issue of arbitrability is for the courts to decide unless the parties stipulate otherwise, but noted that this Court's decisions in *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960), and *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960), caution courts to avoid becoming entangled in the merits of a labor dispute under the guise of deciding arbitrability. From this observation, the court announced an "exception" to the general rule, under which "a court should compel arbitration of the arbitrability issue where the collective bargaining agreement contains a standard arbitration clause, the parties have not clearly excluded the arbitrability issue from arbitration, and deciding the issue would entangle the court in interpretation of substantive provisions of the collective bargaining agreement and thereby involve consideration of the merits of the dispute." 751 F. 2d, at 206.

All of these factors were present in this case. Article 8 was a "standard arbitration clause," and there was "no clear, unambiguous exclusion from arbitration of terminations predicated by a lack of work determination." *Id.*, at 206–207. Moreover, although there were "colorable arguments" on both sides of the exclusion issue, if the court were to decide this question it would have to interpret not only Article 8, but Articles 9 and 20 as well, both of which are "sub-

stantive provisions of the Agreement." The court thus "decline[d] the invitation to decide arbitrability," and ordered AT&T "to arbitrate the arbitrability issue." *Id.*, at 207.

The court admitted that its exception was "difficult to reconcile with the Supreme Court's discussion of a court's duty to decide arbitrability in [*John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964)]." The court asserted, however, that the discussion was "dicta," and that this Court had reopened the issue in *Nolde Brothers, Inc.* v. *Bakery Workers*, 430 U. S. 243, 255, n. 8 (1977). 751 F. 2d, at 206.

We granted certiorari, 474 U. S. 814 (1985), and now vacate the Seventh Circuit's decision and remand for a determination of whether the Company is required to arbitrate the Union's grievance.

II

The principles necessary to decide this case are not new. They were set out by this Court over 25 years ago in a series of cases known as the *Steelworkers Trilogy: Steelworkers* v. *American Mfg. Co., supra; Steelworkers* v. *Warrior & Gulf Navigation Co., supra;* and *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). These precepts have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement. We see no reason either to question their continuing validity, or to eviscerate their meaning by creating an exception to their general applicability.

The first principle gleaned from the *Trilogy* is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf, supra*, at 582; *American Mfg. Co., supra*, at 570–571 (BRENNAN, J., concurring). This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to

arbitration. *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368, 374 (1974).

The second rule, which follows inexorably from the first, is that the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. *Warrior & Gulf, supra*, at 582–583. See *Operating Engineers* v. *Flair Builders, Inc.*, 406 U. S. 487, 491 (1972); *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962), overruled in part on other grounds, *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970). Accord, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626 (1985).

The Court expressly reaffirmed this principle in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964). The "threshold question" there was whether the court or an arbitrator should decide if arbitration provisions in a collective-bargaining contract survived a corporate merger so as to bind the surviving corporation. *Id.*, at 546. The Court answered that there was "no doubt" that this question was for the courts. "'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.' . . . The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *Id.*, at 546–547 (citations omitted).

The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be

frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *American Mfg. Co.*, 363 U. S., at 568 (footnote omitted).

Finally, it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf*, 363 U. S., at 582–583. See also *Gateway Coal Co.* v. *Mine Workers*, *supra*, at 377–378. Such a presumption is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder . . . ." In such cases, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Warrior & Gulf*, *supra*, at 584–585.

This presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements, "furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining." *Schneider Moving & Storage Co.* v. *Robbins*, 466 U. S. 364, 371–372 (1984) (cita-

tion omitted). See *Gateway Coal Co., supra,* at 378–379. The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be "drastically reduced," however, if a labor arbitrator had the "power to determine his own jurisdiction . . . ." Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1509 (1959). Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but, instead, would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." *Ibid.* This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements, and is antithetical to the function of a collective-bargaining agreement as setting out the rights and duties of the parties.

With these principles in mind, it is evident that the Seventh Circuit erred in ordering the parties to arbitrate the arbitrability question. It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a "lack of work" determination by the Company. If the court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration.

The Union does not contest the application of these principles to the present case. Instead, it urges the Court to examine the specific provisions of the agreement for itself and to affirm the Court of Appeals on the ground that the parties had agreed to arbitrate the dispute over the layoffs at issue here. But it is usually not our function in the first instance to construe collective-bargaining contracts and arbitration clauses, or to consider any other evidence that might unmistakably demonstrate that a particular grievance was not to

be subject to arbitration. The issue in the case is whether, because of express exclusion or other forceful evidence, the dispute over the interpretation of Article 20 of the contract, the layoff provision, is not subject to the arbitration clause. That issue should have been decided by the District Court and reviewed by the Court of Appeals; it should not have been referred to the arbitrator.

The judgment of the Court of Appeals is vacated, and the case is remanded for proceedings in conformity with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and JUSTICE MARSHALL join, concurring.

I join the Court's opinion and write separately only to supplement what has been said in order to avoid any misunderstanding on remand and in future cases.

The Seventh Circuit's erroneous conclusion that the arbitrator should decide whether this dispute is arbitrable resulted from that court's confusion respecting the "arbitrability" determination that we have held must be judicially made. Despite recognizing that Article 8 of the collective-bargaining agreement "is a standard arbitration clause, providing for arbitration of 'any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder,'" and that "there is no clear, unambiguous exclusion [of this dispute] from arbitration," the Court of Appeals thought that "there [were] colorable arguments both for and against exclusion." *Communications Workers of America* v. *Western Electric Co.*, 751 F. 2d 203, 206–207 (1984). The "colorable arguments" referred to by the Court of Appeals were the parties' claims concerning the meaning of Articles 9 and 20 of the collective-bargaining agreement: the Court of Appeals thought that if the Union's interpretation of Article 20 was correct and management

could not order layoffs for reasons other than lack of work, the dispute was arbitrable; but if AT&T's interpretation of Article 20 was correct and management was free to order layoffs for other reasons, the dispute was not arbitrable under Article 9. *Id.*, at 207. Because these were the very issues that would be presented to the arbitrator if the dispute was held to be arbitrable, the court reasoned that "determining arbitrability would enmesh a court in the merits of th[e] dispute," *ibid.*, and concluded that the arbitrability issue should be submitted to the arbitrator.

The Court of Appeals was mistaken insofar as it thought that determining arbitrability required resolution of the parties' dispute with respect to the meaning of Articles 9 and 20 of the collective-bargaining agreement. This is clear from our opinion in *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). In *Warrior & Gulf*, the Union challenged management's contracting out of labor that had previously been performed by Company employees. The parties failed to resolve the dispute through grievance procedures, and the Union requested arbitration; the Company refused, and the Union sued to compel arbitration under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185. The collective-bargaining agreement contained a standard arbitration clause similar to Article 8 of the AT&T/CWA contract, *i. e.*, providing for arbitration of all differences with respect to the meaning or application of the contract. We held that, in light of the congressional policy making arbitration the favored method of dispute resolution, such a provision requires arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf*, *supra*, at 582–583 (footnote omitted).

The Company in *Warrior & Gulf* relied for its argument that the dispute was not arbitrable on a "Management Functions" clause which, like Article 9 of the AT&T/CWA agree-

ment, excluded "matters which are strictly a function of management," 363 U. S., at 576, from the arbitration provision. We recognized that such a clause "might be thought to refer to any practice of management in which, under particular circumstances prescribed by the agreement, it is permitted to indulge." *Id.*, at 584. However, we also recognized that to read the clause this way would make arbitrability in every case depend upon whether management could take the action challenged by the Union; the arbitrability of every dispute would turn upon a resolution of the merits, and "the arbitration clause would be swallowed up by the exception." *Ibid.* Therefore, we held that, where a collective-bargaining agreement contains a standard arbitration clause and the "exception" found in the Management Functions clause is general, "judicial inquiry . . . should be limited to the search for an explicit provision which brings the grievance under the cover of the [Management Functions] clause . . . ." *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 572 (1960) (BRENNAN, J., concurring); *Warrior & Gulf*, *supra*, at 584. "In the absence of any express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . . ." 363 U. S., at 584–585.

The Seventh Circuit misunderstood these rules of contract construction and did precisely what we disapproved of in *Warrior & Gulf*—it read Article 9, a general Management Functions clause, to make arbitrability depend upon the merits of the parties' dispute. As *Warrior & Gulf* makes clear, the judicial inquiry required to determine arbitrability is much simpler. The parties' dispute concerns whether Article 20 of the collective-bargaining agreement limits management's authority to order layoffs for reasons other than lack of work. The question for the court is "strictly confined," *id.*, at 582, to whether the parties agreed to submit disputes over the meaning of Article 20 to arbitration. Because the collective-bargaining agreement contains a standard arbitra-

tion clause, the answer must be affirmative unless the contract contains explicit language stating that disputes respecting Article 20 are not subject to arbitration, or unless the party opposing arbitration—here AT&T—adduces "the most forceful evidence" to this effect from the bargaining history. Under *Warrior & Gulf*, determining arbitrability does not require the court even to consider which party is correct with respect to the meaning of Article 20.

The Court remands this case so that the court below may apply the proper standard to determine arbitrability. The Court states that "it is usually not our function in the first instance to construe collective-bargaining contracts and arbitration clauses, or to consider any other evidence that might unmistakably demonstrate that a particular grievance was not to be subject to arbitration." *Ante*, at 651–652. Of course, we have on numerous occasions construed collective-bargaining agreements "in the first instance"; we did so, for example, in the three cases comprising the *Steelworkers Trilogy*. See also *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 552–555 (1964); *Packinghouse Workers* v. *Needham Packing Co.*, 376 U. S. 247, 249–253 (1964). Nonetheless, I agree with the Court that we should interpret a collective-bargaining agreement only where there is some special reason to do so. Thus, it is appropriate for this Court to construe a collective-bargaining agreement where—as in the *Steelworkers Trilogy*—our decision announces a new principle of law, since applying this principle may help to clarify our meaning. There is no such need, however, where—as here—we simply reaffirm established principles. Moreover, since the determination left for the Court of Appeals on remand is straightforward and will require little time or effort, concerns for efficient judicial administration do not require us to interpret the agreement. Finally, because the parties have submitted to us only fragmentary pieces of the bargaining history, we are not in a position properly to evaluate whether there is "the most forceful evidence" that the parties

did not intend for this dispute to be arbitrable. Therefore, I join the Court's opinion and concur in the Court's judgment remanding to the Court of Appeals.

UNITED STATES v. CITY OF FULTON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 84-1725. Argued January 21, 1986—Decided April 7, 1986

Section 5 of the Flood Control Act of 1944 (Act) authorizes the Secretary of Energy (Secretary), acting through Administrators of regional Power Marketing Administrations, to fix rates for the sale of hydroelectric power generated at federally owned dams, and provides that "the rate schedules [shall] become effective upon confirmation and approval by the Secretary." Pursuant to the Secretary's regulatory scheme, new schedules increasing rates were developed by the Southwestern Power Administration after public participation, were approved and placed into effect on an interim basis, effective April 1, 1979, and were ultimately approved on a final basis by the Federal Energy Regulatory Commission (the Secretary's delegate) in January 1982. Respondent cities, who had entered into power purchase contracts with the Government, paid the new increased rates and then filed suit in the Court of Claims to recover money paid pursuant to the interim rate increase between April 1979 and January 1982, contending that the Secretary violated § 5 of the Act and the terms of the power purchase contracts by putting the new rates into effect on an interim basis. The contracts in question provided that rates could be increased or modified and that such rates would become effective "on the effective date specified in the order of the Federal Power Commission [a predecessor of the Secretary with respect to § 5] containing such confirmation and approval." The Court of Claims ruled for respondents on the question of liability (the subsequently organized Claims Court later entered judgment in their favor), and the Court of Appeals for the Federal Circuit affirmed.

Held: Neither the Act nor the power purchase contracts at issue preclude the Secretary from making hydroelectric power rates effective upon interim confirmation and approval, even though further administrative review is still pending. Pp. 665–672.

(a) Although the above-quoted language of § 5 of the Act does not definitively speak to the question of interim rates, the relevant federal agencies' practice (at least since the mid-1970's) of allowing rates to become effective after interim confirmation and approval is as consistent with the statutory language as is respondents' preferred arrangement. While the legislative history of the Act does not resolve the ambiguity, the Secretary's interim rate-setting practice is a reasonable accommoda-

tion of the Act's conflicting policies of protecting consumers by ensuring that power be sold at the lowest possible rates consistent with sound business principles and of protecting the public fisc by ensuring that federal hydroelectric programs recover their own costs and do not require subsidies from the federal treasury. The Secretary's plan is not inconsistent with the congressional scheme, as respondents contend, on the ground that the plan's refund process if interim rates are ultimately found to be too high offers insufficient protection because refunds may not successfully trickle down to the same ultimate consumers who immediately bore the excessive charges. *FPC* v. *Tennessee Gas Transmission Co.*, 371 U. S. 145, distinguished. Pp. 666–671.

(b) Nor do interim rate increases violate the terms of respondents' power purchase contracts. The contracts contain no language unambiguously barring the imposition of interim rates. Moreover, respondents presented no evidence demonstrating that the parties intended the contractual language, which tracks that of the statute, to do anything other than incorporate the statute's procedural requirements. Pp. 671–672.

751 F. 2d 1255, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Andrew J. Pincus argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, David M. Cohen,* and *John W. Showalter.*

Charles F. Wheatley, Jr., argued the cause and filed a brief for respondents.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether the Secretary of Energy violated § 5 of the Flood Control Act of 1944, 16 U. S. C. § 825s, or his contractual obligations by putting rates for hydroelectric power generated at federally owned dams into effect on an interim basis pending further review by the Federal Energy Regulatory Commission. The Court of Claims held that the Secretary's actions exceeded his contractual and statutory authority, and granted summary

**Ralph J. Gillis* and *Robert D. Willis* filed a brief for Sam Rayburn Dam Electric Cooperative, Inc., as *amicus curiae* urging affirmance.

judgment to respondents. 230 Ct. Cl. 635, 680 F. 2d 115 (1982). After further proceedings, the Court of Appeals for the Federal Circuit affirmed, finding that the Court of Claims' decision was the law of the case and correct on the merits. 751 F. 2d 1255 (1985). We granted certiorari, 473 U. S. 903 (1985), and we now reverse.

I

A

In the Flood Control Act, Congress authorized the construction of a number of dam and reservoir projects, operated by the Army Corps of Engineers and producing large blocks of hydroelectric power. Congress had granted authority for several such projects before 1944, but had enacted no "general law governing the sale and distribution of power" so generated. S. Rep. No. 1030, 78th Cong., 2d Sess., 3 (1944). Intending "to place by law the responsibility for disposal of such power in an existing Federal agency," *ibid.*, Congress provided:

> "Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, *the rate schedules to become effective upon confirmation and approval by the Federal Power Commission.* Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. . . ." Ch. 665, § 5, 58 Stat. 887, 890

(emphasis added) (codified as amended at 16 U. S. C. § 825s).

In order to sell the hydroelectric power turned over to him under that statute, the Secretary of the Interior created what eventually became five regional Power Marketing Administrations (PMAs). The PMA Administrators were assigned the responsibility of preparing rate schedules and the supporting accounting and cost allocation studies. There were no formal procedures for public participation in PMA preparation of rate schedules, although some of the PMAs (not including the Southwestern Power Administration (SWPA), immediately concerned in this suit) began to adopt such procedures starting in late 1977. See 45 Fed. Reg. 86976 (1980).

When determining whether to approve a PMA's proposed rates, the Federal Power Commission utilized its "special expertise" and its "independent judgment" in measuring the proposal against the statutory standards. *Bonneville Power Administration*, 34 F. P. C. 1462, 1465 (1965).[1] Because the Flood Control Act imposed no particular procedures for Commission review of rate proposals, the Commission was largely free to design its own. See *Southeastern Power Administration*, 54 F. P. C. 1631, 1632, n. (1975). It developed a practice of affording notice and comment to customers and other affected parties when the Secretary submitted a rate schedule, and granting requests for oral argument or public hearing on a case-by-case basis.

The parties differ as to the degree to which Commission practice included the use of interim rates. The Solicitor General cites several instances in which the Commission did

[1] The cited proceeding arose under both the Flood Control Act and the Bonneville Project Act of 1937, 50 Stat. 731, codified as amended at 16 U. S. C. §§ 832–832*l*. The relevant provisions of the two statutes are essentially identical, however, and the Commission and Secretary have treated them interchangeably. See 34 F. P. C., at 1465–1470; *infra*, at 667.

implement such rates; respondents answer that those instances were both isolated and unrepresentative. Our own examination of the historical record reveals that beginning in the 1970's, the Commission announced its intention to examine PMA rate proposals "on the basis of evidentiary records which are developed during the course of [adjudicatory] public hearings," *Bonneville Power Administration*, 54 F. P. C. 808, 810 (1975). It provided for full administrative hearings with cross-examination of witnesses.[2] At the same time, the Commission adopted, in some cases, the practice of examining rates submitted to it by the Secretary and, if the rates appeared to lie within the statutory boundaries, approving them on an interim basis pending the formal hearing. It required that the PMA refund any overcharges with interest if the Commission found after a hearing that an approved interim rate had been too high. See *Southeastern Power Administration*, 54 F. P. C. 3 (1975); *Bonneville Power Administration*, 52 F. P. C. 1912 (1974); see also *Bonneville Power Administration*, 58 F. P. C. 2498 (1977) (Federal Columbia River Transmission System Act). The Department of the Interior initially took the view that full evidentiary hearings were inappropriate under the Flood Control Act, and that if such hearings were to be held the Commission had no power to approve rates on an interim basis. The Commission, however, explicitly rejected that position. *Southeastern Power Administration, supra*, at 1632–1633; see also *Bonneville Power Administration*, 59 F. P. C. 1194, 1195 (1977) (Federal Columbia River Transmission System Act). The Interior Department then acquiesced in the Commission's view. See *ibid.*

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[2] See *Southeastern Power Administration*, 54 F. P. C. 3 (1975), citing 18 CFR § 1.20 (1975) (superseded in 1978); *Bonneville Power Administration*, 52 F. P. C. 1912, 1912–1913 (1974). But see *Southwestern Power Administration*, 56 F. P. C. 795 (1976) (confirming new rate schedule without adjudicatory hearing, where SWPA had held on-the-record proceedings before proposing new rate).

B

This regulatory scheme was upset in 1977, with the passage of the Department of Energy Organization Act, 42 U. S. C. § 7101 *et seq.* (DOE Act). That statute, designed to "assur[e] coordinated and effective administration of Federal energy policy and programs," § 7112, eliminated the Secretary of the Interior's role in hydroelectric power rate regulation, and abolished the Federal Power Commission entirely. The Interior Secretary's rate-proposing function was transferred to the new Secretary of Energy, "acting by and through [the] Administrators" of the PMAs. § 7152(a)(2). The Federal Power Commission's rate approval function was transferred to the Secretary of Energy as well.[3]

The Secretary of Energy institutionalized an interim rate-approval process for hydroelectric rates. He delegated to the Assistant Secretary for Resource Applications "the authority to develop, acting by and through the [PMA] administrators, and to confirm, approve, and place in effect on an *interim* basis, power and transmission rates for the five power marketing administrations." 43 Fed. Reg. 60636 (1978) (emphasis added).[4] He simultaneously delegated to the new Federal Energy Regulatory Commission (FERC)

[3] 42 U. S. C. § 7151(b) (transferring to the Secretary of Energy all FPC functions not explicitly transferred in Subchapter IV of the Act to the new Federal Energy Regulatory Commission). The Court of Claims' suggestion that FERC, rather than the Secretary, inherited the FPC's rate approval function has been abandoned by respondents, see *infra*, at 665, and is unsupported by the statutory language. See *United States* v. *Tex-La Electric Cooperative, Inc.*, 693 F. 2d 392, 395 (CA5 1982).

[4] The Assistant Secretary of Resource Applications' interim rate approval and implementation responsibilities were later transferred to the Assistant Secretary for Conservation and Renewable Energy. See 47 Fed. Reg. 4562, and n. 1 (1982). We shall refer to both of those officers as the "Assistant Secretary" throughout this opinion.

After FERC's final approval of the rates at issue in this case, the Secretary further modified the delegation order in certain respects. 48 Fed. Reg. 55664 (1983). The propriety of the administrative plan as modified in 1983, however, is not now before us.

"the authority to confirm and approve on a final basis, or to disapprove, rates developed by the Assistant Secretary." *Ibid.* Under the new regulatory scheme, the PMAs give extensive public notice of proposed rates. 10 CFR § 903.13 (1985). They provide all interested persons the opportunity to consult with and obtain information from the PMAs, to examine backup data, and to comment on the proposed rates. § 903.14. In most cases, the PMAs hold one or more "public information forums" and "public comment forums" regarding the rate proposal. §§ 903.15, 903.16. Following this consultation and comment period, the PMA Administrator must develop rates which, in the Assistant Secretary's judgment, should be confirmed, approved, and placed into effect on an interim basis. The Assistant Secretary must prepare a statement explaining the principal factors on which his decision to confirm and approve the rates was based. § 903.21.

The Assistant Secretary, after his interim confirmation and approval, submits the proposed rates to FERC for final confirmation and approval. FERC views its role in this process as "in the nature of an appellate body," 45 Fed. Reg. 79545, 79547 (1980); its function is to determine from the record before it whether "due process requirements have been met and [whether] the Administrator's program of rate schedules and the decision of the [Assistant Secretary] are rational and consistent with the statutory standards." *Ibid.* In exercising that appellate function, FERC relies on the record before it, remanding for supplementation if necessary. If it disapproves the interim rates confirmed and approved by the Assistant Secretary, the Assistant Secretary has the responsibility to submit acceptable substitute rates. Overcharges attributable to excessive interim rates must be refunded with interest to affected customers. 10 CFR § 903.22 (1985).

II

The dispute in this case involves the price charged for the sale of hydroelectric power by the Southwestern Power Ad-

ministration (SWPA) to respondent cities of Lamar, Fulton, and Thayer, Missouri. Respondents and the United States first signed power purchase contracts in 1952, 1956, and 1963 respectively; the Lamar and Fulton contracts were renewed in early 1977. The language of the 1977 contract is typical:

> "It is understood and agreed that the rates and/or terms and conditions set forth in the said Rate Schedule 'F-1,' with the confirmation and approval of the Federal Power Commission, may be increased, decreased, modified, superseded, or supplemented, at any time, and from time to time, and that if so increased, decreased, modified, superseded, or supplemented, the new rates and/or terms and conditions shall thereupon become effective and applicable to the purchase and sale of Firm Power and Firm Energy under this Contract in accordance with and on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval." 230 Ct. Cl., at 638, 680 F. 2d, at 117 (emphasis by Court of Claims deleted).

Provisions for rate increases under the contracts at issue in this case went unused for a long time. SWPA did not increase its basic rate between 1957 and 1977. 44 Fed. Reg. 13068, 13069 (1979). Unfortunately, SWPA's costs did not also remain constant. As a result, FERC found by 1979 that SWPA's annual revenues fell about $20 million short of covering costs and repaying investment. *Ibid.*

After considerable congressional and Commission prodding, see H. R. Rep. No. 95-1247, p. 59 (1978); S. Rep. No. 95-1067, p. 53 (1978); *Southwestern Power Administration*, 58 F. P. C. 2170 (1977); see also Energy and Water Development Appropriations for 1980: Hearings before the Subcommittee on Energy and Water Development of the House Committee on Appropriations, 96th Cong., 1st Sess., 2995-2998 (1979), SWPA in April 1978 finally issued notice of a proposed 42% rate increase. 43 Fed. Reg. 16545 (1978). After the close of the public participation period, SWPA

developed new studies scaling down its estimate of necessary revenues, and developed new proposed rate schedules increasing basic rates only 33%. On March 1, 1979, the Assistant Secretary confirmed and approved the rates and placed them into effect on an interim basis, effective April 1, 1979. 44 Fed. Reg., at 13073.

In June 1981, FERC disapproved the rates as insufficiently supported, finding them likely to be too *low*. 46 Fed. Reg. 30877 (1981). On reconsideration in January 1982, however, FERC concluded that the rates, while "on the low side," were nonetheless reasonable; it confirmed and approved the rates through September 30, 1982. 47 Fed. Reg. 4562, 4563 (1982).

Respondents paid the increased rates assessed by SWPA. They then filed suit, seeking to recover money paid pursuant to the interim rate increase between April 1979 and January 1982. The Court of Claims ruled for respondents on the question of liability, 230 Ct. Cl. 635, 680 F. 2d 115 (1982), the Claims Court entered a $954,816 judgment in their favor, App. to Pet. for Cert. 19a–21a, and the Court of Appeals for the Federal Circuit affirmed, 751 F. 2d 1255 (1985).

III

Respondents contend that interim approval of rate increases by the Assistant Secretary violates the Flood Control Act and their power purchase contracts. They predicate their argument on the statutory direction that rate increases shall "become effective upon confirmation and approval by the Federal Power Commission," and on the similar contractual language quoted *supra*, at 659. That language, according to respondents, by its terms precludes interim rate increases.

It is important to note what questions are *not* before this Court. Respondents do not contest that the DOE Act transferred the FPC's rate-approval function to the Secretary of Energy. See Brief for Respondents 39. They agree that

the Secretary could properly confirm and approve the rates on a final basis, without any further procedures or FERC involvement, *id.*, at 43–45, and that he could "delegate and divide that function amongst subordinate officials and agencies," *id.*, at 44. Further, respondents concede that the contractual language must be read, to some extent, in the light of the DOE Act: they do not argue that the contractual language, providing for rate increases "with the confirmation and approval of the Federal Power Commission," precludes any rate increase now that that body no longer exists. Rather, respondents' sole claim is that the statute and the contracts preclude the Secretary from making hydroelectric power rates effective before rendering a *final* determination that those rates satisfy all statutory requirements. A rate increase, they argue, can become effective only after the entire administrative review process has been completed.

A

We turn first to respondents' statutory contention. Section 5 of the Flood Control Act, on its face, says little about the appropriate method of rate implementation under that Act. The relevant federal agencies, however, at least since the mid-1970's, have interpreted the statute to allow interim rate increases. See *supra*, at 661–663. We must uphold that interpretation if the statute yields up no definitive contrary legislative command and if the agencies' approach is a reasonable one. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984).

The statutory language, providing only that "the rate schedules [shall] become effective upon confirmation and approval by the [Secretary]," does not definitively speak to the question of interim rates. Respondents argue that the requirement that rate schedules become effective "upon" confirmation and approval precludes the Secretary from making rates effective before all confirmation and approval are completed. The Court of Claims agreed. We can find, how-

ever, no such unambiguous meaning in the wording of the statute. The agency's practice of allowing rates to become effective after *interim* "confirmation and approval," even though the rates are subject to further examination, is as consistent with the bare statutory language as is respondents' preferred arrangement.

Nor does the legislative history of the Flood Control Act resolve the ambiguity. Respondents draw on that legislative history in arguing that the drafters of § 5 of the Flood Control Act (like the drafters of § 6 of the Bonneville Project Act of 1937, on which § 5 of the Flood Control Act was based) intended to "protec[t] the power consumers." 90 Cong. Rec. 9283 (1944) (statement of Rep. Rankin). Respondents point out that during the pendency of an interim rate increase, power consumers pay more than they would have paid otherwise, and perhaps more than they should pay. Yet as we shall discuss more extensively below, the goal of protecting power customers is not the only policy embodied in the Flood Control Act. The existence of that policy, without more, hardly supplies an unambiguous legislative command barring any imposition of interim rates. Respondents rely on a statement by Secretary Ickes that the Federal Power Commission would have final yes-or-no authority over rates under the Bonneville Project Act, Columbia River (Bonneville Dam), Oregon and Washington: Hearings on H. R. 7642 before the House Committee on Rivers and Harbors, 75th Cong., 1st Sess., 150 (1937), but that statement is not particularly helpful in determining Congress' intent regarding interim rates.

In the absence of a clear legislative command, we must consider whether the Secretary's choice "'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.'" *Chevron*, *supra*, at 845, quoting *United States* v. *Shimer*, 367 U. S. 374, 383 (1961). The Secretary has a dual obligation under the Flood Control Act. He is required to protect consumers

by ensuring that power is sold "at the lowest possible rates . . . consistent with sound business principles." See *United States* v. *Tex-La Electric Cooperative, Inc.*, 693 F. 2d 392, 399–400 (CA5 1982). He is also, however, required by the plain language of the statute to protect the public fisc by ensuring that federal hydroelectric programs recover their own costs and do not require subsidies from the federal treasury. See H. R. Conf. Rep. No. 2051, 78th Cong., 2d Sess., 7 (1944); see also S. Rep. No. 2280, 74th Cong., 2d Sess., 2 (1936) (Bonneville Project Act); H. R. Rep. No. 2955, 74th Cong., 2d Sess., 2 (1936) (same).

Interim rate setting appears well suited to accommodating that dual goal. That process protects consumers by subjecting proposed rates to initial review before they are made effective, and by allowing for refunds if the rates are ultimately disapproved. It protects the Government by allowing it to collect rate increases that are necessary for recovery of its costs, without having to wait for time-consuming final review. It helps eliminate the possibility that delay in implementation of rate increases, particularly in a period of high inflation, will cause the Government constantly to be playing catch-up in its attempt to secure an appropriate rate.

Respondents argue that the Secretary's plan is inconsistent with the congressional scheme because it allows the implementation of rates that may not meet the statutory standards, and that may ultimately be found to be too high. Congress, respondents argue, intended to eliminate just such a possibility when it interposed the requirement of FPC "confirmation and approval" in the rate-setting process. The refund process, they contend, offers insufficient protection because while excessive charges are immediately passed on to the ultimate consumers, refunds of those charges may not successfully trickle down to those same consumers. Yet rate-setting agencies charged with protecting the public commonly have the power to allow rates to go into effect

prior to the completion of administrative review. See, *e. g.*, Natural Gas Act, § 4(e), 15 U. S. C. § 717c(e); Federal Power Act, § 205(e), 16 U. S. C. § 824d(e); Federal Communications Act, § 204, 47 U. S. C. § 204; Interstate Commerce Act, § 15(7), 49 U. S. C. § 10708. See generally W. Jones, Cases and Materials on Regulated Industries 122–126 (2d ed. 1976). Congress plainly has not found that practice necessarily incompatible with the goal of consumer protection.

Respondents rely on *FPC* v. *Tennessee Gas Transmission Co.*, 371 U. S. 145 (1962), for the proposition that refunds are an inadequate remedy for excessive rates. In *Tennessee Gas*, the Commission was faced with a statutory scheme under which a private utility could put a rate increase into effect, after an initial suspension period, without any governmental review of the legality of the increase. The utility argued that once an increased rate went into effect, it should be allowed to collect that rate until the completion of all Commission proceedings on the legality of the rate, since any illegal charges ultimately would be subject to refund. We rejected that position, holding that the Commission did not have to rely solely on its refund procedure to protect consumers and could instead order an interim reduction of the increased rate.

Tennessee Gas does not support respondents' argument. Where the Government seeks to implement an increase under the Flood Control Act, there is no danger of unreviewed illegal rates, as in *Tennessee Gas*. The rate when implemented has already been the subject of extensive public participation and review by the Assistant Secretary. The Secretary does not rely solely on the refund procedure to protect consumers, and thus the concerns that led the *Tennessee Gas* Court to find that process inadequate are not present. Instead, *Tennessee Gas* illustrates the authority this Court repeatedly has given regulatory agencies to do precisely what respondents claim they should not be able to do—

to issue interim rate orders prior to final determinations whether proposed rates meet statutory requirements.

Respondents argue that the Secretary should be barred from setting interim rates absent explicit congressional authorization. The Secretary, they contend, cannot create a complex regulatory structure out of thin air. The provisions of the Flood Control Act, however, are general, and are in all respects less complex than the analogous provisions of the Federal Power Act governing regulation of private utility charges. Congress, in declining to set out a detailed mandatory procedural scheme, apparently intended to leave the agency substantial discretion as to how to structure its review. There is no support in the legislative history for the proposition that Congress intended to bar the Secretary from taking all steps regarding power rate regulation not explicitly set out in the general terms of § 5 of the Flood Control Act, and Congress may reasonably have intended to allow more administrative discretion with regard to this federal proprietary activity than with regard to control of private rates. Limiting the agency as respondents suggest would thus disserve Congress' goal of establishing "a convenient and practical method of disposing of power at [federal hydroelectric] projects." S. Rep. No. 1030, 78th Cong., 2d Sess., 3 (1944).

Indeed, this Court has in other contexts allowed agencies to set interim rates even though their governing statutes did not explicitly so provide. In the *Trans Alaska Pipeline Rate Cases*, 436 U. S. 631 (1978), we held that it was "an intelligent and practical exercise of [the agency's rate] suspension power," *id.*, at 653, for the Interstate Commerce Commission to set out, without a hearing, interim rates that it would allow to go into effect. We further held that the Commission had authority to condition such an action on the carriers' promise to refund charges ultimately found to be too high. That refund scheme, although nowhere explicitly approved in the statute, was a "'legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power

to suspend rates pending investigation.'" *Id.*, at 655, quoting *United States* v. *Chesapeake & Ohio R. Co.*, 426 U. S. 500, 514 (1976). The *Trans Alaska Pipeline Rate Cases* were decided under a quite different statutory scheme from the one at issue today, and analogies between the two statutory schemes are loose at best. We see no reason, however, why we should take a narrower approach to the Secretary's powers under the Flood Control Act than we took to the ICC's under its enabling statute.[5]

We therefore hold that the procedures established by the Secretary to exercise his powers under the Flood Control Act both are within his delegated authority and constitute a reasonable accommodation of the policies underlying that Act. At bottom, respondents seek to strike down the Secretary's scheme on the ground that it gives power customers *too much* process. They concede that there could be no objection to a scheme under which rate review was simply cut off after the Assistant Secretary's examination, but contend that the administrative plan must be invalidated because the Secretary has allowed still another layer of review. We would not be disposed to accept such a claim absent particularly compelling argument in its favor. Respondents have not supplied such argument here.

B

Respondents also argue that interim rate increases violate the terms of their power purchase contracts. Respondents make no claim that the contracts must be read literally, to bar any rate increase absent approval by a nonexistent Federal Power Commission. They nonetheless argue that the

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[5] Respondents finally point to § 501(a)(1) of the DOE Act, 42 U. S. C. § 7191(a)(1), which provides that that Act was not intended to abrogate "administrative procedure requirements" imposed by other statutes, including the Flood Control Act. Because we find in the Flood Control Act no "administrative procedure requirement" barring interim rates, this provision adds nothing to respondents' case.

contractual language unambiguously bars the imposition of interim rates. We can detect no such absolute bar.

Respondents have presented no evidence demonstrating that the parties intended the contractual language, which tracks that of the statute, to do anything other than incorporate the statute's procedural requirements. The Court of Claims based its acceptance of respondents' position on its desire to construe the contracts "in harmony with" its interpretation of the statutory language, which, it noted, "is incorporated into the contract terms"; on its conclusion that there was no significant administrative practice of interim rate increases; and on its conclusion that the plain meaning of the contractual language unambiguously bars such rate increases. 230 Ct. Cl., at 641–645, 680 F. 2d, at 119–121. The first premise is no longer helpful to respondents, since we have determined that the statute allows the imposition of interim rate increases. We have also rejected the second premise, see *supra*, at 661–663. We now reject the third. The contractual provision that rate increases will become effective "on the effective date specified in the order of the Federal Power Commission containing such confirmation and approval" is, by its terms, no more of a bar to rate increases becoming effective upon *interim* "confirmation and approval" than is the parallel statutory language. If the Government had meant by that contractual language to bind itself with restrictions going beyond those contained in the statute, we believe that such restrictions would have been set out more explicitly.

IV

We conclude that nothing in the Flood Control Act or the power purchase contracts at issue in this case precludes the Secretary from making hydroelectric power rates effective upon interim confirmation and approval, even though further review is still pending. The judgment of the Court of Appeals for the Federal Circuit, accordingly, is reversed.

It is so ordered.

DELAWARE v. VAN ARSDALL

CERTIORARI TO THE SUPREME COURT OF DELAWARE

No. 84-1279. Argued January 22, 1986—Decided April 7, 1986

During respondent's murder trial, the Delaware trial court refused to allow defense counsel to cross-examine a prosecution witness about an agreement that he had made to speak with the prosecutor about the murder in question in exchange for the dismissal of an unrelated criminal charge against him. Respondent was convicted. The Delaware Supreme Court reversed on the ground that the trial court, by improperly restricting defense counsel's cross-examination designed to show bias on the prosecution witness' part, violated respondent's rights under the Confrontation Clause of the Sixth Amendment, and refused to consider whether such ruling was harmless beyond a reasonable doubt.

Held: While the trial court's denial of respondent's opportunity to impeach the prosecution witness for bias violated respondent's rights under the Confrontation Clause, such ruling is subject to harmless-error analysis under *Chapman* v. *California*, 386 U. S. 18. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a number of factors, including the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of corroborating or contradictory testimony on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. Pp. 681-684.

486 A. 2d 1, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 684. MARSHALL, J., *post*, p. 686, and STEVENS, J., *post*, p. 689, filed dissenting opinions.

Richard E. Fairbanks, Jr., argued the cause for petitioner. With him on the briefs were *Charles M. Oberly III*, Attorney General of Delaware, and *Gary A. Myers* and *Loren C. Meyers*, Deputy Attorneys General.

Paul J. Larkin, Jr., argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief

were *Acting Solicitor General Fried, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *Vincent L. Gambale.*

John Williams argued the cause for respondent. With him on the brief was *William N. Nicholas.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Robert Van Arsdall was convicted of murder in a Delaware trial court. The Supreme Court of Delaware reversed his conviction on the ground that the trial court, by improperly restricting defense counsel's cross-examination designed to show bias on the part of a prosecution witness, had violated respondent's confrontation rights under the Sixth and Fourteenth Amendments to the United States Constitution, and that such violation required automatic reversal. 486 A. 2d 1 (1984). While we agree that the trial court's ruling was contrary to the mandate of the Confrontation Clause of the Sixth Amendment, we conclude that the Supreme Court of Delaware was wrong when it declined to consider whether that ruling was harmless in the context of the trial as a whole.

Shortly after midnight on January 1, 1982, Doris Epps was stabbed to death in an apartment in Smyrna, Delaware, after an all-day New Year's Eve party. Respondent and Daniel Pregent, who by respondent's testimony were the only two people in the apartment with Epps at the time she was killed, were arrested at the scene of the crime and charged with Epps' murder. At separate trials, respondent was convicted and Pregent was acquitted.

The State's case against respondent was based on circumstantial evidence, and proceeded on the theory that respondent had either killed Epps or assisted Pregent in doing so. Several of the partygoers testified about the party and the scene after the killing. The party, which lasted from late in the morning of December 31, 1981, until shortly before midnight, was held in the adjacent apartments of Pregent and

Robert Fleetwood. Respondent, who was one of at least a dozen guests who attended the party during the course of the day, had stopped in for two brief periods in the late afternoon and early evening and then returned for a third time at about 11:30 p. m. By that time the party was over. Pregent had quarreled with a female guest, kicked a hole in a hallway wall and had to be restrained. An intoxicated Epps had been placed on a sofa bed in Pregent's apartment after passing out. And shortly before 11 p. m., a second altercation of some kind occurred, prompting Fleetwood to close the party in his apartment to everyone except his two friends, Alice Meinier and Mark Mood. When respondent returned to Pregent's apartment at about 11:30, only Pregent and Epps were present.

Robert Fleetwood was the 10th of 16 prosecution witnesses. In addition to recounting uncontroverted facts about the party, he testified that sometime between 11 and 11:30 p. m. he walked across the hall, looked into Pregent's living room from the doorway, and saw respondent sitting on the edge of the sofa bed next to Pregent's feet. Fleetwood, who did not have a complete view of the bed, did not see Epps or anyone else in the apartment. Upon returning to his own apartment, Fleetwood stayed awake long enough to hear nearby bells ring in the New Year, at which point he passed out. App. 82–85.

Meinier, who with Mood had remained awake in Fleetwood's apartment, testified that at roughly 1 a. m. respondent knocked at Fleetwood's door. Respondent's shirt and hands were spattered with blood, and he was holding a long, blood-covered knife. According to Meinier, respondent stated that "he had gotten in a fight" but that he "got them back." *Id.*, at 130. After turning the knife over to Mood and washing his hands, respondent said "I think there's something wrong across the hall." *Id.*, at 132. Meinier went to Pregent's apartment and discovered Epps' body lying in a pool of blood on the kitchen floor. Mood then summoned the police, who found respondent in Fleetwood's

apartment and Pregent asleep on the blood-splattered sofa bed in his living room.

In addition to the testimony of the partygoers and the arresting officers, the State introduced Pregent's postarrest statement, respondent's two postarrest statements, and the testimony of a forensic expert. Among other things, the expert testified about the nature and source of the bloodstains on respondent's clothing.

During Fleetwood's cross-examination, defense counsel sought to impeach Fleetwood by questioning him about the dismissal of a criminal charge against him—being drunk on a highway—after he had agreed to speak with the prosecutor about Epps' murder. When the prosecutor objected, the trial court allowed counsel to question Fleetwood on the matter outside the presence of the jury. Fleetwood acknowledged that the drunkenness charge had been dropped in exchange for his promise to speak with the prosecutor about the murder, but he denied that the agreement had affected his testimony.[1] The trial court barred any cross-examination about that agreement, citing Delaware Rule of Evidence 403.[2] The court also refused to permit defense counsel to cross-examine Fleetwood about his being questioned by the police in connection with an unrelated homicide that had occurred after Epps' murder. On *voir dire* conducted outside the presence of the jury, Fleetwood denied that he had been

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[1] When asked about his understanding of why the charge was dropped, respondent stated:

"Well, I did understand that I did feel that you wanted to make sure that I knew what I was talking about and I do feel that you wanted to make sure I had my story together before coming in here. So that is why I did feel that it was dropped." App. 106.

[2] Delaware Rule of Evidence 403, which is virtually identical to Federal Rule of Evidence 403, provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

offered any favors, inducements, promises, or deals concerning that homicide investigation in exchange for his testimony at respondent's trial.

Respondent was the only defense witness. Consistent with his second statement to the police, he attributed Epps' murder to Pregent. Consistent with Fleetwood's testimony, he stated that he had returned to Pregent's apartment, after drinking with friends, by about 11:30 p. m.

Defense counsel admitted in their opening and closing arguments to the jury that respondent was in Pregent's apartment when Epps was killed. In closing argument, after attempting to discredit Fleetwood's testimony (largely by emphasizing his intoxication), counsel stressed that all that testimony proved was what respondent "never denied," that "he was at Danny Pregent's apartment before Doris Epps was murdered." App. 188–189. The jury found respondent guilty of first-degree murder and possession of a deadly weapon during the commission of a felony.

On appeal, the Delaware Supreme Court reversed respondent's conviction on the authority of the Confrontation Clause. Noting that "the bias of a witness is subject to exploration at trial and is 'always relevant as discrediting the witness and affecting the weight of his testimony,'" 486 A. 2d, at 6 (quoting *Davis* v. *Alaska*, 415 U. S. 308, 316 (1974)), the court found that the trial judge's ruling denied respondent his constitutional right to effective cross-examination. By barring *any* cross-examination of Fleetwood about the dismissal of the public drunkenness charge, the ruling kept from the jury facts concerning bias that were central to assessing Fleetwood's reliability. The court rejected the State's argument that since "Fleetwood's basic testimony was cumulative in nature and unimportant," the Confrontation Clause error was harmless beyond a reasonable doubt. 486 A. 2d, at 7. The court held that "a blanket prohibition against exploring potential bias through cross-examination"

is "a per se error," so that "the actual prejudicial impact of such an error is not examined." *Ibid.*[3]

We granted certiorari, 473 U. S. 923 (1985), and now vacate and remand.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings, *Pointer* v. *Texas*, 380 U. S. 400 (1965), "means more than being allowed to confront the witness physically." *Davis* v. *Alaska*, 415 U. S., at 315. Indeed, "'[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*'" *Id.*, at 315–316 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)) (emphasis in original). Of particular relevance here, "[w]e have recognized that the exposure of a witness' motivation in testifying is

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[3] Respondent asserts that this Court is without jurisdiction to hear this case because the Delaware Supreme Court's automatic reversal rule rests on an adequate and independent state ground. He argues that the rule was adopted not on the basis of federal constitutional law but as a prophylactic device, announced under that court's "superintending" authority, to "send an unequivocal message" to state trial judges about the importance of permitting liberal cross-examination. Brief for Respondent 41. We disagree.

"[W]e will not assume that a state-court decision rests on adequate and independent state grounds when the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'" *Caldwell* v. *Mississippi*, 472 U. S. 320, 327 (1985) (quoting *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983)). The opinion of the Delaware Supreme Court, which makes use of both federal and state cases in its analysis, lacks the requisite "plain statement" that it rests on state grounds. *Michigan* v. *Long*, *supra*, at 1042, 1044. Indeed, the opinion makes no reference to any "superintending" authority, and nowhere suggests the existence of a state prophylactic rule designed to insure protection for a federal constitutional right. We read the decision below as resting on federal law.

a proper and important function of the constitutionally protected right of cross-examination." *Davis, supra*, at 316–317 (citing *Greene* v. *McElroy*, 360 U. S. 474, 496 (1959)). It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Fensterer*, 474 U. S. 15, 20 (1985) *(per curiam)* (emphasis in original).

In this case, however, the trial court prohibited *all* inquiry into the possibility that Fleetwood would be biased as a result of the State's dismissal of his pending public drunkenness charge. By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause.[4]

The State somewhat tentatively suggests that a defendant should have to show "outcome determinative" prejudice in order to state a violation of the Confrontation Clause: Unless the particular limitation on cross-examination created a reasonable possibility that the jury returned an inaccurate guilty

[4] The Delaware Supreme Court did not decide whether the trial court erred in preventing respondent from cross-examining Fleetwood about the unrelated homicide investigation. 486 A. 2d 1, 7, n. 3 (1984). We likewise decline to consider that question.

verdict, that limitation would not violate the Confrontation Clause. We disagree. While some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole, see, *e. g.*, *Strickland* v. *Washington*, 466 U. S. 668 (1984) (ineffective assistance of counsel), the focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial. It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to "confront[ation]" because use of that right would not have affected the jury's verdict. We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Davis* v. *Alaska*, *supra*, at 318. Respondent has met that burden here: A reasonable jury might have received a significantly different impression of Fleetwood's credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination.

After concluding that the trial judge's ruling was constitutional error, the Delaware Supreme Court rebuffed the State's effort to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *Chapman* v. *California*, 386 U. S. 18, 24 (1967). In so doing, it offered no explanation why the *Chapman* harmless-error standard, which we have applied in other Confrontation Clause cases, *e. g.*, *Harrington* v. *California*, 395 U. S. 250 (1969); *Schneble* v. *Florida*, 405 U. S. 427 (1972), is inapplicable here. We find respondent's efforts to defend the automatic reversal rule unconvincing.

As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one. *E. g., United States* v. *Hasting*, 461 U. S. 499, 508–509 (1983); *Bruton* v. *United States*, 391 U. S. 123, 135 (1968). In *Chapman*, this Court rejected the argument that all federal constitutional errors, regardless of their nature or the circumstances of the case, require reversal of a judgment of conviction. The Court reasoned that in the context of a particular case, certain constitutional errors, no less than other errors, may have been "harmless" in terms of their effect on the factfinding process at trial. Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. *E. g., United States* v. *Hasting*, *supra* (improper comment on defendant's silence at trial); *Moore* v. *Illinois*, 434 U. S. 220, 232 (1977) (admission of identification obtained in violation of right to counsel); *Harrington* v. *California*, *supra* (admission of nontestifying codefendant's statement). The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, *United States* v. *Nobles*, 422 U. S. 225, 230 (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, The Riddle of Harmless Error 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it").

At the same time, we have observed that some constitutional errors—such as denying a defendant the assistance of counsel at trial, or compelling him to stand trial before a trier of fact with a financial stake in the outcome—are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case.

Chapman, *supra*, at 23, n. 8 (citing, *inter alia*, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Tumey* v. *Ohio*, 273 U. S. 510 (1927)). The error at issue here is obviously quite different, however, as this Court's post-*Chapman* decisions demonstrate. In *Harrington* v. *California*, for example, we expressly rejected the claim that the admission into evidence of a statement made by a nontestifying codefendant, in violation of *Bruton* v. *United States*, *supra*, can never be harmless.[5] *Harrington*, which we have expressly reaffirmed on more than one occasion, see, *e. g.*, *Schneble* v. *Florida*, *supra*; *Brown* v. *United States*, 411 U. S. 223 (1973), demonstrates that the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case.

Respondent seeks to blunt the force of *Harrington* in essentially two ways. First, he suggests that this Court's decision in *Davis* v. *Alaska* forecloses application of harmless-error analysis to the particular sort of Confrontation Clause violation involved here, citing the following language near the end of the Court's opinion:

> "[Davis] was thus denied the right of effective cross-examination which '"would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart* v. *Janis*, 384 U. S.

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[5] *Bruton* had held that the receipt at a joint trial of the incriminating statement of a nontestifying codefendent deprived Bruton of his right to cross-examine an adverse witness. In *Harrington*, the trial court admitted the pretrial statements of two codefendants who did not testify. The statements implicated Harrington by placing him at the scene of the robbery, and their admission plainly violated *Bruton*. This Court nevertheless affirmed Harrington's conviction, over his objection that *Bruton* error could never be harmless. Noting that the wrongfully admitted evidence was cumulative and that the untainted proof of the defendant's guilt was overwhelming, the Court concluded that the error was harmless beyond a reasonable doubt. 395 U. S., at 254.

> 1, 3.'" 415 U. S., at 318 (quoting *Smith* v. *Illinois*, 390 U. S. 129, 131 (1968)).

Read properly, however, *Davis* does not support an automatic reversal rule, and the above-quoted language merely reflects the view that on the facts of that case the trial court's error had done "serious damage" to the petitioner's defense.

Davis was charged with stealing a safe from a bar. The police found the stolen safe abandoned near the home of Richard Green, who testified at trial that he had seen Davis engaged in suspicious activity near this site on the day of the crime. Defense counsel was barred from eliciting on cross-examination that Green was on juvenile probation for burglary both at the time of his pretrial identification of Davis and at the time of trial. The defense sought to suggest that Green may have slanted his account in the State's favor either to shift suspicion away from himself or to avoid revocation of probation for failing to "cooperate." 415 U. S., at 310–311. This Court reversed Davis' conviction, emphasizing that Green's tesimony was "crucial" and that there was a "real possibility" that pursuit of the excluded line of impeachment evidence would have done "[s]erious damage to the strength of the State's case." *Id.*, at 319. So despite the absence of a reference to *Chapman*, *Davis* plainly rests on the conclusion that on the facts of that case, the error might well have contributed to the guilty verdict. *Davis* should not be read as establishing, without analysis, a categorical exception to the harmless-error rule.

Respondent's second argument in support of a *per se* reversal rule is that the Confrontation Clause error in this case, which like *Davis* involved the *exclusion* of evidence, is analytically distinct from that in *Harrington* v. *California*, which involved the erroneous *admission* of harmless testimony. Because it is impossible to know how wrongfully excluded evidence would have affected the jury, the argument runs, reversal is mandated. But *Harrington* cannot be so easily dispatched. Respondent, like Harrington, was denied

an opportunity to cast doubt on the testimony of an adverse witness.[6] In both cases the prosecution was thus able to introduce evidence that was not subject to constitutionally adequate cross-examination. And in both cases the reviewing court should be able to decide whether the not-fully-impeached evidence might have affected the reliability of the factfinding process at trial.

Accordingly, we hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. Cf. *Harrington*, 395 U. S., at 254; *Schneble* v. *Florida*, 405 U. S., at 432.

We believe that the determination whether the Confrontation Clause error in this case was harmless beyond a reasonable doubt is best left to the Delaware Supreme Court in the first instance. Accordingly, that court's judgment is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring in the judgment.

The Sixth Amendment confers on defendants in criminal cases the right "to be confronted with the witnesses against"

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[6] Respondent does not contend that he was denied the opportunity to elicit exculpatory evidence from Fleetwood.

them. The Court has interpreted these words as meaning more than being allowed to confront the witnesses physically, more than the right to be tried by live testimony rather than affidavits. It includes the opportunity for effective cross-examination of the State's witnesses. I do not here dispute these interpretations of the constitutional language; but they neither require nor advise the Court to hold, as it does today, that the Amendment is violated whenever a trial judge limits cross-examination of a particular witness and the jury might have received a significantly different impression of the witness' credibility had cross-examination not been curtailed, even if the limitation and its consequences could not possibly have had any effect on the outcome of the trial.

It makes much more sense to hold that no violation of the Confrontation Clause has occurred unless there is some likelihood that the outcome of the trial was affected. I agree that the Delaware Court erred and that we should remand for consideration of prejudice, but I would not now hold that a constitutional violation occurred. If it is ultimately held that the outcome would have been the same whether or not cross-examination had been limited, no Sixth Amendment violation occurred in this case.

I would thus treat this claim of a Sixth Amendment violation just as the majority would treat limitations on cross-examination that would fall within the trial judge's "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Ante*, at 679. These "reasonable" limitations are not violations at all, obviously because they can have no impact on the fairness of the trial. Yet the curtailment of cross-examination imposed in this case is said to be unreasonable and an infraction of the Amendment even though it may be held beyond reasonable doubt that it had no impact whatsoever on the result the jury reached.

No judge welcomes or can ignore being told that he committed a constitutional violation, even if the conviction is saved by a harmless-error finding. Being advised by the Court that there is an area of cross-examination curtailment that is not only harmless but not a constitutional violation but at the same time an area of curtailment that even though harmless is an infraction of our fundamental charter, the judge will surely tend to permit the examination rather than risk being guilty of misunderstanding the constitutional requirements of a fair trial. I would not so undermine the authority of the judge to restrict cross-examination in a manner having no appreciable impact on the reliability of the outcome, particularly since the language and purpose of the specific provision at issue do not otherwise dictate.

Even if it is ultimately held in this case that the error was harmless, as the Court is quite willing to assume will be the case, the judge has been declared derelict and commanded not again to restrict cross-examination in this manner even though he is convinced, and rightly so, that it has no significance whatsoever in terms of the outcome of the trial. With all due respect, I cannot join the Court's opinion.

JUSTICE MARSHALL, dissenting.

The Court today properly holds that a complete denial of cross-examination designed to explore the bias of a prosecution witness violates the Confrontation Clause, whether or not the denial influenced the outcome of the trial and whether or not the witness was important to the prosecution's case. Nevertheless, the Court remands in order to permit the state court to apply harmless-error analysis to that violation. I must respectfully dissent from the latter part of the Court's holding. I believe that the importance of cross-examination to a criminal trial is so great that a complete denial of otherwise proper cross-examination concerning the potential bias of a prosecution witness should lead to no less than a reversal of the conviction.

In holding the Confrontation Clause applicable to the States, this Court referred to the right of cross-examination as "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U. S. 400, 405 (1965). If indeed the harmless-error doctrine focuses on the fairness and accuracy of a criminal trial, see *ante*, at 681, it is odd that the majority so easily applies it to a type of error that calls both fairness and accuracy into question to an almost unique degree.

The centrality of cross-examination to the factfinding process makes it particularly unlikely that an appellate court can determine that a denial of cross-examination had no effect on the outcome of a trial.

> "[T]he court ordinarily cannot measure whether harm has ensued to an appellant when he has been denied the opportunity to cross-examine witnesses against him, given all the risks. Had cross-examination been allowed, for example, it might have served to impeach a witness and thus to cast doubt on corroborating testimony, or it might have elicited exculpatory evidence. Only on rare occasions will an appellate court be able to find that the testimony of the witness was so tangential, or so well corroborated, or so clearly invulnerable to attack that the denial of the right to cross-examination was harmless." R. Traynor, The Riddle of Harmless Error 68–69 (1970).

The fact that a particular witness' testimony was corroborated cannot render harmless a denial of the right to expose his bias. Defense counsel may have valid strategic reasons for challenging one witness' testimony aggressively while treating a corroborating witness more gently. Jurors evaluating the witnesses' demeanor may choose to give great weight to the testimony of one witness while ignoring the similar testimony of another. In either event, denial of cross-examination concerning a witness' bias may deprive the defense of its best opportunity to expose genuine flaws in the

prosecution's case—flaws that the cold record will not reveal to an appellate court.

Indeed, an appellate court attempting to apply harmless-error analysis is faced with a formidable burden. The court cannot merely satisfy itself that the jury would have reached the same result had the witness in question not appeared at all; it must be convinced beyond a reasonable doubt that the jury would have reached the same result even if cross-examination had led the jury affirmatively to believe that the witness was lying. Moreover, the court must conclude, beyond a reasonable doubt, that no evidence exculpatory to the defendant could have emerged from a genuinely adversarial testing of the witness. I think that a court can make such a determination only in the rarest of circumstances, and a rule of *per se* reversal is therefore justified.

The Confrontation Clause violation in this case is especially pernicious. The jury was essentially misled, by the empty gesture of cross-examination, to believe that the defense attorney had been permitted to use all the tools at his disposal to expose weaknesses in Fleetwood's testimony. Having survived what appeared to be counsel's best efforts to undermine the witness' credibility, Fleetwood's testimony necessarily carried more weight with the jury than would the same testimony given without an apparent opportunity to cross-examine.

This analysis makes it unnecessary to strain, as does the majority, to reconcile the apparent *per se* rule of *Davis* v. *Alaska*, 415 U. S. 308 (1974), with the harmless-error analysis employed in *Harrington* v. *California*, 395 U. S. 250 (1969), and *Schneble* v. *Florida*, 405 U. S. 427 (1972). I would simply hold that *Davis* mandates reversal whenever the prosecution puts a witness on the stand but the court does not permit the defense to cross-examine concerning relevant potential bias. I therefore dissent from the Court's decision to permit the Delaware Supreme Court to apply

harmless-error analysis to the Confrontation Clause violation in this case.

I also write to emphasize that this Court cannot *require* state courts to apply harmless-error analysis to violations of the Federal Constitution. See *Connecticut* v. *Johnson*, 460 U. S. 73, 88 (1983) (STEVENS, J., concurring in judgment). While this Court has stated that federal law governs the application of harmless error to violations of the Federal Constitution, see *Chapman* v. *California*, 386 U. S. 18, 21 (1967), that cannot mean more than that state courts *must* reverse convictions when the Constitution so mandates. When the Constitution does not mandate a particular remedy, this Court may not "declare which of many admittedly constitutional [remedial] alternatives a State may choose." *Id.*, at 48 (Harlan, J., dissenting) (footnote omitted). We have never held that the Federal Constitution forbids state courts to reverse certain convictions pursuant to state substantive or procedural law, nor can I imagine what provision of the Constitution could grant us such a power. Thus the Delaware Supreme Court remains free on remand to decide that even though it applied the substantive standards of the Sixth Amendment to determine whether error occurred, its harmless-error analysis was the product of state rather than federal law.

JUSTICE STEVENS, dissenting.

The Court finds the way open to reverse the judgment in this case because "[t]he opinion of the Delaware Supreme Court, which makes use of both federal and state cases in its analysis, lacks the requisite 'plain statement' that it rests on state grounds." *Ante*, at 678, n. 3.[1] In so holding, the Court

[1] A determination that a state-court judgment rests on a federal ground is a prerequisite to the exercise of our jurisdiction in such a case. See *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935) ("[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment");

continues down the path it marked in *Michigan* v. *Long*, 463 U. S. 1032, 1037–1044 (1983), when it announced that it would henceforth presume jurisdiction to review state-court judgments absent a "plain statement" that such judgments rest on state grounds.[2]

Despite the directness of the route chosen, today's destination was not foreordained. Unlike *Michigan* v. *Long*, this case concerns whether the Court should presume jurisdiction to review a state supreme court's *remedy* for a federal constitutional violation. Since courts have traditionally enjoyed broad discretion to fashion remedies—even remedies forbidding otherwise lawful acts—once a constitutional violation

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Murdock v. *City of Memphis*, 20 Wall. 590, 626, 633, 641 (1875) (construing requirement as part of jurisdictional statute). See also Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 S. Ct. Rev. 187, 188–189, and n. 6 (discussing possible constitutional basis for the adequate and independent state ground rule).

[2] The principal question in *Michigan* v. *Long* was whether a state court's determination that a search violated the State Constitution was independent of its conclusion that it violated the Federal Constitution. The Court surveyed the various approaches, decided that "none of [them] thus far recommends itself as the preferred method," 463 U. S., at 1039, and then selected the presumption it did as the most administrable of the available choices, *id.*, at 1041. I agreed with the Court that "we are left with a choice between two presumptions: one in favor of our taking jurisdiction, and one against it," *id.*, at 1066, but explained that "in reviewing the decisions of state courts, the *primary*"—although not exclusive—"role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard," *id.*, at 1068 (first emphasis added). See *Florida* v. *Meyers*, 466 U. S. 380, 385 (1984) (STEVENS, J., dissenting) ("But we must not forget that a central purpose of our written Constitution, and more specifically of its unique creation of a life-tenured federal judiciary, was to ensure that certain rights are firmly secured *against* possible oppression by the Federal or State Governments"). Compare the *Michigan* v. *Long* Court's misreading of my dissent as "propos[ing] the novel view that this Court should *never* review a state court decision unless the Court wishes to vindicate a federal right that has been endangered." 463 U. S., at 1043, n. 8 (emphasis added).

has been proved,[3] the more logical direction would have been to presume that a state court is merely exercising its normal supervisory power over state officials unless it clearly states that federal law requires a particular procedure to be followed. The Court's contrary presumption works a further advancement of its own power, but it flouts this Court's best traditions: it deviates from our normal approach to questions of subject-matter jurisdiction, and it departs from our long-standing practice of reserving decision on federal constitutional law. Even considered purely from the standpoint of managing our own discretionary docket, the Court's presumption includes a selection bias inconsistent with the lessons of history as revealed in this Court's statutory jurisdiction over the judgments of state courts. Finally, the Court's willingness to presume jurisdiction to review state remedies evidences a lack of respect for state courts and will, I fear, be a recurrent source of friction between the federal and state judiciaries.

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The rules that govern this Court's jurisdiction to review state-court judgments should, of course, be consistent with the jurisdictional principles that govern the entire federal ju-

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[3] See, *e. g.*, *Teachers* v. *Hudson*, *ante*, at 309–310, n. 22, and cases cited therein. As I explained in my opinion concurring in the judgment in *Connecticut* v. *Johnson*, 460 U. S. 73, 88 (1983) (footnotes omitted):

"If federal constitutional error occurs in a state criminal trial, federal law places certain limits on the state appellate court's disposition of the case. If the error is sufficiently grievous, it *must* reverse. If the error is less grievous, it also must reverse unless it declares its conviction beyond a reasonable doubt that the federal error was harmless. But federal law does not *require* a state appellate court to make a harmless-error determination; it merely *permits* the state court to do so in appropriate cases. This is all the Court held in *Chapman* v. *California*, 386 U. S. 18 (1967)."

JUSTICE MARSHALL is therefore quite right to point out that "this Court cannot *require* state courts to apply harmless-error analysis to violations of the Federal Constitution." *Ante*, at 689.

dicial system. Indeed, because the example that this Court sets for the entire system inevitably affects the way in which all federal judges tend to evaluate their own powers, we have a special obligation to make sure that our conclusions concerning our own jurisdiction rest on a firm and legitimate foundation.

In origin and design, federal courts are courts of limited jurisdiction; they exercise only the authority conferred on them by Art. III and by congressional enactments pursuant thereto. See *Bender* v. *Williamsport Area School Dist.*, *ante*, at 541, and cases cited therein. Like all other federal courts, this Court has only the power expressly given it. Because it is our inescapable duty—in contrast to that of the political branches—to construe authoritatively the very instruments which define and limit that power, the Court early in its history wisely adopted a presumption that every federal court is "without jurisdiction" unless "the contrary appears affirmatively from the record." *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226 (1887). Accord, *Thomas* v. *Board of Trustees*, 195 U. S. 207, 210 (1904); *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62–63 (1904). That presumption is just as "inflexible" in this Court as in any other federal court.[4]

Even for cases unquestionably within this Court's subject-matter jurisdiction, we have disclaimed any pretension to

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[4] Cf. *Mansfield C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884) ("[T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it").

reach questions arising under the Federal Constitution when an alternative basis of decision fairly presented itself. Thus, in one of the most respected opinions ever written by a Member of this Court, Justice Brandeis wrote:

> "The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:
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> . . . . .
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> ". . . The Court will not pass upon a [federal] constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (concurring opinion).[5]

The Court has remained faithful to these basic tenets when it is reviewing cases that arise in the federal system. See *Bender* v. *Williamsport Area School Dist.*, *ante*, at 545–549; *Regents of University of Michigan* v. *Ewing*, 474 U. S. 214, 222–223 (1985). Ironically, however—and contrary to tradition[6]—the Court has taken a different stance when it is

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[5] See, *e. g.*, *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 193 (1909) (duty of the Federal District Court to decide first a question of state law, over which it has merely pendent jurisdiction, in order to avoid if possible a federal constitutional question); *Santa Clara County* v. *Southern Pacific R. Co.*, 118 U. S. 394, 410–411, 416–417 (1886). *Pennhurst State School & Hospital* v. *Halderman*, 465 U. S. 89 (1984), did not qualify this avoidance principle; it held only that the Eleventh Amendment proscribed the award of injunctive relief for violations of state law in certain cases, thereby removing the basis for avoiding decision of federal constitutional questions in this class of cases. See *id.*, at 119, n. 28 ("Nothing in our decision is meant to cast doubt on the desirability of applying the *Siler* principle in cases where the federal court has jurisdiction to decide the state-law issues").

[6] The Court's time-honored "policy of strict necessity in disposing of [federal] constitutional issues," by which "constitutional issues . . . will not

asked to review cases coming to us from state courts. Although "[w]e cannot perform our duty to refrain from interfering in state law questions and also to review federal ones without making a determination whether the one or the other controls the judgment," *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945), the jurisdictional precepts that serve us so well in reviewing judgments rendered in federal court merit observance in review of state-court judgments too. Abjuring the federal analogy, the Court unwisely marks for special scrutiny the decisions of courts to which I believe it owes special respect.

II

The jurisdictional presumption that the Court applies—and extends—today harbors a hidden selection bias that in turn reveals a disturbing conception of this Court's role. Because a state ground can only support a judgment *consistent* with a

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be determined if the record presents some other ground upon which the case may be disposed of," *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568, 569 (1947), received one of its most forceful expositions in an appeal from a judgment rendered by a state court:

"[T]he policy . . . is one of substance, grounded in considerations which transcend all such particular limitations. Like the case and controversy limitation itself and the policy against entertaining political questions, it is one of the rules basic to the federal system and this Court's appropriate place within that structure.

. . . . .

"The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system." *Id.*, at 568–571 (footnotes omitted).

federal claim, the Court's jurisdictional presumption operates to expand this Court's review of state remedies that overcompensate for violations of federal constitutional rights. Historically, however, such cases have been outside the province of this Court. For well over a century the Judiciary Act of 1789 denied this Court authority to review state-court judgments upholding federal claims.[7] By conferring no power to review these judgments, "the first Congress assembled under the Constitution"—whose Members had "taken part in framing that instrument," *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 297 (1888), in addition to having enacted the First Judiciary Act—codified their conviction that this Court's overriding concern was to ensure that state courts respect federal rights. Only in 1914 did Congress authorize this Court to take jurisdiction over state-court judgments upholding claims of federal constitutional right, Act of Dec. 23, 1914, 38 Stat. 790, and even that legislation reflected an un-

[7] Section 25 of the Act of Sept. 24, 1789, 1 Stat. 85–86, as the First Judiciary Act was also known, provided for review only if the validity of a treaty or of a federal or state statute or "authority," or the construction of a federal treaty, statute, or commission of the Constitution was drawn in question, and then only if "the decision [was] against their validity" or "against the title, right, privilege or exemption" claimed.

In 1867 the post-Civil War Congress, which was not overly concerned with state sovereignty, revised the section to allow review without respect to questions of validity or construction, "where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of or commission held, or authority exercised under the United States." Act of Feb. 5, 1867, § 2, 14 Stat. 386. The question raised by this amendment, however, was not whether the Court could or should review state-court decisions in favor of federal constitutional claims, but whether the amendment had effected an implied repeal of the doctrine that the Court could review only *federal* questions in cases subject to review—a question answered emphatically in the negative in *Murdock* v. *Memphis*, 20 Wall. 590 (1875). (According to Professor Charles Warren, it is "highly probable" that Congress actually meant to provide that "every question passed on by the State Court should be open for reconsideration in the Supreme Court." 2 C. Warren, The Supreme Court in United States History 682 (rev. ed. 1926)).

derstanding that the Court's role is primarily to vindicate such rights.[8] Most of the bills on this subject gave "the litigant an absolute right to appeal or take a writ of error to

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[8] The legislation was a response to the New York Court of Appeals' *Lochner*-style substantive due process decision in *Ives* v. *South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431 (1911). See, *e. g.*, S. Rep. No. 161, 63d Cong., 2d Sess., 2 (1914); H. R. Rep. No. 1222, 63d Cong., 3d Sess., 2–3 (1914); 52 Cong. Rec. 276 (1914) (remarks of Rep. Webb). In the *Ives* case, the Court of Appeals held New York's newly enacted workmen's compensation statute unconstitutional because it imposed on the railroad the obligation to pay for injuries for which it was not at fault. 201 N. Y., at 292–317, 94 N. E., at 439–449. By the 1914 legislation Congress intended to redress a seeming discrimination in favor of railroads and other large economic interests which, under the virulent substantive due process doctrine of the day, could obtain review of challenges to state reform legislation in the Supreme Court if they lost in the highest state court, but whose judgment in state court was protected from review in the Supreme Court if it won. See, *e. g.*, 52 Cong. Rec., *supra*, at 277 (remarks of Rep. Volstead) ("The cases that are taken to the courts for the purpose of having a statute declared unconstitutional are, I believe, in the great majority of cases, taken there by the large corporate interests. . . . If they succeed in having those laws set aside in a State court, that ends it under the law as it now stands. The other side can not appeal. If they fail to have the statute declared void in a State court, they can appeal to the Supreme Court of the United States and have another chance there to effect their purpose. . . . We ought to allow equal treatment to all parties and not favor these large interests"). See also H. R. Rep. No. 1222, *supra*, at 2–3; 52 Cong. Rec., *supra*, at 276 (remarks of Rep. Webb); *ibid.* (quoting letter from Mr. Wheeler of New York); *id.*, at 277 (remarks of Rep. Lewis).

Although Congress' response to the *Ives* case demonstrates that there are cases in which a state court's judgment vindicating a federal claim merits review, that view is perfectly consistent with the traditional understanding that the primary function of this Court is to review decisions rejecting such claims. Indeed, the facts of *Ives* belie any suggestion that Congress intended searching review of state-court decisions upholding claims of federal right. The workmen's compensation legislation was of exceptional importance to the State of New York, as attested to by the fact that it represented the labor of a 14-person commission chaired by a United States Senator, 201 N. Y., at 284, 94 N. E., at 435–436, and was "based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of

the Supreme Court . . . even though the decision is in favor of a claim of right under the Federal Constitution." S. Rep. No. 161, 63d Cong., 2d Sess., 2 (1914). Rather than adopt these bills, which would have placed uniformity of federal law on a par with vindication of federal rights by making review of such judgments at least nominally mandatory, Congress "substitute[d] a grant of jurisdiction to the Supreme Court of the United States to issue a writ of certiorari or otherwise to review the decision of the State court." *Ibid.* Compare Act of Sept. 24, 1789, § 25, 1 Stat. 85–86, with Act of Dec. 23, 1914, 38 Stat. 790. Thus, although this Court now has the power to review decisions defending federal constitutional rights, the claim of these cases on our docket is secondary to the need to scrutinize judgments disparaging those rights.[9]

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which are designed to show that our own system of dealing with industrial accidents is economically, morally and legally unsound," *id.*, at 287, 94 N. E., at 437. (In response to *Ives* the people of New York amended their Constitution to allow for legislation of this kind. S. Rep. No. 161, *supra*, at 2; H. R. Rep. No. 1222, *supra*, at 3.) Not only was this particular statute of great concern to New York, but the constitutionality of legislation of this kind was unsettled: "Similar laws were held constitutional in New Jersey, the State of Washington, and some other States." H. R. Rep. No. 1222, *supra*, at 2. See 52 Cong. Rec., *supra*, at 276 (remarks of Rep. Webb) (New Jersey).

[9] There is strong scholarly support for this view. For example, Dean Choper "submits that the essential role of judicial review in our system is to prevent violations of that category of constitutional provisions that secure individual liberties." J. Choper, Judicial Review and the National Political Process 2 (1980). See *id.*, at 64–65.

Professor Dworkin makes a similar point:

"The institution of rights against the Government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the Government's job of securing the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point. Anyone who professes to take rights seriously, and who praises our Government for respecting them, must have some sense of what that point is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philoso-

When the state-court decision to be reviewed is ambiguous, and it is not even clear that the judgment rests on a federal ground, the basis for exercising jurisdiction is even less tenable.

III

The Court's decision to monitor state-court decisions that may or may not rest on nonfederal grounds is not only historically disfavored but risks the very confrontations and tensions a more humble jurisdictional stance would avoid. The presumption applied today allocates the risk of error in favor of the Court's power of review; as a result, over the long run

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phers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.

"The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom. I do not want to defend or elaborate these ideas here, but only to insist that anyone who claims that citizens have rights must accept ideas very close to these.

"It makes sense to say that a man has a fundamental right against the Government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence. It does not make sense otherwise.

"So if rights make sense at all, then the invasion of a relatively important right must be a very serious matter. It means treating a man as less than a man, or as less worthy of concern than other men. The institution of rights rests on the conviction that this is a grave injustice, and that it is worth paying the incremental cost in social policy or efficiency that is necessary to prevent it. But then it must be wrong to say that inflating rights is as serious as invading them. If the Government errs on the side of the individual, then it simply pays a little more in social efficiency than it has to pay; it pays a little more, that is, of the same coin that it has already decided must be spent. But if it errs against the individual it inflicts an insult upon him that, on its own reckoning, it is worth a great deal of that coin to avoid." R. Dworkin, Takings Rights Seriously 198–199 (1977).

the Court will inevitably review judgments that in fact rest on adequate and independent state grounds. Even if the Court is unconcerned by the waste inherent in review of such cases, even if it is unmoved by the incongruity between the wholly precatory nature of our pronouncements on such occasions and Art. III's prohibition of advisory opinions, it should be concerned by the inevitable intrusion upon the prerogatives of state courts that can only provide a potential source of friction and thereby threaten to undermine the respect on which we must depend for the faithful and conscientious application of this Court's expositions of federal law.

Less obvious is the impact on mutual trust when the state court on remand—perhaps out of misplaced sense of duty—confines its state constitution to the boundaries marked by this Court for the Federal Constitution. In *Montana* v. *Jackson*, 460 U. S. 1030 (1983), for example, this Court vacated and remanded "for further consideration in light of *South Dakota* v. *Neville*, 459 U. S. 553 (1983)." In so doing, this Court presumed that the judgment of the Montana Supreme Court did not rest on Montana's Constitution. Justice Sheehy, joined by the author of the state court's original opinion, rather bitterly disagreed:

> "In our original opinion in this case, we had examined the rights guaranteed our citizens under state constitutional principles, in the light of federal constitutional decisions. Now the United States Supreme Court has interjected itself, commanding us in effect to withdraw the constitutional rights which we felt we should extend to our state citizens back to the limits pr[e]scribed by the federal decisions. Effectively, the United States Supreme Court has intruded upon the rights of the judiciary of this sovereign state.
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> "Instead of knuckling under to this unjustified expansion of federal judicial power into the perimeters of our state power, we should show our judicial displeasure by insisting that in Montana, this sovereign state can inter-

> pret its constitution to guarantee rights to its citizens greater than those guaranteed by the federal constitution.
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> . . . . .
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> "If a majority of this Court had the will to press the issue, we could put the question to the United States Supreme Court four-square, that this State judiciary has the right to interpret its constitution in the light of federal decisions, and to go beyond the federal decisions in granting and preserving rights to its citizens under its state constitution." *State* v. *Jackson*, —— Mont. ——, —— - ——, 672 P. 2d 255, 260–261 (1983) (Sheehy, J., dissenting).

See *id.*, at —— - ——, 672 P. 2d, at 264–265 (Shea, J., dissenting).

The Court's two-sentence analysis notwithstanding, one cannot be confident that we have not trenched on state prerogatives in this very case. Here, the Delaware Supreme Court applied a rule reversing convictions when the defendant had been totally denied the right to cross-examine a witness for bias. The rule was expressly found to be "consistent with *Davis* v. *Alaska*, 415 U. S. 308 (1974) *and with our ruling in Weber* [v. *State*, 457 A. 2d 674 (1983),] for determining whether a violation of the confrontation clause is harmless." 486 A. 2d 1, 7 (1984) (emphasis added and citations omitted). *Weber* itself emphasized that "[b]oth the United States and Delaware Constitutions guarantee the right of a defendant to confront the witnesses against him. U. S. Const. amend. VI; Del. Const. art. I, § 7." *Weber* v. *State*, 457 A. 2d, at 682 (footnote omitted). At no point did the Delaware Supreme Court imply that it reversed the defendant's conviction only because that result was compelled by its understanding of federal constitutional law; rather, the conclusion that its rule was "consistent with" a case of this Court construing the federal Confrontation Clause suggests that it was interested merely in respecting the bounds of federal law as opposed to carrying out its command. The Court rewards

the Delaware Supreme Court's circumspection by unceremoniously reversing its judgment.

IV

I agree with JUSTICE MARSHALL that "the Delaware Supreme Court remains free on remand to decide that . . . its harmless-error analysis was the product of state rather than federal law." *Ante*, at 689. Because the Court's approach does nothing to minimize, and indeed multiplies, future occasions on which state courts may be called upon to clarify whether their judgments were in fact based on state law, it is appropriate to amplify the opinion I expressed in *Massachusetts* v. *Upton*, 466 U. S. 727, 736 (1984) (concurring in judgment), that the proper "sequence of analysis when an arguable violation of the State Constitution is disclosed by the record" is for the state court to consider the state constitutional claim in advance of any federal constitutional claim. In that case, I described the Oregon Supreme Court's practice of considering state constitutional claims before reaching issues of federal constitutional law:

> "'The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.' *Sterling* v. *Cupp*, 290 Ore. 611, 614, 625 P. 2d 123, 126 (1981)." *Massachusetts* v. *Upton*, 466 U. S., at 736.[10]

[10] "[T]he basis for th[e] claim in the state constitution should be examined first, before any issue under the federal fourteenth amendment. To begin with the federal claim, as is customarily done, implicitly admits that the guarantees of the state's constitution are ineffective to protect the asserted right and that only the intervention of the federal constitution stands between the claimant and the state. . . . [I]nsofar as the federal fourteenth amendment is invoked to apply the federal Bill of Rights against state action, particularly in the fields of freedom of ideas, criminal proce-

Since that time, at least four other state courts have expressly endorsed the practice of considering state constitutional claims first.[11] In response to *Michigan* v. *Long*, 463

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dure, and compensation for the taking of property, there is no reason to accept such an assumption that the values enshrined in a state's constitution, in, say, 1859, must today fall short of those in the federal Bill of Rights of 1789. And to add a reference to the corresponding state provision as an afterthought to a holding under the federal guarantee is worse than merely backwards: A holding that a state constitutional provision protects the asserted claim in fact destroys the premise for a holding that the state is denying what the federal Constitution would assure." Linde, Without "Due Process", 49 Ore. L. Rev. 125, 182 (1970).

Accord, Linde, E Pluribus—Constitutional Theory and State Courts, 18 Ga. L. Rev. 165, 178 (1984) ("My own view has long been that a state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state's law protects the claimed right" (footnote omitted)); Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379, 383 (1980) ("Just as rights under the state constitutions were first in time, they are first also in the logic of constitutional law"). For thoughtful discussion of other views, see Utter, Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds, 63 Texas L. Rev. 1025 (1985) (advocating that state courts comment on federal issues even in cases decided on state constitutional grounds); Developments in the Law—The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1356–1367 (1982) (contending that state constitutions should be used only to supplement individual rights in the event that protection under the Federal Constitution is unavailable).

[11] See, *e. g.*, *Large* v. *Superior Court*, 148 Ariz. 229, 235, 714 P. 2d 399, 405 (1986) ("Because petitioner did not articulate whether he was proceeding under the federal or state due process clause, and because the provisions of our state constitution settle the matter, we address only the state constitutional issue. In construing the Arizona Constitution we refer to federal constitutional law only as the benchmark of minimum constitutional protection" (citations omitted)); *City of Portland* v. *Jacobsky*, 496 A. 2d 646, 648 (Me. 1985) ("Just as we avoid expressing opinions on constitutional questions when the issue before us on appeal may be otherwise resolved, a similar policy of judicial restraint impels us to forbear from ruling on federal constitutional questions when the provisions of our state constitution may settle the matter" (citations omitted)); *State* v. *Chaisson*,

U. S. 1032 (1983), for example, the New Hampshire Supreme Court concluded:

> "When a defendant, as in this case, has invoked the protections of the New Hampshire Constitution, we will first address these claims.

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125 N. H. 810, 814–815, 486 A. 2d 297, 301 (1984) ("Next, the defendant contends that his warrantless arrest violated both the Federal and the State Constitutions and that the fruits of that arrest, therefore, should have been suppressed at trial. We, of course, address the State constitutional issues first. In construing the State constitution, we refer to Federal constitutional law as only the benchmark minimum constitutional protection" (citations omitted)); *State* v. *Coe*, 101 Wash. 2d 364, 373–374, 679 P. 2d 353, 359 (1984) ("Whether the prior restraint was constitutionally valid or invalid should be treated first under our state constitution, for a number of reasons. First, state courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system and the vast differences between the federal and state constitutions and courts. Second, the histories of the United States and Washington Constitutions clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty. By turning to our own constitution first we grant the proper respect to our own legal foundations and fulfill our sovereign duties. Third, by turning first to our own constitution we can develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied. Fourth, we will be able to assist other states that have similar constitutional provisions develop a principled, responsible body of law that will not appear to have been constructed to meet the whim of the moment. Finally, to apply the federal constitution before the Washington Constitution would be as improper and premature as deciding a case on state constitutional grounds when statutory grounds would have sufficed, and for essentially the same reasons"). See also Collins, Reliance on State Constitutions: Some Random Thoughts, 54 Miss. L. J. 371, 389–394, and nn. 56–58, 69–72 (1984) (citing cases). See generally Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 Texas L. Rev. 1141, 1157–1158, n. 54 (1985) (discussing practice in state courts generally).

To implement this practice of considering state constitutional issues in advance of federal ones, state high courts have directed parties to file supplemental briefs illuminating possible state constitutional bases of decision

> ". . . We live under a unique concept of federalism and divided sovereignty between the nation and fifty States. The New Hampshire Constitution is the fundamental charter of our State. The sovereign people gave limited powers to the State government, and the Bill of Rights in part I of the New Hampshire Constitution protects the people from governmental excesses and potential abuses. When State constitutional issues have been raised, this court has a responsibility to make an independent determination of the protections afforded in the New Hampshire Constitution. If we ignore this duty, we fail to live up to our oath to defend our constitution and we help to destroy the federalism that must be so carefully safeguarded by our people. The Supreme Court of the State of Oregon recently recognized this responsibility and stated:
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> 'The point is . . . that a state's constitutional guarantees . . . were meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and specifics. State courts cannot abdicate their responsibility for these independent guarantees, at least not unless the people of the State themselves choose to abandon them and entrust their rights entirely to federal law.' *State* v. *Kennedy*, 295 Or. 260, 271, 666 P. 2d 1316, 1323 (1983)." *State* v. *Ball*, 124 N. H. 226, 231, 471 A. 2d 347, 350 (1983).

Since 1983, in over a dozen cases,[12] the New Hampshire Supreme Court has thereby averted unnecessary disquisitions on the meaning of the Federal Constitution.

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when the initial briefings have neglected such issues. See *State* v. *Kennedy*, 295 Ore. 260, 268, 666 P. 2d 1316, 1321 (1983). Cf. *State* v. *Jewett*, 146 Vt. 221, 222, 500 A. 2d 233, 234 (1985).

[12] See *Hopps* v. *State Bd. of Parole*, 127 N. H. 133, 135, 500 A. 2d 355, 356 (1985); *State* v. *Cooper*, 127 N. H. 119, 122, 498 A. 2d 1209, 1212 (1985); *State* v. *Dayutis*, 127 N. H. 101, 105, 498 A. 2d 325, 328 (1985); *State ex rel.*

The emerging preference for state constitutional bases of decision in lieu of federal ones is, in my view, the analytical approach best suited to facilitating the independent role of state constitutions and state courts in our federal system. There is much wisdom in THE CHIEF JUSTICE's admonition that "State courts . . . are responsible first for resolving issues arising under their constitutions and statutes and then for passing on matters concerning federal law." Year-End Report on the Judiciary 18 (1981).

It must be remembered that every State but Rhode Island had a written constitution by the close of the Revolutionary War in 1783. "[F]or the first century of this Nation's history, the Bill of Rights of the Constitution of the United States was solely a protection for the individual in relation to federal authorities. State Constitutions protected the liberties of the people of the several States from abuse by state authorities." *Massachusetts* v. *Upton*, 466 U. S., at 738–739 (STEVENS, J., concurring in judgment). The independent significance of state constitutions clearly informed this Court's conclusion, in *Barron* v. *The Mayor and City Council of Baltimore*, 7 Pet. 243, 247–248 (1833), that the Bill of Rights applied only to the Federal Government:

> "The question thus presented is, we think, of great importance, but not of much difficulty.
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> "The constitution was ordained and established by the people of the United States for themselves, for their own

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McLellan v. *Cavanaugh*, 127 N. H. 33, 37, 498 A. 2d 735, 738 (1985); *State* v. *Langone*, 127 N. H. 49, 51–52, 498 A. 2d 731, 733 (1985); *State* v. *Corey*, 127 N. H. 56, 57, 497 A. 2d 1196, 1197 (1985); *State* v. *Faragi*, 127 N. H. 1, 4–5, 498 A. 2d 723, 726 (1985); *State* v. *Camargo*, 126 N. H. 766, 769, 498 A. 2d 292, 295 (1985); *State* v. *Barham*, 126 N. H. 631, 636, 495 A. 2d 1269, 1273 (1985); *State* v. *Farnsworth*, 126 N. H. 656, 659, 497 A. 2d 835, 836 (1985); *State* v. *Cinino*, 126 N. H. 570, 572, 493 A. 2d 1197, 1200 (1985); *State* v. *Cote*, 126 N. H. 514, 521–522; 493 A. 2d 1170, 1175 (1985); *State* v. *Chaisson*, 125 N. H. 810, 815, 486 A. 2d 297, 301 (1984).

government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated.

". . . In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest."

While the holding of the *Barron* case has since been superseded by ratification of the Fourteenth Amendment and selective incorporation of the Bill of Rights, the concomitant atrophication of state constitutional theory was both unnecessary and unfortunate.[13] State constitutions preceded the Federal Constitution and were obviously intended to have independent significance.[14] The frequent amendments to state

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[13] To quote the Vermont Supreme Court:

"One longs to hear once again of legal concepts, their meaning and their origin. All too often legal argument consists of a litany of federal buzz words memorized like baseball cards. As Justice Linde has noted:

'People do not claim rights against self-incrimination, they "take the fifth" and expect "*Miranda* warnings." Unlawful searches are equated with fourth amendment violations. Journalists do not invoke freedom of the press, they demand their first amendment rights. All claims of unequal treatment are phrased as denials of equal protection of the laws.'" *State* v. *Jewett*, 146 Vt., at 223, 500 A. 2d, at 235 (footnote omitted).

[14] The early state Bills of Rights were, in fact, specifically motivated by the interest in protecting the individual against overreaching by the majority:

"In the period following independence, the state legislatures became increasingly active, enacting a great variety of laws. To many Americans much of this legislation appeared to serve the special interests of some groups at the expense of others. Moreover, much of it was thought to violate the natural rights of individuals. For example, the Pennsylvania Council of Censors issued a report in 1784 that listed many examples of legislative violations of the state constitution and bill of rights. The report showed that 'fines had been remitted, judicially established claims disal-

constitutions likewise presuppose their continued importance. Thus, whether the national minimum set by the Federal Constitution is high or low, state constitutions have their own unique origins, history, language, and structure—all of which warrant independent attention and elucidation. State courts remain primarily responsible for reviewing the conduct of their own executive branches, for safeguarding the rights of their citizenry, and for nurturing the jurisprudence of state constitutional rights which it is their exclusive province to expound.[15]

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lowed, verdicts of juries set aside, the property of one given to another, defective titles secured, marriages dissolved,' and so forth. Similar abuses were also taking place in New Hampshire and other states. The injustice of these laws, as James Madison said, brought 'into question the fundamental principle of republican Government, that the majority who rule in such governments are the safest Guardians both of public Good and private rights.' By the end of the 1780's, 'the Americans' inveterate suspicion and jealousy of political power, once concentrated almost exclusively on the Crown and its agents, was transferred to the various state legislatures.'

. . . . .

"As Americans became more distrustful of democracy, Whig political theory gradually declined and Federalist theory became predominant. Americans began to impose greater restrictions on their legislatures in order to safeguard individual rights. In the 1770's and 1780's more and more rights were added to bills of rights. Moreover, the power of the legislatures to limit or alienate rights was steadily reduced. Increasingly, bills of rights became binding on legislatures. Instead of saying merely that the legislature 'ought' not abridge certain rights, bills of rights began to provide that it 'shall' not do so. The prevailing view among the Federalists was that the authority of the legislature and of government generally should extend only to a relatively narrow range of issues.

"In summary, during the revolutionary period a 'tidal-wave of democracy . . . swept over the colonies.' Thereafter, during the 1780's, those waters receded and another wave swept in: a wave of concern about protecting 'private rights against uncontrolled legislative power.'" Elfenbein, The Myth of Conservatism as a Constitutional Philosophy, 71 Iowa L. Rev. 401, 472–474 (1986).

[15] This would facilitate the work of federal courts, which under this Court's precedents must address issues of state constitutional law before considering claims under the Federal Constitution. See *City of Mesquite*

Because I would not presume that the Delaware Suprem Court failed to discharge this responsibility, I would dismis the writ.

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v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 294–295 (1982) ("[T]here is n need for decision of the federal [constitutional] issue" if the state con stitution provides "independent support"); cf. *Askew* v. *Hargrave*, 40 U. S. 476, 478 (1971) (abstention under *Railroad Comm'n* v. *Pullman Co.* 312 U. S. 496 (1941)); *Reetz* v. *Bozanich*, 397 U. S. 82, 85 (1970) (same) There exists a growing recognition among Federal Courts of Appeals tha it is incumbent upon them to resolve issues of state constitutional law be fore reaching issues arising under the Federal Constitution. See, *e. g.* *Carreras* v. *City of Anaheim*, 768 F. 2d 1039, 1042–1043 (CA9 1985); *Seal* v. *Quarterly County Court of Madison County, Tenn.*, 562 F. 2d 390, 39 (CA6 1977).

ICICLE SEAFOODS, INC. *v.* WORTHINGTON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–195. Argued February 25, 1986—Decided April 21, 1986

Respondents were employed by petitioner as members of the Engineering Department on board a nonself-propelled fish-processing barge. They sued petitioner in Federal District Court, seeking to recover overtime benefits under the Fair Labor Standards Act (FLSA). Finding that they were seamen because they performed work of a maritime character on navigable waters, the District Court held that respondents were excluded from such benefits under the provision of the FLSA that excludes "any employee employed as a seaman." The Court of Appeals reversed. Reviewing under a "*de novo*" standard, the Court of Appeals found that respondents' "dominant employment" was "industrial maintenance" and that the "maritime work" that they performed took only a small portion of their time, and therefore concluded that respondents were not seamen.

Held: The Court of Appeals erred in engaging in such factfinding. The facts necessary to a proper determination of the legal question whether an exemption to the FLSA applies in a particular case should be reviewed by the courts of appeals pursuant to the "clearly erroneous" standard of review set forth in Federal Rule of Civil Procedure 52(a), like the facts in other civil bench-tried litigation in federal courts. *Walling* v. *General Industries Co.*, 330 U. S. 545. Here, if the Court of Appeals believed that the District Court's factual findings were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside, whereas, if it believed that the findings were unassailable, but that the proper rule of law was not correctly applied to those findings, it could have reversed the District Court's judgment on that ground. But it should not simply have made factual findings of its own. Pp. 712–715.

774 F. 2d 349, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 715.

Clemens H. Barnes argued the cause for petitioner. With him on the briefs were *James D. Rolfe* and *Erik Rosenquist*.

Carson F. Eller argued the cause and filed a brief for respondents.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents sued their employer, petitioner Icicle Seafoods, Inc., to recover overtime benefits to which they thought they were entitled under the Fair Labor Standards Act (FLSA), 29 U. S. C. § 207(a)(1). After a 2-day trial, the United States District Court for the Western District of Washington held that respondents were excluded from the overtime benefits of the FLSA by 29 U. S. C. § 213(b)(6), which excludes "any employee employed as a seaman." Reviewing this issue under a "*de novo*" standard of review, the Court of Appeals for the Ninth Circuit reversed the judgment of the District Court, holding that respondents were not "seamen," but instead were industrial maintenance employees on a barge that processed fish caught by a fishing fleet in the coastal waters of the Pacific Northwest. 774 F. 2d 349 (1985). We granted certiorari to consider whether the Court of Appeals applied the appropriate standard of review in passing on the District Court's judgment. 474 U. S. 900 (1985).

The District Court made the following pertinent findings of fact related to whether respondents were "seamen" within the meaning of § 213(b)(6):

> "2. Defendant Icicle Seafoods owned and operated a seafood processing vessel named the *ARCTIC STAR*. Each of the Plaintiffs worked for Defendant on board the *ARCTIC STAR* as members of the Engineering Department . . . . The *ARCTIC STAR* is a nonself-propelled barge which is moved from place to place with the aid of a tow boat, and is located throughout the waters of

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**Eileen Madrid* filed a brief for Maryland Casualty Co. as *amicus curiae*.

Alaska or Washington, depending on the season and type of seafood being caught and processed.

. . . . .

"7. None of the Plaintiffs were members of the Processing Crew on board the *ARCTIC STAR*. The Processing Crew performed all the hands-on processing or packing of the fish or shellfish. Plaintiffs were members of the Engineering Department on board the *ARCTIC STAR*, considered themselves very distinct from the Processing Crew, and did not perform any hands-on processing or packing of fish or shellfish. As members of the Engineering Department, Plaintiffs were responsible for maintaining all systems for support and continuous operation of the vessel while at moorage or underway. Although working in shifts, the Plaintiffs had to be available on call 24 hours a day to perform work at a moment's notice if necessary to keep the vessel operating. Even though the plaintiffs were not licensed by the Coast Guard as engineers or members of an engineering department, each of the Plaintiffs performed tasks which conformed to those expected of Coast Guard licensed personnel. The very description of the Plaintiff's work is that of a marine engineer or member of an engineering department. In summary, each of the Plaintiffs were members of the crew of the *ARCTIC STAR* and performed work which was maritime in character and rendered while the *ARCTIC STAR* was in navigable waters. Each of the Plaintiff's employment was that of a seaman." App. A-3 to Pet. for Cert. 2-3, 5-6.

The Court of Appeals read the District Court's opinion as holding that respondents were "seamen" under § 213(b)(6) because the evidence showed that they "performed work of a maritime character on navigable waters." 774 F. 2d, at 351.

In reviewing this conclusion, the Court of Appeals initially pointed out that it and other Courts of Appeals have applied

conflicting standards of review to claims of exclusion from the FLSA, and attributed these different approaches to three cases decided by this Court within a few months of each other during its October 1946 Term. *Ibid.* The Court of Appeals recognized that in *Walling* v. *General Industries Co.*, 330 U. S. 545 (1947), this Court held that whether an employee falls within the exclusion for "executives" under 29 U. S. C. § 213(a)(1) is a factual question subject to the "clearly erroneous" standard of review set forth in Rule 52(a) of the Federal Rules of Civil Procedure. 774 F. 2d, at 352. But it thought that in *Levinson* v. *Spector Motor Service*, 330 U. S. 649 (1947), and *Rutherford Ford Corp.* v. *McComb*, 331 U. S. 722 (1947), this Court appeared to apply a "*de novo*" standard of review to whether an employee falls within an exclusion for employees covered by the Motor Carrier Act and to whether someone is an independent contractor rather than an employee. 774 F. 2d, at 352. The Court of Appeals reconciled its reading of these cases on grounds that the regulations implementing the provisions at issue in *Levinson* and *Rutherford* were "illustrative and general," whereas those in *Walling* were "specific," and that the trial court's findings in *Walling* were based on the conflicting testimony of witnesses. 774 F. 2d, at 352.

We think that neither *Levinson* nor *Rutherford* should be read to depart from the rule laid down in *Walling*. *Levinson* involved a case that was brought to this Court from the Supreme Court of Illinois, and that court had accepted the factual findings made by the Illinois Appellate Court. But state courts are not required to apply Rule 52(a)—a rule of *federal* civil procedure—to their own appellate system for reviewing factual determinations of trial courts. *Rutherford* came up through the federal court system, and this Court held that the District Court erroneously based its conclusion that particular employees were independent contractors on "isolated factors" in the employee's relationship with the employer. 331 U. S., at 729–730. We set forth a lengthy

summary of the facts without indicating the source for such a summary; but a fair reading of the opinion indicates that we were focusing on a legal question, and not on the allocation of factfinding responsibilities between district courts and courts of appeals. We therefore reaffirm our holding in *Walling* that the facts necessary to a proper determination of the legal question whether an exemption to the FLSA applies in a particular case should be reviewed by the courts of appeals pursuant to Rule 52(a), like the facts in other civil bench-tried litigation in federal courts.

The Court of Appeals in this case proposed to "apply a *de novo* standard of review to the application of the exemption to the facts and [to] review the facts under a clearly erroneous standard." 774 F. 2d, at 352, citing *United States v. McConney*, 728 F. 2d 1195, 1202 (CA9) (en banc), cert. denied, 469 U. S. 824 (1984). But nowhere in its opinion did the court ever mention any of the factual findings of the District Court, much less discuss or analyze them. The Court of Appeals seems to have believed that the District Court applied the wrong legal standard for what constitutes a "seaman" under § 213(b)(6). Whereas the District Court concluded that respondents were seamen because they performed work of a maritime character on navigable waters, see App. A–3 to Pet. for Cert. 6, the Court of Appeals held that under the pertinent regulations, the critical factor for determining whether an employee on a vessel is a seaman is whether his "duties primarily aid navigation of the vessel." 774 F. 2d, at 353; see also 29 CFR §§ 783.31, 783.33, 783.36 (1985). The Court of Appeals reviewed the record independently and found that the "dominant employment" of the respondents was "industrial maintenance," and that the "maritime work" that the respondents performed took but a small portion of their work time. 774 F. 2d, at 353. It therefore concluded that respondents were industrial maintenance employees and not seamen. *Ibid.*

We think that the Court of Appeals was mistaken to engage in such factfinding. The District Court found that "each of the [respondents] . . . performed work which was maritime in character and rendered while the *ARCTIC STAR* was in navigable waters." App. A-3 to Pet. for Cert. 6. But it made no finding that the "maritime work" was "incidental and occasional, taking but a small portion of the work time." 774 F. 2d, at 353. The question of how the respondents spent their working time on board the *Arctic Star* is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law which both parties concede is governed by the pertinent regulations promulgated by the Wage and Hour Administrator. See 29 CFR pt. 783 (1985). If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own. As we stated in *Anderson* v. *Bessemer City*, 470 U. S. 564, 574–575 (1985):

> "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."

The judgment of the Court of Appeals is accordingly vacated, and the cause is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

The Court chastises the Court of Appeals for supplying a gap in the District Court's factual findings with uncontested facts rather than "remand[ing] to the District Court to make those findings." *Ante*, at 714. The criticism is unwarranted.

The issue in this case is whether respondents, who are maintenance employees on a nonself-propelled seafood processing barge, qualify as seamen under the Fair Labor Standards Act and are therefore not entitled to overtime benefits under that Act. See 29 U. S. C. § 207(a)(1). The only dispute below was with regard to the proper definition of "seaman"—an issue on which certiorari was denied and one on which the Court ventures no opinion. The District Court "found that the [respondents] performed work of a maritime character on navigable waters" and "concluded that the [respondents] were 'seamen' and exempt from the overtime provision of the FLSA under 29 U. S. C. § 213(b)(6)." 774 F. 2d 349, 351 (CA9 1985). The Court of Appeals reversed because "[o]ne does not become a 'seaman' under the FLSA merely by performing services aboard a vessel on navigable waters." *Id.*, at 353. Under a proper understanding of the statute, it held that respondents were not seamen:

> "These facts are undisputed. . . .
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> . . . . .
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> "The record indicates, and Icicle's counsel conceded at oral argument, that the [processing barge] remained anchored most of the time. During these periods, the [respondents] primarily monitored, maintained and repaired the processing machinery and electric power generators. Although some of their work may have been of a maritime character, the dominant employment was

> industrial maintenance. The maritime work was incidental and occasional, taking but a small portion of the work time.
>
> "We conclude that these employees, while working on a barge anchored in navigable waters, are principally employed not as exempt seamen but as industrial maintenance employees." *Id.*, at 352–353.

The Court's only quarrel with the Court of Appeals is that it "made factual findings on its own" on the issue whether "the 'maritime work' was 'incidental and occasional, taking but a small portion of the work time.'" *Ante*, at 714. Apparently, the Court would have preferred to see the case "remanded to the District Court," *ibid.*, for the purely ministerial act of entry of formal findings on "these . . . undisputed" facts. The "rationale for deference to the original finder of fact," *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985), embodied in Rule 52(a) does not compel the entirely unrelated proposition that only district courts may make such findings. Appellate courts in general and this Court in particular have, after correcting an erroneous interpretation of law, applied the proper legal standard to undisputed facts of record—whether or not such facts have been memorialized in formal findings by "the original finder of fact." This practice not only promotes "the just, speedy, and inexpensive determination" of civil actions which Rule 52(a) is intended to secure, Fed. Rule Civ. Proc. 1, but it also allows appellate courts to give guidance to trial courts by illustrating the proper application of a new legal standard in a particular case.

I would affirm the judgment of the Court of Appeals.

EVANS, GOVERNOR OF IDAHO, ET AL. v. JEFF D. ET AL., MINORS, BY AND THROUGH THEIR NEXT FRIEND, JOHNSON, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1288. Argued November 13, 1985—Decided April 21, 1986

The Civil Rights Attorney's Fees Awards Act of 1976 (Fees Act) provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" in enumerated civil rights actions. Respondents brought a class action against petitioners (the Governor and other public officials of Idaho responsible for the education and treatment of mentally handicapped children) in Federal District Court on behalf of children who have been or will be placed in petitioners' care. It was alleged that deficiencies in both the educational programs and health care services provided respondents violated the Federal and State Constitutions and various federal and state statutes. Injunctive relief and an award of costs and attorney's fees were sought. Ultimately, the District Court approved a settlement granting the injunctive relief sought conditional on respondents' waiver of any claim for attorney's fees. The Court of Appeals invalidated the fee waiver, left standing the remainder of the settlement, and remanded to the District Court to determine what attorney's fees were reasonable, holding that the historical background of Federal Rule of Civil Procedure 23(e), which gives a district court power to approve settlements of class actions, and of the Fees Act, compelled the conclusion that a stipulated waiver of attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court.

Held:

1. The District Court had the power, in its discretion, to approve the waiver of attorney's fees. Pp. 730-738.

(a) The language of the Fees Act, as well as its legislative history, indicates that Congress bestowed on the "prevailing *party*" a statutory eligibility for a discretionary award of attorney's fees in specified civil rights actions. Neither the statute nor the legislative history suggests that Congress intended to forbid *all* waivers of attorney's fees. Congress neither bestowed fee awards upon attorneys nor rendered them nonwaivable or nonnegotiable; instead, it added them to the remedies available to combat civil rights violations, a goal not invariably inconsist-

ent with conditioning settlement on the merits on a waiver of statutory attorney's fees. Pp. 730–732.

(b) A general proscription against waiver of attorney's fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement. It is not implausible to anticipate that parties to a significant number of civil rights cases would refuse to settle if liability for attorney's fees remained open, thereby forcing more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants. Pp. 732–738.

2. The District Court did not abuse its discretion in approving a waiver of attorney's fees that secured broad injunctive relief greater than that which respondents could reasonably have expected to achieve at trial. There is nothing in the record to indicate that Idaho has adopted a statute, policy, or practice insisting on a fee waiver as a condition of settlement in civil rights litigation in conflict with the Fees Act. Nor does the record indicate that petitioners' request to waive fees was a vindictive effort to deter attorneys from representing plaintiffs in civil rights suits against Idaho. Pp. 738–743.

743 F. 2d 648, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 743.

James Thomas Jones, Attorney General of Idaho, argued the cause for petitioners. With him on the briefs were *John J. McMahon*, Chief Deputy Attorney General, and *Michael De Angelo* and *James Wickham*, Deputy Attorneys General.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Fried*, *Acting Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, *Kathryn A. Oberly*, *John F. Cordes*, and *Douglas Letter*.

William T. Coleman, Jr., argued the cause for respondents. With him on the brief were *Aaron S. Bayer*, *Howard A. Belodoff*, and *Charles Johnson III*.*

*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Francis X. Bellotti*, Attorney General of Massachusetts.

JUSTICE STEVENS delivered the opinion of the Court.

The Civil Rights Attorney's Fees Awards Act of 1976 (Fees Act) provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" in

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and *Ellen Janos* and *Carl Valvo*, Assistant Attorneys General, *Charles A. Graddick*, Attorney General of Alabama, *Harold Brown*, Attorney General of Alaska, *Robert K. Corbin*, Attorney General of Arizona, and *Anthony Ching*, Solicitor General, *John Steven Clark*, Attorney General of Arkansas, *John Van de Kamp*, Attorney General of California, *Duane Woodard*, Attorney General of Colorado, *Charles M. Oberly*, Attorney General of Delaware, *Jim Smith*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *Richard G. Opper*, Attorney General of Guam, *Corinne Watanabe*, Acting Attorney General of Hawaii, *Linley E. Pearson*, Attorney General of Indiana, *Thomas J. Miller*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *David L. Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Stephen H. Sachs*, Attorney General of Maryland, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Edwin Lloyd Pittman*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Mike Greely*, Attorney General of Montana, *Brian McKay*, Attorney General of Nevada, *Stephen E. Merrill*, Attorney General of New Hampshire, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas Spaeth*, Attorney General of North Dakota, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Michael Turpen*, Attorney General of Oklahoma, *David Frohnmayer*, Attorney General of Oregon, *Leroy S. Zimmerman*, Attorney General of Pennsylvania *Hector Rivera-Cruz*, Attorney General of Puerto Rico, *Arlene Violet*, Attorney General of Rhode Island, *Travis Medlock*, Attorney General of South Carolina, *Mark V. Meierhenry*, Attorney General of South Dakota, *W. J. Michael Cody*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, *David L. Wilkinson*, Attorney General of Utah, *Jeffrey Amestoy*, Attorney General of Vermont, *William J. Broaddus*, Attorney General of Virginia, *Victor G. Schneider*, Acting Attorney General of the Virgin Islands, *Kenneth O. Eikenberry*, Attorney General of Washington, *Charlie Brown*, Attorney General of West Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, and *A. G. McClintock*, Attorney General of Wyoming; for the City of New York by *Frederick A. O. Schwarz, Jr.*, *Leonard Koerner*, and *Paul T. Rephen*; for the Council of State Governments et al. by *Benna Ruth Solomon* and *J. Phillip Jordan*;

enumerated civil rights actions. 90 Stat. 2641, 42 U. S. C. § 1988. In *Maher* v. *Gagne*, 448 U. S. 122 (1980), we held that fees *may* be assessed against state officials after a case has been settled by the entry of a consent decree. In this case, we consider the question whether attorney's fees *must* be assessed when the case has been settled by a consent decree granting prospective relief to the plaintiff class but providing that the defendants shall not pay any part of the prevailing party's fees or costs. We hold that the District Court has the power, in its sound discretion, to refuse to award fees.

I

The petitioners are the Governor and other public officials of the State of Idaho responsible for the education and treatment of children who suffer from emotional and mental handicaps. Respondents are a class of such children who have been or will be placed in petitioners' care.[1]

On August 4, 1980, respondents commenced this action by filing a complaint against petitioners in the United States District Court for the District of Idaho. The factual allegations in the complaint described deficiencies in both the educational programs and the health care services provided respondents. These deficiencies allegedly violated the United States Constitution, the Idaho Constitution, four

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and for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Thomas R. Bagby.*

Briefs of *amici curiae* urging affirmance were filed for the Committee on Legal Assistance of the Association of the Bar of the City of New York by *Allan L. Gropper;* and for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius LeVonne Chambers, Charles Stephen Ralston, Steven L. Winter, E. Richard Larson, Burt Neuborne, James Robertson, Harold R. Tyler, Jr., Norman Redlich, William L. Robinson, Norman J. Chachkin, Kalman Finkel, Helaine M. Barnett,* and *John E. Kirklin.*

[1] The number of children in petitioners' custody, as well as the duration of that custody, fluctuates to a certain degree. Although it appears that only 40 or 50 children are in custody at any one moment, the membership in the respondents' class is apparently well over 2,000. App. 61.

federal statutes, and certain provisions of the Idaho Code. The complaint prayed for injunctive relief and for an award of costs and attorney's fees, but it did not seek damages.

On the day the complaint was filed, the District Court entered two orders, one granting the respondents leave to proceed *in forma pauperis*, and a second appointing Charles Johnson as their next friend for the sole purpose of instituting and prosecuting the action. At that time Johnson was employed by the Idaho Legal Aid Society, Inc., a private, nonprofit corporation that provides free legal services to qualified low-income persons.[2] Because the Idaho Legal Aid Society is prohibited from representing clients who are capable of paying their own fees,[3] it made no agreement requiring any of the respondents to pay for the costs of litigation or the legal services it provided through Johnson. Moreover, the special character of both the class and its attorney-client relationship with Johnson explains why it did not enter into any agreement covering the various contingencies that might arise during the course of settlement negotiations of a class action of this kind.

Shortly after petitioners filed their answer, and before substantial work had been done on the case, the parties entered into settlement negotiations. They were able to reach agreement concerning that part of the complaint relating to educational services with relative ease and, on October 14, 1981, entered into a stipulation disposing of that part of the case. The stipulation provided that each party would bear its "own attorney's fees and costs thus far incurred." App.

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[2] Although Johnson subsequently entered private practice and apparently bore some of the financial burden of the litigation himself, any award of costs or fees would inure to the benefit of Idaho Legal Aid. Brief of Plaintiffs in Support of Motion for Consideration of Costs and Attorney Fees in *Jeff D.* v. *Evans*, No. 80-4091 (D. Idaho), p. 6.

[3] Idaho Legal Aid receives grants under the Legal Services Corporation Act, 42 U. S. C. §§ 2996–2996*l*, and is not allowed to represent clients who are capable of paying their own legal fees, see § 2996f(b)(1); 45 CFR § 1609 (1984).

54. The District Court promptly entered an order approving the partial settlement.

Negotiations concerning the treatment claims broke down, however, and the parties filed cross-motions for summary judgment. Although the District Court dismissed several of respondents' claims, it held that the federal constitutional claims raised genuine issues of fact to be resolved at trial. Thereafter, the parties stipulated to the entry of a class certification order, engaged in discovery, and otherwise prepared to try the case in the spring of 1983.

In March 1983, one week before trial, petitioners presented respondents with a new settlement proposal. As respondents themselves characterize it, the proposal "offered virtually all of the injunctive relief [they] had sought in their complaint." Brief for Respondents 5. See App. 89. The Court of Appeals agreed with this characterization, and further noted that the proposed relief was "more than the district court in earlier hearings had indicated it was willing to grant." 743 F. 2d 648, 650 (CA9 1984). As was true of the earlier partial settlement, however, petitioners' offer included a provision for a waiver by respondents of any claim to fees or costs.[4] Originally, this waiver was unacceptable to the Idaho Legal Aid Society, which had instructed Johnson to reject any settlement offer conditioned upon a waiver of fees, but Johnson ultimately determined that his ethical obligation to his clients mandated acceptance of the proposal. The parties conditioned the waiver on approval by the District Court.[5]

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[4] Petitioners append to their brief on the merits the parties' correspondence setting forth their respective positions on settlement. Without embarking on a letter-by-letter discussion of the status of the fee waiver in the bargaining, it is clear that petitioners' proposals uniformly included fee waivers while respondents' almost always did not.

[5] Paragraph 25 of the settlement agreement provides:

"Plaintiffs and defendants shall each bear their own costs and attorney's fees thus far incurred, if so approved by the Court." App. 104.

After the stipulation was signed, Johnson filed a written motion requesting the District Court to approve the settlement "except for the provision on costs and attorney's fees," and to allow respondents to present a bill of costs and fees for consideration by the court. App. 87. At the oral argument on that motion, Johnson contended that petitioners' offer had exploited his ethical duty to his clients—that he was "forced," by an offer giving his clients "the best result [they] could have gotten in this court or any other court," to waive his attorney's fees.[6] The District Court, however, evaluated the waiver in the context of the entire settlement and rejected the ethical underpinnings of Johnson's argument. Explaining that although petitioners were "not willing to concede that they were obligated to [make the changes in their practices required by the stipulation], . . . they were willing to do them as long as their costs were outlined and they didn't face additional costs," it concluded that "it doesn't violate any ethical considerations for an attorney to give up his attorney fees in the interest of getting a better bargain for his client[s]." *Id.*, at 93. Accordingly, the District Court ap-

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In addition, the entire settlement agreement was conditioned on the District Court's approval of the waiver provision under Federal Rule of Civil Procedure 23(e). See nn. 7 and 8, *infra*.

[6] Johnson's oral presentation to the District Court reads in full as follows:

"In other words, an attorney like myself can be put in the position of either negotiating for his client or negotiating for his attorney's fees, and I think that that is pretty much the situation that occurred in this instance.

"I was forced, because of what I perceived to be a result favorable to the plaintiff class, a result that I didn't want to see jeopardized by a trial or by any other possible problems that might have occurred. And the result is the best result I could have gotten in this court or any other court and it is really a fair and just result in any instance and what should have occurred years earlier and which in fact should have been the case all along. That result I didn't want to see disturbed on the basis that my attorney's fees would cause a problem and cause that result to be jeopardized." App. 90–91.

proved the settlement and denied the motion to submit a costs bill.

When respondents appealed from the order denying attorney's fees and costs, petitioners filed a motion requesting the District Court to suspend or stay their obligation to comply with the substantive terms of the settlement. Because the District Court regarded the fee waiver as a material term of the complete settlement, it granted the motion.[7] The Court of Appeals, however, granted two emergency motions for stays requiring enforcement of the substantive terms of the consent decree pending the appeal. More dramatically, after ordering preliminary relief, it invalidated the fee waiver and left standing the remainder of the settlement; it then instructed the District Court to "make its own determination of the fees that are reasonable" and remanded for that limited purpose. 743 F. 2d, at 652.

In explaining its holding, the Court of Appeals emphasized that Rule 23(e) of the Federal Rules of Civil Procedure gives the court the power to approve the terms of all settlements of class actions,[8] and that the strong federal policy embodied in

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[7] The District Court wrote a letter to respondents' counsel explaining the conditional nature of petitioners' settlement offer:

"[T]he defendants' signing of the stipulation was dependent upon the Court's approval of the finding that it was appropriate to accept a stipulation where plaintiffs waived attorneys fees. . . . The defendants entered into the stipulation only as a compromise matter with the understanding that they would not pay any attorneys fees, and advised the Court that if there were going to be attorneys fees that they wanted to proceed with trial because they did not think they were required to conform to the stipulation legally. Under those circumstances, it would be entirely inappropriate to leave the stipulation in effect. If you effectively challenge the stipulation, the whole stipulation falls and the matter must be tried by the Court. On the other hand, if you do not successfully challenge the stipulation, then the stipulation and stay is in effect. But until the validity of the stipulation is determined, the Court feels it is entirely unfair to enforce it." *Id.*, at 115–116. See *id.*, at 112.

[8] "Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed

the Fees Act normally requires an award of fees to prevailing plaintiffs in civil rights actions, including those who have prevailed through settlement.[9] The court added that "[w]hen attorney's fees are negotiated as part of a class action settlement, a conflict frequently exists between the class lawyers' interest in compensation and the class members' interest in relief." 743 F. 2d, at 651–652. "To avoid this conflict," the Court of Appeals relied on Circuit precedent which had "disapproved simultaneous negotiation of settlements and attorney's fees" absent a showing of "unusual circumstances." *Id.*, at 652.[10] In this case, the Court of Appeals found no such "unusual circumstances" and therefore held that an agreement on fees "should not have been a part of the settlement of the claims of the class." *Ibid.* It concluded:

> "The historical background of both Rule 23 and section 1988, as well as our experience since their enactment, compel the conclusion that a stipulated waiver of all attorney's fees obtained solely as a condition for obtaining relief for the class should not be accepted by the court." *Ibid.*

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dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed. Rule Civ. Proc. 23(e).

[9] As we held in *Maher* v. *Gagne*, 448 U. S. 122, 129 (1980): "The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." See *ibid.* (quoting S. Rep. No. 94–1011, p. 5 (1976)). Nor does the fact that the fee award would benefit a legal services corporation justify a refusal to make an award. See *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54, 70–71, n. 9 (1980); H. R. Rep. No. 94–1558, pp. 5 and 8, n. 16 (1976).

[10] That precedent, *Mendoza* v. *United States*, 623 F. 2d 1338 (CA9 1980), like the Third Circuit decision in *Prandini* v. *National Tea Co.*, 557 F. 2d 1015 (1977), which both the *Mendoza* court and the panel below cited approvingly, instituted a ban on simultaneous negotiations of merits and attorney's fees issues to prevent attorneys from trading relief benefiting the class for a more generous fee for themselves. See *Mendoza* v. *United States*, *supra*, at 1352–1353; *Prandini* v. *National Tea Co.*, 557 F. 2d, at 1020–1021. In neither of those cases had the court rejected a part of the settlement and enforced the remainder.

The importance of the question decided by the Court of Appeals, together with the conflict between its decision and the decisions of other Courts of Appeals,[11] led us to grant certiorari. 471 U. S. 1098 (1985). We now reverse.

II

The disagreement between the parties and *amici* as to what exactly is at issue in this case makes it appropriate to put certain aspects of the case to one side in order to state precisely the question that the case does present.

To begin with, the Court of Appeals' decision rested on an erroneous view of the District Court's power to approve settlements in class actions. Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed. Although changed circumstances may justify a court-ordered modification of a consent decree over the objections of a party after the decree has been entered,[12] and the District Court

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[11] On the question whether it is ever proper to put plaintiff's counsel to the choice of recommending acceptance of a favorable settlement or pursuing a statutory fee award, the decision of the Ninth Circuit below is in accord with the rule prevailing in the Third Circuit, see *Prandini* v. *National Tea Co.*, 557 F. 2d, at 1021 (not recognizing an exception for "unusual circumstances"); cf. *El Club Del Barrio, Inc.* v. *United Community Corps.*, 735 F. 2d 98, 101, n. 3 (CA3 1984) (dictum noting applicability of *Prandini* to fee waivers in holding that such waivers must be explicit), and conflicts with decisions in four other Circuits holding that civil rights plaintiffs are free to waive fee awards as part of an overall settlement, at least in some circumstances, see *Moore* v. *National Assn. of Security Dealers, Inc.*, 246 U. S. App. D. C. 114, 125, 762 F. 2d 1093, 1104 (1985) (opinion of MacKinnon, J.); *id.*, at 134–135, 762 F. 2d, at 1113–1114 (Wald, J., concurring in judgment); *Lazar* v. *Pierce*, 757 F. 2d 435, 438–439 (CA1 1985); *Gram* v. *Bank of Louisiana*, 691 F. 2d 728, 730 (CA5 1982) (dictum); *Chicano Police Officer's Assn.* v. *Stover*, 624 F. 2d 127, 132 (CA10 1980).

[12] See *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 437 (1976); *United States* v. *United Shoe Machinery Corp.*, 391 U. S. 244,

might have advised petitioners and respondents that it would not approve their proposal unless one or more of its provisions was deleted or modified, Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party's objection.[13] The options available to the District Court were essentially the same as those available to respondents: it could have accepted the proposed settlement; it could have rejected the proposal and postponed the trial to see if a different settlement could be achieved; or it could have decided to try the case. The District Court could not enforce the settlement on the merits and award attorney's fees anymore than it could, in a situation in which the attorney had negotiated a large fee at the expense of the plaintiff class, preserve the fee award and order greater relief on the merits. The question we must decide, therefore, is whether the District Court had a duty to reject the proposed settlement because it included a waiver of statutorily authorized attorney's fees.

That duty, whether it takes the form of a general prophylactic rule or arises out of the special circumstances of this case, derives ultimately from the Fees Act rather than from the strictures of professional ethics. Although respondents contend that Johnson, as counsel for the class, was faced with an "ethical dilemma" when petitioners offered him relief greater than that which he could reasonably have expected to obtain for his clients at trial (if only he would stipulate to a waiver of the statutory fee award), and although we recognize Johnson's conflicting interests between pursuing relief for the class and a fee for the Idaho Legal Aid Society, we do

251 (1968); *Railway Employees* v. *Wright*, 364 U. S. 642, 651 (1961); *United States* v. *Swift & Co.*, 286 U. S. 106, 114 (1932).

[13] Cf. *Firefighters* v. *Stotts*, 467 U. S. 561, 592 (1984) (STEVENS, J., concurring in judgment); Restatement (Second) of Contracts § 184, Comment *a*, p. 30 (1981) ("If the performance as to which the agreement is unenforceable [as against public policy] is an essential part of the agreed exchange, . . . the entire agreement [is] unenforceable."); E. Farnsworth, Contracts § 5.8, p. 361 (1982).

not believe that the "dilemma" was an "ethical" one in the sense that Johnson had to choose between conflicting duties under the prevailing norms of professional conduct. Plainly, Johnson had no *ethical* obligation to seek a statutory fee award. His ethical duty was to serve his clients loyally and competently.[14] Since the proposal to settle the merits was more favorable than the probable outcome of the trial, Johnson's decision to recommend acceptance was consistent with the highest standards of our profession. The District Court, therefore, correctly concluded that approval of the settlement involved no breach of ethics in this case.

The defect, if any, in the negotiated fee waiver must be traced not to the rules of ethics but to the Fees Act.[15] Fol-

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[14] Generally speaking, a lawyer is under an ethical obligation to exercise independent professional judgment on behalf of his client; he must not allow his own interests, financial or otherwise, to influence his professional advice. ABA, Model Code of Professional Responsibility EC 5-1, 5-2 (as amended 1980); ABA, Model Rules of Professional Conduct 1.7(b), 2.1 (as amended 1984). Accordingly, it is argued that an attorney is required to evaluate a settlement offer on the basis of his client's interest, without considering his own interest in obtaining a fee; upon recommending settlement, he must abide by the client's decision whether or not to accept the offer, see Model Code of Professional Responsibility EC 7-7 to EC 7-9; Model Rules of Professional Conduct 1.2(a).

[15] Even state bar opinions holding it unethical for defendants to request fee waivers in exchange for relief on the merits of plaintiffs' claims are bottomed ultimately on § 1988. See District of Columbia Bar Legal Ethics Committee, Op. No. 147, reprinted in 113 Daily Wash. L. Rep. 389, 394-395 (1985); Committee on Professional Ethics of the Association of the Bar of the City of New York, Op. No. 82-80, p. 1 (1985); *id.*, at 4-5 (dissenting opinion); Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 80-94, reprinted in 36 Record of N. Y. C. B. A. 507, 508-511 (1981); Grievance Commission of Board of Overseers of the Bar of Maine, Op. No. 17, reprinted in Advisory Opinions of the Grievance Commission of the Board of Overseers of the Bar 69-70 (1983). For the sake of completeness, it should be mentioned that the bar is not of one mind on this ethical judgment. See Final Subcommittee Report of the Committee on Attorney's Fees of the Judicial Conference of the United State Court of Appeals for the District of Columbia Circuit, reprinted in 13

lowing this tack, respondents argue that the statute must be construed to forbid a fee waiver that is the product of "coercion." They submit that a "coercive waiver" results when the defendant in a civil rights action (1) offers a settlement on the merits of equal or greater value than that which plaintiffs could reasonably expect to achieve at trial but (2) conditions the offer on a waiver of plaintiffs' statutory eligibility for attorney's fees. Such an offer, they claim, exploits the ethical obligation of plaintiffs' counsel to recommend settlement in order to avoid defendant's statutory liability for its opponents' fees and costs.[16]

The question this case presents, then, is whether the Fees Act requires a district court to disapprove a stipulation seeking to settle a civil rights class action under Rule 23 when the offered relief equals or exceeds the probable outcome at trial but is expressly conditioned on waiver of statutory eligibility for attorney's fees. For reasons set out below, we are not persuaded that Congress has commanded that all such settlements must be rejected by the District Court. Moreover, on the facts of record in this case, we are satisfied that the Dis-

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Bar Rep. 4, 6 (1984) (declining to adopt flat rule forbidding waivers of statutory fees). Cf. State Bar of Georgia, Op. No. 39, reprinted in 10 Ga. St. Bar News No. 2, p. 5 (1984) (rejecting the reasoning of the Committee on Professional and Judicial Ethics of the New York City Bar Association in the context of lump-sum settlement offers for the reason, among others, that "[t]o force a defendant into proposing a settlement offer wherein plaintiffs['] statutory attorney fees are not negotiated . . . [means that] meaningful settlement proposals might never be made. Such a situation undeniably . . . is inimical to the resolution of disputes between parties").

[16] See Committee on Professional Ethics of the Association of the Bar of the City of New York, Op. No. 80–94, reprinted in 36 Record of N. Y. C. B. A., at 508 ("Defense counsel thus are in a uniquely favorable position when they condition settlement on the waiver of the statutory fee: they make a demand for a benefit which the plaintiff's lawyer cannot resist as a matter of ethics and which the plaintiff will not resist due to lack of interest"). Accord, District of Columbia Bar Legal Ethics Committee, Op. No. 147, reprinted in 113 Daily Wash. L. Rep., at 394.

trict Court did not abuse its discretion by approving the fee waiver.

III

The text of the Fees Act provides no support for the proposition that Congress intended to ban all fee waivers offered in connection with substantial relief on the merits.[17] On the contrary, the language of the Act, as well as its legislative history, indicates that Congress bestowed on the "prevailing *party*" (generally plaintiffs[18]) a statutory eligibility for a discretionary award of attorney's fees in specified civil rights actions.[19] It did not prevent the party from waiving this eli-

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[17] The operative language of the Fees Act provides, in its entirety:

"In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 90 Stat. 2641, 42 U. S. C. § 1988.

[18] See H. R. Rep. No. 94-1558, pp. 6-7 (1976); S. Rep. No. 94-1011, pp. 4-5, and n. 4 (1976); 122 Cong. Rec. 35122-35123 (1976) (remarks of Rep. Drinan); *id.*, at 35125 (remarks of Rep. Kastenmeier).

[19] This straightforward reading of § 1988 accords with the view held by the majority of the Courts of Appeals. See, *e. g.*, *Jonas* v. *Stack*, 758 F. 2d 567, 570, n. 7 (CA11 1985) ("Strict conformity to the language of [§ 1988] would require that the [fee] application be made by the attorney in the name of his client, the prevailing party. We consider this to be the procedure of choice, since it ensures that awards made under the Act compensate their intended beneficiaries"); *Brown* v. *General Motors Corp.*, 722 F. 2d 1009, 1011 (CA2 1983) ("Under [42 U. S. C. § 1988] it is the prevailing party rather than the lawyer who is entitled to attorney's fees"); *Cooper* v. *Singer*, 719 F. 2d 1496, 1506-1507 (CA10 1983) (distinguishing between client's and counsel's entitlement to fees in the course of holding that "if the *client's* section 1988 fee award . . . is less than the amount owed to the attorney under the contingent fee agreement, then the lawyer will be expected to reduce his fee to the amount awarded by the courts" (emphasis added)); *White* v. *New Hampshire Dept. of Employment Security*, 629 F. 2d 697, 703 (CA1 1980) ("[A]ward of attorney's fees goes to 'prevailing party,' rather than attorney"), rev'd on other grounds, 455 U. S. 445

gibility anymore than it legislated against assignment of this right to an attorney, such as effectively occurred here. Instead, Congress enacted the fee-shifting provision as "an integral part of the remedies necessary to obtain" compliance with civil rights laws, S. Rep. No. 94-1011, p. 5 (1976), to further the same general purpose—promotion of respect for civil rights—that led it to provide damages and injunctive relief. The statute and its legislative history nowhere suggest that Congress intended to forbid *all* waivers of attorney's fees—even those insisted upon by a civil rights plaintiff in exchange for some other relief to which he is indisputably not entitled[20]—anymore than it intended to bar a concession on damages to secure broader injunctive relief. Thus, while it is undoubtedly true that Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights,[21] it neither bestowed fee awards upon attor-

(1982). But cf. *James* v. *Home Construction Co. of Mobil Inc.*, 689 F. 2d 1357, 1358-1359 (CA11 1982) (disagreeing with *Smith* v. *South Side Loan Co.*, 567 F. 2d 306, 307 (CA5 1978) ("[A]n award [of attorney's fees] is the right of the party suing not the attorney representing him"), and construing Truth in Lending Act's mandatory award of attorney's fees as "creat-[ing] a right of action for attorneys to seek fee awards after settlement of the plaintiff's claim." 689 F. 2d, at 1359).

[20] Judge Wald has described the use of attorney's fees as a "bargaining chip" useful to plaintiffs as well as defendants. In her opinion concurring in the judgment in *Moore* v. *National Assn. of Security Dealers, Inc.*, she wrote:

"On the other hand, the *Jeff D.* approach probably means that a defendant who is willing to grant immediate prospective relief to a plaintiff case, but would rather gamble on the outcome at trial than pay attorneys' fees and costs up front, will never settle. In short, removing attorneys' fees as a 'bargaining chip' cuts both ways. It prevents defendants, who in Title VII cases are likely to have greater economic power than plaintiffs, from exploiting that power in a particularly objectionable way; but it also deprives plaintiffs of the use of that chip, even when without it settlement may be impossible and the prospect of winning at trial may be very doubtful." 246 U. S. App. D. C., at 133, 762 F. 2d, at 1112.

[21] See H. R. Rep. No. 94-1558, *supra*, at 1, 9; S. Rep. No. 94-1011, *supra*, at 2, 6; 122 Cong. Rec. 33313-33314 (1976) (remarks of Sen. Tun-

neys nor rendered them nonwaivable or nonnegotiable; instead, it added them to the arsenal of remedies available to combat violations of civil rights, a goal not invariably inconsistent with conditioning settlement on the merits on a waiver of statutory attorney's fees.[22]

In fact, we believe that a general proscription against negotiated waiver of attorney's fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement. Of particular relevance in this regard is our recent decision in *Marek* v. *Chesny*, 473 U. S. 1 (1985). In that case, which admittedly was not a class action and therefore did not implicate the court's approval power under Rule 23(e), we specifically considered and rejected the contention that civil rights actions should be treated differently from other civil actions for purposes of settlement. As THE CHIEF JUSTICE explained in his opinion for the Court, the settlement of litigation provides benefits for civil rights plain-

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ney); *id.*, at 33314–33315 (remarks of Sen. Kennedy); *id.*, at 35128 (remarks of Rep. Seiberling).

[22] Indeed, Congress specifically rejected a mandatory fee-shifting provision, see H. R. Rep. No. 94-1558, *supra*, at 3, 5, 8; 122 Cong. Rec. 35123 (1976) (remarks of Rep. Drinan), a proposal which the dissent would virtually reinstate under the guise of carrying out the legislative will. Even proponents of nonwaivable fee awards under § 1988 concede that "one would have to strain principles of statutory interpretation to conclude that Congress intended to utilize fee non-negotiability to achieve the purposes of section 1988." Calhoun, Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards under 42 U. S. C. § 1988, 55 U. Colo. L. Rev. 341, 385 (1984). This conclusion is buttressed by Congress' decision to emulate the "over fifty" fee-shifting provisions that had been successful in enlisting the aid of "private attorneys general" in the prosecution of other federal statutes that had been on the books for decades. H. R. Rep. No. 94-1558, *supra*, at 3, 5. Accord, S. Rep. No. 94-1011, *supra*, at 3. See also 122 Cong. Rec., *supra*, at 35123 (appendix to remarks of Rep. Drinan) (listing more than 50 fee-shifting statutes). No one has suggested that the purpose of any of those fee-shifting provisions has been frustrated by the absence of a prohibition against fee waivers.

tiffs as well as defendants and is consistent with the purposes of the Fees Act:

> "There is no evidence, however, that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned. Indeed, Congress made clear its concern that civil rights plaintiffs not be penalized for 'helping to lessen docket congestion' by settling their cases out of court. See H. R. Rep. No. 94-1558, *supra*, at 7.
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> ". . . Some plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation. In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants." 473 U. S., at 10.

To promote both settlement and civil rights, we implicitly acknowledged in *Marek* v. *Chesny* the possibility of a tradeoff between merits relief and attorney's fees when we upheld the defendant's lump-sum offer to settle the entire civil rights action, including any liability for fees and costs.

In approving the package offer in *Marek* v. *Chesny* we recognized that a rule prohibiting the comprehensive negotiation of all outstanding issues in a pending case might well preclude the settlement of a substantial number of cases:

> "If defendants are not allowed to make lump-sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers. As the Court of Appeals observed, 'many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might

fix on motion of the plaintiff.' 720 F. 2d, at 477." *Id.*, at 6–7.

See *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445, 454, n. 15 (1982) ("In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees").

Most defendants are unlikely to settle unless the cost of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package. If fee waivers cannot be negotiated, the settlement package must either contain an attorney's fee component of potentially large and typically uncertain magnitude, or else the parties must agree to have the fee fixed by the court. Although either of these alternatives may well be acceptable in many cases, there surely is a significant number in which neither alternative will be as satisfactory as a decision to try the entire case.[23]

The adverse impact of removing attorney's fees and costs from bargaining might be tolerable if the uncertainty introduced into settlement negotiations were small. But it is not. The defendants' potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits. This proposition is most dramatically illustrated by the fee awards

[23] It is unrealistic to assume that the defendant's offer on the merits would be unchanged by redaction of the provision waiving fees. If it were, the defendant's incentive to settle would be diminished because of the risk that attorney's fees, when added to the original merits offer, will exceed the discounted value of the expected judgment plus litigation costs. If, as is more likely, the defendant lowered the value of its offer on the merits to provide a cushion against the possibility of a large fee award, the defendant's offer on the merits will in many cases be less than the amount to which the plaintiff feels himself entitled, thereby inclining him to reject the settlement. Of course, to the extent that the merits offer is somewhere between these two extremes the incentive of both sides to settle is dampened, albeit to a lesser degree with respect to each party.

of District Courts in actions seeking only monetary relief.[24] Although it is more difficult to compare fee awards with the cost of injunctive relief, in part because the cost of such relief is seldom reported in written opinions, here too attorney's fees awarded by District Courts have "frequently outrun the economic benefits ultimately obtained by successful litigants." 122 Cong. Rec. 31472 (1976) (remarks of Sen. Kennedy).[25] Indeed, in this very case "[c]ounsel for defendants view[ed] the risk of an attorney's fees award as the most significant liability in the case." Brief of Defendants in Support of Approval of Compromise in *Jeff D.* v. *Evans*, No. 80–4091 (D. Idaho), p. 5. Undoubtedly there are many other civil rights actions in which potential liability for attorney's fees may overshadow the potential cost of relief on the merits and darken prospects for settlement if fees cannot be negotiated.

The unpredictability of attorney's fees may be just as important as their magnitude when a defendant is striving to fix its liability. Unlike a determination of costs, which ordinarily involve smaller outlays and are more susceptible of calculation, see *Marek* v. *Chesny*, 473 U. S., at 7, "[t]here is no precise rule or formula" for determining attorney's fees,

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[24] See, *e. g.*, *Rivera* v. *Riverside*, 763 F. 2d 1580, 1581–1583 (CA9 1985) (city ordered to pay victorious civil rights plaintiffs $245,456.25 following a trial in which they recovered a total of $33,350 in damages), cert. granted, 474 U. S. 917 (1985); *Cunningham* v. *City of McKeesport*, 753 F. 2d 262, 269 (CA3 1985) (city ordered to pay some $35,000 in attorney's fees in a case in which judgment for the plaintiff was entered in the amount of $17,000); *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 401, 641 F. 2d 880, 891 (1980) (en banc) ($160,000 attorney's fees awarded for obtaining $33,000 judgment); *Skoda* v. *Fontani*, 646 F. 2d 1193, 1194 (CA7), on remand, 519 F. Supp. 309, 310 (ND Ill. 1981) ($6,086.12 attorney's fees awarded to obtain $1 recovery). Cf. *Marek* v. *Chesny*, 473 U. S., at 7 ($171,692.47 in claimed attorney's fees and costs to obtain $60,000 damages judgment).

[25] See, *e. g.*, *Grendel's Den, Inc.* v. *Larkin*, 749 F. 2d 945, 960 (CA1 1984) (awarding $113,640.85 in fees and expenses for successful challenge to law zoning liquor establishments in *Larkin* v. *Grendel's Den*, 459 U. S. 116 (1982)).

Hensley v. *Eckerhart*, 461 U. S. 424, 436 (1983).[26] Among other considerations, the district court must determine what hours were reasonably expended on what claims, whether that expenditure was reasonable in light of the success obtained, see *id.*, at 436, 440, and what is an appropriate hourly rate for the services rendered. Some District Courts have also considered whether a "multiplier" or other adjustment is appropriate. The consequence of this succession of necessarily judgmental decisions for the ultimate fee award is inescapable: a defendant's liability for his opponent's attorney's fees in a civil rights action cannot be fixed with a sufficient degree of confidence to make defendants indifferent to their exclusion from negotiation.[27] It is therefore not implausible to anticipate that parties to a significant number of civil rights cases will refuse to settle if liability for attorney's fees remains open,[28] thereby forcing more cases to trial, unnec-

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[26] While this Court has identified "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate" as "[t]he most useful starting point for determining the amount of a reasonable fee," *Hensley* v. *Eckerhart*, 461 U. S., at 433, the "product of reasonable hours times a reasonable rate does not end the inquiry," *id.*, at 434, for "there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high." *Blum* v. *Stenson*, 465 U. S. 886, 897 (1984). "A district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness." *Id.*, at 902, n. 19. See *Hensley* v. *Eckerhart*, 461 U. S., at 437. The district court's calculation is thus anything but an arithmetical exercise.

[27] The variability in fee awards is discussed in, for example, Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 U. Pa. L. Rev. 281, 283–284 (1977); Diamond, The Firestorm over Attorney Fee Awards, 69 A. B. A. J. 1420, 1420 (1983); and National Association of Attorneys General, Report to Congress: Civil Rights Attorney's Fees Awards Act of 1976 (Feb. 3, 1984), reprinted in Hearing on The Legal Fee Equity Act (S. 2802) before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 98th Cong., 2d Sess., 280–293 (1984).

[28] This is the experience of every judge and a majority of the members of a Third Circuit Task Force which concluded that that Circuit's ban on fee negotiations "tends to discourage settlement in some cases and, on occa-

essarily burdening the judicial system, and disserving civil rights litigants. Respondents' own waiver of attorney's fees and costs to obtain settlement of their educational claims is eloquent testimony to the utility of fee waivers in vindicating civil rights claims.[29] We conclude, therefore, that it is not

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sion, makes it impossible." Report of the Third Circuit Task Force: Court Awarded Fees 38 (1985) (footnotes omitted). The Task Force reasoned:

"[P]reventing agreement on fees at the time settlement of the merits is discussed . . . makes it difficult for the defendant to ascertain precisely what its liability will be, thereby eliminating the very certainty that makes settlement attractive to the defendant. The net effect . . . may be more trials, thus raising the question whether that cost is justifiable inasmuch as the conflict between settling the merits and discussing fees may be more hypothetical than real." *Ibid.* (footnotes omitted).

[29] Respondents implicitly acknowledge a defendant's need to fix his total liability when they suggest that the parties to a civil rights action should "exchange information" regarding plaintiff's attorney's fees. See, *e. g.*, Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 82–80, p. 2 (1985); Grievance Commission of Board of Overseers of the Bar of Maine, Op. No. 17, Advisory Opinions of the Grievance Commission of the Board of Overseers of the Bar 70 (1983). If this exchange is confined to time records and customary billing rates, the information provides an insufficient basis for forecasting the fee award for the reasons stated above. If the "exchange" is more in the nature of an "assurance" that attorney's fees will not exceed a specified amount, the rule against waiving fees to obtain a favorable settlement on the merits is to that extent breached. Apparently, some parties have circumvented the rule against simultaneous negotiation in one Circuit by means of tacit agreements of this kind. See *El Club Del Barrio, Inc.* v. *United Community Corps.*, 735 F. 2d, at 101, n. 3 (defendants' counsel suggest that the Third Circuit's ban on simultaneous negotiations is "'more honored in the breach'"); A. Miller, Attorneys' Fees in Class Actions 222 (1980) ("Hence even if agreements on fees are not included in settlements, the net result might be to increase informal agreements among counsel or to encourage withholding agreements on fees from the judge until after the settlement is approved"); Comment, Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations, 131 U. Pa. L. Rev. 793, 805, n. 90 (1983) (survey of several District Judges serving in the Third Circuit finding exchanges of information being used by plaintiffs' lawyers to "voluntarily reduce the number of compensable hours claimed as an incentive for defendant to settle"). Finally, if counsel for the plain-

necessary to construe the Fees Act as embodying a general rule prohibiting settlements conditioned on the waiver of fees in order to be faithful to the purposes of that Act.[30]

IV

The question remains whether the District Court abused its discretion in this case by approving a settlement which included a complete fee waiver. As noted earlier, Rule 23(e) wisely requires court approval of the terms of any settlement

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tiffs are allowed to renege on their informal agreements, the rule against fee waivers will have been vindicated at the expense of future settlements, inasmuch as defendants will be unable to trust assurances made by plaintiffs' counsel.

[30] The Court is unanimous in concluding that the Fees Act should not be interpreted to prohibit all simultaneous negotiations of a defendant's liability on the merits and his liability for his opponent's attorney's fees. See opinion of BRENNAN, J., dissenting, *post*, at 762–763, 764–765. We agree that when the parties find such negotiations conducive to settlement, the public interest, as well as that of the parties, is served by simultaneous negotiations. Cf. *supra*, at 732–734. This reasoning applies not only to individual civil rights actions, but to civil rights class actions as well.

Although the dissent would allow simultaneous negotiations, it would require that "whatever fee the parties agree to" be "found by the court to be a 'reasonable' one under the Fees Act." *Post*, at 754. See *post*, at 753, n. 6. The dissent's proposal is imaginative, but not very practical. Of the 10,757 "other civil rights" cases filed in federal court last year—most of which were 42 U. S. C. § 1983 actions for which § 1988 authorizes an award of fees—only 111 sought class relief. See Annual Report of the Director of the Administrative Office of the United States Courts, An Analysis of the Workload of the Federal Courts for the Twelve Month Period Ended June 30, 1985 pp. 281, 555 (1985). Assuming that of the approximately 99% of these civil rights actions that are not class actions, a further 90% would settle rather than go to trial, the dissent's proposal would require district courts to evaluate the reasonableness of fee agreements in several thousand civil rights cases annually while they make that determination in slightly over 100 civil rights class actions now. Moreover, if this novel procedure really is necessary to carry out the purposes of the Fees Act, presumably it should be applied to all cases arising under federal statutes that provide for fee shifting. But see n. 22, *supra*.

of a class action. The potential conflict among members of the class—in this case, for example, the possible conflict between children primarily interested in better educational programs and those primarily interested in improved health care—fully justifies the requirement of court approval.

The Court of Appeals, respondents, and various *amici* supporting their position, however, suggest that the court's authority to pass on settlements, typically invoked to ensure fair treatment of class members, must be exercised in accordance with the Fees Act to promote the availability of attorneys in civil rights cases. Specifically, respondents assert that the State of Idaho could not pass a valid statute precluding the payment of attorney's fees in settlements of civil rights cases to which the Fees Act applies. See Brief for Respondents 24, n. 22. From this they reason that the Fees Act must equally preclude the adoption of a uniform statewide policy that serves the same end, and accordingly contend that a consistent practice of insisting on a fee waiver as a condition of settlement in civil rights litigation is in conflict with the federal statute authorizing fees for prevailing parties, including those who prevail by way of settlement.[31] Remarkably, there seems little disagreement on these points. Petitioners and the *amici* who support them never suggest that the district court is obligated to place its stamp of approval on every settlement in which the plaintiffs' attorneys have agreed to a fee waiver. The Solicitor General, for ex-

[31] See Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 80–94, reprinted in 36 Record of N. Y. C. B. A., 507, 510 (1981) ("[T]he long term effect of persistent demands for the waiver of statutory fees is to . . . undermine efforts to make counsel available to those who cannot afford it"). Accord, District of Columbia Bar Legal Ethics Committee, Op. No. 147, reprinted in 113 Daily Wash. L. Rep. 389, 394 (1985). National staff counsel for the American Civil Liberties Union estimates that requests for fee waivers are made in more than half of all civil rights cases litigated. See Winter, Fee Waiver Requests Unethical: Bar Opinion, 68 A. B. A. J. 23 (1982).

ample, has suggested that a fee waiver need not be approved when the defendant had "no realistic defense on the merits," Brief for United States as *Amicus Curiae* Supporting Reversal 23, n. 9; see *id.*, at 26–27,[32] or if the waiver was part of a "vindictive effort . . . to teach counsel that they had better not bring such cases," Tr. of Oral Arg. 22.

We find it unnecessary to evaluate this argument, however, because the record in this case does not indicate that Idaho has adopted such a statute, policy, or practice. Nor does the record support the narrower proposition that petitioners' request to waive fees was a vindictive effort to deter attorneys from representing plaintiffs in civil rights suits against Idaho. It is true that a fee waiver was requested and obtained as a part of the early settlement of the education claims, but we do not understand respondents to be challenging that waiver, see Tr. of Oral Arg. 31–32, and they have not offered to prove that the petitioners' tactics in this case merely implemented a routine state policy designed to frustrate the objectives of the Fees Act. Our own examination of the record reveals no such policy.

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[32] In this regard, consider the following comment in the Final Subcommittee Report of the Committee on Attorney's Fees of the Judicial Conference of the United States Court of Appeals for the District of Columbia Circuit:

"Against this background, it was agreed that there were certain situations in which the refusal of defense counsel to proceed except on a package basis was improper. For instance, in a Freedom of Information Act case, where a journalist was the plaintiff and either had a reasonably good case, or had won in the district court and the government was considering appeal, it would be improper for government counsel to offer to release the documents, only if plaintiff's counsel agreed to waive all attorneys fees. That situation presents a grossly unfair choice to the plaintiff and his/her counsel, and permitting such offers to be made would seriously undermine the purpose of fee shifting provisions. Moreover, it would serve no end other than saving the government money which it would otherwise have to pay, yet any such saving is plainly at odds with the purpose for which the fee shifting statute was enacted." 13 Bar Rep., at 6.

In light of the record, respondents must—to sustain the judgment in their favor—confront the District Court's finding that the extensive structural relief they obtained constituted an adequate *quid pro quo* for their waiver of attorney's fees.[33] The Court of Appeals did not overturn this finding. Indeed, even that court did not suggest that the option of rejecting the entire settlement and requiring the parties either to try the case or to attempt to negotiate a different settlement would have served the interests of justice. Only by making the unsupported assumption that the respondent class was entitled to retain the favorable portions of the settlement while rejecting the fee waiver could the Court of Appeals conclude that the District Court had acted unwisely.

What the outcome of this settlement illustrates is that the Fees Act has given the victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights by means of settlement or trial. For aught that appears, it was the "coercive" effect of respondents' statutory right to seek a fee award that motivated petitioners' exceptionally generous offer. Whether this weapon might be even more powerful if fee waivers were prohibited in cases like this is another question,[34] but it is in any event a question

[33] From the declarations of respondents' counsel in the lower courts, as well as those of the District Court and the Court of Appeals, all of which are quoted in Part I, *supra*, we understand the District Court's approval of the stipulation settling the health services claims to have rested on the determination that the provision waiving attorney's fees and costs was fair to the class—*i. e.*, the fee waiver was exchanged for injunctive relief of equivalent value.

[34] We are cognizant of the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases. If this occurred, the pool of lawyers willing to represent plaintiffs in such cases might shrink, constricting the "effective access to the judicial process" for persons with civil rights grievances which the Fees Act was intended to provide. H. R. Rep. No. 94-1558, p. 1 (1976). That the "tyranny of small decisions" may operate in this fashion is not to say that there is any

that Congress is best equipped to answer. Thus far, the Legislature has not commanded that fees be paid whenever a case is settled. Unless it issues such a command, we shall rely primarily on the sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in the light of all the relevant circumstances.[35] In this case, the District Court did not

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reason or documentation to support such a concern at the present time. Comment on this issue is therefore premature at this juncture. We believe, however, that as a practical matter the likelihood of this circumstance arising is remote. See *Moore* v. *National Assn. of Securities Dealers, Inc.*, 246 U. S. App. D. C., at 133, n. 1, 762 F. 2d, at 1112, n. 1 (Wald, J., concurring in judgment).

[35] "Each negotiation, like each litigant, is unique; reasonableness can only be determined by looking at the strength of the plaintiff's case, the stage at which the settlement is effective, the substantiality of the relief obtained on the merits, and the explanations of the parties as to why they did what they did." *Id.*, at 134, 762 F. 2d, at 1113 (Wald, J., concurring in judgment).

See also the following comment in the opinion of the Final Subcommittee Report of the Committee on Attorney's Fees of the Judicial Conference of the United States Court of Appeals for the District of Columbia Circuit:

"[T]he purpose of such settlement offers is not, in most cases, to create an attorney-client conflict, nor to punish or deter plaintiffs' attorneys from taking on fee shifting cases. Generally speaking, the reason that defendants make such offers is to limit their total exposure.

. . . . .

"The key in these situations is whether the defendant's offer is reasonable in light of all the circumstances, including the chances of success on the merits and the risk of possible exposure in damages and attorneys fees. And in making such determinations, the legitimate interest of the fee shifting provisions must be balanced against the legitimate interest of the defendant, whether a governmental agency or private party, in making an offer which will fix liability with considerable certainty. This balancing approach applies regardless of whether the issue is phrased in terms of the right of the defendant to make a lump sum settlement offer, or the right to refuse to pay fees to the plaintiff's attorney while providing some measure of relief to the client. In both situations, the inquiry is the same and can be decided only on a case by case basis, assessing the reasonableness of the defendant's conduct." 13 Bar Report, at 6.

abuse its discretion in upholding a fee waiver which secured broad injunctive relief, relief greater than that which plaintiffs could reasonably have expected to achieve at trial.[36]

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Ultimately, enforcement of the laws is what really counts. It was with this in mind that Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988 (Act or Fees Act). Congress authorized fee shifting to improve enforcement of civil rights legislation by making it easier for victims of civil rights violations to find lawyers willing to take their cases. Because today's decision will make it more difficult for civil rights plaintiffs to obtain legal assistance, a result plainly contrary to Congress' purpose, I dissent.

I

The Court begins its analysis by emphasizing that neither the language nor the legislative history of the Fees Act supports "the proposition that Congress intended to ban all fee waivers offered in connection with substantial relief on the merits." *Ante*, at 730. I agree. There is no evidence that

[36] Although the record in this case does not provide us with any information concerning the amount of money that had been expended on costs, it is appropriate to note that costs other than fees may also be a significant item in class-action litigation. For example, in *Moore* v. *National Assn. of Securities Dealers, Inc.*, *supra*, the class representative's liability for costs amounted to over $30,000 at the time she decided that her best interests would be served by a settlement. 246 U. S. App. D. C., at 116–117, 762 F. 2d, at 1095, 1096, and n. 2 (opinion of MacKinnon, J.). The interest in recovering costs already expended by a class representative may justify a refusal to accept a settlement including only prospective relief and, conversely, the interest in avoiding the additional expenditures associated with continuing the litigation may also justify accepting an otherwise doubtful settlement.

Congress gave the question of fee waivers any thought at all. However, the Court mistakenly assumes that this omission somehow supports the conclusion that fee waivers are permissible. On the contrary, that Congress did not specifically consider the issue of fee waivers tells us absolutely nothing about whether such waivers ought to be permitted. It is blackletter law that "[i]n the absence of specific evidence of Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind th[e] provision . . . ." *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 706 (1945); see also 2A C. Sands, Sutherland on Statutory Construction §§ 54.01–54.03 (4th ed. 1984). We must interpret the statute in the way that is most consistent with Congress' broader purpose; a result which is "plainly at variance with the policy of the legislation as a whole," *Ozawa* v. *United States*, 260 U. S. 178, 194 (1922), cannot be correct. *Watt* v. *Western Nuclear, Inc.*, 462 U. S. 36, 56 (1983) (statute should not be interpreted "to produce a result at odds with the purposes underlying the statute" but rather "in a way that will further Congress' overriding objective"); 2A Sands, *supra*, § 46.07; see also *United States* v. *Freeman*, 3 How. 556, 565 (1845); *Sorrells* v. *United States*, 287 U. S. 435, 446 (1932); *United States* v. *Brown*, 333 U. S. 18, 25–26 (1948); *Lynch* v. *Overholser*, 369 U. S. 705, 710 (1962); *Perry* v. *Commerce Loan Co.*, 383 U. S. 392, 399–400 (1966) (quoting *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543 (1940)); *United States* v. *Campos-Serrano*, 404 U. S. 293, 298 (1971). Accordingly, the first and most important question to be asked is what Congress' purpose was in enacting the Fees Act. We must then determine whether conditional fee waivers are consistent with this purpose.

II

The Court asserts that Congress authorized fee awards "to further the same general purpose—promotion of respect for civil rights—that led it to provide damages and injunctive

relief." *Ante*, at 731. The attorney's fee made available by the Act, we are told, is simply an addition to "the arsenal of remedies available to combat violations of civil rights." *Ante*, at 732.

Obviously, the Fees Act is intended to "promote respect for civil rights." Congress would hardly have authorized fee awards in civil rights cases to promote respect for the securities laws. But discourse at such a level of generality is deceptive. The question is *how* did Congress envision that awarding attorney's fees would promote respect for civil rights? Without a clear understanding of the way in which Congress intended for the Fees Act to operate, we cannot even begin responsibly to go about the task of interpreting it. In theory, Congress might have awarded attorney's fees as simply an additional form of make-whole relief, the threat of which would "promote respect for civil rights" by deterring potential civil rights violators. If this were the case, the Court's equation of attorney's fees with damages would not be wholly inaccurate. However, the legislative history of the Fees Act discloses that this is not the case. Rather, Congress provided fee awards to ensure that there would be lawyers available to plaintiffs who could not otherwise afford counsel, so that these plaintiffs could fulfill their role in the federal enforcement scheme as "private attorneys general," vindicating the public interest.[1]

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[1] This is not to deny that the threat of liability for attorney's fees contributes to compliance with civil rights laws and that this is a desirable effect. See *Hensley* v. *Eckerhart*, 461 U. S. 424, 443, n. 2 (1983) (BRENNAN, J., concurring in part and dissenting in part); see also, *Cooper* v. *Singer*, 719 F. 2d 1496, 1501 (CA10 1983); *Shadis* v. *Beal*, 685 F. 2d 824, 829 (CA3 1982); *Oldham* v. *Ehrlich*, 617 F. 2d 163, 168 (CA8 1980); *Dennis* v. *Chang*, 611 F. 2d 1302, 1306 (CA9 1980); Calhoun, Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U. S. C. § 1988, 55 U. Colo. L. Rev. 341, 343 (1984); Kraus, Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorney's Fees Awards Act of 1976, 29 Vill. L. Rev. 597, 643–644

Before the late 1960's, the concept of fee shifting in public interest litigation was virtually nonexistent. In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968) *(per curiam)*, this Court was called upon to interpret the attorney's fee provision of Title II of the then recently enacted Civil Rights Act of 1964, 42 U. S. C. § 2000a–3(b). We held that a prevailing plaintiff should ordinarily recover fees unless special circumstances rendered such an award unjust. Noting that "[w]hen the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law," we recognized that "[a] Title II suit is thus private in form only." *Newman*, 390 U. S., at 401. If a plaintiff obtains relief, he "does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Id.*, at 402 (footnote omitted). We recognized further that the right to recover attorney's fees was conferred by Congress to ensure that this private public-enforcement mechanism would operate effectively:

> "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination

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(1984). My point is simply that this effect was not what led Congress to enact the Fees Act. Significantly, the Court cites nothing from the legislative history—or anywhere else for that matter—to support its argument that, in awarding attorney's fees to prevailing parties, Congress thought it was merely adding one more remedy to the plaintiff's existing "arsenal." As the discussion which follows clearly establishes, this is because Congress viewed attorney's fees as a special kind of remedy designed to serve a specific purpose.

to seek judicial relief under Title II." *Ibid.* (footnote omitted).

Newman interpreted the fee provision of Title II as intended to bridge the gap between the desire of an individual who has been deprived of a federal right to see that right vindicated and the financial ability of that individual to do so. More importantly, *Newman* recognized that Congress did not erect this bridge solely, or even primarily, to confer a benefit on such aggrieved individuals. Rather, Congress sought to capitalize on the happy coincidence that encouraging private actions would, in the long run, provide effective public enforcement of Title II. By ensuring that lawyers would be willing to take Title II cases, Congress made the threat of a lawsuit for violating Title II real, thereby deterring potential violators.

After *Newman*, lower courts—invoking their equitable powers to award attorney's fees—adopted a similar rationale to award fees in cases brought under civil rights statutes that did not contain express provisions for attorney's fees. See, *e. g.*, *Stolberg* v. *Members of Board of Trustees for State Colleges of Conn.*, 474 F. 2d 485 (CA2 1973) (42 U. S. C. § 1983); *Donahue* v. *Staunton*, 471 F. 2d 475 (CA7 1972), cert. denied, 410 U. S. 955 (1973) (same); *Lee* v. *Southern Home Sites Corp.*, 444 F. 2d 143 (CA5 1971) (42 U. S. C. § 1982). See generally Derfner, One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976, 21 St. Louis U. L. J. 441, 443, and nn. 9–22 (1977) (citing cases). In May 1975, this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, ruled that the equitable powers of the federal courts did not authorize fee awards on the ground that a case served the public interest. Although recognizing that "Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation," the Court held that "congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the

Judiciary . . . to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." *Id.*, at 263. Instead, the Court ruled, only Congress could authorize awarding fees as a means of encouraging private actions in the name of public policy. *Id.*, at 269–271.

In the wake of *Alyeska*, Congress acted to correct "anomalous gaps" in the availability of attorney's fees to enforce civil rights laws, S. Rep. No. 94–1011, p. 1 (1976) (hereafter S. Rep.).[2] See H. R. Rep. No. 94–1558, p. 2 (1976) (hereafter H. R. Rep.); 122 Cong. Rec. 31472 (1976) (remarks of Sen. Kennedy). Testimony at hearings on the proposed legislation disclosed that civil rights plaintiffs, "a vast majority of [whom] cannot afford legal counsel," H. R. Rep. 1, were suffering "very severe hardships because of the *Alyeska* decision," *id.*, at 2. The unavailability of fee shifting made it impossible for legal aid services, "already short of resources," to bring many lawsuits, and, without much possibility of compensation, private attorneys were refusing to take civil rights cases. *Id.*, at 3. See generally Hearings on the Effect of Legal Fees on the Adequacy of Representation before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., pts. 1–4 (1973). Congress found that *Alyeska* had a "devastating" impact on civil rights litigation, and it concluded that the need for corrective legislation was "compelling." H. R. Rep. 3; see also, 122 Cong. Rec., *supra*, at 31471 (remarks of Sen. Scott), 31472 (remarks of Sen. Kennedy).

Accepting this Court's invitation, see *Alyeska*, *supra*, at 269–271, Congress passed the Fees Act in order to reestablish the *Newman* regime under which attorney's fees were awarded as a means of securing enforcement of civil rights laws by ensuring that lawyers would be willing to

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[2] *Alyeska* was decided on May 12, 1975. Senator Tunney introduced S. 2278 on July 31, 1975. The bill was signed by the President and became effective on October 19, 1976.

take civil rights cases. The legislative history manifests this purpose with monotonous clarity. For instance, the Report of the House Judiciary Committee notes "The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited." H. R. Rep. 1. The Report explains, quoting from *Newman*, that a plaintiff who obtains relief in a private lawsuit "'does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest' importance." *Id.*, at 2 (quoting 390 U. S., at 402). The Report then describes the intended scope and operation of the Fees Act, before concluding:

> "The application of these standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys. The effect of [the Fees Act] will be to promote the enforcement of the Federal civil rights acts, as Congress intended, and to achieve uniformity in those statutes and justice for all citizens." H. R. Rep. 9.

These same themes are prominent in the Senate Report:

> "The purpose and effect of [the Fees Act] are simple—it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866. . . . All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. 2.

The Senate Report quotes the same language from *Newman* as the House Report, explaining that "fees are an integral

part of the remedy necessary to achieve compliance with our statutory policies." *Id.*, at 3. After citing existing fee-shifting provisions, the Report sets out the Committee's finding that "[t]hese fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy." *Id.*, at 4. The Report then concludes: "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." *Id.*, at 6.

The floor debates, which were extensive, also are replete with similar expressions; I set out but a few examples. Senator Tunney, who sponsored the original version of the Fees Act, stated to the Senate:

> "The problem of unequal access to the courts in order to vindicate congressional policies and enforce the law is not simply a problem for lawyers and courts. Encouraging adequate representation is essential if the laws of this Nation are to be enforced. Congress passes a great deal of lofty legislation promising equal rights to all.
>
> "Although some of these laws can be enforced by the Justice Department or other Federal agencies, most of the responsibility for enforcement has to rest upon private citizens, who must go to court to prove a violation of the law. . . . But without the availability of counsel fees, these rights exist only on paper. Private citizens must be given not only the rights to go to court, but also the legal resources. If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." 122 Cong. Rec. 33313 (1976).

Senator Kennedy, who sponsored the amended version of the Fees Act that was actually passed, made the same point somewhat more succinctly:

> "Long experience has demonstrated . . . that Government enforcement alone cannot accomplish [compliance with the civil rights laws]. Private enforcement of these laws by those most directly affected must continue to receive full congressional support. Fee shifting provides a mechanism which can give full effect to our civil rights laws, at no added cost to the Government." *Id.*, at 31472.

But perhaps it was Representative Anderson, responding to a question from an opponent of the Fees Act, who summed up the reason for the legislation most effectively. He said:

> "We are talking here about major civil rights laws. We have an obligation, it seems to me, as the representatives of the people, to make sure that those laws are enforced and we discharge that obligation when we make available a reasonable award of attorneys' fees at the discretion of the court. Those of us who are interested in making sure that those laws are enforced . . . are simply abetting and aiding that process of law enforcement when we agree to the provisions of this bill." *Id.*, at 35116.

See also, *e. g.*, *id.*, at 31471 (remarks of Sen. Scott) ("Congress should encourage citizens to go to court in private suits to vindicate its policies and protect their rights"), 35128 (remarks of Rep. Seiberling).

III

As this review of the legislative history makes clear, then, by awarding attorney's fees Congress sought to attract competent counsel to represent victims of civil rights violations.[3] Congress' primary purpose was to enable "private attorneys

[3] Even the Court acknowledges that "it is undoubtedly true that Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights. . . ." *Ante*, at 731 (footnote omitted). Ironically, the only authority the Court cites from the legislative history is in support of this statement.

general" to protect the public interest by creating economic incentives for lawyers to represent them. The Court's assertion that the Fees Act was intended to do nothing more than give individual victims of civil rights violations another remedy is thus at odds with the whole thrust of the legislation. Congress determined that the public as a whole has an interest in the vindication of the rights conferred by the civil rights statutes over and above the value of a civil rights remedy to a particular plaintiff.[4]

I have gone to great lengths to show how the Court mischaracterizes the purpose of the Fees Act because the Court's error leads it to ask the wrong question. Having concluded that the Fees Act merely creates another remedy to vindicate the rights of individual plaintiffs, the Court asks whether negotiated waivers of statutory attorney's fees are "invariably inconsistent" with the availability of such fees as a remedy for individual plaintiffs. *Ante*, at 732. Not surprisingly, the Court has little difficulty knocking down this frail straw man.[5] But the *proper* question is whether permitting nego-

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[4] The Court seems to view the options as limited to two: either the Fees Act confers a benefit on attorneys, a conclusion which is contrary to both the language and the legislative history of the Act, *ante*, at 730–731; or the Fees Act confers a benefit on individual plaintiffs, who may freely exploit the statutory fee award to their own best advantage. It apparently has not occurred to the Court that Congress might have made a remedy available to individual plaintiffs primarily for the benefit of the *public*. However, Congress often takes advantage of individual incentives to advance public policy, relying upon "private attorneys general" to secure enforcement of public rights without the need to establish an independent enforcement bureaucracy. As long as the interests of individual plaintiffs coincide with those of the public, it does not matter whether Congress intended primarily to benefit the individual or primarily to benefit the public. However, when individual and public interests diverge, as they may in particular situations, we must interpret the legislation so as not to frustrate Congress' intentions. See *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 704 (1945).

[5] The assumption that fee awards are identical to other remedies like damages or injunctive relief makes it easy for the Court to conclude that

tiated fee waivers is consistent with Congress' goal of attracting competent counsel. It is therefore necessary to consider the effect on *this* goal of allowing individual plaintiffs to negotiate fee waivers.

A

Permitting plaintiffs to negotiate fee waivers in exchange for relief on the merits actually raises two related but distinct questions. First, is it permissible under the Fees Act to negotiate a settlement of attorney's fees simultaneously with the merits? Second, can the "reasonable attorney's fee" guaranteed in the Act be waived? As a matter of logic, either of these practices may be permitted without also permitting the other. For instance, one could require bifurcated settlement negotiations of merits and fees but allow plaintiffs to waive their fee claims during that phase of the negotiations. Alternatively, one could permit simultaneous negotiation of fees and merits but prohibit the plaintiff from waiving statutory fees. This latter possibility exists because there is a *range* of "reasonable attorney's fees" consistent with the Fees Act in any given case. Cf. *Blum* v. *Stenson*, 465 U. S. 886 (1984); *Hensley* v. *Eckerhart*, 461 U. S., 424, 433–437 (1983); H. R. Rep. 8–9; S. Rep. 6; see generally *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 716–720 (CA5 1974) (listing relevant factors).[6]

More importantly, since simultaneous negotiation and waiver may have different effects on the congressional policy of encouraging counsel to accept civil rights cases, each practice must be analyzed independently to determine whether or

Congress would not have intended to prohibit fee waivers in exchange for relief on the merits "anymore than it intended to bar a concession on damages to secure broader injunctive relief." *Ante*, at 731.

[6] Thus, even if statutory fees cannot be waived, the parties may still want to agree on a fee (or a range of acceptable fees) that they believe to be within the range of fees authorized by the Act. The parties may then, if they choose to do so, make their settlement on the merits contingent upon the district court's approval of their negotiated fee as within the range of "reasonable" fees contemplated by the Fees Act.

not it is consistent with the Fees Act. Unfortunately, the Court overlooks the logical independence of simultaneous negotiation and waiver and assumes that there cannot be one without the other. See *ante*, at 734–738, and n. 28. As a result, the Court's discussion conflates the different effects of these practices, and its opinion is of little use in coming to a fair resolution of this case. An independent examination leads me to conclude: (1) that plaintiffs should not be permitted to waive the "reasonable fee" provided by the Fees Act; but (2) that parties may undertake to negotiate their fee claims simultaneously with the merits so long as whatever fee the parties agree to is found by the court to be a "reasonable" one under the Fees Act.

B

1

It seems obvious that allowing defendants in civil rights cases to condition settlement of the merits on a waiver of statutory attorney's fees will diminish lawyers' expectations of receiving fees and decrease the willingness of lawyers to accept civil rights cases. Even the Court acknowledges "the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases." *Ante*, at 741–742, n. 34. The Court tells us, however, that "[c]omment on this issue" is "premature at this juncture" because there is not yet supporting "documentation." *Ibid.* The Court then goes on anyway to observe that "as a practical matter the likelihood of this circumstance arising is remote." *Ibid.*

I must say that I find the Court's assertions somewhat difficult to understand. To be sure, the impact of conditional fee waivers on the availability of attorneys will be less severe than was the restriction on fee awards created in *Alyeska*. However, that experience surely provides an indication of the immediate hardship suffered by civil rights claimants

whenever there is a reduction in the availability of attorney's fee awards.[7] Moreover, numerous courts and commentators have recognized that permitting fee waivers creates disincentives for lawyers to take civil rights cases and thus makes it more difficult for civil rights plaintiffs to obtain legal assistance. See, *e. g.*, *Moore* v. *National Assn. of Securities Dealers, Inc.*, 246 U. S. App. D. C. 114, 133–134, 762 F. 2d 1093, 1112–1113 (Wald, J., concurring in judgment), 1117 (Wright, J., dissenting) (1985); *Shadis* v. *Beal*, 685 F. 2d 824, 830–831 (CA3), cert. denied *sub nom. O'Bannon* v. *Shadis*, 459 U. S. 970 (1982); Kraus, 29 Vill. L. Rev., at 625, 633–638; Comment, Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations, 131 U. Pa. L. Rev. 793, 814–816 (1983); Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 80–94, reprinted in 36 Record of N. Y. C. B. A. 507, 508–509 (1981).

But it does not require a sociological study to see that permitting fee waivers will make it more difficult for civil rights plaintiffs to obtain legal assistance. It requires only common sense. Assume that a civil rights defendant makes a settlement offer that includes a demand for waiver of statutory attorney's fees. The decision whether to accept or reject the

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[7] It is especially important to keep in mind the fragile nature of the civil rights bar. Even when attorney's fees are awarded, they do not approach the large sums which can be earned in ordinary commercial litigation. See Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 U. Pa. L. Rev. 281, 310–315 (1977). It is therefore cost inefficient for private practitioners to devote much time to civil rights cases. Consequently, there are very few civil rights practitioners, and most of these devote only a small part of their time to such cases. Kraus, 29 Vill. L. Rev., at 633–634 (citing studies indicating that less than 1% of lawyers engage in public interest practice). Instead, civil rights plaintiffs must depend largely on legal aid organizations for assistance. These organizations, however, are short of resources and also depend heavily on statutory fees. H. R. Rep. 3; Kraus, *supra*, at 634; see also, *Blum* v. *Stenson*, 465 U. S. 886, 894–895 (1984).

offer is the plaintiff's alone, and the lawyer must abide by the plaintiff's decision. See, *e. g.*, ABA, Model Rules of Professional Conduct 1.2(a) (1984); ABA, Model Code of Professional Responsibility EC 7–7 to EC 7–9 (1982).[8] As a formal matter, of course, the statutory fee belongs to the plaintiff, *ante*, at 730, and n. 19, and thus technically the decision to waive entails a sacrifice only by the plaintiff. As a practical matter, however, waiver affects only the lawyer. Because "a vast majority of the victims of civil rights violations" have no resources to pay attorney's fees, H. R. Rep. 1,[9] lawyers cannot hope to recover fees from the plaintiff and must depend entirely on the Fees Act for compensation.[10] The plain-

[8] The attorney is, in fact, obliged to advise the plaintiff whether to accept or reject the settlement offer based on his independent professional judgment, and the lawyer's duty of undivided loyalty requires that he render such advice free from the influence of his or his organization's interest in a fee. See, *e. g.*, ABA, Model Code of Professional Responsibility EC 5–1, EC 5–2, DR 5–101(A) (1982); ABA, Model Rules of Professional Conduct 1.7(b), 2.1 (1984). Thus, counsel must advise a client to accept an offer which includes waiver of the plaintiff's right to recover attorney's fees if, on the whole, the offer is an advantageous one. See, *e. g.*, Commission Op. No. 17 (1981), Advisory Opinions of the Grievance Commission of the Board of Overseers of the Bar of Maine 69, 70 (1983); District of Columbia Bar, Legal Ethics Committee, Op. No. 147, reprinted in 113 Daily Washington Law Reporter 389, 394 (1985). As the discussion in text makes clear, the plaintiff makes no sacrifice by waiving statutory attorney's fees, and thus a settlement offer is not made less attractive by the inclusion of a demand for a fee waiver.

[9] See also S. Rep. 2; 122 Cong. Rec. 31472 (1976) (remarks of Sen. Kennedy); *id.*, at 31832 (remarks of Sen. Hathaway) ("[R]light now the vindication of important congressional policies in the vital area of civil rights is made to depend upon the financial resources of those least able to promote them"). Indeed, legal aid organizations receiving funds under the Legal Services Corporation Act, 42 U. S. C. §§ 2996–2996*l*, are prohibited from representing individuals who are capable of paying their own legal fees. See § 2996f(b)(1); 45 CFR § 1609 (1985).

[10] Nor can attorneys protect themselves by requiring plaintiffs to sign contingency agreements or retainers at the outset of the representation. *Amici* legal aid societies inform us that they are prohibited by statute, court rule, or Internal Revenue Service regulation from entering into fee

tiff thus has no real stake in the statutory fee and is unaffected by its waiver. See *Lipscomb* v. *Wise*, 643 F. 2d 319, 320 (CA5 1981) *(per curiam)*. Consequently, plaintiffs will readily agree to waive fees if this will help them to obtain other relief they desire.[11] As summed up by the Legal Ethics Committee of the District of Columbia Bar:

> "Defense counsel . . . are in a uniquely favorable position when they condition settlement on the waiver of the statutory fee: They make a demand for a benefit that the plaintiff's lawyer cannot resist as a matter of ethics and one in which the plaintiff has no interest and therefore will not resist." Op. No. 147, reprinted in 113 Daily Washington Reporter, *supra* n. 8, at 394.

Of course, from the lawyer's standpoint, things could scarcely have turned out worse. He or she invested consid-

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agreements with their clients. Brief for NAACP Legal Defense and Educational Fund, Inc., et al. as *Amici Curiae* 10–11; Brief for Committee on Legal Assistance of the Association of the Bar of the City of New York as *Amicus Curiae* 12–13. Moreover, even if such agreements could be negotiated, the possibility of obtaining protection through contingency fee arrangements is unavailable in the very large proportion of civil rights cases which, like this case, seek only injunctive relief. In addition, the Court's misconceived doctrine of state sovereign immunity, see *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 247 (1985) (BRENNAN, J., dissenting), precludes damages suits against governmental bodies, the most frequent civil rights defendants. Finally, even when a suit is for damages, many civil rights actions concern amounts that are too small to provide real compensation through a contingency fee arrangement. Of course, none of the parties has seriously suggested that civil rights attorneys can protect themselves through private arrangements. After all, Congress enacted the Fees Act because, after *Alyeska*, it found such arrangements wholly inadequate. *Supra*, at 748–751.

[11] This result is virtually inevitable in class actions where, even if the class representative feels sympathy for the lawyer's plight, the obligation to represent the interests of absent class members precludes altruistic sacrifice. In class actions on behalf of incompetents, like this one, it is the lawyer himself who must agree to sacrifice his own interests for those of the class he represents. See, *e. g.*, ABA, Model Code of Professional Responsibility EC 7–12 (1982).

erable time and effort in the case, won, and has exactly nothing to show for it. Is the Court really serious in suggesting that it takes a study to prove that this lawyer will be reluctant when, the following week, another civil rights plaintiff enters his office and asks for representation? Does it truly require that somebody conduct a test to see that legal aid services, having invested scarce resources on a case, will feel the pinch when they do not recover a statutory fee?

And, of course, once fee waivers are permitted, defendants will seek them as a matter of course, since this is a logical way to minimize liability. Indeed, defense counsel would be remiss *not* to demand that the plaintiff waive statutory attorney's fees. A lawyer who proposes to have his client pay more than is necessary to end litigation has failed to fulfill his fundamental duty zealously to represent the best interests of his client. Because waiver of fees does not affect the plaintiff, a settlement offer is not made less attractive to the plaintiff if it includes a demand that statutory fees be waived. Thus, in the future, we must expect settlement offers routinely to contain demands for waivers of statutory fees.[12]

The cumulative effect this practice will have on the civil rights bar is evident. It does not denigrate the high ideals that motivate many civil rights practitioners to recognize that lawyers are in the business of practicing law, and that, like other business people, they are and must be concerned with earning a living.[13] The conclusion that permitting fee

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[12] The Solicitor General's suggestion that we can prohibit waivers sought as part of a "vindictive effort" to teach lawyers not to bring civil rights cases, Tr. of Oral Arg. 22, a point that the Court finds unnecessary to consider, *ante*, at 739–740, is thus irrelevant. Defendants will seek such waivers in every case simply as a matter of sound bargaining. Indeed, the Solicitor General's brief suggests that this will be the bargaining posture of the United States in the future. Brief for United States as *Amicus Curiae* 12–13.

[13] See Johnson, Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions, 15 Law & Soc. Rev. 567 (1980–1981) (concluding that "fee for service" lawyers will withdraw resources from a given case

waivers will seriously impair the ability of civil rights plaintiffs to obtain legal assistance is embarrassingly obvious.

Because making it more difficult for civil rights plaintiffs to obtain legal assistance is precisely the opposite of what Congress sought to achieve by enacting the Fees Act, fee waivers should be prohibited. We have on numerous prior occasions held that "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S., at 704 (holding right to liquidated damages under Fair Labor Standards Act nonwaivable). See also, *e. g.*, *Boyd* v. *Grand Trunk Western R. Co.*, 338 U. S. 263, 266 (1949) (holding venue provision of Federal Employers' Liability Act nonwaivable); *Wilko* v. *Swan*, 346 U. S. 427, 434–438 (1953) (holding void an agreement to arbitrate in lieu of judicial remedy provided by Securities Exchange Act); cf. *James* v. *Home Construction Co. of Mobile, Inc.*, 689 F. 2d 1357, 1359 (CA11 1982) (implying a right of action for attorneys to seek fees under Truth-in-Lending Act to further congressional policies). This is simply straightforward application of the well-established principle that an agreement which is contrary to public policy is void and unenforceable. See Restatement (Second) of Contracts § 178 (1981); see also, *Brooklyn Savings Bank* v. *O'Neil*, *supra*, at 710; *Crites, Inc.* v. *Prudential Insurance, Co.*, 322 U. S. 408, 418 (1944); *Weil* v. *Neary*, 278 U. S. 160, 171–174 (1929); *Woodstock Iron Co.* v. *Richmond and Danville Extension Co.*, 129 U. S. 643, 662–663 (1889).[14]

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when total expected costs exceed total expected benefits); Kraus, 29 Vill. L. Rev., at 637 ("No matter how sophisticated the analysis of attorney responses becomes, the conclusion remains that the more we decrease the reasonable expectation of Fees Act awards, the less likely it is that Fees Act cases will be initiated").

[14] To be sure, prohibiting fee waivers will require federal courts to make a determination they would not have to make if fees could be waived. However, this additional chore will not impose a significant burden. In

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This all seems so obvious that it is puzzling that the Court reaches a different result. The Court's rationale is that, unless fee waivers are permitted, "parties to a significant number of civil rights cases will refuse to settle . . . ." *Ante*, at 736. This is a wholly inadequate justification for the Court's result.

First, the effect of prohibiting fee waivers on settlement offers is just not an important concern in the context of the Fees Act. I agree with the Court that encouraging settlements is desirable policy. But it is *judicially* created policy, applicable to litigation of any kind and having no special force in the context of civil rights cases.[15] The *congressional* policy underlying the Fees Act is, as I have argued throughout, to create incentives for lawyers to devote time to civil rights cases by making it economically feasible for them to do so. *Supra*, at 745–753.[16] As explained above, permitting fee

assessing the impact of making statutory fees nonwaivable on the business of the federal courts, it is important not to overlook the context in which the fee determination is made. Unlike in the adversarial context, if the parties have agreed to a fee (or a range of acceptable fees) as part of a settlement, the court will not be required to hear testimony or engage in judicial factfinding in order to resolve disputes over hours reasonably spent, hourly rates and the like. Similarly, the court will not have to decide whether to enhance the lodestar to reflect high-quality representation or risk of nonsuccess, or to prepare an opinion in anticipation of appellate review. The court's simple task will be to review the parties' raw billing data in order to determine whether the court itself *could* reasonably have made a fee award of the amount agreed to by the parties. Such calculations will, in the vast majority of cases, require little time or effort.

[15] By lessening docket congestion, settlements make it possible for the judicial system to operate more efficiently and more fairly while affording plaintiffs an opportunity to obtain relief at an earlier time. These benefits accrue when settlements are reached in noncivil rights cases no less than in civil rights cases.

[16] Settlement is discussed only once in the legislative history of the Fees Act. The House Committee Report explained: "The phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a liti-

waivers significantly undercuts this policy. Thus, even if prohibiting fee waivers does discourage some settlements, a *judicial* policy favoring settlement cannot possibly take precedence over this express *congressional* policy. We must implement Congress' agenda, not our own.

In an attempt to justify its decision to elevate settlement concerns, the Court argues that settlement "provides benefits for civil rights plaintiffs as well as defendants and is consistent with the purposes of the Fees Act" because "'[s]ome plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered.'" *Ante*, at 732–733 (quoting *Marek* v. *Chesny*, 473 U. S. 1, 10 (1985)); see also *ante*, at 731 (legislative history does not show that Congress intended to bar "even [waivers] insisted upon by a civil rights plaintiff in exchange for some other relief to which he is indisputably not entitled . . .") (footnote omitted).

As previously noted, by framing the purpose of the Fees Act in very general terms, the Court merely obscures the proper focus of discussion. The Fees Act was designed to help civil rights plaintiffs in a particular way—by ensuring that there will be lawyers willing to represent them. The fact that fee waivers may produce some settlement offers that are beneficial to a few individual plaintiffs is hardly "consistent with the purposes of the Fees Act," *ante*, at 733, if permitting fee waivers fundamentally undermines what Congress sought to achieve. Each individual plaintiff who waives his right to statutory fees in order to obtain additional relief for himself makes it that much more difficult for the next victim of a civil rights violation to find a lawyer willing or able to bring *his* case. As obtaining legal assistance becomes more difficult, the "benefit" the Court so magnani-

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gant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. . . . A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion." H. R. Rep. 7.

mously preserves for civil rights plaintiffs becomes available to fewer and fewer individuals, exactly the opposite result from that intended by Congress.

Moreover, I find particularly unpersuasive the Court's apparent belief that Congress enacted the Fees Act to help plaintiffs coerce relief to which they are "indisputably not entitled." See *ante*, at 731, 732. It may be that, in particular cases, some defendants' fears of incurring liability for plaintiff's attorney's fees will give plaintiffs leverage to coerce relief they do not deserve. If so, this is an unfortunate cost of a statute intended to ensure that plaintiffs can obtain the relief to which they *are* entitled. And it certainly is not a result we must preserve at the expense of the central purpose of the Fees Act.

Second, even assuming that settlement practices are relevant, the Court greatly exaggerates the effect that prohibiting fee waivers will have on defendants' willingness to make settlement offers. This is largely due to the Court's failure to distinguish the fee waiver issue from the issue of simultaneous negotiation of fees and merits claims. *Supra*, at 754. The Court's discussion mixes concerns over a defendant's reluctance to settle because total liability remains uncertain with reluctance to settle because the cost of settling is too high. See *ante*, at 734–737. However, it is a prohibition on simultaneous negotiation, not a prohibition on fee waivers, that makes it difficult for the defendant to ascertain his total liability at the time he agrees to settle the merits. Thus, while prohibiting fee waivers may deter settlement offers simply because requiring the defendant to pay a "reasonable attorney's fee" increases the total cost of settlment, this is a separate issue altogether, and the Court's numerous arguments about why defendants will not settle unless they can determine their total liability at the time of settlement, *ante*, at 734, 735, 736, are simply beside the point.[17] With respect

[17] For the reasons stated in Part III–C, I would permit simultaneous negotiation of fees and merits. The parties could agree upon a reasonable

to a prohibition on fee waivers (and again merely assuming that effects on settlement are relevant), the sole question to be asked is whether the increased cost of settlement packages will prevent enough settlement offers to be a dispositive factor in this case.

The Court asserts, without factual support,[18] that requiring defendants to pay statutory fee awards will prevent a "significant number" of settlements. *Ante*, at 734–735. It is, of course, ironic that the same absence of "documentation" which makes comment on the effects of *permitting* fee waivers "premature at this juncture," *ante*, at 742, n. 34, does not similarly affect the Court's willingness to speculate about what to expect if fee waivers are *prohibited*. Be that as it may, I believe that the Court overstates the extent to which prohibiting fee waivers will deter defendants from making settlement offers. Because the parties can negotiate a fee (or a range of fees) that is not unduly high and condition their settlement on the court's approval of this fee, the magnitude

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fee which would be subject to judicial approval under the Fees Act. Any settlement on the merits could be made contingent upon such approval. By permitting defendants to ascertain their total liability prior to settling, this approach fully alleviates the Court's concerns in this regard.

[18] The Court does cite a few cases in which courts awarded attorney's fees greater in value than the relief obtained on the merits. See *ante*, at 734–735, and nn. 24, 25. From these, the Court would have us draw the inference that without fee waivers there will be significantly fewer settlements. But what a few courts have done in the context of adversarial proceedings tells us little about what to expect when parties negotiate a reasonable fee award. A court may exercise its discretion and fix a fee award at the upper end of the range of reasonable fees while the parties may agree in negotiation to a figure in the middle or at the lower end of this range.

The Court also cites a brief filed by petitioners in the District Court which states that petitioners viewed the risk of a large attorney's fee award as "'the most significant liability in the case.'" *Ante*, at 735 (quoting Brief for Defendants in Support of Approval of Compromise in *Jeff D.* v. *Evans*, No. 80–4091 (Idaho), p. 5). This self-serving statement, filed by petitioners to persuade the District Court to approve a fee waiver, is hardly authority for the conclusion the Court seeks to establish.

of a defendant's liability for fees in the settlement context need be neither uncertain nor particularly great.[19] Against this, the defendant must weigh the risk of a nonnegotiated fee to be fixed by the court after a trial; as the Court reminds us, fee awards in *this* context may be very uncertain and, potentially, of very great magnitude. See *ante*, at 734–735, nn. 23, 24. Thus, powerful incentives remain for defendants to seek settlement. Moreover, the Court's decision last Term in *Marek* v. *Chesny*, 473 U. S. 1 (1985), provides an additional incentive for defendants to make settlement offers, namely, the opportunity to limit liability for attorney's fees if the plaintiff refuses the offer and proceeds to trial.

All of which is not to deny that prohibiting fee waivers will deter some settlements; any increase in the costs of settling will have this effect. However, by exaggerating the size and the importance of fee awards, and by ignoring the options available to the parties in settlement negotiations, the Court makes predictions that are inflated. An actual disincentive to settling exists only where three things are true: (1) the defendant feels he is likely to win if he goes to trial, in which case the plaintiff will recover no fees; (2) the plaintiff will agree to relief on the merits that is less costly to the defendant than litigating the case; and (3) adding the cost of a negotiated attorney's fee makes it less costly for the defendant to litigate. I believe that this describes a very small class of cases—although, like the Court, I cannot "document" the assertion.

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I would, on the other hand, permit simultaneous negotiation of fees and merits claims, since this would not contra-

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[19] Indeed, although such cases should be rare, in frivolous or minor disputes an agreement that no fees be awarded could be approved by the court as "reasonable" under the Fees Act. Cf. S. Rep. 5 (prevailing plaintiff should ordinarily recover fees, but fees may be denied in "special circumstances"); *Kerr* v. *Quinn*, 692 F. 2d 875 (CA2 1982); *Skehan* v. *Board of Trustees of Bloomsburg State College*, 436 F. Supp. 657 (MD Pa. 1977).

vene the purposes of the Fees Act. Congress determined that awarding prevailing parties a "reasonable" fee would create necessary—and sufficient—incentives for attorneys to work on civil rights cases. Prohibiting plaintiffs from waiving statutory fees ensures that lawyers will receive this "reasonable" statutory fee. Thus, if fee waivers are prohibited, permitting simultaneous fees and merits negotiations will not interfere with the Act; the lawyer will still be entitled to and will still receive a reasonable attorney's fee. Indeed, permitting simultaneous negotiations in such circumstances may even enhance the effectiveness of the Fees Act by making it easier for a lawyer to dispose of his cases more quickly. This frees up the lawyer's time to take other cases and may enhance his reputation as an effective advocate who quickly obtains relief for clients.

IV

Although today's decision will undoubtedly impair the effectiveness of the private enforcement scheme Congress established for civil rights legislation, I do not believe that it will bring about the total disappearance of "private attorneys general." It is to be hoped that Congress will repair this Court's mistake. In the meantime, other avenues of relief are available. The Court's decision in no way limits the power of state and local bar associations to regulate the ethical conduct of lawyers. Indeed, several Bar Associations have already declared it unethical for defense counsel to seek fee waivers. See Committee on Professional Ethics of the Association of the Bar of the City of New York, Op. No. 82–80 (1985); District of Columbia Legal Ethics Committee, Op. No. 147, *supra* n. 8, 113 Daily Washington Law Reporter, at 389. Such efforts are to be commended and, it is to be hoped, will be followed by other state and local organizations concerned with respecting the intent of Congress and with protecting civil rights.

In addition, it may be that civil rights attorneys can obtain agreements from their clients not to waive attorney's fees.[20] Such agreements simply replicate the private market for legal services (in which attorneys are not ordinarily required to contribute to their client's recovery[21]), and thus will enable civil rights practitioners to make it economically feasible—as Congress hoped—to expend time and effort litigating civil rights claims.

During the floor debates over passage of the Fees Act, Senator Hugh Scott reminded the Congress in terms that might well have been addressed to the Court today that "we must bear in mind at all times that rights that cannot be enforced through the legal process are valueless; such a situation breeds cynicism about the basic fairness of our judicial system. [We] must be vigilant to insure that our legal rights are not hollow ones." 122 Cong. Rec. 31471 (1976).

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[20] Since Congress has not sought to regulate ethical concerns either in the Fees Act or elsewhere, the legality of such arguments is purely a matter of local law. See *Nix* v. *Whiteside*, *ante*, at 176 (BRENNAN, J., concurring in judgment).

[21] One of the more peculiar aspects of the Court's interpretation of the Fees Act is that it permits defendants to require plaintiff's counsel to contribute his compensation to satisfying the plaintiff's claims. In ordinary civil litigation, no defendant would make—or sell to his adversary—a settlement offer conditioned upon the plaintiff's convincing his attorney to contribute to the plaintiff's recovery. Yet today's decision creates a situation in which plaintiff's attorneys in civil rights cases are required to do just that. Thus, rather than treating civil rights claims no differently than other civil litigation, *ante*, at 733 (quoting *Marek* v. *Chesny*, 473 U. S. 1, 10 (1985)), the Court places such litigation in a quite unique—and unfavorable—category.

PHILADELPHIA NEWSPAPERS, INC., ET AL. v. HEPPS ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

No. 84-1491. Argued December 3, 1985—Decided April 21, 1986

Appellee Hepps is the principal stockholder of appellee corporation that franchises a chain of stores selling beer, soft drinks, and snacks. Appellant owner published a series of articles in its Philadelphia newspaper whose general theme was that Hepps, the franchisor corporation, and its franchisees (also appellees) had links to organized crime and used some of those links to influence the State's governmental processes. Appellees then brought a defamation suit in a Pennsylvania state court against the newspaper owner and the authors (also appellants) of the articles in question. Concluding that the Pennsylvania statute giving the defendant the burden of proving the truth of allegedly defamatory statements violated the Federal Constitution, the trial court instructed the jury that the plaintiff bore the burden of proving falsity. The jury ruled for appellants and therefore awarded no damages to appellees. The Pennsylvania Supreme Court, concluding that a showing of fault did not require a showing of falsity, held that to place the burden of showing truth on the defendant did not unconstitutionally inhibit free debate, and remanded the case for a new trial.

Held: In a case such as this one, where a newspaper publishes speech of public concern about a private figure, the private-figure plaintiff cannot recover damages without also showing that the statements at issue are false. Because in such a case the scales are in an uncertain balance as to whether the statements are true or false, the Constitution requires that the scales be tipped in favor of protecting true speech. To ensure that true speech on matters of public concern is not deterred, the common-law presumption that defamatory speech is false cannot stand. While Pennsylvania's "shield law," which allows employees of the media to refuse to divulge their sources, places a heavier burden on appellees, the precise scope of that law is unclear and, under these circumstances, it does not appear that such law requires a different constitutional standard than would prevail in the absence of such law. Pp. 771–779.

506 Pa. 304, 485 A. 2d 374, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post*, p. 779. STE-

VENS, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined, *post*, p. 780.

David H. Marion argued the cause for appellants. With him on the briefs were *Samuel E. Klein* and *Kerry L. Adams*.

Ronald H. Surkin argued the cause for appellees. With him on the brief was *Edwin P. Rome*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us once more to "struggl[e] . . . to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 325 (1974). In *Gertz*, the Court held that a private figure who brings a suit for defamation cannot recover without some showing that the media defendant was at fault in publishing the statements at issue. *Id.*, at 347. Here, we hold that, at least where a newspaper publishes speech of public

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *John G. Koeltl, James C. Goodale, Burt Neuborne, Jack D. Novick, Stefan Presser, Bruce W. Sanford, W. Terry Maguire, R. Bruce Rich, Robert D. Sack*, and *Alice Neff Lucan;* for the American Federation of Labor and Congress of Industrial Organizations by *David M. Silberman* and *Laurence Gold;* for Capital Cities Communications, Inc., et al. by *Bernard G. Segal, Jerome J. Shestack, Carl A. Solano, Elihu A. Greenhouse*, and *Lawrence Gunnels;* and for Print and Broadcast Media et al. by *E. Barrett Prettyman, Jr., Dan Paul, Franklin G. Burt, Steven M. Kamp, John H. McElhaney, Richard M. Schmidt, Jr., Peter G. Banta, Stuart F. Pierson, Neil L. Shapiro, Wilford W. Kirton, Jr., David M. Olive, Theodore Sherbow, Robert Haydock, Jr., Peter Michael Meloy, W. Joel Blass, William W. Ogden, Eric D. Lanphere, Michael A. Gross, Conrad M. Shumadine, William A. Niese, Norton L. Armour, H. Hugh Stevens, Jr., Thomas T. Cobb, Michael Minnis, James L. Koley, J. Laurent Scharff, Alexander Wellford, Donald B. Holbrook, Edward P. Davis, Jr., P. Cameron DeVore, Gregg D. Thomas, Jack M. Weiss, Rutledge C. Clement, Jr.*, and *George K. Rahdert*.

Daniel J. Popeo filed a brief for the American Legal Foundation as *amicus curiae* urging affirmance.

concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.

I

Maurice S. Hepps is the principal stockholder of General Programming, Inc. (GPI), a corporation that franchises a chain of stores—known at the relevant time as "Thrifty" stores—selling beer, soft drinks, and snacks. Mr. Hepps, GPI, and a number of its franchisees are the appellees here.[1] Appellant Philadelphia Newspapers, Inc., owns the Philadelphia Inquirer (Inquirer). The Inquirer published a series of articles, authored by appellants William Ecenbarger and William Lambert, containing the statements at issue here. The general theme of the five articles, which appeared in the Inquirer between May 1975 and May 1976, was that appellees had links to organized crime and used some of those links to influence the State's governmental processes, both legislative and administrative. The articles discussed a state legislator, described as "a Pittsburgh Democrat and convicted felon," App. A60, whose actions displayed "a clear pattern of interference in state government by [the legislator] on behalf of Hepps and Thrifty," *id.*, at A62–A63. The stories reported that federal "investigators have found connections between Thrifty and underworld figures," *id.*, at A65; that "the Thrifty Beverage beer chain . . . had connections . . . with organized crime," *id.*, at A80; and that Thrifty had "won a series of competitive advantages through rulings by the State Liquor Control Board," *id.*, at A65. A grand jury was said to be investigating the "alleged relationship between the Thrifty chain and known Mafia figures," and "[w]hether the chain received special treatment from the [state Governor's] administration and the Liquor Control Board." *Id.*, at A68.

[1] Appellants list nine entities as appellees in the proceedings in this Court: Maurice S. Hepps; General Programming, Inc.; A. David Fried, Inc.; Brookhaven Beverage Distributors, Inc.; Busy Bee Beverage Co.; ALMIK, Inc.; Lackawanna Beverage Distributors; N. F. O., Inc.; and Elemar, Inc. Brief for Appellants ii.

Appellees brought suit for defamation against appellants in a Pennsylvania state court. Consistent with *Gertz, supra*, Pennsylvania requires a private figure who brings a suit for defamation to bear the burden of proving negligence or malice by the defendant in publishing the statements at issue. 42 Pa. Cons. Stat. § 8344 (1982). As to falsity, Pennsylvania follows the common law's presumption that an individual's reputation is a good one. Statements defaming that person are therefore presumptively false, although a publisher who bears the burden of proving the truth of the statements has an absolute defense. See 506 Pa. 304, 313–314, 485 A. 2d 374, 379 (1984). See also 42 Pa. Cons. Stat. § 8343(b)(1) (1982) (defendant has the burden of proving the truth of a defamatory statement). Cf. *Gertz, supra*, at 349 (common law presumes injury to reputation from publication of defamatory statements). See generally Eaton, The American Law of Defamation Through *Gertz* v. *Robert Welch, Inc.*, and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1352–1357 (1975) (describing common-law scheme of defamation law).

The parties first raised the issue of burden of proof as to falsity before trial, but the trial court reserved its ruling on the matter. Appellee Hepps testified at length that the statements at issue were false, Tr. 2221–2290, and he extensively cross-examined the author of the stories as to the veracity of the statements at issue. After all the evidence had been presented by both sides, the trial court concluded that Pennsylvania's statute giving the defendant the burden of proving the truth of the statements violated the Federal Constitution. *Id.*, at 3589. The trial court therefore instructed the jury that the plaintiffs bore the burden of proving falsity. *Id.*, at 3848.

During the trial, appellants took advantage of Pennsylvania's "shield law" on a number of occasions. That law allows employees of the media to refuse to divulge their sources. See 42 Pa. Cons. Stat. § 5942(a) (1982) ("No person . . . employed by any newspaper of general circulation . . . or any

radio or television station, or any magazine of general circulation, . . . shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit"). See also 506 Pa., at 327, 485 A. 2d, at 387 ("This statute has been interpreted broadly"). Appellees requested an instruction stating that the jury could draw a negative inference from appellants' assertions of the shield law; appellants requested an instruction that the jury could not draw any inferences from those exercises of the shield law's privilege. The trial judge declined to give either instruction. Tr. 3806–3808. The jury ruled for appellants and therefore awarded no damages to appellees.

Pursuant to Pennsylvania statute, 42 Pa. Cons. Stat. § 722(7) (1982), the appellees here brought an appeal directly to the Pennsylvania Supreme Court. That court viewed *Gertz* as simply requiring the plaintiff to show fault in actions for defamation. It concluded that a showing of fault did not require a showing of falsity, held that to place the burden of showing truth on the defendant did not unconstitutionally inhibit free debate, and remanded the case for a new trial.[2] 506 Pa., at 318–329, 485 A. 2d, at 382–387. We noted probable jurisdiction, 472 U. S. 1025 (1985), and now reverse.

II

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), the Court "determin[ed] for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a

[2] The state courts that have considered this issue since *Gertz* have reached differing conclusions. Compare, *e. g.*, *Denny* v. *Mertz*, 106 Wis. 2d 636, 654–658, 318 N. W. 2d 141, 150–151 (defendant must bear burden of showing truth), cert. denied, 459 U. S. 883 (1982), and *Memphis Publishing Co.* v. *Nichols*, 569 S. W. 2d 412 (Tenn. 1978) (same), with *Gazette, Inc.* v. *Harris*, 229 Va. 1, 15–16, 325 S. E. 2d 713, 725 (plaintiff must bear burden of showing falsity), cert. denied, 473 U. S. 905 (1985), and *Madison* v. *Yunker*, 180 Mont. 54, 67, 589 P. 2d 126, 133 (1978) (same).

public official against critics of his official conduct." *Id.*, at 256. The State's trial court in that case believed the statements tended to injure the plaintiff's reputation or bring him into public contempt, *id.*, at 267, and were therefore libelous *per se*, *id.*, at 262. The trial court therefore instructed the jury that it could presume falsity, malice, and some damage to reputation, as long as it found that the defendant had published the statements and that the statements concerned the plaintiff. *Ibid.* The trial court also instructed the jury that an award of punitive damages required "malice" or "actual malice." *Id.*, at 262, 267. The jury found for the plaintiff and made an award of damages that did not distinguish between compensatory and punitive damages. *Id.*, at 262. The Alabama Supreme Court upheld the judgment of the trial court in all respects. *Id.*, at 263.

This Court reversed, holding that "libel can claim no talismanic immunity from constitutional limitations." *Id.*, at 269. Against the "background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks," the Court noted that "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker." *Id.*, at 270–271. Freedoms of expression require "'breathing space,'" *id.*, at 272 (quoting *NAACP* v. *Button*, 371 U. S. 415, 433 (1963)):

> "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.' . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt

> whether it can be proved in court or fear of the expense of having to do so." 376 U. S., at 279.

The Court therefore held that the Constitution

> "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280.

That showing must be made with "convincing clarity," *id.*, at 285–286, or, in a later formulation, by "clear and convincing proof," *Gertz*, 418 U. S., at 342. The standards of *New York Times* apply not only when a public official sues a newspaper, but when a "public figure" sues a magazine or news service. See *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 162–165 (1967) (Warren, C. J., concurring in result); *id.*, at 170 (opinion of Black, J.); *id.*, at 172 (opinion of BRENNAN, J.). See also *Wolston* v. *Reader's Digest Assn., Inc.*, 443 U. S. 157, 163–169 (1979).

A decade after *New York Times*, the Court examined the constitutional limits on defamation suits by private-figure plaintiffs against media defendants. *Gertz, supra.* The Court concluded that the danger of self-censorship was a valid, but not the exclusive, concern in suits for defamation: "The need to avoid self-censorship by the news media is . . . , not the only societal value at issue . . . [or] this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Gertz, supra*, at 341. See also *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J., concurring). Any analysis must also take into account the "legitimate state interest underlying the law of libel [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz, supra*, at 341. See also *Time, Inc.* v. *Firestone*, 424 U. S. 448, 456 (1976) (dis-

cussing the "appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances"). In light of that interest, and in light of the fact that private figures have lesser access to media channels useful for counteracting false statements and have not voluntarily placed themselves in the public eye, *Gertz*, *supra*, at 344–345, the Court held that the Constitution "allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*," 418 U. S., at 348: "[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.*, at 347. Nonetheless, even when private figures are involved, the constitutional requirement of fault supersedes the common law's presumptions as to fault and damages. In addition, the Court in *Gertz* expressly held that, although a showing of simple fault sufficed to allow recovery for actual damages, even a private-figure plaintiff was required to show actual malice in order to recover presumed or punitive damages. *Id.*, at 348–350.

The Court most recently considered the constitutional limits on suits for defamation in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749 (1985). In sharp contrast to *New York Times*, *Dun & Bradstreet* involved not only a private-figure plaintiff, but also speech of purely private concern. 472 U. S., at 751–752. A plurality of the Court in *Dun & Bradstreet* was convinced that, in a case with such a configuration of speech and plaintiff, the showing of actual malice needed to recover punitive damages under either *New York Times* or *Gertz* was unnecessary:

> "In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest [in preserving private reputation] adequately supports awards of presumed and punitive

> damages—even absent a showing of 'actual malice.'" 472 U. S., at 761 (opinion of POWELL, J.) (footnote omitted).

See also *id.*, at 764 (BURGER, C. J., concurring in judgment); *id.*, at 774 (WHITE, J., concurring in judgment).

One can discern in these decisions two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

Our opinions to date have chiefly treated the necessary showings of fault rather than of falsity. Nonetheless, as one might expect given the language of the Court in *New York Times*, see *supra*, at 772–773, a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation. See *Garrison* v. *Louisiana*, 379 U. S. 64, 74 (1964) (reading *New York Times* for the proposition that "a public official [is] allowed the civil [defamation] remedy only if he establishes that the utterance was false"). See also *Herbert* v. *Lando*, 441 U. S. 153, 176 (1979) ("[T]he plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability").

Here, as in *Gertz*, the plaintiff is a private figure and the newspaper articles are of public concern. In *Gertz*, as in *New York Times*, the common-law rule was superseded by a constitutional rule. We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.

There will always be instances when the factfinding process will be unable to resolve conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive. Under a rule forcing the plaintiff to bear the burden of showing falsity, there will be some cases in which plaintiffs cannot meet their burden despite the fact that the speech is in fact false. The plaintiff's suit will fail despite the fact that, in some abstract sense, the suit is meritorious. Similarly, under an alternative rule placing the burden of showing truth on defendants, there would be some cases in which defendants could not bear their burden despite the fact that the speech is in fact true. Those suits would succeed despite the fact that, in some abstract sense, those suits are unmeritorious. Under either rule, then, the outcome of the suit will sometimes be at variance with the outcome that we would desire if all speech were either demonstrably true or demonstrably false.

This dilemma stems from the fact that the allocation of the burden of proof will determine liability for some speech that is true and some that is false, but *all* of such speech is *unknowably* true or false. Because the burden of proof is the deciding factor only when the evidence is ambiguous, we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much is false. In a case presenting a configuration of speech and plaintiff like the one we face here, and where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech. To ensure that true speech on matters of public concern is not deterred,

we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.

In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified. See *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 540 (1980) (content-based restriction); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978) (speaker-based restriction); *Renton* v. *Playtime Theatres, Inc.*, *ante*, at 47–54 (secondary-effects restriction). See also *Speiser* v. *Randall*, 357 U. S. 513 (1958) (striking down the precondition that a taxpayer sign a loyalty oath before receiving certain tax benefits). It is not immediately apparent from the text of the First Amendment, which by its terms applies only to governmental action, that a similar result should obtain here: a suit by a private party is obviously quite different from the government's direct enforcement of its own laws. Nonetheless, the need to encourage debate on public issues that concerned the Court in the governmental-restriction cases is of concern in a similar manner in this case involving a private suit for damages: placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result. See *New York Times*, 376 U. S., at 279; *Garrison*, *supra*, at 74 ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned"). Because such a "chilling" effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could "only result in a deterrence of speech which the Constitution makes free." *Speiser*, *supra*, at 526.

We recognize that requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so. Nonetheless, the Court's previous decisions on the restrictions that the First Amendment places upon the common law of defamation firmly support our conclusion here with respect to the allocation of the burden of proof. In attempting to resolve related issues in the defamation context, the Court has affirmed that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz*, 418 U. S., at 341. Here the speech concerns the legitimacy of the political process, and therefore clearly "matters." See *Dun & Bradstreet*, 472 U. S., at 758–759 (speech of public concern is at the core of the First Amendment's protections). To provide "'breathing space,'" *New York Times*, *supra*, at 272 (quoting *NAACP* v. *Button*, 371 U. S., at 433), for true speech on matters of public concern, the Court has been willing to insulate even *demonstrably* false speech from liability, and has imposed additional requirements of fault upon the plaintiff in a suit for defamation. See, *e. g.*, *Garrison*, 379 U. S., at 75; *Gertz*, *supra*, at 347. We therefore do not break new ground here in insulating speech that is not even demonstrably false.

We note that our decision adds only marginally to the burdens that the plaintiff must already bear as a result of our earlier decisions in the law of defamation. The plaintiff must show fault. A jury is obviously more likely to accept a plaintiff's contention that the defendant was at fault in publishing the statements at issue if convinced that the relevant statements were false. As a practical matter, then, evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted. See Keeton, Defamation and Freedom of the Press, 54 Texas L. Rev. 1221, 1236 (1976). See also Franklin & Bussel, The Plaintiff's Burden in Defamation: Awareness and Falsity, 25 Wm. & Mary L. Rev. 825, 856–857 (1984).

We recognize that the plaintiff's burden in this case is weightier because of Pennsylvania's "shield" law, which allows employees of the media to refuse to divulge their sources. See *supra*, at 770–771.[3] But we do not have before us here the question of the permissible reach of such laws. Indeed, we do not even know the precise reach of Pennsylvania's statute. The trial judge refused to give any instructions to the jury as to whether it could, or should, draw an inference adverse to the defendant from the defendant's decision to use the shield law rather than to present affirmative evidence of the truthfulness of some of the sources. See *supra*, at 771. That decision of the trial judge was not addressed by Pennsylvania's highest court, nor was it appealed to this Court.[4] In the situation before us, we are unconvinced that the State's shield law requires a different constitutional standard than would prevail in the absence of such a law.

For the reasons stated above, the judgment of the Pennsylvania Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN joins, concurring.

I believe that where allegedly defamatory speech is of public concern, the First Amendment requires that the plaintiff,

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[3] Pennsylvania is not alone in this choice. See, *e. g.*, Ala. Code § 12-21-142 (1977); Cal. Const., Art. I, § 2(b); N. Y. Civ. Rights Law § 79-h (McKinney 1976).

[4] We also have no occasion to consider the quantity of proof of falsity that a private-figure plaintiff must present to recover damages. Nor need we consider what standards would apply if the plaintiff sues a nonmedia defendant, see *Hutchinson* v. *Proxmire*, 443 U. S. 111, 133, n. 16 (1979), or if a State were to provide a plaintiff with the opportunity to obtain a judgment that declared the speech at issue to be false but did not give rise to liability for damages.

whether public official, public figure, or private individual, prove the statements at issue to be false, and thus join the Court's opinion. Cf. *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971). I write separately only to note that, while the Court reserves the question whether the rule it announces applies to nonmedia defendants, *ante*, at 779, n. 4, I adhere to my view that such a distinction is "irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.'" *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 781 (1985) (BRENNAN, J., dissenting) (quoting *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777 (1978)).

JUSTICE STEVENS, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE REHNQUIST join, dissenting.

The issue the Court resolves today will make a difference in only one category of cases—those in which a private individual can prove that he was libeled by a defendant who was at least negligent. For unless such a plaintiff can overcome the burden imposed by *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 347 (1974), he cannot recover regardless of how the burden of proof on the issue of truth or falsity is allocated. By definition, therefore, the only litigants—and the only publishers—who will benefit from today's decision are those who act negligently or maliciously.

The Court, after acknowledging the need to "'accommodat[e] . . . the law of defamation and the freedoms of speech and press protected by the First Amendment,'" *ante*, at 768 (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 325), decides to override "the common-law presumption" retained by several States[1] that "defamatory speech is false" because of

[1] See, *e. g.*, *Elliott* v. *Roach*, 409 N. E. 2d 661, 681 (Ind. App. 1980); *Trahan* v. *Ritterman*, 368 So. 2d 181, 184 (La. App. 1979); *Parsons* v. *Gulf*

the need "[t]o ensure that true speech on matters of public concern is not deterred." *Ante*, at 776–777. I do not agree that our precedents require a private individual to bear the risk that a defamatory statement—uttered either with a mind toward assassinating his good name or with careless indifference to that possibility—cannot be proven false. By attaching no weight to the State's interest in protecting the private individual's good name, the Court has reached a pernicious result.

The state interest in preventing and redressing injuries to reputation is obviously important. As Justice Stewart eloquently reminded us in his concurrence in *Rosenblatt* v. *Baer*, 383 U. S. 75, 92–94 (1966):

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.
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> ". . . The First and Fourteenth Amendments have not stripped private citizens of all means of redress for inju-

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& South American S.S. Co., 194 So. 2d 456, 460 (La. App.), cert. denied, 389 U. S. 896 (1967); *Madison* v. *Yunker*, 180 Mont. 54, 61, 589 P. 2d 126, 129–130 (1978); *Rogozinski* v. *Airstream by Angell*, 152 N. J. Super. 133, 146–147, 377 A. 2d 807, 814 (1977), modified, 164 N. J. Super. 465, 397 A. 2d 334 (1979); *Martin* v. *Griffin Television, Inc.*, 549 P. 2d 85, 87, 94 (Okla. 1976); *Corabi* v. *Curtis Publishing Co.*, 441 Pa. 432, 447–451, 468, 273 A. 2d 899, 907–909, 917 (1971); *Memphis Publishing Co.* v. *Nichols*, 569 S. W. 2d 412, 420 (Tenn. 1978); *Frank B. Hall & Co., Inc.* v. *Buck*, 678 S. W. 2d 612, 623–625 (Tex. App. 1984), cert. denied, 472 U. S. 1009 (1985); *Denny* v. *Mertz*, 106 Wis. 2d 636, 654–655, 318 N. W. 2d 141, 150, cert. denied, 459 U. S. 883 (1982).

ries inflicted upon them by careless liars. The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

"Moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society."[2]

While deliberate or inadvertent libels vilify private personages, they contribute little to the marketplace of ideas. In assaying the First Amendment side of the balance, it helps to remember that the perpetrator of the libel suffers from its failure to demonstrate the truth of its accusation only if the "private-figure" plaintiff first establishes that the publisher is at "fault," 418 U. S., at 347—*i. e.*, either that it published its libel with "actual malice" in the *New York Times* sense ("with knowledge that it was false or with reckless disregard of whether it was false or not," *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964)), or that it published with that degree of careless indifference characteristic of negligence. Far from being totally in the dark about "how much

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[2] "There is no doubt about the historical fact that the interest in one's good name was considered an important interest requiring legal protection more than a thousand years ago; and that so far as Anglo-Saxon history is concerned this interest became a legally protected interest comparatively soon after the interest in bodily integrity was given legal protection." L. Eldridge, The Law of Defamation § 53, pp. 293–294 (1978).

See *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 757–758 (1985) (opinion of POWELL, J.); *id.*, at 767–769 (WHITE, J., concurring in judgment); *id.*, at 793, n. 16 (BRENNAN, J., dissenting) ("the individual's interest in reputation is certainly at the core of notions of human dignity"); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 341 (1974).

of the speech affected by the allocation of the burden of proof is true and how much is false," *ante*, at 776, the antecedent fault determination makes irresistible the inference that a significant portion of this speech is beyond the constitutional pale.[3] This observation is almost tautologically true with regard to libels published with "actual malice." For that standard to be met, the publisher must come close to willfully blinding itself to the falsity of its utterance.[4] The observation is also valid, albeit to a lesser extent, with respect to

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[3] "But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. *New York Times Co.* v. *Sullivan*, 376 U. S. [254,] 270 [(1964)]. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942)." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 340.

But cf. *New York Times Co.* v. *Sullivan*, 376 U. S., at 279, n. 19.

[4] "Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra*, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison* v. *State of Louisiana*, 379 U. S. 64 (1964), . . . the opinion emphasized the necessity for a showing that a false publication was made with a 'high degree of awareness of . . . probable falsity.' 379 U. S., at 74. Mr. Justice Harlan's opinion in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 153 (1967), stated that evidence of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstates actual malice." *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968).

See *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J., concurring) ("What the *New York Times* rule ultimately protects is defamatory falsehood").

defamations uttered with "fault."[5] Thus, while the public's interest in an uninhibited press is at its nadir when the publisher is at fault or worse, society's "equally compelling" need

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[5] It is presumably for this reason that the Court believes that its "decision adds only marginally to the burdens that the plaintiff must already bear as a result of our earlier decisions in the law of defamation." *Ante*, at 778. See *ibid.* ("As a practical matter, then, evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted" (citations omitted)).

Although I am inclined to agree with the preceding observation, I do not agree that it supports the result reached by the Court today. That allocation of the burden of proof is inconsequential in many cases provides no answer to cases in which it is determinative. See *infra*, at 785–786. Moreover, the Court's belief, however sincere, that its decision will not significantly impair the state interest in redressing injury to reputation is not itself sufficient to justify overriding state law. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 349.

I note that the Court makes no claim that its decision to impose on private-figure libel plaintiffs the burden of proving falsity is necessary to prevent jury confusion. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 116, pp. 839–840 (5th ed. 1984) ("[T]here is no inconsistency in assuming falsity until defendant publisher proves otherwise and requiring the plaintiff to prove negligence or recklessness with respect to the truth or falsity of the imputation"). See also 506 Pa. 304, 325, n. 13, 485 A. 2d 374, 385, n. 13 (1984) ("In a rather circuitous argument, [appellants] contend that falsity is inextricably bound up with proof of fault. [Appellants] assert that to prove fault the plaintiff in fact must demonstrate the falsity of the matter. While in some instances the plaintiff may elect to establish the patent error in the material to demonstrate the lack of due care in ascertaining its truth, it does not necessarily follow that negligence of the defendant can only be shown by proving that the material is false. A plaintiff can demonstrate negligence in the manner in which the material was gathered, regardless of its truth or falsity. In such instance the presumption of falsity will prevail unless the defendant elects to establish the truth of the material and thereby insulate itself from liability. Where it is necessary to prove falsity to establish the negligence of the defendant, it is then the burden of the plaintiff to do so. . . . That proposition will not, of course, hold true in all cases. Where negligence can be established without a demonstration of the falsity of the material, there is no additional obligation upon the plaintiff to prove the falsity of the material").

for judicial redress of libelous utterances is at its zenith. *Time, Inc.* v. *Firestone*, 424 U. S. 448, 456 (1976).

To appreciate the thrust of the Court's holding, we must assume that a private-figure libel plaintiff can prove that a story about him was published with "actual malice"—that is, without the publisher caring in the slightest whether it was false or not. Indeed, in order to comprehend the full ramifications of today's decision, we should assume that the publisher knew that it would be impossible for a court to verify or discredit the story and that it was published for no other purpose than to destroy the reputation of the plaintiff. Even if the plaintiff has overwhelming proof of malice—in both the common-law sense and as the term was used in *New York Times Co.* v. *Sullivan*—the Court today seems to believe that the character assassin has a constitutional license to defame.[6]

In my opinion deliberate, malicious character assassination is not protected by the First Amendment to the United States Constitution. That Amendment does require the target of a defamatory statement to prove that his assailant was at fault, and I agree that it provides a constitutional shield for truthful statements. I simply do not understand, however, why a character assassin should be given an absolute license to defame by means of statements that can be neither verified nor disproved. The danger of deliberate defamation by reference to unprovable facts is not a merely speculative or hypothetical concern. Lack of knowledge about third parties, the loss of critical records, an uncertain recollection about events that occurred long ago, perhaps during a period of special stress, the absence of eyewitnesses—a host of fac-

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[6] This license would gain immeasurable strength if courts take up the suggestion of commentators in the Court's camp that the nonfalsifiable nature of a libel should entitle the defendant to summary judgment. See Franklin & Bussel, The Plaintiff's Burden in Defamation: Awareness and Falsity, 25 Wm. & Mary L. Rev. 825, 865 (1984) ("If the plaintiff's suit is based upon a statement that is not susceptible to being proved false, for example, the court should deny any discovery and dismiss the complaint").

tors—may make it impossible for an honorable person to disprove malicious gossip about his past conduct, his relatives, his friends, or his business associates.

The danger of which I speak can be illustrated within the confines of this very case. Appellants published a series of five articles proclaiming that "Federal authorities . . . have found connections between Thrifty and underworld figures," App. A65; that "Federal agents have evidence of direct financial involvement in Thrifty by [Joseph] Scalleat," a "leader of organized crime in northeastern Pennsylvania," *id.*, at A72; and that "the Thrifty Beverage beer chain . . . had connections itself with organized crime," *id.*, at A80.[7] The defamatory character of these statements is undisputed. Yet the factual basis for the one specific allegation contained in them is based on an admitted relationship between appellees and a third party. The truth or falsity of that statement depends on the character and conduct of that third party—a matter which the jury may well have resolved against the plaintiffs on the ground that they could not disprove the allegation on which they bore the burden of proof.[8]

Despite the obvious blueprint for character assassination provided by the decision today, the Court's analytical approach—by attaching little or no weight to the strong state interest in redressing injury to private reputation—provides a wholly unwarranted protection for malicious gossip. As I understand the Court's opinion, its counterintuitive result is derived from a straightforward syllogism. The major premise seems to be that "the First Amendment's protection of true speech on matters of public concern," *ante*, at 777, is

[7] The parties agree that "the thrust of the challenged publications was that the Thrifty chain was connected with underworld figures and organized crime. It was that proposition that was required to be proven false." Brief for Appellants 36.

[8] At trial, the individual plaintiff simply denied knowledge of Joseph Scalleat's employment with Beer Sales Consultants and of BSC's employment by three Thrifty stores. See Testimony of Maurice Hepps, Tr. 2185–2186, 2200.

tantamount to a command that no rule of law can stand if it will exclude any true speech from the public domain. The minor premise is that although "we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much is false," *ante*, at 776, at least some unverifiable gossip is true. From these premises it necessarily follows that a rule burdening the dissemination of such speech would contravene the First Amendment. Accordingly, "a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant." *Ante*, at 777.

The Court's result is plausible however, only because it grossly undervalues the strong state interest in redressing injuries to private reputations. The error lies in its initial premise, with its mistaken belief that doubt regarding the veracity of a defamatory statement must invariably be resolved in favor of constitutional protection of the statement and against vindication of the reputation of the private individual. To support its premise, the Court relies exclusively on our precedents requiring the government to bear the burden of proving that a restriction of speech is justified. See *ante*, at 777–778. Whether such restrictions appear in the form of legislation burdening the speech of particular speakers or of particular points of view, or of common-law actions punishing seditious libel, the Court is doubtlessly correct that the government or its agents must at a minimum shoulder the burden of proving that the speech is false and must do so with sufficient reliability that we can be confident that true speech is not suppressed. It was to achieve this reliability that the Court, in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), incorporated into the First Amendment the then-emergent common-law "privilege for [good-faith] criticism of official conduct." *Id.*, at 282. See *id.*, at 282, n. 21. Because "erroneous statement is inevitable in free debate, and [because] it must be protected if the freedoms of expres-

sion are to have the 'breathing space' that they 'need . . . to survive, *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 433 [1963],'" *id.*, at 271–272, this privilege is defeasible only if the defamatory statement "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not," *id.*, at 279–280. "Allowance of the defense of truth, with the burden of proving it on the defendant," was found wanting because it did not "mean that only false speech [would] be deterred"—doubts regarding whether truth "can be proved in court or fear of the expense of having to do so" would force good-faith critics of official conduct to "'steer far wider of the unlawful zone,'" *id.*, at 279 (quoting *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958)).[9]

Even assuming that attacks on the reputation of a public figure should be presumed to be true, however, a different calculus is appropriate when a defamatory statement disparages the reputation of a private individual.[10] In that case, the overriding concern for reliable protection of truthful statements must make room for "[t]he legitimate state interest underlying the law of libel"—"the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 341. A public official, of course, has no "less interest in protecting his reputation than an individual in private life." *Rosenbloom* v. *Metromedia*, 403 U. S. 29, 46 (1971) (opinion of

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[9] The *New York Times Co.* v. *Sullivan* privilege was subsequently extended to "public figures." See *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 164 (1967) (Warren, C. J., concurring in result).

[10] If the issue were properly before us, I would be inclined to the view that public figures should not bear the burden of disproving the veracity of accusations made against them with "actual malice," as the *New York Times* Court used that term. The contrary remarks in cases such as *Garrison* v. *Louisiana*, 379 U. S. 64, 74 (1964), were not necessary to the decisions in those cases, and they do not persuade me that the constitutional value in truthful statements requires any more protection of defamatory utterances whose truth may not be ascertained than is provided by the *New York Times* test.

BRENNAN, J.). But private persons are "more vulnerable to injury" and "more deserving of recovery"—more vulnerable because they lack "access to the channels of effective communication . . . to counteract false statements"; more deserving because they have "relinquished no part of [their] good name[s]" by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 344–345.

Recognition of the "strong and legitimate [state] interest in compensating private individuals for injury to reputation," *id.*, at 348–349, exposes the untenability of the Court's methodology: the burden of proof in "private-figure" libel suits simply cannot be determined by reference to our precedents having the reputations of "public figures" in mind. In libel cases brought by the latter category of plaintiffs,

> "we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error . . . would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate." *Rosenbloom* v. *Metromedia*, 403 U. S., at 50 (opinion of BRENNAN, J.).

In libel suits brought by private individuals, in contrast, "the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain." *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 343. To be sure, both categories of cases involve "speech that matters." *Id.*, at 341. But "[t]he extension of the *New York Times* test" to every item of public interest "would abridge this legitimate state interest to a degree that we find unacceptable." *Id.*, at 346.[11] Accordingly, in *Gertz* v. *Robert Welch, Inc.*, this

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[11] See 418 U. S., at 342 ("Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test").

Court rejected the *Rosenbloom* plurality's assumption that the risk of error must invariably be borne by the libel plaintiff, regardless of his or her status, as long as the defamatory statement touches "matters of public or general concern." *Rosenbloom* v. *Metromedia*, 403 U. S., at 44. *Gertz* thus forecloses the Court's unacknowledged reliance on the discredited analysis of the *Rosenbloom* plurality; where private-figure libel plaintiffs are involved, the First Amendment does *not* "requir[e] us to tip [the scales] in favor of protecting true speech" merely because that speech addresses "matters of public concern." *Ante*, at 776. See 418 U. S., at 345–346. See also *Time, Inc.* v. *Firestone*, 424 U. S., at 454–456 (refusing to "reinstate the doctrine advanced in the plurality opinion in *Rosenbloom*" in the guise of protection for inaccurate reporting on "public controversies" or on judicial proceedings).

In my view, as long as publishers are protected by the requirement that the plaintiff has the burden of proving fault, there can be little, if any, basis for a concern that a significant amount of true speech will be deterred unless the private person victimized by a malicious libel can also carry the burden of proving falsity. The Court's decision trades on the good names of private individuals with little First Amendment coin to show for it.

I respectfully dissent.

UNITED STATES v. QUINN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1717. Argued March 5, 1986—Decided April 21, 1986

Certiorari dismissed. Reported below: 751 F. 2d 980.

Mark I. Levy argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Joel M. Gershowitz*.

Eugene G. Iredale argued the cause for respondent. With him on the brief was *Patrick Q. Hall*.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

CHIEF JUSTICE BURGER, with whom JUSTICE BLACKMUN joins, dissenting.

We granted certiorari to decide the following question:

> "Whether a defendant has a Fourth Amendment expectation of privacy that entitles him to challenge the search of a boat, which he had never personally used prior to the search and which had been out of his custody and control for two months at the time of the search, on the grounds that he was the owner of the boat and was a co-venturer in a criminal enterprise involving the use of the boat by others to smuggle marijuana in which he had a possessory interest."

The question presented is one of considerable significance. It frequently arises in criminal prosecutions because drug smugglers often purchase vessels or airplanes for others to use in criminal enterprises. Given the massive infusion of dangerous drugs into this country by water and air we have

an obligation to decide the issue presented. The drug problem presents as great a danger to the United States as any foreign power or fiscal problem.

I

Here are the uncontested facts: Having solicited one Hunt to assist in a drug-smuggling scheme, respondent Quinn purchased a 54-foot vessel—the *Sea Otter*—and gave possession to Hunt. Hunt took the *Sea Otter* to Colombia and picked up roughly 12,000 pounds of marijuana, which he then delivered to Quinn's ranch in California. On June 27, 1979, California Fish and Game officials, suspecting that the *Sea Otter* had been engaged in unlawful fishing operations, boarded the vessel where they observed marijuana "debris" in plain view. They left and notified the United States Coast Guard and the Customs Service of their suspicions that the *Sea Otter* had been used in a marijuana-smuggling operation.

Federal officials intercepted the *Sea Otter* at sea and boarded. The crew could not produce documentation for the boat. Hunt admitted that he had not contacted either the Coast Guard or the Immigration and Naturalization Service, as required by law, when the vessel arrived at the California coast. The officials took the vessel to a nearby Coast Guard station. The forward holds were pumped out and material later identified as marijuana was discovered.

Quinn was arrested and charged with importation and possession of marijuana. He moved to suppress all evidence seized and obtained as result of the stop and search of the *Sea Otter*, arguing that his Fourth Amendment rights as the owner of the *Sea Otter* had been violated. The District Court found that because Quinn had turned the boat over to others he had no standing to contest the search. Quinn then entered a conditional guilty plea, preserving his right to appeal the District Court's decision that he lacked standing to contest the search.

A divided panel of the Court of Appeals for the Ninth Circuit reversed and remanded. 751 F. 2d 980 (1984). The majority found that Quinn had an expectation of privacy based on the "conjunction" of several factors: Quinn's ownership of the vessel; "[h]is possessory interest in the marijuana seized, arising from his joint venture with Hunt"; "[t]he fact that the boat, when searched, was returning from a delivery of marijuana to [Quinn] and was, thus, pursuing the purpose of [Quinn's] joint venture"; and the fact that "reasonable precautions had been taken to preserve privacy." *Id.*, at 981.

II

On this record we should reverse the Court of Appeals. It is axiomatic that the Fourth Amendment guarantee against unreasonable searches and seizures protects personal privacy interests, not property rights. Thus, the "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas* v. *Illinois*, 439 U. S. 128, 143 (1978).

Here the record is clear that Quinn, notwithstanding his naked title interest in the *Sea Otter*, had never made personal use of the vessel that would give rise to a legitimate expectation of privacy. At the time of the search he had never kept private quarters on the boat or used it as a repository of personal effects. Quinn purchased the vessel for the specific purpose of having others operate it to smuggle drugs into the United States. Moreover, Quinn did not exert any control over the boat: his partner Hunt had complete control over the vessel at all times preceding the search and for two years thereafter while he used it for commercial fishing in Costa Rica. These facts afford no basis for any claim to an expectation of privacy in the *Sea Otter*.

The Court of Appeals' contrary conclusion rests on a fundamental misconception of the scope of the Fourth Amendment.

Under the reasoning of the Court of Appeals, an owner's Fourth Amendment rights would extend not to just a single boat but to a fleet of vessels, airplanes, or trucks merely because he has held legal title to and sent these conveyances into an illegal drug-smuggling enterprise. But the Fourth Amendment only extends to what people seek to "preserve as private." *Katz* v. *United States*, 389 U. S. 347, 351 (1967). The Court of Appeals reasoned that since the marijuana was found in the hold of the vessel, "reasonable precautions had been taken to preserve privacy." 751 F. 2d, at 981. Even if this inference is warranted from the facts, it is irrelevant because there is no indication that *Quinn* took any precautions whatsoever. "Fourth Amendment rights are personal rights which, like some other constitutional rights, *may not be vicariously asserted.*" *Rakas* v. *Illinois*, *supra*, at 133–134 (emphasis added). That someone other than the title holder took steps indicating an expectation of privacy has no bearing on whether Quinn's Fourth Amendment rights were violated.

The Court of Appeals' conclusion that Quinn's status as a "co-venturer" with those who exerted control over the vessel and his possessory interest in the contraband gave him standing to challenge the search is similarly misguided. Under this flawed analysis, if a defendant has a sufficient link to seized contraband to incriminate him, the guarantees of the Fourth Amendment attach. But it is the established rule that suppression of evidence "can be successfully urged *only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.* Coconspirators and codefendants have been accorded no special standing." *Alderman* v. *United States*, 394 U. S. 165, 171–172 (1969) (emphasis added). Unless Quinn can demonstrate a reasonable expectation of privacy in the place searched, neither his involvement in the criminal enterprise, see *Alderman*, *supra*, nor his naked possessory interest in the seized evidence, see *United States* v.

Salvucci, 448 U. S. 83 (1980); *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980), establishes a Fourth Amendment violation.

The District Court, therefore, correctly held that suppression was not warranted because Quinn had not manifested a reasonable expectation of privacy in the *Sea Otter*. I regard it as an error of gravest consequences to allow the erroneous holding of the Court of Appeals to stand when the country is being flooded at its borders with dangerous drugs. I would therefore reverse the judgment of the Court of Appeals.

CITY OF LOS ANGELES ET AL. *v.* HELLER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-531. Decided April 21, 1986

Respondent was stopped by Los Angeles police officers, who suspected that he was driving while intoxicated, and was told that he was under arrest. When an officer attempted to handcuff him, an altercation developed and respondent fell through a plate-glass window. Respondent filed suit in Federal District Court under 42 U. S. C. § 1983, claiming damages from arrest without probable cause and from excessive force in the making of the arrest. During a bifurcated trial, his claims against the police officer were heard first, and the jury was instructed that respondent would make out his constitutional claim if he demonstrated he had been arrested without reasonable cause or with "unreasonable force" that exceeded the force necessary under the circumstances to effect arrest. The jury was not instructed on any affirmative defenses that might have been asserted by the officer. The jury returned a verdict for the officer, and the District Court dismissed the action against petitioners, the city and members of its Police Commission. The Court of Appeals reversed the judgment dismissing the case against petitioners, even though it did not disturb the verdict for the officer.

Held: The Court of Appeals erred in apparently basing its reversal on the grounds that the jury could have believed that the officer, having followed Police Department regulations, was entitled in substance to a defense of good faith, and that such a belief would not negate the existence of a constitutional injury. The jury was not charged on any affirmative defense that the officer might have had—such as good faith and qualified immunity—and the theory under which jury instructions are given, and reviewed on appeal, provides that juries act in accordance with the instructions given them and do not base their decisions on legal questions as to which they are not charged. The jury's finding of no constitutional injury was conclusive not only as to the officer, but also as to petitioners. Petitioners were sued only because they were thought legally responsible for the officer's actions; if the latter inflicted no constitutional injury on respondent, petitioners cannot be liable in damages to respondent, re-

gardless of whether departmental regulations might have *authorized* the use of constitutionally excessive force.

Certiorari granted; 759 F. 2d 1371, reversed and remanded.

PER CURIAM.

Respondent Ronald Heller sued petitioners, city of Los Angeles and individual members of the Los Angeles Police Commission, and two Los Angeles police officers in the United States District Court for the Central District of California under the provisions of 42 U. S. C. § 1983. He claimed damages by reason of having been arrested without probable cause and having been the victim of excessive force in the making of the arrest. The incident arose as a result of the two Los Angeles police officers stopping him because of a suspicion that he was driving while intoxicated. In the words of the Court of Appeals for the Ninth Circuit:

> "The officers administered a series of field sobriety tests. Apparently dissatisfied with the results, the officers decided to take Heller to the station to undergo a breath test. When notified that he was under arrest, however, Heller became belligerent. One of the defendants, Officer Bushey, attempted to handcuff him. An altercation ensued. In the course of the struggle, Heller fell through a plate glass window." *Heller* v. *Bushey*, 759 F. 2d 1371, 1372–1373 (1985).

The District Court held a bifurcated trial, and first heard respondent's claims against one of the individual police officers.* The jury was instructed that Heller would make out his constitutional claim if he were arrested without reasonable cause, or if he were arrested with "unreasonable force" that exceeded the force necessary under the circumstances to effect arrest. *Id.*, at 1374. The jury was not instructed on any affirmative defenses that might have been asserted by

*The second of the two police officers named as defendants was granted summary judgment by the District Court.

the individual police officer. Tr. in No. 80-2643 (CD Cal.), pp. 803-822, 843. The jury returned a verdict for the defendant police officer and against respondent. The District Court then dismissed the action against the petitioners, concluding that if the police officer had been exonerated by the jury there could be no basis for assertion of liability against the city or the persons constituting its Police Commission.

Respondent appealed to the Court of Appeals for the Ninth Circuit, and that court reversed the judgment of the District Court dismissing respondent's case against the petitioners even though it did not disturb the verdict for the defendant police officer. Respondent urged, and the Court of Appeals apparently agreed, that "the jury could have believed that Bushey, having followed Police Department regulations, was entitled in substance to a defense of good faith. Such a belief would not negate the existence of a constitutional injury" (footnote omitted). 759 F. 2d, at 1373-1374.

The difficulty with this position is that the jury was not charged on any affirmative defense such as good faith which might have been availed of by the individual police officer. Respondent contends in his brief in opposition to certiorari that even though no issue of qualified immunity was presented to the jury, the jury might nonetheless have considered evidence which would have supported a finding of such immunity. But the theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them, see *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U. S. 585, 604 (1985), and that they do not consider and base their decisions on legal questions with respect to which they are not charged. We think that the Court of Appeals' search for ambiguity in the verdict was unavailing; as that court itself noted later in its opinion, "[b]ecause the instructions required a verdict for [respondent] if *either* the due process *or* the excessive force claim was found, the jury's

verdict for the defendant required a negative finding on both claims." 759 F. 2d, at 1374, n. 3. This negative, it seems to us, was not only conclusive as to Officer Bushey, but also as to the city and its Police Commission. They were sued only because they were thought legally responsible for Bushey's actions; if the latter inflicted no constitutional injury on respondent, it is inconceivable that petitioners could be liable to respondent.

The Court of Appeals also stated:

> "We must conclude that the general verdict does not foreclose a finding that Heller suffered a constitutional deprivation. Heller's *Monell* claim survived the general verdict. . . . The jury verdict, of course, conclusively determined that there was probable cause to arrest Heller. On the other hand, it is equally clear that whether the application of force in accordance with Police Department regulations in this case exceeded constitutional limits has not been determined." *Id.*, at 1374–1375.

But this was an action for damages, and neither *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN took no part in the consideration or decision of this case.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Cuyahoga Valley R. Co.* v. *Transportation Union*, 474 U. S. 3, 8 (1985) (MARSHALL, J., dissenting); *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting).

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

Whenever the Court decides a case without the benefit of briefs or argument on the merits, there is a danger that it will issue an opinion without the careful deliberation and explication that the issues require. Today's "*per curiam*" opinion is a fair illustration of the problem. The two important issues presented in this case are not even identified in that document. The District Court's decision to dismiss the action against the city, the Police Department, and the Police Commissioners necessarily rested on two assumptions: (1) there was an inherent inconsistency between the jury verdict in favor of Officer Bushey and a possible verdict against the municipal defendants and (2) that inconsistency required the dismissal of the action against the municipal defendants. Far from specifically addressing those issues, however, the District Court dismissed the action against the city on the ground that it had "become moot."[1] In a similar vein, this

[1] See 8 Record 844 ("With respect to the Monell cause of action, which was bifurcated from the initial trial, the Court is now convinced that has become moot by reason of the verdict in favor of the defendant and the Court is ordering dismissal of that cause of action at this time"); 2 *id.*, Doc. No. 209, dismissal order ("the plaintiff's theory of liability against the defendants, CITY OF LOS ANGELES, LOS ANGELES BOARD OF POLICE COMMISSIONERS and LOS ANGELES POLICE DEPARTMENT, based on the case of *Monell* v. *Department of Social Services of the City of New York*, 436 U. S. 658 . . . is moot").

Court rests its summary decision on the maxim that "juries act in accordance with the instructions given them." *Ante*, at 798. In my view, neither of the necessary assumptions for the District Court's action—and for this Court's reinstatment of its decision—is remotely present in this case.

I

The first necessary assumption is that there would be an inevitable inconsistency between the jury verdict of no liability for Officer Bushey and a possible verdict of liability against the municipal entities; in the absence of such an inconsistency, the District Court's decision, and this Court's reinstatement of it, are simply inexplicable.

It is undisputed that Ronald Heller crashed through a plate-glass window after some kind of an altercation with Officer Bushey. He had been stopped on suspicion of driving while intoxicated and given sobriety tests.[2] In his claim against the municipal entities, Heller contended that the city and the Police Department had adopted a policy of condoning excessive force in making arrests, that the policy was unlawful, and that he had been injured by the application of that policy at the time of his arrest. In his claim against Officer Bushey, Heller contended that his constitutional rights were violated because Officer Bushey had employed "unreasonable force" in arresting him.

On the day before trial, the District Judge bifurcated the trial into two phases—the first against Officer Bushey and the second against the municipal entities. The record contains no explanation for this decision, but it does reveal that Heller's counsel opposed bifurcation.[3]

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[2] After the altercation, Heller was given an alcohol level test, and was found to have one-tenth the level of alcohol in his body necessary for a finding of driving while intoxicated under California law. 5 *id.*, at 134–136. Heller was never charged with driving while intoxicated. *Ibid.*

[3] See 5 *id.*, Doc. No. 203, minutes of chambers conference (Oct. 18, 1982) ("Court confers with Counsel re: Pretrial order, Jury trial on 10/19/82, Jury Instructions, Defendant's amended witness list and bifurca-

In the proceeding against Officer Bushey, considerable evidence of the Los Angeles Police Department's policy and custom on the use of force was introduced. An expert witness testified regarding Los Angeles' officially sanctioned use of "escalating force," culminating in the use of the notorious "chokehold."[4] Officer Bushey himself testified that Heller's flight through the window resulted from his attempt to impose a chokehold, and that he was carefully following official Police Department policy.[5] Officer Bushey's superior, Sergeant Shrader, also testified that Officer Bushey's actions were in complete compliance with official Police Department policy.[6] Finally, Officer Bushey's attorney repeatedly

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tion of case. Plaintiff counsel opposes Bifurcation. Defendant does not oppose bifurcation").

[4] See 5, *id.*, at 157–158 (testimony of James Fyfe) ("The Los Angeles Police Department employs a scale of escalation in the use of force. . . . [T]he Los Angeles Police Department varies from every other major police department I know of. The Los Angeles Police Department says that if that compliance hold fails to work the next degree of force to be used is a choke hold or, as the police department calls them, a carotid control hold and modified carotid hold and bar arm control holds"). Cf. *Los Angeles* v. *Lyons*, 461 U. S. 95, 97, n. 1 (1983) (describing chokehold); *id.*, at 114–119 (MARSHALL, J., dissenting) (reviewing Los Angeles Police Department's use of chokeholds and noting that 16 deaths had resulted from chokeholds since 1975). At the time of Heller's trial, *Lyons* was pending before this Court.

[5] 5 Record 99–100 ("As he began his two steps forward I applied—I put my left arm around his—the portion I tried to get was the front part of his throat. You use the blade of your wrist on the person's throat. As we are supposed to when we are trying to take someone into custody use verbal commands of first asking verbally and then demanding verbally. If that does not work we use what is called a pain compliance, which is trying to twist someone's wrist where the pain hurts them and they'll comply with your request. . . . I tried to get the blade of my wrist around to his throat to apply pressure to his throat, which is also a pain compliance hold").

[6] See 6 *id.*, at 279–281 (testimony of Sergeant Shrader) (describing Police Department's "accelerated force theory" and concluding that Officer Bushey's use of a chokehold would have been "within the policy").

emphasized that his client's actions were entirely consistent with established Department policy.[7]

In submitting the claim against Officer Bushey to the jury, the trial judge gave an instruction that simply stated that whether or not the force used in making an arrest is unreasonable "is an issue to be determined in the light of all the surrounding circumstances."[8] After deliberating several hours, the jury returned a general verdict in favor of the officer.

Thus, despite the majority's summary assertion to the contrary, it is perfectly obvious that the general verdict rejecting the excessive force claim against Officer Bushey did not necessarily determine the constitutionality of the city's "escalating force" policy—a subject on which the jury had received no instructions at all. The verdict merely determined that the officer's action was not unreasonable "in the light of all the surrounding circumstances"—which, of course, included the evidence that Officer Bushey was merely obeying orders and following established Police Department policy.

As a result, there was no necessary inconsistency between the verdict for Officer Bushey and a possible verdict of liabil-

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[7] See, *e. g.*, 5 *id.*, at 170 ("[T]he carotid hold was a hold that was being taught to the Los Angeles Police Department"); 6 *id.*, at 279 (referring to "the accelerated force theory that the police department has"), *id.*, at 281 (referring to "the policy of what police department officers do"). See also Officer Bushey's counsel's closing argument, 7 *id.*, at 699 ("In this case it's not the City that's the defendant. It's Officer Bushey"); *id.*, at 706 (citing "testimony concerning our own policies and procedures as to the Los Angeles Police Department"); *ibid.* ("[T]he procedures which Officer Bushey followed are exactly what he's taught and the reasons he's taught to do it"); *id.*, at 716 ("It's Officer Bushey who's the defendant"); *id.*, at 718 ("Officer Bushey was trying to do his job").

[8] "Whether or not the force used in making an arrest, preventing an escape, or overcoming resistance was expressive *[sic]*, unreasonable or violent is an issue to be determined in the light of all the surrounding circumstances." 8 *id.*, at 815–816.

ity against the municipal defendants. On that basis alone, the District Court plainly erred in dismissing as "moot" the suit against the municipal defendants, and the Court of Appeals was plainly correct to reverse the dismissal.[9]

II

In view of the fact that the Court of Appeals correctly concluded that there was no necessary inconsistency between a verdict exonerating Officer Bushey and a verdict holding the city and Police Department liable for the "escalating force" policy, it did not have to consider the appropriate response to a possible inconsistency in the context of a bifurcated trial.

Inconsistent verdicts are, of course, a familiar phenomenon. In a criminal case, a jury's apparently inconsistent verdict is allowed to stand.[10] In a civil case, the rule is less

[9] The Court of Appeals concluded:

"The jury, in substance, was instructed that Heller was deprived of liberty without due process if he was arrested without reasonable cause. The jurors were further instructed that Heller's constitutional rights were violated if he was arrested with "unreasonable force" that exceeded the force necessary under the circumstances to effect arrest. The jury's verdict for the defendant therefore embodies a finding that Heller was arrested for reasonable cause *and* that the amount of force used was not unreasonable or excessive. The difficulty is that the conclusion that the force was reasonable could have been derived either from Police Department regulations, which incorporate a theory of 'escalating force,' or from a constitutional standard entirely independent of such regulations. We cannot say which with assurance." *Heller* v. *Bushey*, 759 F. 2d 1371, 1374 (CA9 1985) (footnote omitted).

[10] See *United States* v. *Powell*, 469 U. S. 57 (1984) (reaffirming general rule that inconsistent verdicts can stand); *Harris* v. *Rivera*, 454 U. S. 339, 345 (1981) ("Inconsistency in a verdict is not a sufficient reason for setting it aside"); *Hoag* v. *New Jersey*, 356 U. S. 464, 472 (1958) ("[J]ury verdicts are sometimes inconsistent or irrational"); *United States* v. *Dotterweich*, 320 U. S. 277, 279 (1943) ("Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries"); *Dunn* v. *United States*, 284 U. S. 390, 393 (1932) ("Consistency in the verdict is not necessary").

clear.[11] Nevertheless, in contrast to the Court's blithe assumption today, it is far from certain that the District Court's action—the dismissal—was an appropriate response, even if somehow a verdict against the municipal entities might have created an inconsistency. First, the Court ignores the fact that, in certain circumstances, a court retains the authority, even in a civil case, to allow an apparently inconsistent verdict to stand.[12] Second, the Court ignores the

Cf. *Ulster County Court* v. *Allen*, 442 U. S. 140, 168 (1979) (BURGER, C. J., concurring) ("Courts have long held that in the practical business of deciding cases the factfinders, not unlike negotiators, are permitted the luxury of verdicts reached by compromise").

[11] See, *e. g.*, Bickel, Judge and Jury—Inconsistent Verdicts in the Federal Courts, 63 Harv. L. Rev. 649, 654 (1950) ("[T]here is not in a civil case the equivalent of a precedent such as *Dunn* [v. *United States*, *supra*] to overrule in upsetting inconsistent verdicts. The argument outlined against extending the *Dunn* rule to civil cases is thus quite a plausible one. But it is not unanswerable") (footnote omitted).

[12] Indeed, in explaining why an apparently inconsistent verdict in a civil case should not be disturbed, Justice Brandeis cited the leading case on the permissibility of inconsistent verdicts in a criminal context. See *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 485 (1933) (citing *Dunn* v. *United States*). See also F. James & G. Hazard, Civil Procedure 384 (3d ed. 1985) ("[T]he refusal of a trial court to set aside a verdict obviously representing a compromise has frequently, and quite properly, been upheld"); *id.*, at 394 ("One of the great values of jury trial . . . is its ability to reflect the community sense of over-all fairness, and this may not in all cases coincide with the written law and the instructions which the court must give"); *Karcesky* v. *Laria*, 382 Pa. 227, 235, 114 A. 2d 150, 154 (1955) ("Where the evidence of negligence, or contributory negligence, or both, is conflicting or not free from doubt, a trial judge has the power to uphold the time-honored right of a jury to render a compromise verdict, and to sustain a verdict which is substantial"); *Jayne* v. *Mason & Dixon Lines, Inc.*, 124 F. 2d 317, 319 (CA2 1941) (L. Hand) ("We do not mean to imply however that we should have thought it fatal to the wife's recovery if no rational reconciliation of the verdicts was possible. *Dunn* v. *United States*, 284 U. S. 390"). Cf. Note, Inconsistent Verdicts in Civil Trials, 45 Harv. L. Rev. 1230, 1234 (1932) (observing that, in some jurisdictions, "a master can not complain solely because the servant was exonerated at the same trial. If the evidence is sufficient to support the verdict against the master, his appeal will be denied") (footnote omitted).

fact that, when faced with an apparently inconsistent verdict, a court has a duty to attempt to read the verdict in a manner that will resolve inconsistencies.[13] Third, the Court ignores the fact that, upon receiving an apparently inconsistent verdict, the trial judge has the responsibility, not to retain half of the verdict, but to resubmit the question to the jury.[14] Finally, the Court ignores the fact that, if verdicts are genuinely inconsistent and if the evidence might support either of the "inconsistent" verdicts, the appropriate remedy is ordinarily, not simply to accept one verdict and dismiss the other, but to order an entirely new trial.[15]

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[13] See *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U. S. 108, 119 (1963) (In considering jury answers to questions in a special verdict, "it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them . . . . We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, . . . before we are free to disregard the jury's special verdict and remand the case for a new trial"); *Atlantic & Gulf Stevedores, Inc.*, v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 364 (1962) ("Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way"); *Affolder* v. *New York, Chi. & St. L. R. Co.*, 339 U. S. 96 (1950); *Fairmount Glass Works*, 287 U. S., at 485 (Brandeis, J.) ("Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct"); *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 334 (1918) (Holmes, J.) ("[S]ince the [jury] finding was possible on the evidence it cannot be attributed to disregard of duty. . . . Beyond the question of attributing misconduct to the jury we are not concerned to inquire whether its reasons were right or wrong").

[14] See, *e. g.*, *Dickerson* v. *Pritchard*, 706 F. 2d 256, 259 (CA7 1983) ("[T]he trial court properly resubmitted the inconsistent verdicts to the jury for reconsideration"); *University Computing Co.* v. *Lykes-Youngstown Corp.*, 504 F. 2d 518, 547 (CA5 1974) ("[I]f the jury returns two inconsistent verdicts, the trial court may resubmit the issue to them for clarification"); *Hopkins* v. *Coen*, 431 F. 2d 1055, 1059 (CA6 1970) (upon receipt of inconsistent verdicts, trial court could have sent jury "back to the jury room to further deliberate with appropriate instructions to bring back consistent verdicts"); *Alston* v. *West*, 340 F. 2d 856, 858 (CA7 1965) (when jury returned an inconsistent verdict, "the court properly exercised its discretion in resubmitting the case to the jury").

[15] See, *e. g.*, *Malley-Duff & Associates* v. *Crown Life Ins. Co.*, 734 F. 2d 133, 145 (CA3) ("We conclude that the answers to Questions 1, 2(A), and

Although the Court fails to address it, the question this case raises (if, in fact, the initial view of inevitable inconsistency is accepted) is whether a different set of principles should apply in a bifurcated trial—more narrowly, in a trial that was bifurcated over the objection of the plaintiff. Because the question has not been argued, I do not foreclose the possibility that bifurcation should make a difference, but it is not immediately apparent to me why it should. In this case, the same jury would have passed on the municipal entities' liability, and would have relied on the evidence adduced in the first phase of the trial as well as that presented in the second phase. At the very least, it is unclear to me why the normal devices for addressing an apparently inconsistent verdict—construing the verdict in a manner that resolves the inconsistency; resubmitting the case to the jury for *it* to resolve the inconsistency; or even ordering a new trial—should be unavailable in a bifurcated context.

If the Court's unprecedented, ill-considered, and far-reaching decision happens to be correct, defendants as a class have been presented with a tactical weapon of great value. By persuading trial judges to bifurcate trials in which both the principal and its agents are named as defendants, and to require the jury to bring in its verdict on the individual claim first, they may obtain the benefit of whatever intangible factors have prompted juries to bring in a multitude of inconsistent verdicts in past years; defendants will no longer have to abide the mechanisms that courts have used to mitigate

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2(B) may be considered inconsistent . . . . We will vacate the $900,000 verdict in the state law claims and order a new trial"), cert. denied, 469 U. S. 1072 (1984); *Global Van Lines, Inc.* v. *Nebeker*, 541 F. 2d 865, 868 (CA10 1976) (citing "the rule which says that inconsistencies which show jury confusion serve to mandate a new trial"); *Wood* v. *Holiday Inns, Inc.*, 508 F. 2d 167, 175 (CA5 1975) ("Where verdicts in the same case are inconsistent on their faces indicating that the jury was confused, a new trial is certainly appropriate and may even be required"). Cf. Fed. Rule Civ. Proc. 49(b) (appropriate remedy for inconsistent special verdicts and general verdict is resubmission to the jury, or a new trial).

and resolve apparent inconsistencies.[16] Perhaps that is an appropriate response to the current widespread concern about the potential liabilities of our municipalities, but I doubt it. Cf. *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 843–844 (1985) (STEVENS, J., dissenting).

III

The Court today reverses an interlocutory decision in a constitutional rights case on the basis of assumptions that dramatically conflict with the record and with settled legal principles. The Court mistakenly assumes that there was a necessary inconsistency between the verdict of no liability against the individual officer and a possible verdict against the municipal defendants; it then mistakenly assumes that dismissal was an appropriate response to the perceived inconsistency. Perhaps not coincidentally, the Court achieves these results without the aid of briefs or argument, and relies on an anonymous author to explain what it has done.

I respectfully dissent.

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[16] Cf. *Alston* v. *West*, *supra* (in negligence suit against flower shop and driver for automobile accident, jury initially returned verdict of liability for flower shop and no liability for driver; after case was resubmitted, jury returned liability verdicts against both employer and driver).

DENNISON MANUFACTURING CO. v. PANDUIT CORP.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 85-1150. Decided April 21, 1986

Respondent, which holds patents for plastic cable ties, sued petitioner in Federal District Court for infringement, and petitioner defended on the ground that the patents were invalid for obviousness. After examining the prior art, identifying the differences between it and the patents at issue, and ultimately concluding that all of the improvements made by the patents over the prior art would have been obvious to one skilled in that art, the court held that respondent's patents were invalid for obviousness. The Court of Appeals reversed, disagreeing with the District Court's assessment of the prior art, and ruling that the references cited by the District Court did not teach the innovations introduced by respondent. Petitioner contends that the Court of Appeals improperly ignored Federal Rule of Civil Procedure 52(a) in substituting its view of factual issues for that of the District Court.

Held: Regardless of whether the ultimate question of obviousness is one of fact subject to the clearly-erroneous standard of Rule 52(a), the District Court's subsidiary determinations, at the least, are subject to the Rule. The Court of Appeals, however, did not mention the Rule, did not explicitly apply the clearly-erroneous standard to any of the District Court's findings on obviousness, and did not explain why, if it was of that view, the Rule had no applicability to the issue of obviousness. In the absence of an opinion clearly setting forth the Court of Appeals' views on such matters, plenary consideration will not be given here to petitioner's claim that the decision below cannot be squared with the Rule. Instead, the Court of Appeals' judgment is vacated, and the case is remanded to that court for further consideration in light of the Rule.

Certiorari granted; 774 F. 2d 1082, vacated and remanded.

PER CURIAM.

Respondent holds three patents for plastic cable ties, products that are commercially successful. Petitioner copied respondent's products, was sued for patent infringement in the Northern District of Illinois, and defended on the ground that the patents were invalid for obviousness. The trial

judge examined the prior art, identified the differences between the prior art and each of the three patents at issue, and concluded that all of the improvements made by the three patents over the prior art would have been obvious to one skilled in that art. In the course of arriving at this conclusion, the trial judge recognized that the presumption of patent validity must be overcome by clear and convincing evidence, that the patents' commercial success and the failure of competitors to develop equally successful inventions were important factors weighing in favor of the validity of the patents, and that in addressing the question of obviousness a judge must not pick and choose isolated elements from the prior art and combine them so as to yield the invention in question if such a combination would not have been obvious at the time of the invention. Nonetheless, the judge found that respondent's patents were invalid for obviousness.

The Court of Appeals for the Federal Circuit reversed. 774 F. 2d 1082 (1985). The court disagreed with the District Court's assessment of the prior art, ruled that the references cited by the District Court did not teach the innovations introduced by respondent, and referred to other errors made by the District Court.

Petitioner contends that the Federal Circuit ignored Federal Rule of Civil Procedure 52(a) in substituting its view of factual issues for that of the District Court. In particular, petitioner complains of the rejection of the District Court's determination of what the prior art revealed and its findings that the differences identified between respondent's patents and the prior art were obvious.

Petitioner's claims are not insubstantial. As this Court observed in *Graham* v. *John Deere Co.*, 383 U. S. 1, 17–18 (1966):

> "While the ultimate question of patent validity is one of law, . . . the § 103 condition [that is, nonobviousness] . . . lends itself to several basic factual inquiries. Under § 103, the scope and content of the prior art are to be

determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unresolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy."

This description of the obviousness inquiry makes it clear that whether or not the ultimate question of obviousness is a question of fact subject to Rule 52(a), the subsidiary determinations of the District Court, at the least, ought to be subject to the Rule.

The Federal Circuit, however, did not mention Rule 52(a), did not explicitly apply the clearly-erroneous standard to any of the District Court's findings on obviousness, and did not explain why, if it was of that view, Rule 52(a) had no applicability to this issue. We therefore lack an adequate explanation of the basis for the Court of Appeals' judgment: most importantly, we lack the benefit of the Federal Circuit's informed opinion on the complex issue of the degree to which the obviousness determination is one of fact. In the absence of an opinion clearly setting forth the views of the Court of Appeals on these matters, we are not prepared to give plenary consideration to petitioner's claim that the decision below cannot be squared with Rule 52(a). Instead, we grant the petition for certiorari, vacate the judgment, and remand the case to the Court of Appeals for further consideration in light of Rule 52(a).

It is so ordered.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties

prior notice or an opportunity to file briefs on the merit
See *Cuyahoga Valley R. Co.* v. *United Transportatio Union*, 474 U. S. 3, 8 (1985) (MARSHALL, J., dissenting *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MA SHALL, J., dissenting).

AETNA LIFE INSURANCE CO. v. LAVOIE ET AL.

APPEAL FROM THE SUPREME COURT OF ALABAMA

No. 84-1601. Argued December 4, 1985—Decided April 22, 1986

When appellant insurer refused to pay the full amount of a hospital bill incurred by appellees, they brought suit in an Alabama state court, seeking both payment of the full amount and punitive damages for appellant's alleged bad-faith refusal to pay a valid claim. The jury awarded $3.5 million in punitive damages. The Alabama Supreme Court affirmed, 5 to 4, in a *per curiam* opinion written by Justice Embry. Appellant then filed an application for rehearing, and, before the application was acted on, learned that while the case was pending before the Alabama Supreme Court, Justice Embry had filed two actions in an Alabama court against insurance companies alleging bad-faith failure to pay claims and seeking punitive damages. One of the actions was a class action on behalf of all state employees insured under a group plan by Blue Cross-Blue Shield. Appellant then filed motions challenging, on due process grounds, Justice Embry's participation in the *per curiam* decision and his continued participation in considering the rehearing application, and also alleging that all justices on the court should recuse themselves because of their interests as potential class members in the Blue Cross suit. The court denied these motions, and also the rehearing application. Subsequently, the Blue Cross suit was settled, and Justice Embry received $30,000 under that settlement.

Held:

1. This Court has jurisdiction over the question whether Justice Embry's participation in this case violated appellant's rights under the Due Process Clause of the Fourteenth Amendment, where the Alabama Supreme Court's order denying the recusal motions clearly demonstrated that the court reached the merits of appellant's constitutional challenge, and where appellant raised this issue as soon as it discovered the facts relating to Justice Embry's personal lawsuits. Pp. 819–820.

2. Appellant's allegations, on a general basis, of Justice Embry's bias and prejudice against insurance companies that were dilatory in paying claims, were insufficient to establish any constitutional violation. Pp. 820–821.

3. The record, however, presents more than mere allegations of bias and prejudice, and supports the conclusion that Justice Embry's participation in this case violated appellant's due process rights. All of the issues in this case were present in his Blue Cross suit, and the very

nature of that suit placed in issue whether he would have to establish that he was entitled to a directed verdict on the underlying claims that Blue Cross refused to pay before gaining punitive damages. Moreover, the affirmance in this case of the largest punitive damages award ever issued in Alabama on precisely the type of claim raised in the Blue Cross suit "raised the stakes" for Blue Cross in that suit to Justice Embry's benefit. Thus, his opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case. When he made the judgment in this case, he acted as "a judge in his own case." His interest in this case was "'direct, personal, substantial, [and] pecuniary,'" *Ward* v. *Village of Monroeville*, 409 U. S. 57, 60, as shown by the sum he received in settlement of the Blue Cross suit. Pp. 821–825.

4. There is no basis for concluding that the justices of the Alabama Supreme Court other than Justice Embry were disqualified under the Due Process Clause. While those justices might conceivably have had a slight pecuniary interest in this case because of their possible inclusion in the Blue Cross class action, that interest cannot properly be characterized as "direct, personal, substantial, [and] pecuniary." Any interest that they might have had when they passed on the rehearing application was highly speculative and contingent, since at that time the trial court in the Blue Cross suit had not even certified a class, let alone awarded any class relief of a pecuniary nature. Pp. 825–827.

5. Because of Justice Embry's leading role in the decision under review, the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings. Pp. 827–828.

470 So. 2d 1060, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 829. BLACKMUN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 831. STEVENS, J., took no part in the consideration or decision of the case.

Theodore B. Olson argued the cause for appellant. With him on the briefs were *John J. Swenson*, *Larry L. Simms*, *Peter V. Sintz*, and *Wm. M. Cunningham, Jr.*

Jack N. Goodman argued the cause for appellees. With him on the briefs were *Alvin T. Prestwood* and *Joseph M. Brown, Jr.**

*Briefs of *amici curiae* urging reversal were filed for the Alabama Defense Lawyers Association by *Davis Carr*; for the Association of California

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when a justice of the Alabama Supreme Court declined to recuse himself from participation in that court's consideration of this case.

I

This appeal arises out of litigation concerning an insurance policy issued by appellant covering appellees Margaret and Roger Lavoie. In January 1977, Mrs. Lavoie was examined by her physician, Dr. Douglas, because of various ailments. Shortly thereafter, on Dr. Douglas' recommendation, she was admitted to the Mobile Infirmary Hospital, where she remained for 23 days for a battery of tests.

After her discharge, the hospital forwarded the appropriate forms and medical records along with a bill for $3,028.25 to appellant's local office in Mobile, Alabama. The local office refused to pay the entire amount, tendering payment for only $1,650.22. The local office also sent a letter to the national office, concluding that the 23-day hospitalization was unnecessary and that "[h]ospital records do not indicate anything to the contrary," even though all the hospital records had not yet been received. At one point, the national office told the local office to continue denying the request for full payment, but added that "if they act like they are going to file suit," the file should be reviewed.

Insurance Companies et al. by *Joseph W. Rogers, Jr.*, *Martin Quinn*, and *Susan M. Popik;* for the American Council of Life Insurance et al. by *Erwin N. Griswold*, *Thomas F. Cullen, Jr.*, *Jack H. Blaine*, *Edward J. Zimmerman*, and *John P. Dineen;* for the American Insurance Association et al. by *Ellis J. Horvitz;* for Golden Rule Insurance Co. by *David A. Strauss;* and for the Southeastern Legal Foundation, Inc., by *G. Stephen Parker*.

Briefs of *amici curiae* urging affirmance were filed for the Alabama Trial Lawyers Association by *Lanny S. Vines;* and for the Association of California Trial Lawyers et al. by *Peter Perlman* and *Harvey R. Levine*.

Appellees filed suit against appellant, seeking both payment of the remainder of their original claim and punitive damages for the tort of bad-faith refusal to pay a valid claim. The trial court dismissed for failure to state a cause of action with respect to the bad-faith counts. Appellees appealed to the Alabama Supreme Court, which remanded on the ground that it had "not foreclosed the possibility of recovery in tort for the bad faith refusal of an insurer to pay legitimate benefits due under an insurance policy." *Lavoie* v. *Aetna Life & Casualty Co.*, 374 So. 2d 310, 312 (1979). On remand, the trial court entered judgment for appellees on the unpaid portion of their claim and granted summary judgment for appellant on the bad-faith claim. The Alabama Supreme Court again reversed, explaining that on that same day it had "recognized the intentional tort of bad faith in first party insurance actions." *Lavoie* v. *Aetna Life & Casualty Co.*, 405 So. 2d 17, 18 (1981) (citing *Chavers* v. *National Security Fire & Casualty Co.*, 405 So. 2d 1 (1981)). On remand, appellees' bad-faith claim was submitted to a jury. The jury awarded $3.5 million in punitive damages. The trial judge denied appellant's motion for judgment n.o.v. or, alternatively, for remittitur.

The Alabama Supreme Court affirmed the award in a 5-to-4 decision. 470 So. 2d 1060 (1984). An unsigned *per curiam* opinion expressed the view of five justices that the evidence demonstrated that appellant had acted in bad faith. The court interpreted its prior opinions as not requiring dismissal of a bad-faith-refusal-to-pay claim even where a directed verdict against the insurer on the underlying claim was impossible. The opinion also clarified the issue of whether a bad-faith suit could be maintained where the insurer had made a partial payment of the underlying claim. Although earlier opinions of the court had refused to allow bad-faith suits in such circumstances, partial payment was not dispositive of

the bad-faith issue. The court also rejected appellant's argument that the punitive damages award was so excessive that it must be set aside.

Chief Justice Torbert, joined by Justice Beatty, dissented; Justice Maddox, joined by Justice Shores, also dissented, concluding that the case was controlled by the court's earlier decision in *National Savings Life Ins. Co.* v. *Dutton*, 419 So. 2d 1357 (1982), because there was an arguable reason for appellant's refusal to pay the claim.

The court's opinion was released on December 7, 1984; on December 21, 1984, appellant filed a timely application for rehearing. On February 14, 1985, before its application had been acted on, appellant learned that while the instant action was pending before the Alabama Supreme Court, Justice Embry, one of the five justices joining the *per curiam* opinion, had filed two actions in the Circuit Court for Jefferson County, Alabama, against insurance companies. Both of these actions alleged bad-faith failure to pay a claim. One suit arose out of Maryland Casualty Company's alleged failure to pay for the loss of a valuable mink coat; the other suit, which Justice Embry brought on behalf of himself and as a representative of a class of all other Alabama state employees insured under a group plan by Blue Cross-Blue Shield of Alabama (including, apparently, all justices of the Alabama Supreme Court), alleged a willful and intentional plan to withhold payment on valid claims. Both suits sought punitive damages.

On February 21, 1985, appellant filed two motions in the Alabama Supreme Court, challenging Justice Embry's participation in the court's December 7, 1984, decision and his continued participation in considering appellant's application for rehearing. The motion also alleged that all justices on the court should recuse themselves because of their interests as potential class members in Justice Embry's suit against Blue Cross. On March 8, 1985, the court unanimously de-

nied the recusal motions. The brief order stated that each justice had voted individually on the matter of whether he should recuse himself and that each justice had voted not to do so. At the same time, by a 5-to-4 division, the court denied appellant's motion for rehearing.

Chief Justice Torbert wrote separately, explaining that although his views had not been influenced by his possible membership in the putative class alleged in Justice Embry's suit against Blue Cross, he was nonetheless notifying the Clerk of the court where that suit was pending not to permit him to be included in the alleged class. Justice Maddox also wrote separately, taking similar action.

On March 20, 1985, appellant obtained a copy of the transcript of Justice Embry's deposition, taken on January 10, 1985, in connection with his Blue Cross suit. The deposition revealed that Justice Embry had authored the *per curiam* opinion in this case over an 8- or 9-month period during which his civil action against Blue Cross was being prosecuted. Justice Embry also stated that, during that period, he had received "leads" from people with regard to his bad-faith action against Blue Cross and that he put them in touch with his attorney. Finally, Justice Embry revealed frustration with insurance companies. For example, when asked if he had ever had any difficulty with processing claims, Justice Embry retorted: "[T]hat is a silly question. For years and years."

Appellant moved for leave to file a second application for rehearing based on the deposition, but that motion was denied. Appellant filed an appeal with this Court, and JUSTICE POWELL, as Circuit Justice, granted appellant's application for a stay of the judgment below pending this Court's disposition of the appeal. Shortly thereafter, Justice Embry's suit against Blue Cross was settled by stipulation of the parties.[1] In the stipulation, Blue Cross recognized that "some problems have occurred in the past and is determined

[1] Justice Embry's suit against Maryland Casualty Company had been settled sometime earlier by the payment of Justice Embry's claim.

to minimize them in the future." Justice Embry received $30,000 under the settlement agreement on a basic compensatory claim of unspecified amount; a check for that sum was deposited by his attorney directly into Justice Embry's personal account.

We postponed consideration of the question of jurisdiction pending argument on the merits. 471 U. S. 1134 (1985). We now vacate and remand.

II

We are satisfied as to the Court's jurisdiction over the question of whether Justice Embry's participation violated appellant's Fourteenth Amendment due process rights. Appellees argue that the Alabama Supreme Court did not reach this issue because it was raised only after the court's decision on the merits. We reject that contention as at odds with the record. On March 8, 1985, the court entered the following order:

> "Upon consideration, the Court is of the opinion that under the allegation of said motion in this case each justice should vote individually on the matter of whether or not he or she is disqualified and should recuse. Each justice having voted not to recuse,
>
> "IT IS, THEREFORE, ORDERED that the 'Motion for Disqualification and Motion for Withdrawal of Opinion of December 7, 1984, and for Hearing De Novo' be . . . denied." App. to Juris. Statement 64a.

This order clearly demonstrates that the Alabama court reached the merits of appellant's constitutional challenge, albeit on a justice-by-justice basis. Moreover, appellant raised this issue as soon as it discovered the facts relating to Justice Embry's personal lawsuits. On this record, we conclude jurisdiction is proper. See *Ulster County Court* v.

Allen, 442 U. S. 140, 147–154 (1979); *Ward* v. *Village of Monroeville*, 409 U. S. 57, 61 (1972).

III

A

Appellant contends Justice Embry's general hostility towards insurance companies that were dilatory in paying claims, as expressed in his deposition, requires a conclusion that the Due Process Clause was violated by his participation in the disposition of this case. The Court has recognized that not "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumey* v. *Ohio*, 273 U. S. 510, 523 (1927); see also *FTC* v. *Cement Institute*, 333 U. S. 683, 702 (1948) ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level"). Moreover, the traditional common-law rule was that disqualification for bias or prejudice was not permitted. See, *e. g.*, *Clyma* v. *Kennedy*, 64 Conn. 310, 29 A. 539 (1894). See generally Frank, Disqualification of Judges, 56 Yale L. J. 605 (1947). As Blackstone put it, "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." 3 W. Blackstone, Commentaries *361. The more recent trend has been towards the adoption of statutes that permit disqualification for bias or prejudice. See *Berger* v. *United States*, 255 U. S. 22, 31 (1921) (enforcing statute disqualifying federal judges in certain circumstances for personal bias or prejudice). See also ABA Code of Judicial Conduct, Canon 3C(1)(a) (1980) ("A judge should disqualify himself . . . where he has a personal bias or prejudice concerning a party"). But that alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.

We held in *Patterson* v. *New York*, 432 U. S. 197, 201–202 (1977) (citations omitted), that

> "it is normally within the power of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

We need not decide whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal. Certainly only in the most extreme of cases would disqualification on this basis be constitutionally required, and appellant's arguments here fall well below that level. Appellant suggests that Justice Embry's general frustration with insurance companies reveals a disqualifying bias, but it is likely that many claimants have developed hostile feelings from the frustration in awaiting settlement of insurance claims. Insurers, on their side, have no easy task, especially when trying to evaluate whether certain medical diagnostic tests or prolonged hospitalization were indicated. In turn, the physicians and surgeons, whether impelled by valid medical judgment or by apprehension as to future malpractice claims—or some combination of the two—similarly face difficult problems. Appellant's allegations of bias and prejudice on this general basis, however, are insufficient to establish any constitutional violation.

B

The record in this case presents more than mere allegations of bias and prejudice, however. Appellant also presses a claim that Justice Embry had a more direct stake in the outcome of this case. In *Tumey*, while recognizing that the Constitution does not reach every issue of judicial qualification, the Court concluded that "it certainly violates the Fourteenth Amendment . . . to subject [a person's] liberty or

property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." 273 U. S., at 523.

More than 30 years ago Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U. S. 133, 136 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to disqualify a judge from sitting "cannot be defined with precision." *Ibid.* Nonetheless, a reasonable formulation of the issue is whether the

> "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Ward* v. *Village of Monroeville*, 409 U. S., at 60.

Under these prior holdings, we examine just what factors might constitute such an interest in the outcome of this case that would bear on recusal. At the time Justice Embry cast the deciding vote and authored the court's opinion, he had pending at least one very similar bad-faith-refusal-to-pay lawsuit against Blue Cross in another Alabama court. The decisions of the court on which Justice Embry sat,[2] the Alabama Supreme Court, are binding on all Alabama courts. We need not blind ourselves to the fact that the law in the area of bad-faith-refusal-to-pay claims in Alabama, as in many other jurisdictions, was unsettled at that time, as the court's close division in deciding this case indicates. When Justice Embry cast the deciding vote, he did not merely apply well-established law and in fact quite possibly made new law; the court's opinion does not suggest that its conclusion was compelled by earlier decisions. Instead, to decide the case the court stated that "it is first necessary to review the policy considerations, elements, and instructive guide

[2] Justice Embry has since retired from the court for health reasons.

posts set out by this court in earlier case law." 470 So. 2d, at 1070. And in another case the court acknowledged that "the tort of bad faith refusal to pay a valid insurance claim is in the embryonic stage, and the Court has not had occasion to address every issue that might arise in these cases." *National Savings Life Ins. Co.* v. *Dutton*, 419 So. 2d, at 1362.

The decision under review firmly established that punitive damages could be obtained in Alabama in a situation where the insured's claim is not fully approved and only partial payment of the underlying claim had been made. Prior to the decision under review, the Alabama Supreme Court had not clearly recognized any claim for tortious injury in such circumstances; moreover, it had affirmatively recognized that partial payment was evidence of good faith on the part of the insurer. *Sexton* v. *Liberty National Life Ins. Co.*, 405 So. 2d 18, 22 (1981). The Alabama court also held that a bad-faith-refusal-to-pay cause of action will lie in Alabama even where the insured is not entitled to a directed verdict on the underlying claim, a conclusion that at the least clarified the thrust of an earlier holding. Cf. *National Savings Life Insurance Co.* v. *Dutton*, *supra*, at 1362. Finally, the court refused to set aside as excessive a punitive damages award of $3.5 million. The largest punitive award previously affirmed by that court was $100,000, a figure remitted from $1.1 million as "obviously the result of passion and prejudice on the part of the jury." *Gulf Atlantic Life Ins. Co.* v. *Barnes*, 405 So. 2d 916, 926 (1981).

All of these issues were present in Justice Embry's lawsuit against Blue Cross. His complaint sought recovery for partial payment of claims. Also the very nature of Justice Embry's suit placed in issue whether he would have to establish that he was entitled to a directed verdict on the underlying claims that he alleged Blue Cross refused to pay before gaining punitive damages. Finally, the affirmance of the largest punitive damages award ever (by a substantial margin) on precisely the type of claim raised in the Blue Cross

suit undoubtedly "raised the stakes" for Blue Cross in that suit, to the benefit of Justice Embry. Thus, Justice Embry's opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case.

We need not decide whether to characterize the decision under review as a change in Alabama law or a clarification of the contours of that law, a judgment we are obviously not called on to make. We hold simply that when Justice Embry made that judgment, he acted as "a judge in his own case." *Murchison*, *supra*, at 136.

We also hold that his interest was "'direct, personal, substantial, [and] pecuniary.'" *Ward*, *supra*, at 60 (quoting *Tumey* v. *Ohio*, 273 U. S., at 523). Justice Embry's complaint against Blue Cross sought "compensatory damage for breach of contract, inconvenience, emotional and mental distress, disappointment, pain and suffering" in addition to punitive damages for himself and for the class. Soon after the opinion of the Alabama Supreme Court in this case was announced, Blue Cross paid Justice Embry what he characterized in an interview as "a tidy sum," Reply Brief for Appellant 10, n. 8, to settle the suit. Records lodged with this Court show that Justice Embry received $30,000, which was deposited by his attorney directly into Justice Embry's personal account. To be sure, a portion of this money may have gone to Justice Embry's attorney in connection with the case, even though some materials before us suggest that his attorney agreed to waive his fee. Deposition of A. Grey Till in *Clay* v. *Nationwide Insurance Co.*, CV-78-1148 (Cir. Ct. of Mobile Cty., Ala.), pp. 27–29. We are also aware that Justice Embry obtained a statement in the settlement agreement to the effect that "[t]he primary object of the institution of this suit . . . was to emphasize to defendant Blue Cross . . . that claims under the Plan be processed and determined by Blue Cross in a timely and efficient manner," even though that type of relief was not sought specifically in the complaint

while monetary relief was. We nonetheless hold that the "tidy sum" that Justice Embry received directly is sufficient to establish the substantiality of his interest here.

We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey*, *Murchison*, and *Ward*. We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Ward*, 409 U. S., at 60 (quoting *Tumey* v. *Ohio*, *supra*, at 532). The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Murchison*, 349 U. S., at 136 (citation omitted).

C

Appellant has challenged not only the participation of Justice Embry in this case but also the participation of all the other justices of the Alabama Supreme Court, or at least the six justices who did not withdraw from Justice Embry's class action against Blue Cross, claiming that they also have an interest in this case. Such allegations do not constitute a sufficient basis for requiring recusal under the Constitution. In the first place, accepting appellant's expansive contentions might require the disqualification of every judge in the State. If so, it is possible that under a "rule of necessity" none of the judges or justices would be disqualified. See *United States* v. *Will*, 449 U. S. 200, 214 (1980).

More important, while these justices might conceivably have had a slight pecuniary interest,[4] we find it impossible to

[4] The Court in *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U. S. 145 (1968), stated in dicta that "in *Tumey*[, 273 U. S., at 524,] the Court held that a decision should be set aside where there is 'the

characterize that interest as "'direct, personal, substantial, [and] pecuniary.'" *Ward, supra*, at 60 (quoting *Tumey, supra*, at 523). Appellant concedes that nothing in the record even suggests that these justices had any knowledge of the class action before the court issued a decision on the merits. Thus, at most only the decision to deny rehearing was even plausibly affected. Any interest that they might have had when they passed on the rehearing motion was clearly highly speculative and contingent. At the time, the trial court had not even certified a class, let alone awarded any class relief of a pecuniary nature. With the proliferation of class actions involving broadly defined classes, the application of the constitutional requirement of disqualification must be carefully limited. Otherwise constitutional disqualification arguments could quickly become a standard feature of class-action litigation. Cf. *In re City of Houston*, 745 F. 2d 925 (CA5 1984). At some point, "[t]he biasing influence . . . [will be] too remote and insubstantial to violate the constitutional constraints." *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 243 (1980). Charges of disqualification should not be

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slightest pecuniary interest' on the part of the . . . ." *Id.*, at 148. We think this was a misreading of *Tumey*. The reference to "the slightest pecuniary interest" in that opinion came in a portion of the opinion describing "cases at common law in England prior to the separation of colonies from the mother country . . . ." 273 U. S., at 524. At a later point in the opinion, Chief Justice Taft quoted approvingly from the work of Justice Cooley, that disqualification is not worked in cases where the "'interest is so remote, trifling and insignificant that it may fairly be supposed to be incapable of affecting the judgment of or of influencing the conduct of an individual.'" *Id.*, at 531 (quoting T. Cooley, Constitutional Limitations 594 (7th ed. 1903)). Chief Justice Taft also reiterated that the case was not one "in which the penalties and the costs are negligible. . . . The court is a state agency, imposing substantial punishment . . . . It is not to be treated as a mere village tribunal for village peccadilloes." 273 U. S., at 532. We therefore follow *Ward* v. *Village of Monroeville*, 409 U. S. 57, 60 (1972), and decline to read *Tumey* as constitutionalizing any rule that a decision rendered by a judge with "the slightest pecuniary interest" constitutes a violation of the Due Process Clause.

made lightly. See *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413 (1923). We hold that there is no basis for concluding these justices were disqualified under the Due Process Clause.

D

Having concluded that only Justice Embry was disqualified from participation in this case, we turn to the issue of the proper remedy for this constitutional violation. Our prior decisions have not considered the question of whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case. Rather, our prior cases have involved interpretations of statutes with provisions concerning this question, *e. g.*, *Commonwealth Corp.* v. *Continental Casualty Co.*, 393 U. S. 145 (1968), disqualifications of the sole member of a tribunal, *e. g.*, *Ward* v. *Village of Monroeville*, *supra*, and disqualifications of an entire panel, *e. g.*, *Gibson* v. *Berryhill*, 411 U. S. 564 (1973). Some courts have concluded that a decision need not be vacated where a disqualified judge's vote is mere surplusage. See, *e. g.*, *State ex rel. Langer* v. *Kositzky*, 38 N. D. 616, 166 N. W. 534 (1918); but see, *e. g.*, *Oakley* v. *Aspinwall*, 3 N. Y. 547 (1850).[4] But we are aware of no case, and none has been called to our atten-

[4] We have confined the opinion to the issues presented by the parties and express no view on the question discussed by the Justices who write separately. The issues here are far more complex than acknowledged by the concurrences, which, reasoning from hypothetical situations on matters not presented by the facts of this case, postulate a broad general rule. Traditionally the Court does not undertake to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Comm'rs*, 113 U. S. 33, 39 (1885)). Because the issue of disqualification of a single member of a multimember panel arises in a variety of factual contexts, see generally 48A C. J. S., Judges § 159, p. 868 (1981) (collecting cases), sound judicial practice wisely counsels judges to avoid unnecessary declarations on issues not presented, briefed, or argued.

tion, permitting a court's decision to stand when a disqualified judge casts the deciding vote. Here Justice Embry's vote was decisive in the 5-to-4 decision[4] and he was the author of the court's opinion. Because of Justice Embry's leading role in the decision under review, we conclude that the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings. Appellees have not contended that, upon a finding of disqualification, this disposition is improper.

III

We underscore that our decision today undertakes to answer only the question of under what circumstances the Constitution requires disqualification. The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.

Appellant also argues that the retrospective imposition of punitive damages under a new cause of action violates its rights under the Contracts Clause of Article I, § 10; that a $3.5 million punitive damages award is impermissible under the Excessive Fines Clause of the Eighth Amendment; and that lack of sufficient standards governing punitive damages awards in Alabama violates the Due Process Clause of the Fourteenth Amendment. In addition, appellant contends that Ala. Code § 12-22-72 (1975), under which any person who unsuccessfully appeals a money judgment is assessed a 10% penalty, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. These arguments raise important issues which, in an appropriate setting, must

[4] If Justice Embry had disqualified himself, the decision of the trial court would not have been affirmed by a vote of an equally divided court. Rather, Ala. Code § 12-2-14 (1975), which authorizes the appointment of special justices in the event disqualifications result in an even-numbered court which is evenly divided on a matter, would presumably have come into play.

be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them.

The judgment of the Supreme Court of Alabama is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

Vacated and remanded.

JUSTICE STEVENS took no part in the consideration or decision of this case.

JUSTICE BRENNAN, concurring.

I agree with the Court that, given Justice Embry's interest in the outcome of this case, his participation in its disposition violated due process. As the Court notes, resolution of the issues raised in the appeal below enhanced the viability and settlement value of Justice Embry's own lawsuit. Such an interest clearly required recusal under our decisions in *Tumey* v. *Ohio*, 273 U. S. 510 (1927); *In re Murchison*, 349 U. S. 133 (1955); *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972); and *Gibson* v. *Berryhill*, 411 U. S. 564 (1973). As Justice Black explained in *In re Murchison:*

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." 349 U. S., at 136.

I write separately to set forth my understanding of certain statements in the Court's opinion. *First*, the Court stresses that Justice Embry's interest was "'direct, personal, substantial, [and] pecuniary.'" *Ante*, at 824 (quoting *Ward*, *supra*, at 60); see also *ante*, at 826. I do not understand that by this language the Court states that only an interest that satisfies this test will taint the judge's participation as a due process violation. Nonpecuniary interests, for example, have been found to require recusal as a matter of due proc-

ess. See, *e. g.*, *In re Murchison*, *supra* (judge who presided over a "one-man grand jury" also presided over contempt proceedings relating to events which took place in the grand jury proceedings). Moreover, as this case demonstrates, an interest is sufficiently "direct" if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding. See, *e. g.*, *Ward* v. *Village of Monroeville*, *supra* (mayor's adjudication of traffic fines, which contributed to city finances, violated due process); *Gibson* v. *Berryhill*, *supra* (proceedings by Alabama Board of Optometry enjoined because Board members were competitors of petitioners and therefore stood to gain competitively). Nothing in the Court's opinion should be read, as I understand it, to limit these precedents in any way. Rather, the Court clearly indicates the contrary in acknowledging that the interests which trigger due process condemnation "'cannot be defined with precision.'" *Ante*, at 822 (quoting *In re Murchison*, *supra*, at 136).

Second, the Court points out that Justice Embry obtained a favorable settlement in his own lawsuit several months after the Alabama Supreme Court handed down its decision in this case. But even without that settlement, Justice Embry's participation in this case deprived appellant of due process. The deprivation occurred when Justice Embry took part in the deliberations and decision of the Alabama Supreme Court in this case. At most—and, again, I do not read the Court's opinion to say otherwise—the fact of the later settlement merely confirms that Justice Embry had a substantial interest in the outcome of this case.

Finally, I understand that the Court's opinion is not to be read to suggest that the outcome might be different had Justice Embry not provided the necessary fifth vote in the court below. That fact too is irrelevant—Justice Embry's participation in the court's resolution of the case, while he was fully aware of his interest in its outcome, was sufficient

in itself to impugn the decision. The description of an opinion as being "for the court" connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

I join the Court's judgment that Justice Embry's participation in this case denied appellant the impartial decisionmaker required by the Due Process Clause. I write separately, however, to stress that the constitutional violation in this case should not depend on the Court's apparent belief that Justice Embry cast the deciding vote—a factual assumption that may be incorrect and, to my mind, should be irrelevant to the Court's analysis. For me, Justice Embry's mere participation in the shared enterprise of appellate decisionmaking—whether or not he ultimately wrote, or even joined, the Alabama Supreme Court's opinion—posed an unacceptable danger of subtly distorting the decisionmaking process.

The Court states that a decision cannot be permitted to stand "when a disqualified judge casts the deciding vote. Here, Justice Embry's vote was decisive in the 5-to-4 decision and he was the author of the court's opinion." *Ante*, at 828. In a footnote, the Court elaborates on the decisiveness

of Justice Embry's vote: had he disqualified himself, the decision of the trial court would not have been affirmed by an equally divided court because, under Alabama law, a special justice would have been appointed to break the tie. *Ante*, at 828, n. 5.

The record, however, casts doubt upon the Court's suggestion that Justice Embry provided the most crucial vote. Justice Embry's deposition testimony in the Blue Cross suit suggests that the initial vote of the Alabama Supreme Court was in fact to reverse the decision of the trial court in favor of the Lavoies. Accordingly, Justice Embry began work on a dissent. App. to Juris. Statement 168a–169a. After Justice Embry began writing, however, at least one justice switched his vote. Justice Embry's proposed dissent ultimately was issued as the *per curiam* opinion of the court. He explained: "It's customary a lot of times [to issue an opinion as a *per curiam*], if it's been assigned to you because the other opinion didn't prevail . . . ." *Id.*, at 167a.

We cannot know what led each justice on the Alabama Supreme Court to the position he or she reached in this case. But we do know, from our own experience on this 9-member Court, that a forceful dissent may lead Justices to rethink their original positions and change their votes. And to suggest that the author of an opinion where the final vote is 5–4 somehow plays a peculiarly decisive "leading role," *ante*, at 828, ignores the possibility of a case where the author's powers of persuasion produce an even larger margin of votes. It makes little sense to intimate that if Justice Embry's dissent had led two colleagues to switch their votes, and the final vote had been 6–3, Aetna would somehow not have been injured by his participation.

More importantly, even if Justice Embry had not written the court's opinion, his participation in the case would have violated the Due Process Clause. Our experience should tell us that the concessions extracted as the price of joining

an opinion may influence its shape as decisively as the sentiments of its nominal author. To discern a constitutionally significant difference between the author of an opinion and the other judges who participated in a case ignores the possibility that the collegial decisionmaking process that is the hallmark of multimember courts led the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity. And because this collegial exchange of ideas occurs in private, a reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case. We should not attempt the perhaps futile task of distilling Justice Embry's particular contribution to determine whether the result would have been the same had he disqualified himself at the outset. I would not want other appellate courts to read the Court's opinion today to suggest that such an inquiry provides an appropriate guarantee of due process.

The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose that his vote and his views, potentially tainted by his interest in the pending Blue Cross suit, would influence the votes and views of his colleagues. The remaining events—that another justice switched his vote and that Justice Embry wrote the court's opinion—illustrate, but do not create, the constitutional infirmity that requires us to vacate the judgment of the Alabama Supreme Court.

UNITED STATES *v.* AMERICAN COLLEGE OF PHYSICIANS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 84-1737. Argued January 21, 1986—Decided April 22, 1986

Section 511(a)(1) of the Internal Revenue Code imposes a tax on the "unrelated business taxable income" of tax-exempt organizations. Section 512(a)(1) defines "unrelated business taxable income" as the gross income derived by such an organization from any "unrelated trade or business . . . regularly carried on by it," and § 513(a) defines "unrelated trade or business" as "any trade or business the conduct of which is not substantially related" to the organization's tax-exempt purposes. Respondent tax-exempt organization, in furtherance of its exempt purposes of maintaining high standards in medical education and practice, encouraging research, and fostering measures for preventing disease and improving public health, publishes a monthly medical journal containing articles relevant to the practice of internal medicine. Each issue of the journal contains paid advertisements for pharmaceuticals, and medical supplies and equipment useful in the practice of internal medicine. After respondent had paid taxes on its net income from such advertisements in 1975, it filed a claim for a refund, and when the Government demurred, ultimately filed suit in the United States Claims Court, which held that the advertisements were not substantially related to respondent's tax-exempt purposes and that therefore the advertising proceeds were taxable. The Court of Appeals reversed. Taking the view that the Claims Court had focused too much on the commercial character of the advertising business and not enough on the advertisements' contribution to the education of the medical journal's readers, the Court of Appeals held that respondent had established the requisite substantial relation and its entitlement to exemption from taxation.

Held: Respondent must pay a tax on the profits it earns from the advertisements. Pp. 837–850.

(a) It is undisputed that respondent's publication of paid advertising is a "trade or business" and that the business is "regularly carried on." Pp. 839–841.

(b) There is no merit to the Government's argument that Congress and the Treasury intended to establish a blanket rule requiring the taxation of income from all commercial advertising by tax-exempt professional journals without a specific analysis of the circumstances.

There is no support for such a rule in the regulations or in the legislative history of the Internal Revenue Code. Pp. 841–847.

(c) In this case, however, based on the Claims Court's finding of facts that are adequately supported by the record, and considering those facts in light of the applicable legal standard, it must be concluded that the advertisements in question were not "substantially related," or in the words of the implementing regulation did not "contribute importantly," to the medical journal's educational purposes. The Claims Court properly directed its attention to respondent's conduct of its advertising business, whereas the Court of Appeals erroneously focused exclusively upon the information conveyed by commercial advertising and consequently failed to give effect to the governing statute and regulations. Pp. 847–850.

743 F. 2d 1570, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court. BURGER, C. J., filed a concurring opinion, in which POWELL, J., joined, *post*, p. 850.

Albert G. Lauber, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Archer, Robert A. Bernstein,* and *Robert S. Pomerance.*

John B. Huffaker argued the cause for respondent. With him on the brief were *Eleanor N. Ewing* and *Gerald P. Norton.**

JUSTICE MARSHALL delivered the opinion of the Court.

A tax-exempt organization must pay tax on income that it earns by carrying on a business not "substantially related" to the purposes for which the organization has received its exemption from federal taxation. The question before this Court is whether respondent, a tax-exempt organization,

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**Robert A. Saltzstein* and *Joseph J. Saunders* filed a brief for American Business Press as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Association for the Advancement of Science by *John D. Lane;* for the American Medical Association et al. by *George A. Platz, Frank V. Battle, Jr., J. Timothy Kleespies,* and *Kathleen R. Curtis;* and for the American Society of Association Executives by *George D. Webster* and *Frank M. Northam.*

must pay tax on the profits it earns by selling commercial advertising space in its professional journal, The Annals of Internal Medicine.

I

Respondent, the American College of Physicians, is an organization exempt from taxation under § 501(c)(3) of the Internal Revenue Code.[1] The purposes of the College, as stated in its articles of incorporation, are to maintain high standards in medical education and medical practice; to encourage research, especially in clinical medicine; and to foster measures for the prevention of disease and for the improvement of public health. App. 16a. The principal facts were stipulated at trial. In furtherance of its exempt purposes, respondent publishes The Annals of Internal Medicine (Annals), a highly regarded monthly medical journal containing scholarly articles relevant to the practice of internal medicine. Each issue of Annals contains advertisements for pharmaceuticals, medical supplies, and equipment useful in the practice of internal medicine, as well as notices of positions available in that field. Respondent has a longstanding policy of accepting only advertisements containing information about the use of medical products, and screens proffered advertisements for accuracy and relevance to internal medicine. The advertisements are clustered in two groups, one at the front and one at the back of each issue.

In 1975, Annals produced gross advertising income of $1,376,322. After expenses and deductible losses were subtracted, there remained a net income of $153,388. Respondent reported this figure as taxable income and paid taxes on it in the amount of $55,965. Respondent then filed a timely claim with the Internal Revenue Service for refund of these

[1] Title 26 U. S. C. § 501(c)(3) exempts from taxation entities "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes," with certain restrictions on their activities, including prohibition of political activity.

taxes, and when the Government demurred, filed suit in the United States Claims Court.

The Claims Court held a trial and concluded that the advertisements in Annals were not substantially related to respondent's tax-exempt purposes. 3 Cl. Ct. 531 (1983). Rather, after finding various facts regarding the nature of the College's advertising business, it concluded that any correlation between the advertisements and respondent's educational purpose was incidental because "the comprehensiveness and content of the advertising package is entirely dependent on each manufacturer's willingness to pay for space and the imagination of its advertising agency." *Id.*, at 535. Accordingly, the court determined that the advertising proceeds were taxable.

The Court of Appeals for the Federal Circuit reversed. 743 F. 2d 1570 (1984). It held clearly erroneous the trial court's finding that the advertising was not substantially related to respondent's tax-exempt purpose. The Court of Appeals believed that the trial court had focused too much on the commercial character of the advertising business and not enough on the actual contribution of the advertisements to the education of the journal's readers. It held that respondent had established the requisite substantial relation and its entitlement to exemption from taxation. *Id.*, at 1578. We granted the Government's petition for certiorari, 473 U. S. 904 (1985), and now reverse.

II

The taxation of business income not "substantially related" to the objectives of exempt organizations dates from the Revenue Act of 1950, Ch. 994, 64 Stat. 906 (1950 Act). The statute was enacted in response to perceived abuses of the tax laws by tax-exempt organizations that engaged in profit-making activities. Prior law had required only that the profits garnered by exempt organizations be used in furtherance of tax-exempt purposes, without regard to the source of

those profits. See *Trinidad* v. *Sagrada Orden de Predicadores*, 263 U. S. 578, 581 (1924); *C. F. Mueller Co.* v. *Commissioner*, 190 F. 2d 120 (CA3 1951); *Roche's Beach, Inc.* v. *Commissioner*, 96 F. 2d 776 (CA2 1938). As a result, tax-exempt organizations were able to carry on full-fledged commercial enterprises in competition with corporations whose profits were fully taxable. See Revenue Revision of 1950: Hearings before the House Committee on Ways and Means, Vol. I, 81st Cong., 2d Sess., 18–19 (1950) (hereinafter cited as 1950 House Hearings) (describing universities' production of "automobile parts, chinaware, and food products, and the operation of theatres, oil wells, and cotton gins"). Congress perceived a need to restrain the unfair competition fostered by the tax laws. See H. R. Rep. No. 2319, 81st Cong., 2d Sess., 36–37 (1950).

Nevertheless, Congress did not force exempt organizations to abandon all commercial ventures, nor did it levy a tax only upon businesses that bore no relation at all to the tax-exempt purposes of an organization, as some of the 1950 Act's proponents had suggested. See, *e. g.*, 1950 House Hearings, at 4, 19, 165. Rather, in the 1950 Act it struck a balance between its two objectives of encouraging benevolent enterprise and restraining unfair competition by imposing a tax on the "unrelated business taxable income" of tax-exempt organizations. 26 U. S. C. § 511(a)(1).

"Unrelated business taxable income" was defined as "the gross income derived by any organization from any unrelated trade or business . . . regularly carried on by it . . . ." § 512(a)(1). Congress defined an "unrelated trade or business" as "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption . . . ." § 513(a). Whether respondent's advertising income is taxable, therefore, depends upon (1) whether the publication of paid advertising is a "trade or business," (2) whether it

is regularly carried on, and (3) whether it is substantially related to respondent's tax-exempt purposes.

III

A

Satisfaction of the first condition is conceded in this case, as it must be, because Congress has declared unambiguously that the publication of paid advertising is a trade or business activity distinct from the publication of accompanying educational articles and editorial comment.

In 1967, the Treasury promulgated a regulation interpreting the unrelated business income provision of the 1950 Act. The regulation defined "trade or business" to include not only a complete business enterprise, but also any component activity of a business. Treas. Reg. § 1.513–1(b), 26 CFR § 1.513–1(b) (1985) (first published at 32 Fed. Reg. 17657 (1967)).[2] This revolutionary approach to the identification of a "trade or business" had a significant effect on advertising, which theretofore had been considered simply a part of a unified publishing business. The new regulation segregated the "trade or business" of selling advertising space from the "trade or business" of publishing a journal, an approach commonly referred to as "fragmenting" the enterprise of publishing into its component parts:

> "[A]ctivities of soliciting, selling, and publishing commercial advertising do not lose identity as a trade or business even though the advertising is published in an exempt organization periodical which contains editorial matter related to the exempt purposes of the organization." 26 CFR § 1.513–1(b) (1985).

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[2] The 1967 Treasury regulations at issue in this case, published in final form at 32 Fed. Reg. 17657 (1967), have not been amended in pertinent part since their promulgation, and references to those regulations herein are to the current version.

In 1969, Congress responded to widespread criticism of those Treasury regulations[3] by passing the Tax Reform Act of 1969, Pub. L. 91–172, 83 Stat. 487 (1969 Act). That legislation specifically endorsed the Treasury's concept of "fragmenting" the publishing enterprise into its component activities, and adopted, in a new § 513(c), much of the language of the regulation that defined advertising as a separate trade or business:

> "Advertising, etc., activities . . . an activity does not lose identity as a trade or business merely because it is carried on . . . within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organization." 26 U. S. C. § 513(c).

The statute clearly established advertising as a trade or business, the first prong of the inquiry into the taxation of unrelated business income.

The presence of the second condition, that the business be regularly carried on, is also undisputed here. The satisfaction of the third condition, however, that of "substantial rela-

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[3] See, *e. g.*, Moore, Current Problems of Exempt Organizations, 24 Tax L. Rev. 469, 476 (1969); Middleditch & Webster, The new unrelated business income Regs: what they mean; how to cope with them, 28 J. Tax. 174, 178 (1968); Webster, New proposals change definition of unrelated business income, 27 J. Tax. 42, 43 (1967); Weithorn & Liles, Unrelated Business Income Tax: Changes Affecting Journal Advertising Revenues, 45 Taxes 791, 798 (1967). See also Tax Reform, 1969: Hearings before the House Committee on Ways and Means, 91st Cong., 1st Sess., 1129, 1184, 1223 (1969). Numerous bills were introduced in the 90th Congress, 1st Session, in an unsuccessful attempt to overturn the regulations, even before they became final. See, *e. g.*, H. R. 8765; H. R. 8766; H. R. 9103; H. R. 9468; H. R. 9661; H. R. 9763; H. R. 10150; H. R. 10997; H. R. 10998; H. R. 11491; H. R. 11492. And several years later, two federal courts struck down the 1967 regulations as exceeding pre-1969 statutory authority, insofar as they required the "fragmentation" of publishing activities. See *American College of Physicians* v. *United States*, 209 Ct. Cl. 23, 29, 530 F. 2d 930, 933 (1976); *Massachusetts Medical Society* v. *United States*, 514 F. 2d 153, 154 (CA1 1975).

on," is vigorously contested, and that issue forms the crux f the controversy before us.

B

According to the Government, Congress and the Treasury stablished a blanket rule that advertising published by tax-xempt professional journals can never be substantially re-ated to the purposes of those journals and is, therefore, al-vays a taxable business. Respondent, however, contends hat each case must be determined on the basis of the charac-eristics of the advertisements and journal in question. Each party finds support for its position in the governing tatute and regulations issued by the Department of the Treasury.

In its 1967 regulations, the Treasury not only addressed he "fragmentation" issue discussed above, but also at-empted to clarify the statutory "substantially related" tandard found in § 513(a). It provided that the conduct of a ax-exempt business must have a causal relation to the orga-ization's exempt purpose (other than through the generation of income), and that "the production or distribution of the goods or the performance of the services from which the gross income is derived must *contribute importantly* to the accomplishment of [the exempt] purposes." Treas. Reg. § 1.513–1(d)(2), 26 CFR § 1.513–1(d)(2) (1985) (emphasis added). In illustration of its new test for substantial rela-tion, the Treasury provided an example whose interpretation is central to the resolution of the issue before us. Example 7 of Treas. Reg. § 1.513–1(d)(4)(iv) involves "Z," an exempt association formed to advance the interests of a particular profession and drawing its membership from that profession. Z publishes a monthly journal containing articles and other editorial material that contribute importantly to the tax-exempt purpose. Z derives income from advertising prod-ucts within the field of professional interest of the members:

"Following a practice common among taxable magazines which publish advertising, Z requires its advertising to comply with certain general standards of taste, fairness, and accuracy; but within those limits the form, content, and manner of presentation of the advertising messages are governed by the basic objective of the advertisers to promote the sale of the advertised products. While the advertisements contain certain information, the informational function of the advertising is incidental to the controlling aim of stimulating demand for the advertised products and differs in no essential respect from the informational function of any commercial advertising. Like taxable publishers of advertising, Z accepts advertising only from those who are willing to pay its published rates. Although continuing education of its members in matters pertaining to their profession is one of the purposes for which Z is granted exemption, the publication of advertising designed and selected in the manner of ordinary commercial advertising is not an educational activity of the kind contemplated by the exemption statute; it differs fundamentally from such an activity both in its governing objective and in its method. Accordingly, Z's publication of advertising does not contribute importantly to the accomplishment of its exempt purposes; and the income which it derives from advertising constitutes gross income from unrelated trade or business." § 1.513–1(d)(4)(iv), Example 7.

The Government contends both that Example 7 creates a *per se* rule of taxation for journal advertising income and that Congress intended to adopt that rule, together with the remainder of the 1967 regulations, into law in the 1969 Act. We find both of these contentions unpersuasive.

Read as a whole, the regulations do not appear to create the type of blanket rule of taxability that the Government urges upon us. On the contrary, the regulations specifically condition tax exemption of business income upon the impor-

tance of the business activity's contribution to the particular exempt purpose at issue, and direct that "[w]hether activities productive of gross income contribute importantly to the accomplishment of any purpose for which an organization is granted an exemption depends *in each case* upon the facts and circumstances involved," § 1.513–1(d)(2) (emphasis added). Example 7 need not be interpreted as being inconsistent with that general rule. Attributing to the term "example" its ordinary meaning, we believe that Example 7 is best construed as an illustration of one possible application, under given circumstances, of the regulatory standard for determining substantial relation.

The interpretative difficulty of Example 7 arises primarily from its failure to distinguish clearly between the statements intended to provide hypothetical facts and those designed to posit the necessary legal consequences of those facts. Just at the point in the lengthy Example at which the facts would appear to end and the analysis to begin, a pivotal statement appears: "the informational function of the advertising is incidental to the controlling aim of stimulating demand for the advertised products." The Government's position depends upon reading this statement as a general proposition of law, while respondent would read it as a statement of fact that may be true by hypothesis of "Z" and its journal, but is not true of Annals.

We recognize that the language of the Example is amenable to either interpretation. Nevertheless, several considerations lead us to believe that the Treasury did not intend to set out a *per se* statement of law. First, when the regulations were proposed in early 1967, the Treasury expressed a clear intention to treat all commercial advertising as an unrelated business. See Technical Information Release No. 889, CCH 1967 Stand. Fed. Tax Rep. ¶ 6557. When the regulations were issued in final form, however, following much criticism and the addition of Example 7, they included no such statement of intention. 32 Fed. Reg. 17657 (1967). Second,

a blanket rule of taxation for advertising in professional journals would contradict the explicit case-by-case requirement articulated in Treas. Reg. § 1.513–1(d)(2), and we are reluctant to attribute to the Treasury an intention to depart from its own general principle in the absence of clear support for doing so. Finally, at the time the regulations were issued, the 1950 Act had been interpreted to mean that business activities customarily engaged in by tax-exempt organizations would continue to be considered "substantially related" and untaxed. See Note, The Macaroni Monopoly: The Developing Concept of Unrelated Business Income of Exempt Organizations, 81 Harv. L. Rev. 1280, 1291 (1968). A *per se* rule of taxation for the activity, traditional among tax-exempt journals, of carrying commercial advertising would have been a significant departure from that prevailing view. Thus, in 1967 the idea of a *per se* rule of taxation for all journal advertising revenue was sufficiently controversial, its effect so substantial, and its statutory authorization so tenuous, that we simply cannot attribute to the Treasury the intent to take that step in the form of an ambiguous example, appended to a subpart of a subsection of a subparagraph of a regulation.

It is still possible, of course, that, regardless of what the Treasury actually meant by its 1967 regulations, Congress read those regulations as creating a blanket rule of taxation, and intended to adopt that rule into law in the 1969 Act. The Government appears to embrace this view, which it supports with certain statements in the legislative history of the 1969 Act. For example, the Government cites to a statement in the House Report, discussing the taxation of advertising income of journals published by tax-exempt organizations:

> "Your committee believes that a business competing with taxpaying organizations should not be granted an unfair competitive advantage by operating tax free unless the business contributes importantly to the exempt function. It has concluded that by that standard, ad-

vertising in a journal published by an exempt organization is not related to the organization's exempt functions, and therefore it believes that this income should be taxed." H. R. Rep. No. 91-413, pt. 1, p. 50 (1969).

Similar views appear in the Senate Report:

"Present law.—In December 1967, the Treasury Department promulgated regulations under which the income from advertising and similar activities is treated as 'unrelated business income' even though such advertising for example may appear in a periodical related to the educational or other exempt purpose of the organization.

"General reasons for change.—The committee agrees with the House that the regulations reached an appropriate result in specifying that when an exempt organization carries on an advertising business in competition with other taxpaying advertising businesses, it should pay a tax on the advertising income. The statutory language on which the regulations are based, however, is sufficiently unclear so that substantial litigation could result from these regulations. For this reason, the committee agrees with the House that the regulations, insofar as they apply to advertising and related activities, should be placed in the tax laws." S. Rep. No. 91-552, p. 75 (1969).

Based on this language, the Government argues that the 1969 Act created a *per se* rule of taxation for advertising income. The weakness of this otherwise persuasive argument, however, is that the quoted discussion appears in the Reports solely in support of the legislators' decision to enact § 513(c), the provision approving the fragmentation of "trade or business." Although § 513(c) was a significant change in the tax law that removed one barrier to the taxation of advertising proceeds, it cannot be construed as a comment upon the two other distinct conditions—"regularly carried on" and "not substantially related"—whose satisfaction is prereq-

uisite to taxation of business income under the 1950 Act. Congress did not incorporate into the 1969 Act the language of the regulation defining "substantial relation," nor did the statute refer in any other way to the issue of the relation between advertising and exempt functions, even though that issue had been hotly debated at the hearings. See, *e. g.*, Tax Reform, 1969: Hearings before the House Committee on Ways and Means, 91st Cong., 1st Sess., 1113, 1118, 1192, 1241 (1969). Thus, we have no reason to conclude from the Committee Reports that Congress resolved the dispute whether, in a specific case, a journal's carriage of advertising could so advance its educational objectives as to be "substantially related" to those objectives within the meaning of the 1950 Act.

It is possible that the Committees' discussion of advertising reflects merely an erroneous assumption that the "fragmentation" provision of § 513(c), without more, would establish the automatic taxation of journal advertising revenue. Alternatively, the quoted passages could be read to indicate the Committees' intention affirmatively to endorse what they believed to be existing practice, or even to change the law substantially. The truth is that, other than a general reluctance to consider commercial advertisements generally as substantially related to the purposes of tax-exempt journals, no congressional view of the issue emerges from the quoted excerpts of the Reports.[4] Thus, despite the Reports' seeming endorsement of a *per se* rule, we are hesitant to rely on that inconclusive legislative history either to supply a provision *not* enacted by Congress, see *Commissioner* v. *Acker*,

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[4] Indeed, different excerpts suggest that perhaps the House Committee did not construe the statute as creating a *per se* rule. In its explanation of § 513(c), the House Report states that "the advertising contained in a publication of an exempt organization *may* be subject to the tax under section 511 even though the editorial content of the publication may be related to the exempt purposes of the organization." H. R. Rep. No. 91-413, pt. 2, p. 26 (1969) (emphasis added).

361 U. S. 87, 93 (1959); 1 J. Mertens, Law of Federal Income Taxation § 3.29 (Weinstein rev. 1985), or to define a statutory term enacted by a prior Congress. See *SEC* v. *Sloan*, 436 U. S. 103, 121 (1978); *United States* v. *Price*, 361 U. S. 304, 313 (1960). Cf. *TVA* v. *Hill*, 437 U. S. 153, 193 (1978). We agree, therefore, with both the Claims Court and the Court of Appeals in their tacit rejection of the Government's argument that the Treasury and Congress intended to establish a *per se* rule requiring the taxation of income from all commercial advertisements of all tax-exempt journals without a specific analysis of the circumstances.[5]

IV

It remains to be determined whether, in this case, the business of selling advertising space is "substantially related"—or, in the words of the regulation, "contributes importantly"—to the purposes for which respondent enjoys an exemption from federal taxation. Respondent has maintained throughout this litigation that the advertising in Annals performs an educational function supplemental to that of the journal's editorial content. App. 7a. Testimony of respondent's witnesses at trial tended to show that drug advertising performs a valuable function for doctors by disseminating information on recent developments in drug manufacture and use. *Id.*, at 27a, 38a, 43a. In addition, respondent has contended that the role played by the Food and Drug Administration, in regulating much of the form and content of prescription-drug advertisements, enhances the contribution that such advertisements make to the readers' education. All of these

[5] This conclusion is consistent with the Treasury's own approach to analogous problems. See, *e. g.*, Rev. Rul. 82-139, 1982-2 Cum. Bull. 108 (advertisements in county bar journal; no *per se* rule); Rev. Rul. 72-431, 1972-2 Cum. Bull. 281 (exempt organization's sale of mailing lists to commercial advertisers; no *per se* rule). Our rejection of the *per se* rule renders it unnecessary for us to address respondent's alternative argument that any such rule should apply only to associations organized under § 501(c)(6) of the Internal Revenue Code.

factors, respondent argues, distinguish the advertising in Annals from standard commercial advertising. Respondent approaches the question of substantial relation from the perspective of the journal's subscribers; it points to the benefit that they may glean from reading the advertisements and concludes that that benefit is substantial enough to satisfy the statutory test for tax exemption. The Court of Appeals took the same approach. It concluded that the advertisements performed various "essential" functions for physicians, 743 F. 2d, at 1576, and found a substantial relation based entirely upon the medically related content of the advertisements as a group.

The Government, on the other hand, looks to the conduct of the tax-exempt organization itself, inquiring whether the publishers of Annals have performed the advertising services in a manner that evinces an intention to use the advertisements for the purpose of contributing to the educational value of the journal. Also approaching the question from the vantage point of the College, the Claims Court emphasized the lack of a comprehensive presentation of the material contained in the advertisements. It commented upon the "hit-or-miss nature of the advertising," 3 Cl. Ct., at 543, n. 3, and observed that the "differences between ads plainly reflected the advertiser's marketing strategy rather than their probable importance to the reader." *Id.*, at 534. "[A]ny educational function [the advertising] may have served was incidental to its purpose of raising revenue." *Id.*, at 535.

We believe that the Claims Court was correct to concentrate its scrutiny upon the conduct of the College rather than upon the educational quality of the advertisements. For all advertisements contain some information, and if a modicum of informative content were enough to supply the important contribution necessary to achieve tax exemption for commercial advertising, it would be the rare advertisement indeed that would fail to meet the test. Yet the statutory and regulatory scheme, even if not creating a *per se* rule *against* tax

exemption, is clearly antagonistic to the concept of a *per se* rule *for* exemption for advertising revenue. Moreover, the statute provides that a tax will be imposed on "any trade or business the *conduct* of which is not substantially related," 26 U. S. C. § 513(a) (emphasis added), directing our focus to the manner in which the tax-exempt organization operates its business. The implication of the statute is confirmed by the regulations, which emphasize the "manner" of designing and selecting the advertisements. See Treas. Reg. § 1.513–1(d)(4)(iv), Example 7, 26 CFR § 1.513–1(d)(4)(iv), Example 7 (1985). Thus, the Claims Court properly directed its attention to the College's conduct of its advertising business, and it found the following pertinent facts:

> "The evidence is clear that plaintiff did not use the advertising to provide its readers a comprehensive or systematic presentation of any aspect of the goods or services publicized. Those companies willing to pay for advertising space got it; others did not. Moreover, some of the advertising was for established drugs or devices and was repeated from one month to another, undermining the suggestion that the advertising was principally designed to alert readers of recent developments [citing, as examples, ads for Valium, Insulin and Maalox]. Some ads even concerned matters that had no conceivable relationship to the College's tax-exempt purposes." 3 Cl. Ct., at 534 (footnotes omitted).

These facts find adequate support in the record. See, *e. g.*, App. 29a–30a, 59a. Considering them in light of the applicable legal standard, we are bound to conclude that the advertising in Annals does not contribute importantly to the journal's educational purposes. This is not to say that the College could not control its publication of advertisements in such a way as to reflect an intention to contribute importantly to its educational functions. By coordinating the content of the advertisements with the editorial content of the issue, or by publishing only advertisements reflecting

new developments in the pharmaceutical market, for example, perhaps the College could satisfy the stringent standards erected by Congress and the Treasury. In this case, however, we have concluded that the Court of Appeals erroneously focused exclusively upon the information that is invariably conveyed by commercial advertising, and consequently failed to give effect to the governing statute and regulations. Its judgment, accordingly, is

Reversed.

CHIEF JUSTICE BURGER, with whom JUSTICE POWELL joins, concurring.

Most medical journals are not comparable to magazines and newspapers published for profit. Their purpose is to assemble and disseminate to the profession relevant information bearing on patient care. The enormous expansion of medical knowledge makes it difficult for a general practitioner—or even a specialist—to keep fully current with the latest developments without such aids. In a sense these journals provide continuing education for physicians—a "correspondence course" not sponsored for profit but public health.

There is a public value in the widest possible circulation of such data, and advertising surely tends to reduce the cost of publication and hence the cost to each subscriber, thereby enhancing the prospect of wider circulation. Plainly a regulation recognizing these realities would be appropriate. Such regulations, of course, are for the Executive Branch and the Congress, not the courts. I join the opinion because it reflects a permissible reading of the present Treasury regulations.

SORENSON v. SECRETARY OF THE TREASURY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1686. Argued January 15, 1986—Decided April 22, 1986

The Internal Revenue Code (IRC) allows an individual responsible for the support of a child living with him a credit against income taxes due equal to a certain percentage of so much of earned income as does not exceed a specified amount. If the credit exceeds tax liability, the excess is considered "an overpayment" of tax under IRC § 6401(b). Section 6402(a) provides for a refund of "any overpayment" to the person who made it. Section 6402(c) requires the amount of "any overpayment" to be reduced by the amount of any past-due child-support payments assigned to a State. Section 464 of the Social Security Act (SSA) directs the Secretary of the Treasury to "intercept" tax refunds payable to persons who have failed to meet child-support obligations that have been assigned to a State. When petitioner's husband fell behind in support payments for a child of a previous marriage who was in the custody of his former wife, the latter, upon applying for welfare benefits from the State of Washington, assigned to the State, as required by the Aid to Families with Dependent Children program, her right to collect the unpaid child-support payments. Petitioner and her husband, who had their own dependent child living with them, filed a joint federal income tax return for 1981 in which all income was attributable to petitioner's wages and unemployment compensation benefits and in which they anticipated a refund based in part on an earned-income credit. The Internal Revenue Service, however, notified them that a certain amount of the anticipated refund was being retained, under the authority of the tax-intercept law, and would be paid over to the State of Washington. Petitioner then filed a class action in Federal District Court, seeking a declaration that § 464 of the SSA did not reach a refund attributable to an excess earned-income credit. The District Court granted summary judgment for the Government, and the Court of Appeals affirmed.

Held: An excess earned-income credit can properly be intercepted under the applicable statutes. Pp. 859–865.

(a) The IRC's treatment of earned-income credits supports the Government's position. The refundability of that credit is inseparable from its classification as an overpayment of tax. It is an "overpayment" not only for purposes of § 6402(a), but also for purposes of § 6402(c). Eligi-

bility for an earned-income credit does not depend upon an individual's actually having paid any tax. The IRC's classification of the credit as an "overpayment" to be refunded is similarly independent of the individual's actually having made any payment. To the extent an excess credit is "payable" to an individual, it is payable as if it were a refund of tax paid. Pp. 859–863.

(b) There is no support for petitioner's claim that Congress did not intend the tax-intercept program to reach excess earned-income credits. Although Congress never mentioned the earned-income credit in enacting the Omnibus Budget Reconciliation Act of 1981, which added § 6402(c) to the IRC, it must have been aware, when it provided in § 6402(c) that "*any* overpayment" to be refunded shall be reduced by the amount of any past-due child support, that this would include refunds attributable to excess earned-income credits. And, although the goals of the earned-income credit—to reduce the disincentive to work caused by social security taxes on earned income, to stimulate the economy by funneling funds to persons likely to spend the money immediately, and to provide for relief for low-income families hurt by rising food and energy prices—are important, it cannot be said that Congress concluded that they outweigh the goals served by the subsequently enacted tax-intercept program—securing child support from absent parents and reducing the number of families on welfare. Pp. 863–865.

752 F. 2d 1433, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 866.

Peter Greenfield argued the cause for petitioner. With him on the briefs was *J. Bruce Smith.*

Richard Farber argued the cause for respondents. With him on the brief were *Solicitor General Fried, Assistant Attorney General Archer, Albert G. Lauber, Jr., Michael L. Paup,* and *Steven I. Frahm.**

JUSTICE BLACKMUN delivered the opinion of the Court.

The Internal Revenue Code and the Social Security Act direct the Secretary of the Treasury to "intercept" certain

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**Joseph I. Lieberman*, Attorney General of Connecticut, and *Joseph X. Dumond, Jr.*, Assistant Attorney General, filed a brief for the State of Connecticut as *amicus curiae* urging affirmance.

tax refunds payable to persons who have failed to meet child-support obligations. In this case, the United States Court of Appeals for the Ninth Circuit ruled that payments involving earned-income credits could be intercepted. 752 F. 2d 1433 (1985). We granted certiorari, 472 U. S. 1016 (1985), because this ruling was in conflict with decisions of the Courts of Appeals for the Second and Tenth Circuits. See *Rucker* v. *Secretary of Treasury*, 751 F. 2d 351 (CA10 1984); *Nelson* v. *Regan*, 731 F. 2d 105 (CA2), cert. denied *sub nom. Manning* v. *Nelson*, 469 U. S. 853 (1984).

I

A

Stanley Sorenson, the husband of petitioner Marie Sorenson, was legally obligated to make child-support payments for a child of his previous marriage who was in the custody of his former wife. Mr. Sorenson was unemployed because of a disability and fell behind on those support payments. His former wife applied for welfare benefits from the State of Washington. Since 1975, the program for Aid to Families with Dependent Children (AFDC) has required, as a condition of eligibility, that applicants for welfare assign to the State concerned any right to child-support payments that has accrued at the time of assignment. Pub. L. 93–647, § 101(c)(5)(C), 88 Stat. 2359, 42 U. S. C. § 602(a)(26)(A).[1] Thus, Stanley Sorenson's former wife turned over to the State her right to collect the payments Mr. Sorenson had failed to make.

Stanley and Marie Sorenson also had their own dependent child living with them. They thus were potentially eligible

[1] Section 402(a)(26)(A) of the Social Security Act, as amended, 42 U. S. C. § 602(a)(26)(A), requires the assignment to the State of "any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed."

to receive an earned-income credit. For the calendar year 1981, the time relevant to this lawsuit, § 43 of the Internal Revenue Code of 1954, as amended, provided that an individual responsible for the support of a child living with him was allowed "as a credit against the tax imposed . . . for the taxable year an amount equal to 10 percent of so much of the earned income for the taxable year as does not exceed $5,000." As the amount of the taxpayer's earned income increased, the amount of the credit decreased, reaching zero when the taxpayer's adjusted gross income reached $10,000.[2]

Unlike certain other credits, which can be used only to offset tax that would otherwise be owed, the earned-income credit is "refundable." Thus, if an individual's earned-income credit exceeds his tax liability, the excess amount is "considered an overpayment" of tax under § 6401(b), as it then read, of the 1954 Code.[3] Subject to specified setoffs,

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[2] By the Tax Reform Act of 1984, Pub. L. 98-369, § 471(c)(1), 98 Stat. 826, Congress redesignated § 43 as § 32. By § 1042 of that Act, 98 Stat. 1043, it raised the earned-income percentage from 10 to 11 percent, the maximum amount of the credit from $500 to $550, and the eligibility ceiling from $10,000 to $11,000.

[3] At the time relevant to this lawsuit, § 6401(b) of the 1954 Code provided, in pertinent part:

"If the amount allowable as credits under sections 31 (relating to tax withheld on wages), and 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), and 43 (relating to earned income credit), exceeds the tax imposed by subtitle A (reduced by the credits allowable under subpart A of part IV of subchapter A of chapter 1, other than the credits allowable under sections 31, 39, and 43), the amount of such excess shall be considered an overpayment."

Section 6401(b) was amended by the Tax Reform Act of 1984. Section 474(r)(36) of that Act, 98 Stat. 846, designated existing § 6401(b) as § 6401(b)(1) and substituted the following language for the language quoted above:

"If the amount allowable as credits under subpart C of part IV of subchapter A of chapter 1 (relating to refundable credits) exceeds the tax imposed by subtitle A (reduced by the credits allowable under subparts A, B, and D of such part IV), the amount of such excess shall be considered an overpayment."

§ 6402(a) directs the Secretary to credit or refund "any overpayment" to the person who made it.[4] An individual who is entitled to an earned-income credit that exceeds the amount of tax he owes thereby receives the difference as if he had overpaid his tax in that amount.

B

In February 1982, petitioner and her husband timely filed a joint federal income tax return for the calendar year 1981. Petitioner had worked during part of that year, and all the Sorenson family income for the year was attributable to her wages and unemployment compensation benefits. By the return so filed, the Sorensons anticipated a refund of $1408.90, consisting in part of excess withholding on petitioner's wages and in part of an earned-income credit. The Internal Revenue Service, however, notified the Sorensons that $1,132 of the anticipated refund was being retained, under the authority granted it by the tax-intercept law, and

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The earned-income credit remains refundable under the revised provision, since it is within the category of "refundable credits." See Tax Reform Act of 1984, § 471, 98 Stat. 825.

[4] The version of § 6402(a) in effect for the tax year 1981 provided:

"In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsection (c), refund any balance to such person."

The question presented by this case is the scope of subsection (c)—the provision governing the offset of past-due child-support payments.

Section 2653(b)(2) of the Spending Reduction Act of 1984, 98 Stat. 1155, amended § 6402(a). Under amended § 6402(a), the Secretary's authority, with respect to refunds payable after December 31, 1985, and before January 1, 1988, see § 2653(c) of the 1984 Act, 98 Stat. 1156, is restricted by a new subsection (d) as well as by subsection (c) of § 6402. Section 2653(b)(1) of the 1984 Act, 98 Stat. 1154, added the new subsection (d). Section 6402(d) requires the offset of debts owed to various federal agencies. Under § 6402(d)(2), the collection of past-due child-support payments pursuant to § 6402(c) has priority over the collection of debts covered by § 6402(d).

would be paid over to the State of Washington because that State had been assigned the right to collect Mr. Sorenson's unpaid child-support obligations. See Second Declaration of Peter Greenfield, Exh. B, *Sorenson* v. *Secretary of Treasury*, No. C82–441C (WD Wash.).

The tax-intercept law essentially directs the Secretary to give priority to a State's claim for recoupment of welfare payments made to a family who failed to receive child support, see § 402(a)(26)(A) of the Social Security Act, as amended, 42 U. S. C. § 602(a)(26)(A), over an individual's claim for refund of tax overpayment. See § 6402(a), as amended, of the 1954 Code. The intercept law originally was enacted as part of the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. 97–35, § 2331, 95 Stat. 860. First, OBRA § 2331(a) added § 464 to the Social Security Act, 42 U. S. C. § 664. That section directs the Secretaries of the Treasury and of Health and Human Services to establish a scheme by which a State is to notify the Secretary of the Treasury of persons who owe past-due child-support payments that have been assigned to it, and directs the Secretary of the Treasury to intercept tax-refund payments that would otherwise be paid to those persons:

> "Upon receiving notice from a State agency administering [an AFDC plan] . . . that a named individual owes past-due support which has been assigned to such State pursuant to section 402(a)(26), the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to the past-due support, and pay such amount to the State agency (together with notice of the individual's

home address) for distribution in accordance with section 457(b)(3)." § 464(a), 42 U. S. C. § 664(a).[5]

Section 2331(c) of OBRA amended the Internal Revenue Code. It added a new subsection to the provision governing the Secretary of the Treasury's authority to refund overpayments to taxpayers. The new subsection, § 6402(c), requires the Secretary to withhold from the refund otherwise due the taxpayer the amount owed the State in past-due child support and to remit the amount withheld to the State:

> "The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax."

C

After negotiations concerning the status of tax refunds in community property States such as Washington—issues that are not germane to the question now presented to this Court—the Secretary ultimately withheld only half of the refund increment the Sorensons claimed. Petitioner then filed

[5] Section 464(a) was amended by the Child Support Enforcement Amendments of 1984, Pub. L. 98-378, § 21, 98 Stat. 1322, which authorized the interception and diversion of refunds for the benefit of non-AFDC children as well as children receiving AFDC benefits. The Amendments also provided additional procedural protections for refund claimants whose refunds are intercepted.

a class action in the United States District Court for the Western District of Washington seeking, among other things, a declaration that § 464 of the Social Security Act did not reach a refund attributable to an excess earned-income credit. The District Court rejected the Secretary's jurisdictional arguments, which were renewed on appeal to the Court of Appeals but which are not pressed in this Court. See Brief for Respondents 5, n. 1. But it agreed with the Secretary's arguments on the merits and granted summary judgment for the Government. 557 F. Supp. 729 (1982).

The Court of Appeals affirmed that judgment. 752 F. 2d 1433 (CA9 1985). It rejected petitioner's statutory construction arguments, and held that, since the Code expressly defined excess earned-income credits as "overpayments," and disbursed those excess credits to recipients through the income tax refund process, the credits were "payable '*as*' refunds of federal taxes paid" and therefore could be intercepted. *Id.*, at 1441 (emphasis in original). Congress used the broad terms "any amounts" and "any overpayment" in the tax-intercept law and gave no indication that it intended to exclude earned-income credit payments from these terms.

The Court of Appeals also rejected petitioner's argument that the Secretary's position conflicted with Congress' intention to provide benefits to the poor through the earned-income credit. First, the legislative history of § 43 did not suggest that the earned-income credit was intended primarily as a type of welfare grant; rather, it was meant to negate the disincentive to work caused by social security taxes. Since the earned-income credit was payable as a lump sum, it was more like excess withholding, which was clearly reachable by the intercept program, than it was like wages, a portion of which Congress exempted from the assessment and collection process. See 752 F. 2d, at 1443, n. 1. Second, had Congress intended to exempt earned-income credit payments from the intercept program, it could have done so expressly. Instead, it provided that any amount payable

through the federal tax-refund process might be intercepted. "In the face of this rather clear statutory mandate," said the Court of Appeals, "we conclude that we are not free to speculate that Congress intended otherwise." *Id.*, at 1443.

II

Petitioner advances two arguments to support her claim that an excess earned-income credit cannot be intercepted. First, she claims that the language and structure of the interlocking statutory provisions that make up the intercept law exclude an earned-income credit from its reach: excess earned-income credits are neither "overpayments" nor "refunds of Federal taxes paid," and only those items are subject to interception. Second, she claims that permitting interception of an earned-income credit would frustrate Congress' aims in providing the credit, and thus that Congress could not have intended the intercept law to reach earned-income credits. We find neither argument persuasive.

A

The Internal Revenue Code's treatment of earned-income credits supports the Government's position. An individual can receive the amount by which his entitlement to an earned-income credit exceeds his tax liability only because § 6401(b) of the Code defines that amount as an "overpayment," and § 6402 provides a mechanism for disbursing overpayments, namely, the income tax refund process. The refundability of the earned-income credit is thus inseparable from its classification as an overpayment of tax. Petitioner therefore acknowledges that the excess earned-income credit is an "overpayment" for purposes of § 6402(a), the general provision that authorizes all tax refunds. See n. 4, *supra*. If it were not, the Secretary would lack authorization for refunding it to her. She claims, however, that while an excess earned-income credit is an "overpayment" for purposes of § 6402(a), it is not an "overpayment" for purposes of § 6402(c), which requires that the "amount of any overpayment . . .

shall be reduced by the amount of any past-due support" assigned to the State.

The normal rule of statutory construction assumes that "'identical words used in different parts of the same act are intended to have the same meaning.'" *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 87 (1934), quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932). That the Internal Revenue Code includes an explicit definition of "overpayment" in the same subchapter strengthens the presumption. And that both subsections concern the tax-refund treatment of "overpayment[s]" is especially damaging to any claim that "the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." *Stockholms Enskilda Bank*, 293 U. S., at 87.

Petitioner and the two Courts of Appeals that have excluded excess earned-income credits from the definition of "overpayment" used in § 6402(c) offer two bases for their position. First, they believe that § 6402(c) limits § 6401(b)'s broad definition "by [using] the phrase 'overpayment to be refunded to the person making the overpayment.'" *Nelson* v. *Regan*, 731 F. 2d, at 111; see *Rucker* v. *Secretary of Treasury*, 751 F. 2d, at 356. Not all overpayments, they suggest, are refunded to persons who "made" them, since some—those consisting of earned-income credits—may be refunded to persons who actually have not paid any tax. We disagree. *All* refunds made by the Secretary under § 6402(a) are paid to "the person who made the overpayment." The phrase merely identifies the *person* entitled to the refund; it does not restrict the nature of the refund itself. Petitioner must characterize herself as a person who has "made" an overpayment; otherwise, she cannot claim her excess earned-income credit. The phrase in § 6402(c) on which petitioner and the Second and Tenth Circuits relied is virtually identical to the phrase used in § 6402(a). Since the words cannot have

the limiting effect petitioner proposes when used in § 6402(a), no justification exists for giving them such a construction in § 6402(c).

Second, petitioner and the Second and Tenth Circuits perceive a tension between § 6401(b)'s and § 6402(a)'s treatment of excess earned-income credits and § 464(a)'s treatment of interceptable amounts. As used in those Code sections, "overpayment" includes more than "refunds of Federal taxes paid," the phrase used in the Social Security Act. Since § 464 and § 6402(c) were enacted simultaneously as part of OBRA, petitioner and the two Circuits believe that § 6402(c) should be harmonized with § 464 rather than with §§ 6401(b) and 6402(a). See *Rucker* v. *Secretary of Treasury*, 751 F. 2d, at 357; *Nelson* v. *Regan*, 731 F. 2d., at 111.

This second argument, it seems to us, misperceives the structure of the tax-intercept law, and manufactures a tension that need not exist. OBRA's placement of provisions regarding interception in both Acts reflects a division of functions. The tax-intercept program lies at the intersection of the Social Security Act's concern in Subchapter IV, Part D, with child support, and the Internal Revenue Code's concern in Chapter 65, Subchapter A, with the treatment of credits in the tax-refund process. Section 464 addresses the concerns of the States that have received AFDC-related grants. It defines past-due child support, authorizes procedures by which the States can notify the Secretary of the Treasury of their entitlement to recover such past-due support, and directs the Secretary to aid the States, through his control over the tax-refund process, in recouping that support. Sections 6401 and 6402 address the operation of the tax-refund process under the Internal Revenue Code. They define the status of certain tax credits, set up a mechanism for disbursing refunds, and direct the Secretary to divert certain amounts from the refund process. To the extent that the tax-intercept law regulates the relationship of the Secretary of the Treasury to refund claimants, it does so through

§ 6402, and not through a provision that governs the Secretary's relationship to state agencies.

Petitioner, however, views § 6402(c)'s reference to § 464 as indicating that § 464(a) is meant to be read into § 6402(c) as a limitation on the Secretary's intercept powers. This argument depends on a somewhat strained construction of § 6402(c)'s statement that "[t]he amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support . . . owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act." Petitioner claims that "[t]he words 'in accordance with section 464 of the Social Security Act' . . . do not modify 'has been notified by a State,' as one might initially assume. Rather they belatedly modify the words 'shall be reduced.'" Brief for Petitioner 18. In petitioner's view, her construction would lead to the conclusion that a refund can be reduced only to the extent that the refund represents a refund of tax actually paid, since that is all § 464(a) permits.

We disagree with both petitioner's construction of § 6402(c) and her reading of § 464(a). First, it seems far more plausible that the words modify the nearest verb. If they are given this more natural reading, then § 6402(c) directs the Secretary to intercept only that amount which properly is classified as past-due support and of which he properly has been notified.

But even if the reference in § 6402(c) to § 464 were read to refer solely to § 464(a),[6] nothing in that subsection exempts excess earned-income credits from interception. Petitioner and the Second and Tenth Circuits recast their

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[6] In light of Congress' specific reference to § 464(c) earlier in § 6402(c), it seems particularly likely that Congress would have referred to subsection (a) of § 464 expressly had it meant "in accordance with § 464(a)" rather than in accordance with the entire scheme for identifying past-due support payments and notifying the Federal Government of such obligations set out in § 464.

argument regarding the meaning of "overpayment" by contending that the amount of a refund that is attributable to an excess earned-income credit is not a "refun[d] of Federal taxes paid," and that § 464(a) permits interception of only "amounts, as refunds of Federal taxes paid":

> "A refund of federal taxes is a repayment of money paid by a taxpayer in excess of that taxpayer's liability. Although the earned income credit is given effect through the income tax return, the credit is not a tax refund because eligibility for the credit is not contingent upon payment of any federal income tax." *Rucker* v. *Secretary of Treasury*, 751 F. 2d, at 356.

But just as eligibility for an earned-income credit does not depend upon an individual's actually having paid any tax, the Code's classification of the credit as an "overpayment" to be refunded is similarly independent of the individual's actually having made any payment. Cf. § 6401(c). The Ninth Circuit correctly held that, to the extent an excess earned-income credit is "payable" to an individual, it is payable *as if* it were a refund of tax paid. 752 F. 2d, at 1441. Section 464(a)'s reference to the tax-refund process is best understood as a directive to the Secretary that he follow the procedures established by the Internal Revenue Code for calculating and disbursing refunds, rather than as an attempt implicitly to redefine terms given special meaning by the Code.

B

Nor do we agree with petitioner's claim that Congress did not intend the intercept program to reach excess earned-income credits. Petitioner and the Government agree that Congress never mentioned the earned-income credit in enacting OBRA. See Brief for Petitioner 24; Tr. of Oral Arg. 21. But it defies belief that Congress was unaware, when it provided in § 6402(c) that "*any* overpayment to be refunded . . . shall be reduced by the amount of any past-due support" (em-

phasis added), that this would include refunds attributable to excess earned-income credits. Congress had previously expressly defined an excess earned-income credit as an "overpayment," in § 6401(b) of the Internal Revenue Code—the section immediately preceding the section to which Congress added the intercept provision.[7]

What petitioner and the Second and Tenth Circuits are really claiming is that the intercept law should be read narrowly to avoid frustrating the goals of the earned-income credit program. The earned-income credit was enacted to reduce the disincentive to work caused by the imposition of social security taxes on earned income (welfare payments are not similarly taxed), to stimulate the economy by funneling funds to persons likely to spend the money immediately, and to provide relief for low-income families hurt by rising food and energy prices.[8] Each is an undeniably important objective. It is impossible, however, for us to say that these goals outweigh the goals served by the subsequently enacted tax-intercept program—securing child support from absent par-

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[7] That Congress could not have viewed the earned-income credit as immune from seizure to satisfy child-support obligations is suggested by a number of other factors as well. As the Government notes, once an individual has actually received his tax-refund payment, the proceeds of that refund, even if they reflect an earned-income credit component, are subject to levy under § 6305 of the Code. The fact that the Government may not have used this cumbersome procedure, see Tr. of Oral Arg. 23–25, reflects the economic inefficiency of locating and pursuing a payment that cannot exceed $550 rather than a lack of authority to do so. And certainly no one has suggested that the former spouse to whom a support obligation not assigned to the State is owed would be precluded from employing the judicial process to attach and seize the credit once the recipient had received it.

[8] See, *e. g.*, S. Rep. No. 94–36, pp. 11, 33 (1975); H. R. Rep. No. 94–19, pp. 3–4, 29–31 (1975); Hearings on H. R. 2166 before the Senate Committee on Finance, 94th Cong., 1st Sess., 66, 315 (1975); Hearings before the House Committee on Ways and Means on the President's Authority to Adjust Imports of Petroleum; Public Debt Ceiling Increase; and Emergency Tax Proposals, 94th Cong., 1st Sess., 661, 742–743, 797 (1975); 121 Cong. Rec. 4609 (1975).

ents whenever possible and reducing the number of families on welfare.[9] Congress of course could conclude that families eligible for earned-income credits have a more compelling claim to the funds involved than do either the States or non-AFDC families. But it is equally clear that Congress could have decided that the more pressing need was to alleviate the "devastating consequences for children and the taxpayers" of the epidemic of nonsupport. See Hearings before the Senate Committee on Finance on Spending Reduction Proposals, 97th Cong., 1st Sess., pt. 1, p. 34 (1981) (statement of Secretary Schweiker).[10]

The ordering of competing social policies is a quintessentially legislative function. In light of Congress' decision to direct the interception of *any* overpayment otherwise refundable to a taxpayer, the Ninth Circuit correctly refused to "speculate that Congress intended otherwise." 752 F. 2d, at 1443. Its judgment, accordingly, is affirmed.

It is so ordered.

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[9] See, *e. g.*, S. Rep. No. 98-387, pp. 5-8 (1984); Hearings before the Senate Committee on Finance on Spending Reduction Proposals, 97th Cong., 1st Sess., pt. 1, pp. 19, 34-35, 81, 312 (1981); Hearings before the House Committee on Ways and Means on Tax Aspects of the President's Economic Program, 97th Cong., 1st Sess., pt. 1, pp. 159, 237 (1981).

[10] Even if Congress' sole concern were providing funds to the neediest children involved, it is far from certain that all children living in households receiving refunds of earned-income credits are needier than all children owed past-due child support. When the earned-income credit is claimed at the end of the tax year (an individual can, pursuant to § 3507 of the Code, receive an advance on his earned-income credit over the course of the year), it may in fact go to a recipient who is not currently needy. For example, an individual, with a dependent child, who was unemployed during most of 1981 and therefore earned only $5,000, but found a job paying $20,000 per year on January 1, 1982, would have been able to claim in a tax return filed in April 1982 an earned-income credit of $500, despite the fact that, in late spring 1982, when the refund check ultimately arrived, the individual might no longer be needy.

JUSTICE STEVENS, dissenting.

The class of persons that Congress intended to benefit by creating the "Earned Income Credit" Program in 1975 is composed entirely of low-income families.[1] The Court has fairly described the purposes of the 1975 legislation:

> "The earned-income credit was enacted to reduce the disincentive to work caused by the imposition of social security taxes on earned income (welfare payments are not similarly taxed), to stimulate the economy by funneling funds to persons likely to spend the money immediately, and to provide relief for low-income families hurt by rising food and energy prices." *Ante*, at 864.

The mechanism by which Congress funneled the funds to those persons was to treat the credits as though their recipients had overpaid their taxes, giving them a right to a "refund" of a hypothetical overpayment. This relatively obscure provision of the Internal Revenue Code gave rise to no particular difficulties for the ensuing six years.

The principal beneficiaries of the Intercept Program enacted by Congress as part of what is appropriately called the Omnibus Budget Reconciliation Act of 1981 were state governments which had claims for recoupment of welfare payments made to families that were unable to enforce a departed parent's child-support obligations. Thus, the real adversaries in this case are the Sorensons—a low-income family—on the one hand, and the State of Washington, on the other, which will ultimately receive the intercepted "refund" under the Court's holding. The question is whether Congress in 1981 intended to divert these federal funds from the original beneficiaries of the Earned Income Credit Program to the treasuries of state governments. Notwithstanding the Court's careful and admittedly accurate parsing of the language of the statute, I am not persuaded that Congress had any such intent.

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[1] 121 Cong. Rec. 8861 (1975) (remarks of Sen. Long).

The Court confidently asserts that "it defies belief that Congress was unaware" of the impact of its Intercept Program upon the Earned Income Credit Program when it enacted OBRA in 1981. See *ante*, at 863. The Court does not pause to tell us why, if that be so, Congress did not even mention this important change at any point in the legislative history of OBRA. With all due respect to the Court and to our hardworking neighbors in the Congress, I think "it defies belief" to assume that a substantial number of legislators were sufficiently familiar with OBRA to realize that somewhere in that vast piece of hurriedly enacted legislation there was a provision that changed the 6-year-old Earned Income Credit Program.[2]

I agree that the Court's reading of the statutory language is faithful to its grammar. I am not persuaded, however, that it actually reflects the intent of the Congress that enacted OBRA. I therefore would accept the construction of the relevant statutes adopted by the Courts of Appeals for the Second and Tenth Circuits. See *Rucker* v. *Secretary of Treasury*, 751 F. 2d 351, 356–357 (CA10 1984); *Nelson* v. *Regan*, 731 F. 2d 105, 110–112 (CA2), cert. denied *sub nom. Manning* v. *Nelson*, 469 U. S. 853 (1984). I respectfully dissent.

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[2] "Smoking a big cigar, the Speaker [of the House of Representatives] got angry again over the slap-dash quality of the bill [that became the Omnibus Budget Reconciliation Act of 1981], with parts of it photocopied from memorandums, other parts handwritten at the last minute, and some final sections hastily crossed out in whorls of pencil marks.

. . . . .

"But then he smiled, too, noting such cryptic and accidental entries in the bill as a name and phone number—'Ruth Seymour, 225–4844'—standing alone as if it were a special appropriation item." N. Y. Times, July 1, 1981, p. A16, col. 1.

NEW YORK *v.* P. J. VIDEO, INC., DBA NETWORK VIDEO, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 85-363. Argued March 4, 1986—Decided April 22, 1986

Following an investigation by the Erie County, N. Y., District Attorney's Office, an investigator viewed videocassette movies that had been rented from respondents' store by a member of the County Sheriff's Department. The investigator then executed affidavits summarizing the theme of, and conduct depicted in, each movie. These affidavits were attached to an application for a warrant to search respondents' store, and a New York Supreme Court Justice issued the warrant authorizing the search and the seizure of the movies. The warrant was executed, and the movies were seized. Respondents were charged in a New York Justice Court with violating the New York obscenity statute and moved to suppress the seized movies on the ground that the warrant was issued without probable cause to believe that the movies were obscene. The Justice Court granted the motion and dismissed the charges, and both the County Court and the New York Court of Appeals affirmed. The Court of Appeals held that there was a "higher" probable-cause standard for issuing warrants to seize such things as books and movies than for warrants to seize such things as weapons or drugs, and that under this "higher" standard there was insufficient information in the affidavits to permit the issuing justice to believe that the movies in question were obscene under New York law.

Held: No "higher" probable-cause standard was required by the First Amendment for issuance of the warrant in question. An application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same probable-cause standard used to review warrant applications generally, namely, that there is a "fair probability" that evidence of a crime will be found in the particular place to be searched. Evaluating the supporting affidavits here under this standard, the warrant was supported by probable cause to believe that the movies were obscene under New York law, and they should not have been suppressed. Pp. 873-878.

65 N. Y. 2d 566, 483 N. E. 2d 1120, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined.

MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 884.

John J. DeFranks argued the cause for petitioner. With him on the briefs was *Richard J. Arcara.*

Paul John Cambria, Jr., argued the cause and filed a brief for respondents.*

JUSTICE REHNQUIST delivered the opinion of the Court.

This case concerns the proper standard for issuance of a warrant authorizing the seizure of materials presumptively protected by the First Amendment. Respondents P. J. Video, Inc., and James Erhardt were charged in the village of Depew, New York, Justice Court with six counts of obscenity in the third degree under § 235.05(1) of the New York Penal Law.[1] Respondents moved to suppress five videocassette movies that had been seized from respondents' store, and that formed the basis for the obscenity charges

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**Charles B. Ruttenberg* and *James P. Mercurio* filed a brief for the Video Software Dealers Association as *amicus curiae* urging affirmance.

[1] Section 235.05(1) (McKinney Supp. 1986) provides:

"A person is guilty of obscenity in the third degree when, knowing its content and character, he:

"1. Promotes, or possesses with intent to promote, any obscene material . . . ."

"Obscenity in the third degree is a class A misdemeanor."

The statutory definition of "obscenity," which is derived from *Miller* v. *California*, 413 U. S. 15 (1973), appears at § 235.00(1) (McKinney 1980):

". . . Any material or performance is 'obscene' if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audiences."

against respondents, on the ground that the warrant authorizing the seizure was issued without probable cause to believe that the movies were obscene. The Justice Court granted the motion and dismissed the informations under which respondents were charged, and both the County Court of Erie County and the New York Court of Appeals affirmed. 65 N. Y. 2d 566, 483 N. E. 2d 1120 (1985). We granted certiorari to resolve the conflict between the decision of the New York Court of Appeals in the instant case and the decisions in *Sequoia Books, Inc.* v. *McDonald*, 725 F. 2d 1091 (CA7 1984), and *United States* v. *Pryba*, 163 U. S. App. D. C. 389, 502 F. 2d 391 (1974), cert. denied, 419 U. S. 1127 (1975). 474 U. S. 918 (1985). We now reverse the judgment of the Court of Appeals.

The obscenity charges against respondents arose out of an investigation by the Erie County District Attorney's Office. Investigator David J. Groblewski was assigned to review 10 videocassette movies that had been rented from respondents' store by a member of the Erie County Sheriff's Department.[2] Groblewski viewed the movies in their entirety, and executed affidavits summarizing the theme of, and conduct depicted in, each film. The affidavits were attached to an application filed by the village of Depew Police Department for a warrant to search respondents' store.

A justice of the New York Supreme Court issued the warrant, authorizing the search of the store and the seizure of the movies. The warrant was executed the next day and, according to a sworn, itemized inventory statement, the police seized 1 or 2 copies of each of the 10 movies. A total of 13 videocassettes were seized. The justice who had issued the warrant ordered that the videocassettes be temporarily

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[2] The 10 movies were entitled "California Valley Girls," "Taboo II," "Taboo," "All American Girls," "Debbie Does Dallas," "Body Magic," "Deep Throat," "Every Which Way She Can," "Filthy Rich," and "Little Girls Blue."

retained by the police as evidence for trial. See N. Y. Crim. Proc. Law §§ 690.05–690.55 (McKinney 1984).

Respondents ultimately were charged in the village of Depew Justice Court with violating the New York obscenity laws with respect to only 5 of the 10 movies. The affidavits describing these five movies appear in full in the Appendix to this opinion.[3] Respondents moved for suppression of the seized videocassettes, alleging that the warrant authorizing their seizure was not supported by probable cause because the issuing justice had not personally viewed the movies. The Justice Court granted the motion and dismissed the informations under which respondents were charged, and on the State's appeal the County Court of Erie County affirmed.

The New York Court of Appeals likewise affirmed, although on a different theory than that of the Justice Court. According to the Court of Appeals, "there is a higher standard for evaluation of a warrant application seeking to seize such things as books and films, as distinguished from one seeking to seize weapons or drugs, for example (*Roaden* v. *Kentucky*, [413 U. S. 496], 504 [1973]; *Marcus* v. *Search Warrant*, 367 U. S. 717, 730–731 [1961]). In applying the [Fourth] Amendment to such items, the court must act with 'scrupulous exactitude' (*Stanford* v. *Texas*, 379 U. S. 476, 481–485 [1965]; *see also*, *Maryland* v. *Macon*, 472 U. S. 463 [1985])." 65 N. Y. 2d, at 569–570, 483 N. E. 2d, at 1123 (footnote omitted). Using this "higher" probable-cause standard to review the affidavits submitted in support of the warrant application, the Court of Appeals stated:

> "Many of the scenes described contain explicit sexual activity, patently offensive by any constitutional standard, but the allegations of the affidavits do not indicate whether they constitute all, most or a few of the scenes

[3] The five movies that formed the basis for the obscenity charges against respondents were "California Valley Girls," "Taboo II," "Taboo," "All American Girls," and "Debbie Does Dallas."

> presented in the films. . . . The descriptions of the action are not supplemented by references to the narrative or dialogue of the films and the affiant attempted to describe the 'character' or 'theme' of the movies by settings having nothing to do with the plot . . . . He made no attempt to reveal the story line (or lack of one) of the films or demonstrate that their 'predominant appeal' was to prurient interest. In short, none of the affidavits permit an inference that the scenes described are more than a catalog of offensive parts of the whole." *Id.*, at 570–571, 483 N. E. 2d, at 1124.

The Court of Appeals concluded that the affidavits did not contain sufficient information to permit the issuing justice, "applying contemporary community standards, to judge the films as a whole and determine that they are within the statutory definitions of obscenity and thus are not entitled to constitutional protection." *Id.*, at 572, 483 N. E. 2d, at 1124 (footnote omitted). One judge dissented, arguing that the affidavits contained enough information for the issuing justice "to reasonably believe that the video movies were obscene as legislatively defined." *Id.*, at 573, 483 N. E. 2d, at 1125 (Jasen, J., dissenting).[4]

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[4] Respondents argue that the decision of the New York Court of Appeals rested on adequate and independent state grounds, namely, provisions of the New York Constitution and various state-court decisions, and that we therefore lack jurisdiction to review that decision. We disagree. As we explained in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985):

"[W]e will not assume that a state-court decision rests on adequate and independent state grounds when the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'" *Id.*, at 327, quoting *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983).

Here, the New York Court of Appeals cited the New York Constitution only once, near the beginning of its opinion, and in the same parenthetical also cited the Fourth Amendment to the United States Constitution. Moreover, the Court of Appeals repeatedly referred to the "First Amend-

We have long recognized that the seizure of films or books on the basis of their content implicates First Amendment concerns not raised by other kinds of seizures. For this reason, we have required that certain special conditions be met before such seizures may be carried out. In *Roaden* v. *Kentucky*, 413 U. S. 496 (1973), for example, we held that the police may not rely on the "exigency" exception to the Fourth Amendment's warrant requirement in conducting a seizure of allegedly obscene materials, under circumstances where such a seizure would effectively constitute a "prior restraint." In *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964), and *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961), we had gone a step farther, ruling that the large-scale seizure of books or films constituting a "prior restraint" must be preceded by an adversary hearing on the question of obscenity. In *Heller* v. *New York*, 413 U. S. 483 (1973), we emphasized that, even where a seizure of allegedly obscene materials would not constitute a "prior restraint," but instead would merely preserve evidence for trial, the seizure must be made pursuant to a warrant and there must be an opportunity for a prompt postseizure judicial determination of obscenity. And in *Lee Art Theatre, Inc.* v. *Virginia*, 392 U. S. 636 (1968), we held that a warrant authorizing the seizure of materials presumptively protected by the First Amendment may not issue based solely on the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order

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ment" and "Fourth Amendment" during its discussion of the merits of the case, strongly indicating that it believed that its decision was governed by federal law. Finally, although the Court of Appeals cited several state-court decisions, the only citations appended to the crucial language quoted in the text were to the federal decisions in *Roaden* v. *Kentucky*, 413 U. S. 496 (1973), *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961), *Stanford* v. *Texas*, 379 U. S. 476 (1965), and *Maryland* v. *Macon*, 472 U. S. 463 (1985). We conclude, in the absence of a "plain statement" to the contrary, that the decision of the Court of Appeals was premised on federal, not state, law.

that the issuing magistrate may "focus searchingly on the question of obscenity." *Marcus, supra,* at 732; see also *Stanford* v. *Texas*, 379 U. S. 476, 486 (1965).[5]

The New York Court of Appeals construed our prior decisions in this area as standing for the additional proposition that an application for a warrant authorizing the seizure of books or films must be evaluated under a "higher" standard of probable cause than that used in other areas of Fourth Amendment law. But we have never held or said that such a "higher" standard is required by the First Amendment. In *Heller*, we said:

> "[S]eizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film. If such a seizure is pursuant to a warrant, *issued after a determination of probable cause by a neutral magistrate*, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. . . .
>
> "*The necessity for a prior judicial determination of probable cause* will protect against gross abuses . . . ." 413 U. S., at 492–493 (emphasis added; footnotes omitted).

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[5] Contrary to the position apparently taken by the Justice Court in the instant case, we have never held that a magistrate must personally view allegedly obscene films prior to issuing a warrant authorizing their seizure. See *Lee Art Theatre, Inc.* v. *Virginia*, 392 U. S., at 637. On the contrary, we think that a reasonably specific affidavit describing the content of a film generally provides an adequate basis for the magistrate to determine whether there is probable cause to believe that the film is obscene, and whether a warrant authorizing the seizure of the film should issue.

We think that this passage from *Heller*, emphasizing the requirement that the magistrate determine probable cause as a means of safeguarding First Amendment interests, and eschewing any suggestion that the standard of probable cause in the First Amendment area is different than in other contexts, suggests that we saw no need for the latter requirement. In our view, the longstanding special protections described above, and enunciated in cases such as *Roaden*, *A Quantity of Books*, *Marcus*, *Heller*, and *Lee Art Theatre*, are adequate to ensure that First Amendment interests will not be impaired by the issuance and execution of warrants authorizing the seizure of books or films. We think, and accordingly hold, that an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally.[6]

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[6] Respondents contend that the seizure in the instant case was not limited to only one copy of each film, but instead extended to all copies of the films that the police were able to find during their search of respondents' store. According to respondents, the seizure had the effect of severely restricting public access to the films, and thereby constituted a "prior restraint." Respondents therefore argue that this case is properly governed not by *Heller* v. *New York*, 413 U. S. 483 (1973), but by *Roaden* v. *Kentucky*, *supra*, where this Court stated that the seizure of an allegedly obscene film, under circumstances where the seizure "brought to an abrupt halt an orderly and presumptively legitimate . . . exhibition" of the film, "calls for a higher hurdle in the evaluation of reasonableness." *Id.*, at 504.

We reject this contention. Our reference in *Roaden* to a "higher hurdle . . . of reasonableness" was not intended to establish a "higher" standard of probable cause for the issuance of a warrant to seize books or films, but instead related to the more basic requirement, imposed by that decision, that the police not rely on the "exigency" exception to the Fourth Amendment warrant requirement, but instead obtain a warrant from a magistrate who has "'focus[ed] searchingly on the question of obscenity.'" *Id.*, at 506, quoting *Marcus* v. *Search Warrant*, 367 U. S., at 732.

We also note that the burden is on the defendant to make a pretrial showing of a "substantial restraint" if he wishes to escape the rule of *Heller*, *supra*, that a mere seizure to preserve evidence does not impose on

That standard was recently set forth by this Court in *Illinois* v. *Gates*, 462 U. S. 213 (1983):

> "'[T]he term "probable cause," . . . means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion.' [*Locke* v. *United States*, 7 Cranch 339, 348 (1813).] . . . Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision.
>
> . . . . .
>
> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing,]' [*Jones* v. *United States*, 362 U. S. 257, 271 (1960),] that probable cause existed." *Id.*, at 235, 238–239.

Applying the *Gates* standard to the affidavits in the instant case, we think it clear beyond peradventure that the warrant was supported by probable cause to believe that the five films at issue were obscene under New York law. Respondents concede that the affidavits describing the five films adequately established probable cause with respect to the second of the three elements of obscenity under the statute, namely, that the movies depicted "in a patently offensive manner" the various kinds of sexual conduct specified in the statute. See N. Y. Penal Law § 235.00(1)(b) (McKinney 1980). Our review of the affidavits convinces us that the issuing justice also was given more than enough information to conclude that there was a "fair probability" that the movies satisfied

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the State a duty to conduct an adversary hearing of the sort described in *Marcus*, *supra*. Respondents made no such pretrial showing in this case.

the first and third elements of the statutory definition, namely, that the "predominant appeal [of the movies] is to the prurient interest in sex," and that the movies "lac[k] serious literary, artistic, political, and scientific value." See N. Y. Penal Law §§ 235.00(1)(a), (c) (McKinney 1980). As Judge Jasen of the Court of Appeals noted in his dissent in the present case:

> "Each of the affidavits describing the films clearly state at the outset that 'the *content* and character of the above mentioned video movie is as follows.' Inasmuch as the magistrate was reviewing affidavits describing movies which were advertised by defendants as 'adult cassette movies,' it was reasonable for him to believe that the affidavits faithfully and accurately described the substance of each movie as a whole. Each affidavit describes the numerous acts of deviate sexual intercourse and the objectification of women occurring in each film which the majority concede to be offensive. Each film is of relatively short duration. Manifestly, the acts described in each movie consume a substantial time span. Thus, the magistrate may reasonably have concluded that the described, successive acts of deviate sexual intercourse pervaded each film. When the title of each movie is considered together with its plot and setting, its general theme and serious value, if any, may reasonably be discerned. The films were described in each of the five nonconclusory affidavits in such a fashion as to permit the magistrate to focus searchingly on the issue of obscenity. Under these circumstances, there was a reasonable basis for the magistrate to authorize the seizure of the films in question." 65 N. Y. 2d, at 580, 483 N. E. 2d, at 1130 (emphasis in original).

We believe that the analysis and conclusion expressed by the dissenting judge are completely consistent with our statement in *Gates* that "probable cause requires only a prob-

ability or substantial chance of criminal activity, not an actual showing of such activity." 462 U. S., at 244, n. 13. We hold that, evaluated under the correct standard of probable cause, the warrant was properly issued and the videocassettes of the five movies should not have been suppressed. The judgment of the New York Court of Appeals is accordingly reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 26th, 1983 I viewed the video tape movie "CALIFORNIA VALLEY GIRLS," which was rented on September 20th, 1983, from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 12:00 Noon and lasted until 1:33 P.M.

The content and character of the above mentioned video movie is as follows: Six white females, approximately 18 to 25 years of age, are unemployed and attempt to make a living by

becoming prostitutes. The first scene is a bedroom scene where two females are involved in love making, fondling and cunnilingus. The second scene depicts a white male and a white female having intercourse in the back of a van. The third scene is a house scene where six girls, all white females are introduced to the art of love making. One male, approximately 35 years of age, is teaching the girls the art of fellatio with each one of them performing this act on him. The next scene is a bedroom scene in a home where a husband and wife, a white male and a white female, alone with a girl, a white female, perform various sexual acts which include intercourse, fellatio, anal intercourse and cunnilingus. The movie ends with some lesbianism where the wife performs cunnilingus on the girl while she performs fellatio on the husband and they engage in intercourse and anal intercourse.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to
before me this [21] day
of November, 1983.

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and

prior to this, a member of the New York State Police for approximately 25 years.

On September 23rd, 1983, I viewed the video tape movie "TABOO II," which was rented on September 20th, 1983, from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 9:00 A.M. and with several interruptions lasted until 12:12 P.M.

The content and character of the above mentioned video movie: The theme of the movie is a middle-class neighborhood where a home is the place where all the sexual acts are performed. The movie starts with a brother and sister, a white male and white female, fondling each other. The second scene is another house scene where a white male and white female are giving a rubdown to a white female. The sexual acts that follow include cunnilingus and fellatio. There is also intercourse and the scene closes with the male placing his penis between the girl's breasts and ejaculating into and over her mouth. In another scene there is some incestuous type activity between the brother and the sister where again fellatio and intercourse are performed. At one point during the movie the mother enters the bedroom and observes the two performing the sexual acts and becomes depressed about the situation. In a later scene the son and his mother are on a couch where they become involved in sexual acts of intercourse and fellatio. The movie closes with the mother and father asleep in their bedroom at which time the daughter enters and sleeps next to her father, where they perform incestuous acts of intercourse, and she performs fellatio on her father.

[Signature]

Subscribed and sworn to before me
this [21] day of November, 1983

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 29th, 1983, I viewed the video tape movie "TABOO," which was rented on September 27th, 1983 from Network Video, 5868 Transit Road, Depew, New York. This movie was rented by Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department. This movie was viewed in my office starting at 11:00 A.M. and lasted until 11:55 A.M. and watched again commencing at 1:42 P.M. and lasting until 2:23 P.M.

The content and character of the above mentioned video movie is as follows: The first scene is a bedroom scene where two white females and one white male perform various acts of fellatio, cunnilingus and intercourse. The second scene is a house party scene where many white males and white females are involved in various acts of intercourse, fellatio and cunnilingus. There is also a scene where females perform acts of cunnilingus on each other. The movie portrays at one point a bedroom scene with a white male, the son, laying in bed naked, at which time his mother, a white female enters the room. She makes love to him and incestuous acts of intercourse, placing of the penis between her breasts, ejaculation and cunnilingus are performed.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to
before me this [21] day
of November, 1983

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On September 28th, 1983, Detective Sergeant Vincent Costanza, a Member of the Erie County Sheriff's Department and I viewed the video tape movie "ALL AMERICAN GIRLS," which was rented on September 27th, 1983 from Network Video, 5868 Transit Road, Depew, New York. This movie was viewed in my office starting at 11:35 A.M., and lasted until 1:00 P.M.

The content and character of the above mentioned video movie is as follows: The theme of the movie is a home of one of the six girls, all white females who had previously attended high school and were meeting for a reunion. The first scene is two girls in a room performing acts of lesbianism, namely cunnilingus on each other. They are met by a white male and they perform acts of fellatio on him, have intercourse and all leave the room. Throughout the movie the girls reminisce about their high school days with each one depicting her sexual acts with her male partner. The sex-

ual acts which followed included intercourse, fellatio and cunnilingus.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to
before me this [21] day
of November, 1983

[Signature]
Notary Public

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

DAVID J. GROBLEWSKI, being duly sworn, deposes and says:

I am presently a Confidential Criminal Investigator assigned to the Erie County District Attorney's Office and prior to this, a member of the New York State Police for approximately 25 years.

On October 3rd, 1983, Detective Sergeant Vincent Costanza, a member of the Erie County Sheriff's Department and I viewed the video tape movie "DEBBIE DOES DALLAS," which was rented on September 30th, 1983, by Vincent Costanza from Network Video, 5868 Transit Road, Depew, New York. This movie was viewed in my office starting at 2:50 P.M. and lasted until 4:23 P.M.

The content and character of the above mentioned video movie is as follows: The theme of the movie is a girl moving out west for a change of atmosphere. The first scene is a jail scene where a white female is in jail after she had been put there by the so-called Sheriff, a white male, and she performs fellatio on him. The two then perform intercourse, at which

time he removes his pants and ejaculates over her buttocks. The second scene is the ranch, a so-called house of ill repute, a bedroom scene in which a white male and a white female are involved in various sexual acts including fellatio, cunnilingus and intercourse. At the end of the scene the male ejaculates in and over the female's mouth. The third scene, a bathroom scene, depicts some lesbianism involving three girls. They participate in love making, foreplay and performing cunnilingus on each other. Throughout, the movie depicts some lesbianism along with sexual acts of intercourse, fellatio and cunnilingus.

[Signature]
David J. Groblewski
Confidential Criminal
Investigator

Subscribed and sworn to before
me this [21] day of November, 1983

[Signature]
Notary Public

JUSTICE MARSHALL, with whom, JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

Under New York law, a film depicting specified sexual acts in a patently offensive manner is obscene if "the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex," and if "considered as a whole, it lacks serious literary, artistic, political, and scientific value." N. Y. Penal Law §§ 235.00(1)(a), (c) (McKinney 1980). The question before this Court is whether three New York state courts erred in holding that the affidavits at issue in this case failed to establish probable cause that those standards were met.[1] The determination of what the standards of

[1] The New York Court of Appeals held that the third branch of the statute, providing that a film, to be obscene, must depict specified sexual acts "in a patently offensive manner, actual or simulated," § 235.00(1)(b),

§ 235.00(1) mean and how they should be applied in individual cases, of course, is in the first instance a matter of state law and the rightful province of the state courts. While the majority describes it as "clear beyond peradventure," *ante*, at 876, that the affidavits set out the requisite probable cause, I do not find that result "clear" at all, and I would not overturn the state courts' contrary judgment.

I

The affidavits at issue in this case were first found inadequate at a suppression hearing in the Depew Justice Court. The court, per Justice Wick, noted that the issuing Magistrate had apparently not himself viewed the films, and that the retired state trooper who compiled the affidavits had "obviously paid no attention to contemporary community standards" and "made no further determination if the presentations had any literary, artistic, political or scientific value." App. to Pet. for Cert. A-37. Without stating clearly the exact basis of its decision, the court noted that "[t]he material contained [in the films] may be of the type proscribed by Section 235.05 of the Penal Law but equally, it may be . . . 'coarse, puerile, offensive and distasteful (and still not) obscene under the law or proscribable.'" *Id.*, at A-38, quoting *People* v. *Stabile*, 58 Misc. 2d 905, 296 N. Y. S. 2d 815 (N. Y. C. Crim. Ct. 1969). The court granted respondents' suppression motion.

The Erie County Court affirmed. Justice LaMendola noted the absence of a transcript of the proceedings, if any, before the issuing Magistrate, and declared it within the lower court's discretion to hold that "under New York law, the issuing magistrate had failed to make an adequate finding of probable cause . . . because he relied solely on the affidavits of the police officers without any further investigation or viewing of the materials to be confiscated." App. to Pet.

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was satisfied by the descriptions in the affidavits in this case. 65 N. Y. 2d 566, 570, n. 1, 483 N. E. 2d 1120, 1123, n. 1 (1985).

for Cert. A-33. Justice LaMendola's reference to "further investigation *or* viewing" makes it plain that she did not regard the issuing Magistrate's viewing of the film as an invariable requisite to issuance of a warrant. The affidavits in this case, however, unsupported by further investigation, provided insufficient basis for a warrant authorization.

The New York Court of Appeals affirmed. 65 N. Y. 2d 566, 483 N. E. 2d 1120 (1985). The court recognized that "the task of the issuing magistrate was not to decide guilt or innocence but to determine in a preliminary way from the information submitted and available to him whether there was probable cause to believe that the material to be seized was obscene within the tripartite definition of the statute." *Id.*, at 570, 483 N. E. 2d, at 1123. Applying that standard, it held the affidavits insufficient.

Near the beginning of its opinion, the New York court reiterated this Court's recent direction that the Fourth Amendment be applied with "'scrupulous exactitude'" in cases of searches for and seizures of presumptively protected materials, *Maryland* v. *Macon*, 472 U. S. 463, 468 (1985); see also *Stanford* v. *Texas*, 379 U. S. 476 (1965), and noted a "higher standard" for warrant determinations when books and films are seized, citing *Roaden* v. *Kentucky*, 413 U. S. 496 (1973). The New York court did not go on, however, to apply any extraordinary standard of scrutiny to the determination of probable cause. Rather, its holding was a simple one: "There must be enough information before [the issuing magistrate] in one form or other . . . to enable him to judge the obscenity of the film, not of isolated scenes from it." 65 N. Y. 2d, at 571, 483 N. E. 2d, at 1124. The affidavits, the court explained, merely cataloged offensive sex acts depicted in the films. Such catalogs say nothing about the "predominant appeal" of a film, its impact "considered as a whole," or its overall literary or artistic value. "Undoubtedly, similar lists could readily be compiled by excerpting descriptions of scenes from books and movies having recog-

nized merit. Stanley Kubrick's 'Clockwork Orange' and Federico Fellini's 'Satyricon' come quickly to mind." *Ibid.* Because obscenity law requires examination of the films as a whole, the court held, probable cause cannot be inferred from the description of a few excerpted scenes. *Id.*, at 572, 483 N. E. 2d, at 1124.

II

Taken in the abstract, the New York court's reasoning is unassailable. A mere listing of sex acts depicted in a film, or a description of excerpted scenes, says little about the predominant effect of the film considered as a whole. It says nothing about whether the film, considered as a whole, has any artistic value. And it says nothing about how the film should be regarded in light of contemporary community standards. Such a description, then, cannot establish even probable cause to believe that the film is obscene. "[S]ex and obscenity are not synonomous." *Roth* v. *United States*, 354 U. S. 476, 487 (1957).[2] A magistrate armed only with such a description cannot "'focus searchingly on the question of obscenity,'" as the majority, *ante*, at 874, concedes he is obligated to do.

The majority's rejection of the New York court's reasoning appears to derive from a largely unarticulated feeling that that reasoning is inappropriately applied in the present case. As a result, notwithstanding the sweeping legal principles set out in the majority's opinion, the decision of this case ultimately rests on the mundane application of clear law to

[2] Obscene material, considered as a whole, must not only be without serious literary or other merit, but it must, applying contemporary community standards, also appeal predominantly to a "shameful or morbid" interest in sex. See *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491 (1985). Indeed, three of the very films described by the affidavits in this case have been declared outside the constitutional boundaries of obscenity. See *United States* v. *Various Articles of Obscene Merchandise*, 709 F. 2d 132 (CA2 1983) ("Deep Throat," "Debbie Does Dallas," and "Little Girls Blue" not obscene, applying community standards of Southern District of New York).

undisputed facts. The majority suggests that the New York court wrongly applied its law because the affidavits described more than excerpted scenes: they allowed the Magistrate to discern the "'general theme and serious value'" of the films, and established that sex acts "'pervaded'" each film. *Ante*, at 877.

The problem with the majority's approach is that it is unsupported in the texts of the affidavits. Although a boilerplate sentence in each affidavit invokes the "content" of the films, and two of the affidavits conclusorily assert that certain sex acts are depicted "throughout" the film, the affidavits do not attempt to describe every scene in the films or even most of the scenes. Rather, the scenes described in the affidavits are simply those the author chose to describe. While descriptions of sex acts pervade the *affidavits*, it is hardly clear that depictions of sex acts pervade the *films*. Similarly, while the "general tone" of the affidavits is clear, we have little basis for a conclusion about the "general tone" of the films.

The affidavits do not purport to be exhaustive. They can be meaningful in considering the artistic value of the films, taken as a whole, or the films' predominant appeal, only if one assumes that everything, or almost everything, worth noting in the films was incorporated into the affidavits. Nothing in the affidavits, however, justifies that assumption. The affidavits are precisely what the New York Court of Appeals condemned: mere listings of selected scenes from the films that involved depictions of sex. The films described could as well be "Last Tango in Paris."

The majority's decision upholding a warrant authorization uninformed by any information relating to crucial elements of the definition of obscenity is especially incongruous because the majority overrules the institution most closely attuned to the content of those elements: the New York courts. The New York courts are well suited to decide whether, on the basis of "contemporary community standards," the informa-

tion supporting a warrant authorization allows the magistrate to focus searchingly on the question of obscenity, and to find probable cause that given material is obscene. The New York courts have unanimously held in this case that the affidavits were insufficient to achieve that end. The majority's eagerness to reverse that fact-bound determination in order to expedite an obscenity prosecution is inappropriate and reflects a dubious notion of this Court's institutional role. Cf. *California* v. *Carney*, 471 U. S. 386, 395 (1985) (STEVENS, J., dissenting).

I dissent.

Reporter's Note

Orders commencing with April 7, 1986, begin with page 1104. The preceding orders in 475 U. S., from February 24 through March 31, 1986, were reported in Parts 1 and 2, at 1001–1104. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

No. 85-6476 (A-664). ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 484 So. 2d 580.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 84-744. UNITED STATES *v.* LANE ET AL., 474 U. S. 438;
No. 85-1179. SONDEREGGER *v.* E. F. HUTTON & CO., INC., ET AL., *ante*, p. 1048;
No. 85-5865. HOWARD *v.* UNITED STATES, *ante*, p. 1022;
No. 85-5893. NICKENS *v.* MISSISSIPPI, 474 U. S. 1104;
No. 85-5931. DYSON *v.* TEXAS, *ante*, p. 1002; and
No. 85-6078. MUZA *v.* UNITED STATES, *ante*, p. 1028. Petitions for rehearing denied.

APRIL 7, 1986

Appeals Dismissed

No. 85-1418. NATIONWIDE MUTUAL INSURANCE CO. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO (MITCHELL ET AL., REAL PARTIES IN INTEREST). Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction.

No. 85-1452. LAUVE *v.* SECRETARY OF STATE OF MICHIGAN; LAUVE *v.* ATTORNEY GENERAL OF MICHIGAN; and LAUVE *v.* SECRETARY OF STATE OF MICHIGAN. Appeals from Sup. Ct. Mich. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as a petition for writ of certiorari, certiorari denied. Reported below: 422 Mich. 962 (first case); 424 Mich. 855 (second case); 424 Mich. 874 (third case).

No. 85-6451. WESLEY *v.* TEXAS. Appeal from 66th Jud. Dist. Ct. Tex., Hill County, dismissed for want of jurisdiction. Treat-

ing the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 84-6677. HOLLOWAY *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Michigan* v. *Jackson, ante,* p. 625, and *Moran* v. *Burbine, ante,* p. 412. Reported below: 691 S. W. 2d 608.

No. 85-249. CITY OF LITTLE ROCK *v.* WILLIAMS. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pembaur* v. *Cincinnati, ante,* p. 469. Reported below: 762 F. 2d 73.

No. 85-487. FORD MOTOR CO. ET AL. *v.* TUNIS BROTHERS CO., INC., ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp., ante,* p. 574. Reported below: 763 F. 2d 1482.

No. 85-6318. MACLEAN *v.* CITY OF BELLINGHAM. Ct. App. Wash. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Pembaur* v. *Cincinnati, ante,* p. 469. Reported below: 41 Wash. App. 700, 705 P. 2d 1232.

Certiorari Dismissed

No. 85-6557. JONES *v.* SMITH, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Petition for writ of certiorari dismissed as moot. Reported below: 786 F. 2d 1011.

Miscellaneous Orders

No. ——. COOK *v.* CHIU-AN WANG ET AL. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A-710 (85-6545). JAMES *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. The stay order granted March 18, 1986 [*ante,* p. 1074], is continued pending final disposition of the petition for writ of certiorari.

No. A–694. BANKERS' LIFE & CASUALTY CO. *v.* CRENSHAW. Sup. Ct. Miss. Application for stay pending appeal, addressed to THE CHIEF JUSTICE and referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant this application.

No. A–756. JOHNSON *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the filing of a petition for writ of certiorari on or before May 7, 1986. If the petition is filed on or before May 7, 1986, this order is to continue in effect pending this Court's final disposition of the petition for writ of certiorari.

No. D–533. IN RE DISBARMENT OF EVANS. Disbarment entered. [For earlier order herein, see 474 U. S. 1002.]

No. D–543. IN RE DISBARMENT OF DEGLOW. Disbarment entered. [For earlier order herein, see 474 U. S. 1079.]

No. D–544. IN RE DISBARMENT OF TILLEY. Disbarment entered. [For earlier order herein, see *ante*, p. 1003.]

No. D–552. IN RE DISBARMENT OF PLAZA. It is ordered that Richard J. Plaza, of Jersey City, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 84–1379. DIAMOND ET AL. *v.* CHARLES ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 471 U. S. 1115.] Motion of appellees for leave to file a supplemental brief after argument granted.

No. 85–250. LYNG, SECRETARY OF AGRICULTURE *v.* CASTILLO ET AL. D. C. S. D. Tex. [Probable jurisdiction noted *sub nom. Block* v. *Castillo*, 474 U. S. 994.] Motion of the Solicitor General to permit Jeffrey P. Minear, Esquire, to present oral argument *pro hac vice* granted.

No. 85–437. ARCARA, DISTRICT ATTORNEY OF ERIE COUNTY *v.* CLOUD BOOKS, INC., DBA VILLAGE BOOK & NEWS STORE, ET AL. Ct. App. N. Y. [Certiorari granted, 474 U. S. 978.] Motion of City of Santa Ana for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 85-473. CARGILL, INC., ET AL. *v.* MONFORT OF COLORADO, INC. C. A. 10th Cir. [Certiorari granted, 474 U. S. 1049.] Motion of The Business Roundtable for leave to file a brief as *amicus curiae* granted. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 85-920. ALASKA AIRLINES, INC., ET AL. *v.* BROCK, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1044.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 85-1377. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES *v.* SYNAR, MEMBER OF CONGRESS, ET AL.;

No. 85-1378. UNITED STATES SENATE *v.* SYNAR, MEMBER OF CONGRESS, ET AL.; and

No. 85-1379. O'NEILL, SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL. *v.* SYNAR, MEMBER OF CONGRESS, ET AL. D. C. D. C. [Probable jurisdiction noted, *ante*, p. 1009.] Motion of the parties for divided argument granted.

No. 85-6374. IN RE KOENIG. Petition for writ of mandamus denied.

Certiorari Granted

No. 85-1027. ARIZONA *v.* HICKS. Ct. App. Ariz. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 146 Ariz. 533, 707 P. 2d 331.

Certiorari Denied. (See also Nos. 85-1452 and 85-6451, *supra*.)

No. 84-6580. MARANT *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 84-6825. PFEIL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PFEIL *v.* ROGERS, FORMER DISTRICT ATTORNEY OF RUSK COUNTY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 757 F. 2d 850.

No. 85-82. BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY ET AL. *v.* ALTEMOSE CONSTRUCTION CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 653.

No. 85-301. AMEY, INC., ET AL. *v.* GULF ABSTRACT & TITLE, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 1486.

No. 85–885. ZELEZNIK, ADMINISTRATOR OF THE ESTATE OF ZELEZNIK, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 770 F. 2d 20.

No. 85–890. HUBBY *v.* HISTORIC SAVANNAH FOUNDATION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 174.

No. 85–1042. MARINE TRANSPORT LINES, INC. *v.* INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1526.

No. 85–1058. LISIECKI *v.* FEDERAL HOME LOAN BANK BOARD ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 769 F. 2d 1558.

No. 85–1100. DOE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 624.

No. 85–1146. KWALLEK *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 85–1155. PAPAGO TRIBAL UTILITY AUTHORITY *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 773 F. 2d 1056.

No. 85–1196. CITY OF CHARLOTTESVILLE, VIRGINIA *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 249 U. S. App. D. C. 236, 774 F. 2d 1205.

No. 85–1315. KOSHER ET UX. *v.* STAMATIS ET UX. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 223, 487 N. E. 2d 241.

No. 85–1320. CENTRAL HARDWARE CO. *v.* CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 2d 106.

No. 85–1334. ROE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 781 F. 2d 238.

No. 85–1351. CASACELI, INDIVIDUALLY AND AS DULY AUTHORIZED REPRESENTATIVE OF THE ESTATE OF BODD, ET AL. *v.*

CHERAMIE BO TRUC #11, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 774 F. 2d 1322.

No. 85-1363. O'MAHONY *v.* CHICAGO TRANSIT AUTHORITY. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 54.

No. 85-1364. CLADY ET AL. *v.* COUNTY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 1421.

No. 85-1368. GALARDI ET AL. *v.* TOKAI BANK OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1025.

No. 85-1369. ZOLDESSY *v.* FOUNDERS TITLE CO. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1175.

No. 85-1371. DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK *v.* FORBES, INC. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 243, 487 N. E. 2d 251.

No. 85-1374. LOEB, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF LOEB, ET AL. *v.* BERGERON. C. A. 1st Cir. Certiorari denied. Reported below: 777 F. 2d 792.

No. 85-1376. GLASGOW, INC. *v.* NOETZEL ET UX. Super. Ct. Pa. Certiorari denied. Reported below: 338 Pa. Super. 458, 487 A. 2d 1372.

No. 85-1383. KAONOHI OHANA, LTD. *v.* SUTHERLAND ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 1425.

No. 85-1397. VASQUEZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 968, 489 N. E. 2d 757.

No. 85-1417. TYLER-BARCOMB ET AL. *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 197 Conn. 666, 500 A. 2d 1324.

No. 85-1472. BALLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 287.

No. 85-1487. MATCHETT *v.* CHICAGO COUNCIL OF LAWYERS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 134 Ill. App. 3d 1153, 496 N. E. 2d 365.

No. 85-1495. PECIC *v.* UNITED STATES; and
No. 85-1502. MURPHY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 778 F. 2d 963.

No. 85-1507. GALLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1037.

No. 85-1508. WEINSTEIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 1522 and 778 F. 2d 673.

No. 85-5729. HOWELL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 64 Md. App. 724.

No. 85-5858. COOPER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 85-5920. POOL *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 85-6035. FOX *v.* CITY OF DES MOINES. Sup. Ct. Iowa. Certiorari denied.

No. 85-6083. LUCK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 772 F. 2d 719.

No. 85-6127. ROY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 771 F. 2d 54.

No. 85-6198. CALETTA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 1014.

No. 85-6294. POREE *v.* CHRANS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 85-6343. TURNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 2.

No. 85-6355. KRZYZAK *v.* UNITED STATES POSTAL SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 760 F. 2d 253.

No. 85-6362. WILKINS *v.* LYLES, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1037.

No. 85-6363. LINDSEY *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 85-6375. KNIES *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 125 Wis. 2d 584, 375 N. W. 2d 215.

No. 85-6379. JONES *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 699.

No. 85-6397. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 781 F. 2d 903.

No. 85-6398. VARGAS *v.* COUGHLIN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 113 App. Div. 2d 1037, 494 N. Y. S. 2d 255.

No. 85-6410. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1029.

No. 85-6413. PETERSON *v.* BOWEN, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 778 F. 2d 791.

No. 85-6428. HOPPER *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1021.

No. 85-6441. NOLL *v.* WILKERSON ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-6462. WOOD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 555.

No. 85-6464. GOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 773.

No. 85-6480. JOOST *v.* O'BRIEN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-6506. LUCAS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 497 A. 2d 1070.

No. 85-690. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* FELDER. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 765 F. 2d 1245.

No. 85-882. LOVSHIN *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 767 F. 2d 826.

No. 85-1352. FLORIDA FRUIT & VEGETABLE ASSN. ET AL. *v.* BROCK, SECRETARY OF LABOR, ET AL. C. A. 11th Cir. Motion of Ramirez, Ruiz, and Carrizalez for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 771 F. 2d 1455.

No. 85-6376. ANDRADE *v.* TEXAS. Ct. Crim. App. Tex.; and No. 85-6439. WISE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: No. 85-6376, 700 S. W. 2d 585; No. 85-6439, 230 Va. 322, 337 S. E. 2d 715.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 85-659. HOPFMANN *v.* UNITED STATES FEDERAL ELECTION COMMISSION ET AL., 474 U. S. 1038;

No. 85-5277. O'DRISCOLL *v.* UNITED STATES, *ante*, p. 1020;

No. 85-5415. ROBERTS *v.* RUTGERS STATE UNIVERSITY OF NEW JERSEY ET AL., 474 U. S. 952;

No. 85-5967. DRYDEN *v.* SAFECO INSURANCE COMPANY OF AMERICA, *ante*, p. 1049;

No. 85-6040. RICHARDS ET UX. *v.* SWINEBROAD & DENTON AUCTIONEERS ET AL., *ante*, p. 1026; and

No. 85-6099. RODMAN *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE, ET AL., *ante*, p. 1028. Petitions for rehearing denied.

No. 85-429. EXXON CORP. *v.* UNITED STATES ET AL., 474 U. S. 1105. Motion for leave to file petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 85-5835. IN RE PATRASCU, 474 U. S. 1100. Motion for leave to file petition for rehearing denied.

APRIL 11, 1986

Certiorari Denied

No. 85-6679 (A-762). THOMAS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Appli-

cation for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 486 So. 2d 574.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

APRIL 15, 1986

Certiorari Denied

No. 85-6714 (A-777). THOMAS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for certificate of probable cause, presented to JUSTICE POWELL, and by him referred to the Court, denied. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 788 F. 2d 684.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for certificate of probable cause, the application for stay, and the petition for writ of certiorari and would vacate the death sentence in this case.

APRIL 21, 1986

Appeals Dismissed

No. 85-1093. RYNIAWEC *v.* TSAPIS, JUDGE, CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA, ET AL. Appeal from Sup. Ct. App. W. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-6403. DYSON *v.* TEXAS A & M UNIVERSITY. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-1343. HUMPHREY ET AL., DBA HUMPHREY & HAAS *v.* COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSN. Appeal from Sup. Ct. Iowa dismissed for want of substantial federal question. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 377 N. W. 2d 643.

No. 85-1392. PULLUM *v.* CINCINNATI, INC., ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 476 So. 2d 657.

No. 85-1407. CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL. *v.* PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 66 N. Y. 2d 369, 488 N. E. 2d 83.

No. 85-6499. STARADUMSKY *v.* RHODE ISLAND. Appeal from Dist. Ct. R. I. dismissed for want of substantial federal question.

Certiorari Granted—Reversed and Remanded. (See No. 85-531, *ante*, p. 796.)

Certiorari Granted—Vacated and Remanded. (See also No. 85-1150, *ante*, p. 809.)

No. 85-299. ROYAL CENTER, INC. *v.* LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226, ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *AT&T Technologies, Inc.* v. *Communications Workers*, *ante*, p. 643. Reported below: 754 F. 2d 835.

No. 85-875. RHODE ISLAND *v.* MANOCCHIO. Sup. Ct. R. I. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Delaware* v. *Van Arsdall*, *ante*, p. 673. Reported below: 496 A. 2d 931.

No. 85-1026. TEXAS *v.* JACKSON. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Texas* v. *McCullough*, *ante*, p. 134. Reported below: —— S. W. 2d ——.

No. 85-1434. TIERNEY ET AL. *v.* CITY OF TOLEDO ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Teachers* v. *Hudson*, *ante*, p. 292. Reported below: 785 F. 2d 310.

Miscellaneous Orders

No. ——. CRIBB ET AL. *v.* PELHAM ET AL.; and
No. ——. COX *v.* LEMAIRE, FAUNTZ & KATZNELSON. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. D-554. IN RE DISBARMENT OF WOOD. It is ordered that Jack R. Wood, of Shelbyville, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-555. IN RE DISBARMENT OF KERPAN. It is ordered that William John Kerpan, of Marysville, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 74, Orig. GEORGIA *v.* SOUTH CAROLINA. First Report of the Special Master received and ordered filed. [For earlier order herein, see, *e. g.*, 434 U. S. 1057.]

No. 85-236. EICHENLAUB *v.* YURKY ET AL. C. A. 3d Cir. [Certiorari granted, 474 U. S. 1049.] Motion of respondents Zimmerman and Wicker for divided argument granted. Request for additional time for oral argument denied.

No. 85-473. CARGILL, INC., ET AL. *v.* MONFORT OF COLORADO, INC. C. A. 10th Cir. [Certiorari granted, 474 U. S. 1049.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 85-488. OHIO CIVIL RIGHTS COMMISSION ET AL. *v.* DAYTON CHRISTIAN SCHOOLS, INC., ET AL. C. A. 6th Cir. [Probable jurisdiction postponed, 474 U. S. 978.] Motion of appellees for leave to file a supplemental brief after argument granted.

No. 85-660. COLORADO *v.* CONNELLY. Sup. Ct. Colo. [Certiorari granted, 474 U. S. 1050.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-701. FEDERAL ELECTION COMMISSION *v.* MASSACHUSETTS CITIZENS FOR LIFE, INC. C. A. 1st Cir. [Probable jurisdiction noted, 474 U. S. 1049.] Motions of Chamber of Commerce of the United States, Joseph M. Scheidler et al., and Catholic League for Religious and Civil Rights for leave to file briefs as *amici curiae* granted.

No. 85-792. INTERSTATE COMMERCE COMMISSION *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL.; and

No. 85-793. MISSOURI-KANSAS-TEXAS RAILROAD CO. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1081.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 85-937. WEST VIRGINIA *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1009.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 85-1206. ROSE *v.* ROSE ET AL. Appeal from Ct. App. Tenn. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 85-1217. CITY OF SPRINGFIELD, MASSACHUSETTS *v.* KIBBE, ADMINISTRATRIX OF THE ESTATE OF THURSTON. C. A. 1st Cir. [Certiorari granted, *ante*, p. 1064.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted.

No. 85-1377. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES *v.* SYNAR, MEMBER OF CONGRESS, ET AL.;

No. 85-1378. UNITED STATES SENATE *v.* SYNAR, MEMBER OF CONGRESS, ET AL.; and

No. 85-1379. O'NEILL, SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL. *v.* SYNAR, MEMBER OF CONGRESS, ET AL. D. C. D. C. [Probable jurisdiction noted, *ante*, p. 1009.] Motions of Edward Blankstein and American Jewish Congress for leave to file briefs as *amici curiae* out of time granted.

No. 85-6214. LINDAHL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Motion of petitioner for leave to proceed

in forma pauperis denied. Petitioner is allowed until May 12, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85-6418. ISSA *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 12, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85-6335. IN RE WEEMS;
No. 85-6395. IN RE SMITH;
No. 85-6400. IN RE PETERS; and
No. 85-6407. IN RE CARSON. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 85-1180. MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. *v.* KEENE. Appeal from D. C. E. D. Cal. Probable jurisdiction noted. Reported below: 619 F. Supp. 1111.

No. 85-993. HOBBIE *v.* UNEMPLOYMENT APPEALS COMMISSION OF FLORIDA ET AL. Appeal from Dist. Ct. App. Fla., 5th Dist. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 475 So. 2d 711.

*Certiorari Granted**

No. 85–129. WIMBERLY *v.* LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI ET AL. Sup. Ct. Mo. Certiorari granted. Reported below: 688 S. W. 2d 344.

No. 85–1449. TOWN OF NEWTON ET AL. *v.* RUMERY. C. A. 1st Cir. Certiorari granted. Reported below: 778 F. 2d 66.

No. 85–1277. SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, ET AL. *v.* ARLINE. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. In addition, the parties are requested to brief and argue the following question: "Whether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being 'otherwise qualified' for the job of elementary-school teacher, within the meaning of § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794?" Reported below: 772 F. 2d 759.

JUSTICE STEVENS, dissenting.

The Court of Appeals remanded this case for further proceedings, and concluded its opinion as follows:

> "In this case, the district court made no findings resolving the numerous factual disputes as to whether the risks entailed in retaining Arline in her elementary school position precluded her from having the necessary physical qualifications for the job, whether the same would be true if she were transferred to a position teaching less susceptible individuals, or whether the costs involved in accommodating her would place undue burdens on the school system. Rather, it simply concluded that the school board was exempt from any duty whatever to weigh the actual costs and risks involved in accommodating Arline because of an overriding 'duty to the public it serves.' Section 504 by its existence establishes that such a duty cannot be used to shield an entity from liability for making decisions which 'arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program.' *Southeastern Community College* [v. *Davis*, 442

*[REPORTER'S NOTE: An order granting certiorari in No. 85–99, *Messerschmitt Bolkow Blohm, GmbH.* v. *Walker et al.*, issued on April 21, 1986, was vacated on June 9, 1986. See 476 U. S. 1168.]

U. S. 397, 412 (1979)]. We therefore remand this case for further findings as to whether the risks of infection precluded Mrs. Arline from being 'otherwise qualified' for her job and if so whether it was possible to make some reasonable accommodation for her in that teaching position, in another position teaching less susceptible individuals, or in some other kind of position in the school system." 772 F. 2d 759, 765 (CA11 1985) (footnotes omitted).

In my opinion, it is inappropriate for this Court to direct the parties to present argument on the "otherwise qualified" issue before the District Court has an opportunity to make the findings ordered by the Court of Appeals. It is especially inappropriate because petitioner did not seek review on that issue. Accordingly, I respectfully dissent.

No. 85-6461. MARTIN *v.* OHIO. Sup. Ct. Ohio. Motion of Ohio Public Defender Commission for leave to file a brief as *amicus curiae* granted. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question IV presented by the petition. Reported below: 21 Ohio St. 3d 91, 488 N. E. 2d 166.

Certiorari Denied. (See also Nos. 85-1093 and 85-6403, *supra.*)

No. 85-834. NIXON, ADMINISTRATOR OF THE ESTATE OF NIXON *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1083.

No. 85-886. BRUNO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 197 Conn. 326, 497 A. 2d 758.

No. 85-917. HOLLINS ET AL. *v.* POWELL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 773 F. 2d 191.

No. 85-1010. PASCHALL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 772 F. 2d 68.

No. 85-1065. BARTIMO *v.* HORSEMEN'S BENEVOLENT & PROTECTIVE ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 771 F. 2d 894.

No. 85-1176. COHEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied.

No. 85–1191. PAINTERS LOCAL UNION NO. 164 OF THE BROTHERHOOD OF PAINTERS, DECORATORS & PAPERHANGERS OF AMERICA ET AL. *v.* EPLEY, INDIVIDUALLY AND DBA EPLEY COATINGS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 2d 1509.

No. 85–1194. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1550.

No. 85–1197. CLAIBORNE, UNITED STATES DISTRICT JUDGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 2d 784.

No. 85–1209. KAHLENBERG *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1346.

No. 85–1224. KERKMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 53.

No. 85–1266. ZIMMERMAN ET AL. *v.* HANDLEY, ADMINISTRATOR, AGRICULTURAL MARKETING SERVICE, DEPARTMENT OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1047.

No. 85–1278. HERRERA-VINEGAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 788.

No. 85–1287. BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 774 F. 2d 999.

No. 85–1324. WASHINGTON STATE NURSES ASSN. *v.* WASHINGTON STATE HOSPITAL COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 773 F. 2d 1044.

No. 85–1336. WALSH, CHIEF OF POLICE OF ORLANDO, FLORIDA *v.* CENTRAL FLORIDA NUCLEAR FREEZE CAMPAIGN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1515.

No. 85–1393. BELL ET AL. *v.* CRAWFORD COUNTY, ARKANSAS, ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 287 Ark. 251, 697 S. W. 2d 910.

No. 85-1395. NATIONAL STEEL CORP. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 85-1396. ROYSTER *v.* BOARD OF TRUSTEES OF ANDERSON COUNTY SCHOOL DISTRICT NO. 5 ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 618.

No. 85-1402. CITY OF CORONA ET AL. *v.* SUPERIOR COURT OF CALIFORNIA FOR RIVERSIDE COUNTY (EBEL ET AL., REAL PARTIES IN INTEREST). Sup. Ct. Cal. Certiorari denied. Reported below: 39 Cal. 3d 740, 705 P. 2d 347.

No. 85-1408. LOCAL 710, INTERNATIONAL BROTHERHOOD OF TEAMSTERS *v.* MCGINNIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 196.

No. 85-1419. NAEGELE OUTDOOR ADVERTISING COMPANY OF LOUISVILLE, A DIVISION OF NAEGELE, INC. *v.* MOULTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 773 F. 2d 692.

No. 85-1420. DIXON *v.* CITY OF WINSTON-SALEM, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-1421. TERRAIN ENTERPRISES, INC. *v.* WESTERN CASUALTY & SURETY CO. C. A. 5th Cir. Certiorari denied. Reported below: 774 F. 2d 1320.

No. 85-1422. SHERMAN TREATERS LTD. *v.* AHLBRANDT. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 322.

No. 85-1424. BARGE OCEAN STATES *v.* AMOCO OIL CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 766 F. 2d 473.

No. 85-1426. COAKLEY & WILLIAMS, INC. *v.* SHATTERPROOF GLASS CORP. C. A. 4th Cir. Certiorari denied. Reported below: 778 F. 2d 196.

No. 85-1427. PEEPLES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 85-1428. NATIVE VILLAGE OF STEVENS *v.* SMITH, COMMISSIONER OF HEALTH AND HUMAN SERVICES OF ALASKA,

ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 1486.

No. 85–1432. DAVIS *v.* CITY OF ROSWELL, GEORGIA, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 255 Ga. 158, 335 S. E. 2d 582.

No. 85–1438. CHARLOTTE MEMORIAL HOSPITAL AND MEDICAL CENTER ET AL. *v.* OLIPHANT ET AL. C. A. 4th Cir. Certiorari denied.

No. 85–1440. SPRIGGINS ET UX. *v.* FIRST NATIONAL BANK OF LEA COUNTY ET AL. C. A. 10th Cir. Certiorari denied.

No. 85–1444. ALLEN GROUP, INC., ET AL. *v.* FRICKE ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1062.

No. 85–1447. CABRIOLET PORSCHE + AUDI, INC. *v.* AMERICAN HONDA MOTOR CO., INC. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1193.

No. 85–1450. HORTON *v.* MILLER CHEMICAL CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1351.

No. 85–1451. HOWARD, DBA LAFAYETTE COMPONENTS *v.* CONTINENTAL CASUALTY CO. C. A. 7th Cir. Certiorari denied. Reported below: 775 F. 2d 876.

No. 85–1457. CATERPILLAR TRACTOR CO. *v.* WHEELER ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 108 Ill. 2d 502, 485 N. E. 2d 372.

No. 85–1458. PETERSON *v.* KENNEDY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 771 F. 2d 1244.

No. 85–1460. VESSICHIO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 197 Conn. 644, 500 A. 2d 1311.

No. 85–1462. WALLACE *v.* HERRON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 778 F. 2d 391.

No. 85–1467. HOFFMAN *v.* DAVIDOFF EXTENSION, S. A. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1178.

No. 85-1470. COMMUNITY NUTRITION INSTITUTE ET AL. *v.* YOUNG, COMMISSIONER OF FOOD AND DRUG ADMINISTRATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 249 U. S. App. D. C. 150, 773 F. 2d 1356.

No. 85-1473. EDWARDS *v.* GOLDBERG ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 50.

No. 85-1474. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1029.

No. 85-1475. KALIN ET AL. *v.* CASILLAS, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 780 F. 2d 533.

No. 85-1478. BOYCE *v.* RIDGELY ET AL., PERSONAL REPRESENTATIVES OF THE ESTATE OF BOYCE. Ct. Sp. App. Md. Certiorari denied.

No. 85-1484. OWEN STEEL CO., INC., ET AL. *v.* SOUTH CAROLINA TAX COMMISSION ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 287 S. C. 274, 337 S. E. 2d 880.

No. 85-1489. HILGEFORD ET AL. *v.* PEOPLES BANK, PORTLAND, INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 176.

No. 85-1497. FLYNN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1042.

No. 85-1531. GUMZ *v.* MORRISSETTE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 1395.

No. 85-1532. FLEMING *v.* MOORE. C. A. 4th Cir. Certiorari denied. Reported below: 780 F. 2d 438.

No. 85-1534. BOLDEN *v.* UNITED STATES; and
No. 85-1562. EDWARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 644.

No. 85-1552. MOSHER *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 1292.

No. 85-1557. GREENSPAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 782 F. 2d 1025.

No. 85-1564. CADE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 703.

No. 85-1566. KAKAR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 251 U. S. App. D. C. 197, 782 F. 2d 279.

No. 85-1567. VARRASO *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 129.

No. 85-1580. GIBSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1037.

No. 85-5873. BEST *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 491 A. 2d 480.

No. 85-5911. ROUCO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 765 F. 2d 983.

No. 85-6038. WALKER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 133 Ill. App. 3d 1155, 496 N. E. 2d 18.

No. 85-6074. YOUNG *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 136.

No. 85-6167. CRITTENDON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 85-6221. GOMETZ *v.* UNITED STATES;
No. 85-6222. FOUNTAIN *v.* UNITED STATES; and
No. 85-6230. SILVERSTEIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 790 and 777 F. 2d 345.

No. 85-6227. GLASGOW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1044.

No. 85-6352. BORDAN *v.* STRATTON. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-6360. SMITH *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 37.

No. 85-6361. PEARSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 1031.

No. 85-6385. RICHARDS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 85-6391. CARTER ET AL. *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied.

No. 85-6392. NOLL *v.* PETROVSKY, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1168.

No. 85-6393. RAY *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 703.

No. 85-6399. MORRIS *v.* CHRISTIAN HOSPITAL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 682 S. W. 2d 492.

No. 85-6401. KALTENBACH *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied.

No. 85-6402. MUELLER *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 3d Cir. Certiorari denied.

No. 85-6405. CRAWFORD *v.* PARKS ET AL. Ct. App. Ga. Certiorari denied. Reported below: 176 Ga. App. 497, 336 S. E. 2d 585.

No. 85-6406. BOYER *v.* FREY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1168.

No. 85-6408. MCDANIEL *v.* KELLUM. C. A. 5th Cir. Certiorari denied.

No. 85-6409. CISNEROS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied.

No. 85-6412. MASTERS *v.* WHITTAKER STEEL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 2d 145.

No. 85-6416. REDMAN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1178.

No. 85-6419. LAMPKIN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 480 So. 2d 1320.

No. 85-6420. WHITE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 134 Ill. App. 3d 262, 479 N. E. 2d 1121.

No. 85-6421. JAHN *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 54.

No. 85-6423. SHIMKUS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 135 Ill. App. 3d 981, 482 N. E. 2d 194.

No. 85-6426. CISSELL *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 127 Wis. 2d 205, 378 N. W. 2d 691.

No. 85-6427. MITCHELL *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 85-6431. DALE *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 379 N. W. 2d 811.

No. 85-6432. JACKSON *v.* NEWSOME, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 85-6434. MORALES *v.* LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 1.

No. 85-6436. DAY *v.* CONTINENTAL INSURANCE COS. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1169.

No. 85-6437. CAMPBELL *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 2d 1573.

No. 85-6443. FRENCH *v.* O'LEARY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85-6444. LAMPKIN *v.* MORRIS, SUPERINTENDENT, SOUTHEASTERN TRAINING CENTER. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 309.

No. 85-6445. GUNTHER *v.* WORKMEN'S COMPENSATION APPEAL BOARD. Sup. Ct. Pa. Certiorari denied.

No. 85-6446. HOWARD *v.* FITZPATRICK ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6449. MAYFIELD *v.* NATIONAL BROADCASTING CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 173.

No. 85-6450. RUTLEDGE *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 135 Ill. App. 3d 259, 481 N. E. 2d 348.

No. 85-6452. TODD *v.* REES, SUPERINTENDENT, DEUEL VOCATIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 85-6453. SAWDEY *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 2.

No. 85-6455. FARQUHAR *v.* FOOD AND DRUG ADMINISTRATION. C. A. D. C. Cir. Certiorari denied.

No. 85-6459. OSTROM *v.* HOUSEWRIGHT, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1174.

No. 85-6463. GUICHARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 1139.

No. 85-6466. CAMPBELL *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 711 P. 2d 1357.

No. 85-6469. DRAPER *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 45.

No. 85-6473. GARIVAY *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 680.

No. 85-6477. WHITE *v.* MOORE, CHAIRMAN AND COMPACT ADMINISTRATOR, MISSOURI BOARD OF PROBATION AND PAROLE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1169.

No. 85-6479. DORSEY *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 680.

No. 85-6490. TIPTON *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 699.

No. 85-6493. KAHN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1157.

No. 85-6503. VELLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 1031.

No. 85-6505. RIVERA *v.* GREEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 775 F. 2d 1381.

No. 85-6513. WRENN *v.* WALTERS, ADMINISTRATOR, VETERANS ADMINISTRATION. C. A. D. C. Cir. Certiorari denied.

No. 85-6520. MEYER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 1054.

No. 85-6522. ISENBERG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1032.

No. 85-6532. TRIPP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 38.

No. 85-6537. HOOKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 780 F. 2d 1526.

No. 85-6539. HAIRSTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 311.

No. 85-6543. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 403.

No. 85-6564. JAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1111.

No. 85-6567. RODERICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1037.

No. 85-6569. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 1054.

No. 85-6577. SOTELO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 1125.

No. 85-6579. VOLINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1149.

No. 85-6582. TIERNO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1033.

No. 85-791. O'DELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 751 F. 2d 387.

No. 85-1445. DEAS ET AL. *v.* PACCAR, INC. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 775 F. 2d 1498.

No. 85-1454. WILL ET AL. *v.* COMPREHENSIVE ACCOUNTING CORP. ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 776 F. 2d 665.

No. 85-1177. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 776 F. 2d 978.

No. 85-1235. POYTHRESS ET AL. *v.* KESSLER. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 1508.

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE joins, dissenting.

This petition presents the question whether a prevailing plaintiff, a lawyer, who acted for herself may recover attorney's fees under 42 U. S. C. § 1988. The Courts of Appeals have uniformly held that a *pro se* litigant may not recover attorney's fees under § 1988, since such a litigant does not require the assistance of an attorney to enforce his rights. *Lovell* v. *Snow*, 637 F. 2d 170 (CA1 1981); *Pitts* v. *Vaughn*, 679 F. 2d 311 (CA3 1982); *Cofield* v. *City of Atlanta*, 648 F. 2d 986 (CA5 1981); *Rheuark* v. *Shaw*, 628 F. 2d 297 (CA5 1980), cert. denied *sub nom. Rheuark* v. *Dallas County, Texas*, 450 U. S. 931 (1981); *Davis* v. *Parratt*, 608 F. 2d 717 (CA8 1979); *Turman* v. *Tuttle*, 711 F. 2d 148 (CA10 1983).

Here, the Court of Appeals for the Eleventh Circuit required the District Court to award fees to respondent Kathleen Kessler, who is an attorney, even though she was proceeding *pro se*. 777 F. 2d 1508 (1985). In the analogous context of attorney fee awards under the Freedom of Information Act, 5 U. S. C. § 552(a)(4)(E), the Courts of Appeals have reached conflicting conclusions concerning whether a *pro se* plaintiff who is also an attorney is entitled to fees. Compare *Falcone* v. *Internal Revenue Service*, 714 F. 2d 646 (CA6 1983) (attorney-litigant denied fees), cert. denied, 466 U. S. 908 (1984), with *Cazalas* v. *United States Dept. of Justice*, 709 F. 2d 1051 (CA5 1983) (attorney-

litigant entitled to fees). District Courts have also reached conflicting determinations concerning an attorney-plaintiff's eligibility for fees under § 1988. Compare *Rybicki* v. *State Board of Elections of Ill.*, 584 F. Supp. 849 (ND Ill. 1984) (attorney-plaintiff entitled to fees), with *Lawrence* v. *Staats*, 586 F. Supp. 1375 (DC 1984) (attorney-plaintiff denied fees).

Because the award of fees under § 1988 and under the Freedom of Information Act have much in common, and because the award of fees in this case is in conflict with the general rule against the award of fees to *pro se* litigants, I would grant certiorari in order to resolve the conflicting decisions in the lower federal courts.

No. 85–1314. WILSEY, INDIVIDUALLY AND AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF HAMMEL *v.* EDDINGFIELD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 780 F. 2d 614.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Petitioner Krista Wilsey, an Iowa resident, filed this wrongful-death action in the United States District Court for the Central District of Illinois against the respondents, three Illinois physicians. Specifically, the petitioner alleged that the respondents had been negligent in performing surgery on her 4-year-old daughter, the decedent. The petitioner also requested that she be appointed special administrator of the estate of her deceased daughter so that she could properly prosecute the action: Under Illinois law, a special administrator is appointed to administer a decedent's estate where the only asset of that estate is a cause of action for wrongful death. See Ill. Rev. Stat., ch. 70, ¶ 2.1 (1986). Jurisdiction was allegedly based on diversity of citizenship under 28 U. S. C. § 1332.

A panel of the United States Court of Appeals for the Seventh Circuit, however, held that diversity jurisdiction was lacking and dismissed the action. 780 F. 2d 614 (1985). Relying on its earlier decision in *Betar* v. *De Havilland Aircraft of Canada, Ltd.*, 603 F. 2d 30 (1979), the Court of Appeals concluded that a special administrator under Illinois law has no personal stake in the proceeds of a wrongful-death action but merely distributes those proceeds to the statutory beneficiaries. Consequently, the statutory beneficiaries and not the special administrator are the real parties in interest whose citizenship is determinative for di-

versity purposes. Because the decedent's father, one of the statutory beneficiaries, was an Illinois resident, there was incomplete diversity between the parties and diversity jurisdiction was lacking.

This holding, as the Court of Appeals itself recognized, is in conflict with the Tenth Circuit's decision in *Hackney* v. *Newman Memorial Hospital, Inc.*, 621 F. 2d 1069 (1980), in which that court found diversity jurisdiction to be proper in a very similar situation involving the Oklahoma wrongful-death statute. See also, *e. g.*, *Bettin* v. *Nelson*, 744 F. 2d 53 (CA8 1984); *Bianca* v. *Parke-Davis Pharmaceutical Div. of Warner-Lambert Co.*, 723 F. 2d 392 (CA5 1984). Moreover, as Judge Posner pointed out in his dissent from the Court of Appeals' decision not to rehear this case en banc, under Illinois law the special administrator is a fiduciary of the estate's beneficiaries and has sole control over the litigation. See *Rodgers* v. *Consolidated Railroad Corp.*, 136 Ill. App. 3d 191, 193, 482 N. E. 2d 1080, 1082 (1985). Thus, the holding below is also in tension with this Court's decision in *Navarro Savings Assn.* v. *Lee*, 446 U. S. 458, 465 (1980), in which we held that business trustees—"active trustees whose control over the assets held in their names is real and substantial"—were real parties in interest for diversity purposes. See also *Mecom* v. *Fitzsimmons Co.*, 284 U. S. 183 (1931). In addition, defining diversity jurisdiction by the citizenship of the statutory beneficiaries, the approach taken by the Seventh Circuit panel, could make for a difficult and time-consuming determination in ascertaining diversity for jurisdictional purposes. See *Navarro*, *supra*, at 464, n. 13.

Because of the conflict among the Circuits and the tension between the Court of Appeals' holding and our decision in *Navarro*, I would grant certiorari.

No. 85–1399. EDWARD HINES LUMBER COMPANY OF OREGON *v.* LUMBER & SAWMILL WORKERS LOCAL NO. 2588 ET AL. C. A. 9th Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 764 F. 2d 631.

No. 85–1414. LAPEYROUSE GRAIN CORP. ET AL. *v.* NELSON, DBA W. J. NELSON CO. Sup. Ct. Ala. Motion of petitioner to defer consideration of the petition for certiorari denied. Certiorari denied. Reported below: 479 So. 2d 1226.

No. 85–1476. BLACKBURN, WARDEN *v.* FLOWERS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 779 F. 2d 1115.

No. 85–6147. KING *v.* HEALY ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. JUSTICE MARSHALL would grant certiorari.

No. 85–6299. ESQUIVEL *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.; and

No. 85–6365. QUINCE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 85–6299, 777 F. 2d 956; No. 85–6365, 477 So. 2d 535.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 84–1360. CITY OF RENTON ET AL. *v.* PLAYTIME THEATRES, INC., ET AL., *ante*, p. 41;

No. 84–1636. MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY *v.* MATHEWS, *ante*, p. 237;

No. 85–897. KOWALCHUK *v.* UNITED STATES, *ante*, p. 1012;

No. 85–979. SVENDROWSKI *v.* MISSOURI, *ante*, p. 1001;

No. 85–982. SAMPSON *v.* RASKIN ET AL., *ante*, p. 1013;

No. 85–1050. TRAHAN *v.* TRAHAN, *ante*, p. 1002;

No. 85–1090. HUDNUT, MAYOR OF CITY OF INDIANAPOLIS, INDIANA, ET AL. *v.* AMERICAN BOOKSELLERS ASSN., INC., ET AL., *ante*, p. 1001;

No. 85–1115. MOATS *v.* WICK, DIRECTOR, UNITED STATES INFORMATION AGENCY, ET AL., *ante*, p. 1017;

No. 85–1123. TAYLOR *v.* UNITED STATES ET AL., *ante*, p. 1018;

No. 85–5386. FLEMING *v.* KEMP, WARDEN, *ante*, p. 1058;

No. 85–5907. LUMBERT *v.* DEROBERTIS, WARDEN, *ante*, p. 1022;

No. 85–5921. IN RE MURPHY, *ante*, p. 1008; and

No. 85–5935. SMITH *v.* SOUTH CAROLINA, *ante*, p. 1031. Petitions for rehearing denied.

No. 85-5952. GISRIEL *v.* BOARD OF APPEALS, MARYLAND DEPARTMENT OF EMPLOYMENT AND TRAINING, *ante*, p. 1023;

No. 85-5964. LEVENTHAL *v.* UNITED STATES DEPARTMENT OF LABOR ET AL., *ante*, p. 1024;

No. 85-5998. RUNNELS *v.* KINGSTON ET AL., *ante*, p. 1025;

No. 85-6009. BOGGS *v.* VIRGINIA, *ante*, p. 1031;

No. 85-6058. LACKHOUSE *v.* MERIT SYSTEMS PROTECTION BOARD ET AL., *ante*, p. 1049;

No. 85-6070. FIELDS *v.* SIMMONS ET AL., *ante*, p. 1027;

No. 85-6139. REEDER *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, *ante*, p. 1051;

No. 85-6193. COLATRIANO *v.* CAVE ET AL., *ante*, p. 1052; and

No. 85-6231. SOMMER *v.* CLINTON COUNTY SUPREME COURT ET AL., *ante*, p. 1067. Petitions for rehearing denied.

No. 84-1044. PACIFIC GAS & ELECTRIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL., *ante*, p. 1. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 85-961. HOLDING *v.* SOVRAN BANK ET AL., *ante*, p. 1036. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 85-6194. RODMAN *v.* REED ET AL., *ante*, p. 1066. Petition for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

APRIL 22, 1986

Miscellaneous Order

No. A-807 (85-6761). FUNCHESS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is granted until 5:00 p.m., April 22, 1986.

Certiorari Denied

No. 85-6761 (A-807). FUNCHESS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. The order heretofore entered staying execution of sentence of death until 5:00 p.m., April 22, 1986, is vacated. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 788 F. 2d 1443.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

APRIL 28, 1986

Appeals Dismissed

No. 84-1672. HEPPS ET AL. *v.* PHILADELPHIA NEWSPAPERS, INC., ET AL. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 506 Pa. 304, 485 A. 2d 374.

No. 85-6501. ROBINSON *v.* UNITED STATES. Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-6004. CLARK *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 5th Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

CHIEF JUSTICE BURGER.

I agree that we should dismiss this improper appeal, and treating the appeal as a petition for certiorari, deny certiorari. The merits of this appeal are utterly frivolous, as were most of appellant's persistent efforts in the courts of Florida. In light of that frivolousness, as well as appellant's status as a member of the Florida Bar, I would award the State costs and fees under Rule 49.2.

This case originated when appellant Bret Clark received a speeding ticket while traveling on the Florida Turnpike on August 12, 1982. At the time he was a law student. Appellant pleaded not guilty, went to trial *pro se* and lost; he was fined $100. On appeal the Fifth Judicial Circuit Court of Florida, sitting in its appellate capacity, affirmed without opinion on September 4, 1984. At some point during 1984 appellant graduated from law school and was admitted to the Florida Bar.

Five months later, on February 14, 1985, appellant sought a writ of certiorari from the Florida Fifth District Court of Appeal. Under Florida Rule of Appellate Procedure 9.100(c), however, a petition for that writ must be filed within 30 days of the order sought to be reviewed, or in this case, no later than October 4, 1984. Appellant claimed that his petition was nevertheless timely under an exception to the rule when denial of appellate review would be fundamentally unfair, because he claimed he did not become aware of the Fifth Judicial Circuit's order of affirmance until January 14, 1985, after his driver's license had been suspended by the Florida Department of Highway Safety and Motor Vehicles. He apparently failed to inform the Circuit Court of his change of address while appeal was pending and to keep a watchful eye on that court's docket, as he was obligated to do if he intended to pursue his claim.

On the merits, he challenged the arresting officer's failure to show him the digital display on the radar detection device indicating that he was exceeding the speed limit. He also challenged the Florida sentencing procedure as discriminating against traffic offenders who plead not guilty by imposing "double or nothing" fines that exceeded the fine imposed if they pleaded guilty, thereby discouraging offenders from protesting their guilt. Finally, he challenged the constitutionality of the 55-mile-per-hour speed limit. The Court of Appeal ordered the State to show cause why the petition should not be granted, and the State filed a response raising the jurisdictional bar based on the untimely filing of the petition. On April 15, 1985, the court dismissed the petition for lack of jurisdiction.

Undeterred, appellant filed a motion for rehearing which was stricken as untimely. Over a month later he filed a motion to recall mandate and a suggestion for reconsideration. At this point the State, frustrated with appellant's frivolous litigious efforts, filed a response pointing out that the court had no power to recall mandate, and that no mandate had even issued. The State also moved for attorney's fees pursuant to Fla. Stat. § 57.105 (1985), which provides for an award of fees where a losing party's position is completely lacking any "justiciable issue" of law or fact. The State emphasized that appellant's motion for recall of mandate

> "demonstrates a startling ignorance of the law, and, more importantly, an unwillingness to expend even minimal effort

> to research facts or law before taking the time of this counsel and this honorable court. . . . [T]he correspondence and pleadings in this cause . . . amply demonstrate petitioner's misconception that his law training entitles him to file whatever he wants whenever he wants without the slightest regard for the law or judicial resources." App. to Juris. Statement A-4.

Appellant responded by citing a Florida District Court of Appeal decision from 1980 supporting his position that the court could consider his rehearing motion. See *Rogers* v. *State Farm Mutual Automobile Insurance Co.*, 390 So. 2d 138 (Fla. App. 1980). He also asserted that the State's motion for fees "demonstrate[d] a shocking degree of arrogance and lack of professionalism," App. to Juris. Statement A-7, and that the State, "by its motion, reveals that it has nothing but contempt for a law student who does not simply permit an injustice to run its course, paying an unjust penalty." *Id.*, at A-8.

The Court of Appeal issued an order to show cause why sanctions should not be awarded, and appellant again responded that his efforts were not frivolous, relying on the same 1980 case. He claimed his driver's "license was suspended without notice or an opportunity to be heard." *Id.*, at A-10. The State filed a notice of supplemental authority pointing out that the 1980 case upon which appellant relied had been *reversed* by the Florida Supreme Court in 1981. See *State Farm Mutual Automobile Insurance Co.* v. *Judges of District Court of Appeal, Fifth District*, 405 So. 2d 980 (Fla. 1981), *reversing* 390 So. 2d 138 (Fla. App.). The Court of Appeal thereafter denied the motion for recall of mandate and awarded attorney's fees in the amount of $100 against appellant pursuant to Florida Rule of Appellate Procedure 9.400(b).

Not one to suffer defeat lightly, appellant untimely moved the Court of Appeal to review its order granting the nominal $100 fee award. *For the first time*, as appellant acknowledges, see Juris. Statement 2, he claimed that the award of sanctions was in retaliation for certain correspondence he had sent to the Court of Appeal complaining about the "denial" of appellate review of his conviction, in violation of his First Amendment right to petition for redress of grievances. He contended that the fee statute was therefore "repugnant to the Constitution and laws of the United States." App. to Juris. Statement A-14. The Court of Appeal

summarily denied his motion to review the award on September 12, 1985, and the Florida Supreme Court informed appellant that it lacked jurisdiction to review orders granting fee awards under Rule 9.400(c) on November 14, 1985.

From the Florida Fifth District Court of Appeal's "final" order, appellant brings this appeal challenging the fee award as in violation of the First Amendment. He claims Fla. Stat. § 57.105 (1985) permits an award of fees based "upon the vague concept of what constitutes a 'justiciable issue.'" Juris. Statement 2. This claim, coming from an attorney, is so utterly frivolous as to not warrant any further discussion. All this suggests is that appellant considers the judicial system a laboratory where small boys can play.

Rule 49.2 provides that "[w]hen an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages." Plainly this is an appropriate case for sanctions. As the State makes clear:

> "This case, although the subject of considerable judicial attention, has been troubled by two common elements—untimeliness and only casual observance of proper state procedural rules. Every pleading Clark filed after the affirmance of his speeding ticket was either late or inappropriate and filed with but a minimal knowledge of relevant procedure. That which started him litigating in the Fifth District Court of Appeal was filed almost four months late. Even after being informed that the court was without jurisdiction to entertain the petition, Clark nevertheless persisted in his efforts to obtain something to which he was not legally entitled under state law. When that persistence resulted in a motion for him to pay for the state's costs in the litigation, he was given an opportunity to show cause why such an assessment should not issue. At most, Clark only offered reasons which had nothing to do with the purpose of the motion." Motion to Dismiss 4–5.

Appellant now claims that he "is the victim of a state court system which, confronted by a critical and recalcitrant defendant, decided to punish him for attempting to assert his right to a day in court on an appeal from a conviction in a presumably routine traffic case." Brief Opposing Motion to Dismiss 1. This distorted framing of the issue simply illuminates the frivolousness of this

appeal. The extended proceedings in this case make clear that no one has denied Bret Clark his day in court. Rather, appellant has demonstrated a contempt for the Florida courts and the system of justice by repeatedly ignoring filing deadlines and by raising patently frivolous claims. As a result of his protracted efforts to keep this case alive, the State has been denied its right to put an end to this tedious litigation.

This curious sequence suggests the dangers of a system of legal education that trains students in technique without instilling a sense of professional responsibility and ethics—a bit like giving a small boy a loaded pistol without instruction as to when and how it is to be used. Had he thus conducted himself after finishing law school and before being admitted to practice the State would plainly have been entitled to conclude that he was unfit to be a member of the Bar.

I would impose a penalty of $1,000 in favor of the State against appellant, who, as a member of the Florida Bar, has abused his privilege to practice law by repeatedly filing frivolous papers.

Certiorari Granted—Vacated and Remanded

No. 85-1295. TYUS *v.* MARTINEZ. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to consider the question of mootness. Reported below: 771 F. 2d 424 and 778 F. 2d 553.

No. 85-1446. UNITED RETAIL WORKERS UNION, LOCAL 881, CHARTERED BY THE UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *NLRB* v. *Financial Institution Employees*, *ante*, p. 192. Reported below: 774 F. 2d 752.

No. 85-6213. MURPHY *v.* HOLLAND, WARDEN. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Michigan* v. *Jackson*, *ante*, p. 625. Reported below: 776 F. 2d 470.

Certiorari Dismissed

No. 84-6903. MATTHESON *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS. C. A.

5th Cir. Petition for writ of certiorari dismissed as moot. Reported below: 751 F. 2d 1432.

Miscellaneous Orders

No. — - ——. SMITH *v.* TRANSWORLD DRILLING COMPANY VESSEL. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A-749. TREADWELL FORD, INC. *v.* CAMPBELL ET AL. Sup. Ct. Ala. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied. JUSTICE BLACKMUN would deny this application as moot.

No. D-519. IN RE DISBARMENT OF DAVIS. Disbarment entered. [For earlier order herein, see 474 U. S. 896.]

No. 85-494. CALIFORNIA FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* GUERRA, DIRECTOR, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, ET AL. C. A. 9th Cir. [Certiorari granted, 474 U. S. 1049.] Motion of American Civil Liberties Union et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied.

No. 85-495. ANSONIA BOARD OF EDUCATION ET AL. *v.* PHILBROOK ET AL. C. A. 2d Cir. [Certiorari granted, 474 U. S. 1080.] Motion of respondent Ansonia Federation of Teachers for divided argument and for additional time for oral argument denied.

No. 85-767. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION ET AL. *v.* CREST STREET COMMUNITY COUNCIL, INC., ET AL. C. A. 4th Cir. [Certiorari granted, 474 U. S. 1049.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-6491. IN RE PALLETT. Petition for writ of habeas corpus denied.

No. 85-6304. IN RE PARKER;
No. 85-6396. IN RE WOLLAK;
No. 85-6488. IN RE HEGWOOD; and
No. 85-6517. IN RE FRAZIER. Petitions for writs of mandamus denied.

No. 85-6364. IN RE MAY. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied. (See also Nos. 84-1672, 85-6501, and 85-6004, *supra*.)

No. 85-1122. BEHREND ET AL. *v.* GODWIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 774 F. 2d 1150.

No. 85-1234. BENAVIDES, WEBB COUNTY JUDGE, ET AL. *v.* GONZALEZ. C. A. 5th Cir. Certiorari denied. Reported below: 774 F. 2d 1295.

No. 85-1318. ADAMICK ET AL. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 1052.

No. 85-1413. MARCANTONIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1051.

No. 85-1464. NEWKIRK ET AL. *v.* BIGARD, INDIVIDUALLY AND DBA B & B OIL CO., ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 109 Ill. 2d 28, 485 N. E. 2d 321.

No. 85-1465. MARYLAND STATE TEACHERS ASSN., INC., ET AL. *v.* HUGHES, GOVERNOR OF MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-1468. WOODS *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA (JONES, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 85-1469. MASSACHUSETTS DEPARTMENT OF EDUCATION ET AL. *v.* DAVID D. C. A. 1st Cir. Certiorari denied. Reported below: 775 F. 2d 411.

No. 85-1482. TILKENS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JONES *v.* PARKS. Ct. App. Okla. Certiorari denied. Reported below: 710 P. 2d 123.

No. 85-1492. BORG-WARNER LEASING, A DIVISION OF BORG-WARNER ACCEPTANCE CORP. *v.* DOYLE ELECTRIC CO., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 767 F. 2d 936.

No. 85-1496. ALPERSTEIN ET AL. *v.* THREE LAKES WATER AND SANITATION DISTRICT. Ct. App. Colo. Certiorari denied. Reported below: 710 P. 2d 1186.

No. 85-1498. MOORE ET AL. *v.* VOLKSWAGENWERK, A. G., ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-1509. VINTILLA ET AL. *v.* UNITED STATES STEEL CORPORATION PLAN FOR EMPLOYEE PENSION BENEFITS. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1033.

No. 85-1516. GIAMMARIO ET AL. *v.* TRENTON BOARD OF EDUCATION ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 203 N. J. Super. 356, 497 A. 2d 199.

No. 85-1523. CALDWELL *v.* ENOCH, JUDGE, 101ST DISTRICT COURT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1525.

No. 85-1527. JOHNSON *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 379 N. W. 2d 291.

No. 85-1595. KARAPINKA *v.* UNION CARBIDE CORP. C. A. 2d Cir. Certiorari denied.

No. 85-1601. WINFIELD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1044.

No. 85-1614. POLLINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 782 F. 2d 358.

No. 85-5591. STEELE *v.* UNITED STATES; and
No. 85-5704. GODFREY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 2d 1401.

No. 85-5925. BREWER *v.* GARNER, WARDEN. Ct. Crim. App. Tex. Certiorari denied.

No. 85-5936. THIBODEAU *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 496 A. 2d 635.

No. 85-6108. SCOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 915.

No. 85-6109. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 776 F. 2d 397.

No. 85-6164. MILLER *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 300 Ore. 203, 709 P. 2d 225.

No. 85-6171. DAVENPORT ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Barbara. Certiorari

denied. Reported below: 176 Cal. App. 3d Supp. 10, 222 Cal. Rptr. 736.

No. 85-6200. NEAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1023.

No. 85-6234. WILLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 789.

No. 85-6274. DEAN *v.* YOUNG, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 2d 1239.

No. 85-6478. QUINN *v.* ARMONTROUT, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-6482. WILLIAMS *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 303.

No. 85-6483. BERGSTROM *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 41 Wash. App. 1056.

No. 85-6484. GRIEDER *v.* ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 135 Ill. App. 3d 1167, 496 N. E. 2d 1278.

No. 85-6485. HALL *v.* GRANT, SUPERINTENDENT, CORRECTIONS CAMP PROGRAM. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1021.

No. 85-6486. EDABURN *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 127 Wis. 2d 563, 378 N. W. 2d 297.

No. 85-6487. HALL *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 85-6489. JETER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 775 F. 2d 670.

No. 85-6492. JENKINS *v.* RAFFERTY, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 774 F. 2d 1151.

No. 85-6494. HAKIM *v.* WOLVERINE PACKING CO. Sup. Ct. Mich. Certiorari denied. Reported below: 422 Mich. 970.

No. 85-6496. BENEDUM *v.* PERINI, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1041.

No. 85-6497. GATES *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 779 F. 2d 58.

No. 85-6500. PRIVETT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 85-6502. SUTTON *v.* MORRIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 1053.

No. 85-6507. KELLER *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-6541. SPANN *v.* CLARK. Ct. App. Ga. Certiorari denied. Reported below: 171 Ga. App. 690, 320 S. E. 2d 822.

No. 85-6585. FLEMING *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 198 Conn. 255, 502 A. 2d 886.

No. 85-6597. LLOYD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 585.

No. 85-6598. BARKER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 785 F. 2d 214.

No. 85-6601. CARR *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 78.

No. 85-6609. SPEAR *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 93.

No. 85-6615. GUZMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 781 F. 2d 428.

No. 85-465. MOUNTAIN PLAINS CONGRESS OF SENIOR ORGANIZATIONS ET AL. *v.* MALCHMAN ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 761 F. 2d 893.

No. 85-744. MAINE *v.* THIBODEAU. Sup. Jud. Ct. Me. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 496 A. 2d 635.

CHIEF JUSTICE BURGER, dissenting.

John Tower's brother reported him missing on October 27, 1983; his mother told police that he had last been seen taking respondent Jay Thibodeau for a test drive in his car that he had for sale. On the morning of October 28, police officers went to the Thibodeau apartment where they spoke with respondent in the presence of his parents for about 10 minutes. Respondent told police that he and Tower had gone for a test drive the previous day, after which Tower dropped him off at home.

Two police officers returned to the Thibodeau household that afternoon and asked respondent to show them the route he and Tower had taken the day before. Respondent agreed and got into the back seat of the police car, a two-door automobile. For about an hour and a half the three retraced the complicated route respondent described to the police, after which respondent was returned home. At no time did respondent ask to leave the car. At one point in the journey respondent asked if he was a suspect. The police stated that he had been the last person seen with the victim, to which respondent replied, "Well, I guess I am."

Two days later police found John Tower's body, shot in the head with a .22-caliber rifle. The next day, police discovered that respondent had traded in his .22-caliber rifle for another gun. Police arrested respondent on November 1. After waving his *Miranda* rights, respondent confessed to the killing.

At trial respondent moved to suppress his statements to the police on the morning and afternoon of October 28 on the ground that he was subjected to custodial interrogations without the necessary *Miranda* warnings. The trial court denied the motion, finding that the statements were "voluntary beyond a reasonable doubt" and that "the circumstances did not constitute custodial interrogation" because respondent had willingly cooperated with the police in generally non-coercive settings.

The Maine Supreme Judicial Court, three justices dissenting, reversed respondent's murder conviction on the ground that the afternoon session with police constituted a custodial interrogation requiring *Miranda* warnings. 496 A. 2d 635 (1985). The court listed the following criteria for determining whether there had

been a custodial interrogation: (1) the locale where the statements were made; (2) the party initiating the contact; (3) the existence or nonexistence of probable cause to arrest; (4) the subjective intent of the police; (5) the subjective belief of the defendant; and (6) the focus of the investigation. Applying these factors to this case, the court noted that the officers' suspicions had "increased dramatically since the morning" and that, although no crime had yet been detected, respondent "was the *only* suspect." *Id.*, at 639. Furthermore, a reasonable person would have felt, as did respondent, that he had no choice but to accompany the officers. Finally, by placing him in the back seat of a two-door automobile, police had deprived him of his freedom in a significant way.

This decision of the Maine Supreme Judicial Court illustrates an acute need for clarification of the proper factors to be considered in making the "in custody" determination—a clarification perhaps made necessary by our own lack of clarity as to the standards to be applied. However, four of the six factors enumerated by the Maine court have been rejected by either this Court or other state and federal courts.

(1) We plainly rejected the relevancy of the "subjective intent of the police" in *Berkemer* v. *McCarty*, 468 U. S. 420, 442 (1984), where we stated "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time."

(2) In *Beckwith* v. *United States*, 425 U. S. 341 (1976), we held that whether police suspicion had focused upon the defendant has no bearing whatever on the "in custody" determination: "'It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning.'" *Id.*, at 346–347 (quoting *United States* v. *Caiello*, 420 F. 2d 471, 473 (CA2 1969)). See also *People* v. *Black*, 698 P. 2d 766 (Colo. 1984) (trial court erred in suppressing evidence by considering whether the police's investigation had "focused" on the defendant). Cf. *Green* v. *Superior Court*, 40 Cal. 3d 126, 707 P. 2d 248 (1985) (lack of police suspicion dispositive).

(3) The Ninth Circuit has held that the existence of probable cause at the time of the interrogation is similarly irrelevant. See *United States* v. *Woods*, 720 F. 2d 1022 (1983).

(4) In *Berkemer* we noted that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." 468 U. S., at 442. The Maine court eschewed this objective test, substituting instead the "subjective belief of the defendant." But see *State* v. *Willis*, 145 Vt. 459, 475, 494 A. 2d 108, 116 (1985) ("Inquiring into the subjective thoughts of either the police or the defendant is likely to pervert the factfinding process in a *Miranda* hearing . . ."); *State* v. *Cruz-Mata*, 138 Ariz. 370, 373, 674 P. 2d 1368, 1371 (1983) (the test is not whether the defendant "felt" he or she was in custody, but rather whether objective indicia of arrest are present, including the site of the questioning, the length of the interrogation, and the method used to summon the individual); *People* v. *Viduya*, 703 P. 2d 1281, 1286 (Colo. 1985) ("We have held that this question of custody turns on an objective assessment of whether a reasonable person in the suspect's position would believe himself to be deprived of his freedom of action in any significant way"). The Oregon Supreme Court espouses yet a third view, stating that the touchstone of the "in custody" determination is whether "the officer should be aware that the totality of circumstances in which the interrogation takes place is such that the person questioned would reasonably believe he is not free to leave." *State* v. *White*, 297 Ore. 302, 310, 685 P. 2d 983, 987 (1984).

With this confusion, it is perhaps helpful to turn for guidance to the *Miranda* decision itself. In *Miranda*, the Court stated that "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* v. *Arizona*, 384 U. S. 436, 444 (1966). As the trial court found, in this case there is no indication that the questioning took place in a context where respondent's freedom was restricted in any significant way. Respondent voluntarily accompanied the officers. He never asked to leave. The police never told him that he was not free to leave, never used any physical restraint of any kind, never threatened him, never confronted him with any incriminating evidence, and dropped him off at home at the end of the trip. Respondent was not being coerced by the "inherently compelling pressures" of a custodial setting. See *Miranda*, *supra*, at 467. As he testified in the suppression hearing, he took police on the long road trip "to keep them off [his] track." It was he, and not the police, who exploited the situation.

Respondent may have therefore unwisely placed himself in an uncomfortable position, but no more so than a suspect who voluntarily comes to the police station for questioning, see *Beckwith, supra; Oregon* v. *Mathiason*, 429 U. S. 492 (1977), or a motorist who is involuntarily detained for questioning concerning a traffic violation. See *Berkemer, supra.*

The Maine Supreme Judicial Court's rejection of the factual findings of the trial court cannot be reconciled with the decisions of this and other courts. I would grant the petition and give plenary consideration to this case.

No. 85-1038. EUROQUILT, INC. *v.* SCANDIA DOWN CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 2d 1423.

JUSTICE WHITE, dissenting.

One of the questions presented by this case is whether, in a trademark infringement action under § 43(a) of the Lanham Act, 15 U. S. C. § 1125(a), a district court's finding of "likelihood of confusion" is reviewable under the "clearly erroneous" standard, as a finding of fact, or *de novo*, as a conclusion of law. As I have previously noted, the Courts of Appeals are divided on this question. *Elby's Big Boy of Steubenville, Inc.* v. *Frisch's Restaurants, Inc.*, 459 U. S. 916 (1982) (WHITE, J., dissenting from denial of certiorari). I would grant certiorari to resolve this conflict.

No. 85-1281. HIBERNIA NATIONAL BANK IN NEW ORLEANS *v.* CHUNG, YONG IL, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1043.

JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Eleventh Circuit held that the penalty wage provision of 46 U. S. C. § 596, which operates in favor of seamen whose wages are not timely paid, applies to wages earned aboard a docked vessel for which no voyage has been scheduled. *Chung, Yong Il* v. *Overseas Navigation Co.*, 774 F. 2d 1043 (1985). This holding conflicts with the decisions in *Compton* v. *Alton Steamship Co.*, 608 F. 2d 96 (CA4 1979), and *Eaton* v. *S.S. Export Challenger*, 376 F. 2d 725 (CA4 1967).

The Eleventh Circuit also held that penalty wages continued to accrue against petitioner despite its filing with the District Court

of a $400,000 letter of undertaking, in lieu of a bond, by which petitioner guaranteed payment of all maritime liens against its vessel. In so holding, the Eleventh Circuit rejected the view expressed in *Southern Cross Steamship Co.* v. *Firipis*, 285 F. 2d 651, 659–660 (CA4 1960), and *Swain* v. *Isthmian Lines, Inc.*, 360 F. 2d 81, 88, n. 26 (CA3 1966), that a shipowner may stop the accruing of penalty wages by placing in the hands of the court the allegedly unlawfully withheld wages.

Additionally, the Eleventh Circuit held that penalty wages continued to accrue against petitioner up to the actual payment of the disputed wages shortly prior to oral argument on appeal. This ruling is difficult if not impossible to square with *Pacific Mail S.S. Co.* v. *Schmidt*, 241 U. S. 245 (1916), which we recently characterized with approval as "holding that when an appeal is taken on reasonable grounds, the penalty should not apply to delays in payment beyond the date on which the district court's decree is entered, since those delays are supported by sufficient cause." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564, 574, n. 9 (1982).

I would grant certiorari to resolve the questions presented concerning the correct interpretation of the penalty wage statute.

No. 85–1435. LITTLE *v.* FIRST BAPTIST CHURCH, CRESTWOOD. Cir. Ct., City of Chesapeake, Va. Certiorari denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In this case a state court conducted an election to determine whether petitioner, who was previously elected pastor of the First Baptist Church, Crestwood (Church), is still entitled to serve as pastor. I believe that such an action threatens to erode the First Amendment's prohibitions against entanglement between religious and secular authority, and I would therefore grant the petition for certiorari.

I

In December 1982 petitioner was elected pastor of the Church. The Church is congregational or self-governing, as opposed to associational or hierarchical, which refers to churches that are part of and governed by a larger organization. See generally *Watson* v. *Jones*, 13 Wall. 679, 722–728 (1872). During 1984 petitioner and certain members of the Church became involved in a dispute. Respondents, individual members of the Church, then filed this action for an injunction, claiming to act on behalf of the Church. Respondents alleged that at a duly held meeting of the

congregation, a majority had voted to terminate petitioner's employment. Petitioner's answer disputed respondents' authority to initiate the action on behalf of the Church.

The trial court, based only on the pleadings, temporarily enjoined petitioner from entering the Church premises and appointed a commissioner to hold an election of the congregation. After the commissioner had held the election and certified to the court that a majority had voted to fire petitioner, the court permanently enjoined petitioner from entering Church property or interfering in Church affairs.

II

Because religious organizations may own property and enter into contracts, it is inevitable that they will become involved in legal disputes. However, where the use of property or the terms of contracts necessitate reference to ecclesiastical principles or authority, courts must exercise extreme care to avoid taking sides on matters of religious belief. This Court set down the basic framework for such situations over 100 years ago, in *Watson, supra*. Although it has undergone some refinements, see, *e. g., Jones* v. *Wolf*, 443 U. S. 595 (1979), the *Watson* approach is simple. A court may apply neutral principles of secular law to the dispute at hand. When that process requires a court to determine the validity of a church decision, the court ordinarily must discern from the relevant canonical law what body is authorized to make a particular decision within the church, and what decision that body has reached. Having done so, the court may not inquire whether the decision was made arbitrarily or whether it conflicts with the ecclesiastical precepts of the organization. *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U. S. 696 (1976); *Maryland and Virginia Eldership* v. *Church of God at Sharpsburg, Inc.*, 396 U. S. 367, 368 (1970) (BRENNAN, J., concurring).

In the present case the trial court clearly did not follow this method; indeed it imposed its own view of proper procedures on the congregation's decisionmaking. The court took respondents' word that they represented the Church without any evidence, although petitioner contested the fact. The court made no inquiry into whether the alleged meeting at which petitioner was fired actually took place, whether a quorum was present, or how the members voted. Lacking any evidence that the authorized decisionmaker had acted, the court induced a decision on its own initiative.

This participation in the decisionmaking of an ecclesiastical body is both dangerous and unwarranted. Courts have no business "helping" a religious organization to make its wishes known. The court in this case should have limited its inquiry to the terms of petitioner's employment contract and to whether the Church had taken the actions requisite to terminating that contract. If the authorized body had indeed terminated petitioner's employment, then the court could validly have taken steps to enforce the Church's right to keep petitioner off Church property. Until respondents, who bore the burden of proof, demonstrated that such termination had taken place, the court's only proper response was to do nothing. Because the trial court instead plunged directly into the dispute, heedless of the severe risk of entanglement in religious affairs, I dissent from this Court's denial of certiorari.

No. 85-1477. LUCY, PERSONAL REPRESENTATIVE OF THE ESTATE OF LUCY, ET AL. *v.* AMOCO OIL CO. C. A. 6th Cir. Motions of Concerned Leaders in Government, Education and Business and Service Station Dealers of America, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 780 F. 2d 1022.

No. 85-6170. PRESCOTT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 66 N. Y. 2d 216, 486 N. E. 2d 813.

No. 85-6495. HOLCOMB *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 508 Pa. 425, 498 A. 2d 833.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 83-6950. MAY *v.* KROGER CO. ET AL., 469 U. S. 847; and

No. 84-1538. FISHER ET AL. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL., *ante*, p. 260. Petitions for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of these petitions.

No. 85-676. BOCK *v.* NEW YORK ET AL., 474 U. S. 996;
No. 85-6001. DOOLEY *v.* BELCHER, *ante*, p. 1002;
No. 85-6002. DOOLEY *v.* FEDERAL HOME LOAN MORTGAGE CORPORATION ET AL., *ante*, p. 1002;
No. 85-6100. KALYON *v.* NEW YORK, *ante*, p. 1086;
No. 85-6144. ACUFF *v.* HENRY ET AL., *ante*, p. 1042;
No. 85-6150. IN RE NELSON, *ante*, p. 1044; and
No. 85-6293. MCDONALD *v.* TENNESSEE, *ante*, p. 1088. Petitions for rehearing denied.

No. 85-1182. HUMBLE EXPLORATION CO., INC., ET AL. *v.* BROWNING ET AL., *ante*, p. 1065;
No. 85-1185. WHEATON *v.* CITY OF OKLAHOMA CITY ET AL., *ante*, p. 1062;
No. 85-6186. TUCKER ET AL. *v.* MASCHNER, WARDEN, ET AL., *ante*, p. 1066;
No. 85-6201. PRANTIL *v.* CALIFORNIA, *ante*, p. 1067; and
No. 85-6212. SMIGA *v.* DEAN WITTER REYNOLDS, INC., *ante*, p. 1067. Petitions for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of these petitions.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on March 10, 1986, pursuant to 18 U. S. C. § 3772 and 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1154. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2072, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Appellate Procedure and the amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, and 441 U. S. 973.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

MARCH 10, 1986

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Appellate Procedure which have been adopted by the Supreme Court pursuant to Title 18, United States Code, Section 3772, and Title 28, United States Code, Section 2072.

Accompanying these rules is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee notes submitted to the Court for its consideration pursuant to Title 28, United States Code, Section 331.

Respectfully,

(Signed) WARREN E. BURGER
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 10, 1986

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein new Appellate Rules 3.1, 5.1 and 15.1 and amendments to Appellate Rules 3(d), 8(b), 10(b) and (c), 11(b), 12(a), 19, 23(b) and (c), 24(a), 25(a) and (b), 26(a) and (c), 28(c) and (j), 30(a), (b) and (c), 31(a) and (c), 34(a) and (e), 39(c) and (d), 43(a) and (c), 45(a), (b), and (d), and 46(a) and (b), as hereinafter set forth:

[See *infra*, pp. 1157–1174.]

2. That the foregoing additions to and changes in the Federal Rules of Appellate Procedure, shall take effect on July 1, 1986, and shall govern all proceedings in appellate actions thereafter commenced and, insofar as just and practicable, all proceedings in appellate actions then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing additions to and changes in the Rules of Appellate Procedure in accordance with the provisions of Section 3772 of Title 18 and Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 3. Appeal as of right—how taken.

* * * * *

(d) Service of the notice of appeal.—The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the last known address of that party; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

* * * * *

Rule 3.1. Appeals from judgments entered by magistrates in civil cases.

When the parties consent to a trial before a magistrate pursuant to 28 U. S. C. §636(c)(1), an appeal from a judgment entered upon the direction of a magistrate shall be heard by the court of appeals pursuant to 28 U. S. C. §636(c)(3), unless the parties, in accordance with 28 U. S. C. §636(c)(4), consent to an appeal on the record to a judge of the district court and thereafter, by petition only, to the

court of appeals. Appeals to the court of appeals pursuant to 28 U. S. C. § 636 (c)(3) shall be taken in identical fashion as appeals from other judgments of the district court.

Rule 5.1. Appeals by permission under 28 U. S. C. § 636(c)(5).

(a) Petition for leave to appeal; answer or cross petition.—An appeal from a district court judgment, entered after an appeal pursuant to 28 U. S. C. § 636(c)(4) to a judge of the district court from a judgment entered upon direction of a magistrate in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.

(b) Content of petition; answer.—The petition for leave to appeal shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and any opinion or memorandum relating thereto. The petition and answer shall be submitted to a panel of judges of the court of appeals without oral argument unless otherwise ordered.

(c) Form of papers; number of copies.—All papers may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

(d) Allowance of the appeal; fees; cost bond; filing of record.—Within 10 days after the entry of an order granting the appeal, the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7.

The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice, the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b).

Rule 8. Stay or injunction pending appeal.

. . . . .

(b) Stay may be conditioned upon giving of bond; proceedings against sureties.—Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. A surety's liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribes may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.

. . . . .

Rule 10. The record on appeal.

. . . . .

(b) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of

the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript or other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) Statement on the evidence or proceedings when no report was made or when the transcript is unavailable.—If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

. . . . .

Rule 11. Transmission of the record.

. . . . .

(b) Duty of reporter to prepare and file transcript; notice to court of appeals; duty of clerk to transmit the record.—Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that the reporter has received it and the date on which the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that the reporter has done so.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

. . . . .

Rule 12. Docketing the appeal; filing of the record.

(a) Docketing the appeal.—Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, the appellant's name, identified as appellant, shall be added to the title.

. . . . .

Rule 15.1. Briefs and oral argument in national labor relations board proceedings.

Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise.

Rule 19. Settlement of judgments enforcing orders.

When an opinion of the court is filed directing the entry of a judgment enforcing in part the order of an agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion, the respondent shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which the respondent deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.

Rule 23. Custody of prisoners in habeas corpus proceedings.

. . . . .

(b) Detention or release of prisoner pending review of decision failing to release.—Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the

prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon the prisoner's recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

(c) Release of prisoner pending review of decision ordering release.—Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon the prisoner's recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

. . . . .

Rule 24. Proceedings in forma pauperis.

(a) Leave to proceed on appeal in forma pauperis from district court to court of appeals.—A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or

shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.

. . . . .

Rule 25. Filing and service.

(a) Filing.—Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the date of filing and shall thereafter transmit it to the clerk.

(b) Service of all papers required.—Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for that party on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

. . . . .

Rule 26. Computation and extension of time.

(a) Computation of time.—In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

. . . .

(c) Additional time after service by mail.—Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon that party and the paper is served by mail, 3 days shall be added to the prescribed period.

Rule 28. Briefs.

. . . . .

(c) Reply brief.—The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross

appeal. No further briefs may be filed except with leave of court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the reply brief where they are cited.

. . . . .

(j) Citation of supplemental authorities.—When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Rule 30. Appendix to the briefs.

(a) Duty of appellant to prepare and file; content of appendix; time for filing; number of copies.—The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with the brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

(b) Determination of contents of appendix; cost of producing.—The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which the appellant intends to include in the appendix and a statement of the issues which the appellant intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the appellee shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented the appellant may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party. Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.

(c) Alternative method of designating contents of the appendix; how references to the record may be made in the briefs when alternative method is used.—If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be

filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time each brief is served, and a statement of the issues presented shall be unnecessary.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in a brief directly to pages of the appendix, that party may serve and file typewritten or page proof copies of the brief within the time required by Rule 31(a), with appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix is filed the party shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

. . . . .

Rule 31. Filing and service of briefs.

(a) Time for serving and filing briefs.—The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for

serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

. . . . .

(c) Consequence of failure to file briefs.—If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the court.

Rule 34. Oral argument.

(a) In general; local rule.—Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral Argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

. . . . .

(e) Non-appearance of parties.—If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

. . . . .

Rule 39. Costs.

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(c) Costs of briefs, appendices, and copies of records.—By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.

(d) Bill of costs; objections; costs to be inserted in mandate or added later.—A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

. . . . .

Rule 43. Substitution of parties.

(a) Death of a party.—If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be

had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

* * * * *

(c) Public officers; death or separation from office.

(1) When a public officer is a party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding in an official capacity that public officer may be described as a party by the public officer's official title rather than by name; but the court may require the public officer's name to be added.

Rule 45. Duties of clerks.

(a) General provisions.—The clerk of a court of appeals shall take the oath and give the bond required by law. Neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while continuing in office. The court of appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process

and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

(b) The docket; calendar; other records required.—The clerk shall maintain a docket in such form as may be prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall enter a record of all papers filed with the clerk and all process, orders and judgments. An index of cases contained in the docket shall be maintained as prescribed by the Director of the Administrative Office of the United States Courts.

The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law.

The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, or as may be required by the court.

. . . . .

(d) Custody of records and papers.—The clerk shall have custody of the records and papers of the court. The clerk shall not permit any original record or paper to be taken from the clerk's custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were re-

ceived. The clerk shall preserve copies of briefs and appendices and other printed papers filed.

Rule 46. Attorneys.

(a) Admission to the bar of a court of appeals; eligibility; procedure for admission.—An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals.

An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing the applicant's personal statement showing eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation:

I,__ _____, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that the applicant appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.

(b) Suspension or disbarment.—When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or dis-

barred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

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OF

THE SUPREME COURT

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

EDWIN MEESE III, ATTORNEY GENERAL.
CHARLES FRIED, SOLICITOR GENERAL.
JOSEPH F. SPANIOL, JR., CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1985

SKIPPER *v.* SOUTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 84-6859. Argued February 24, 1986—Decided April 29, 1986

Petitioner was convicted of capital murder and rape after a jury trial in a South Carolina court. The State sought the death penalty, and a separate sentencing hearing was held before the trial jury. Following the State's introduction of evidence in aggravation of the offense, petitioner presented as mitigating evidence his own testimony and that of his former wife, his mother, his sister, and his grandmother. He then sought to introduce testimony of two jailers and a "regular visitor" to the effect that he had "made a good adjustment" during the 7½ months he had spent in jail between his arrest and trial. The trial court ruled such evidence irrelevant and inadmissible, and petitioner was sentenced to death. The South Carolina Supreme Court affirmed the death sentence, rejecting petitioner's contention that the trial court had committed constitutional error in excluding the testimony of the jailers and visitor.

Held: The trial court's exclusion from the sentencing hearing of the testimony of the jailers and the visitor denied petitioner his right to place before the sentencing jury all relevant evidence in mitigation of punishment. *Lockett* v. *Ohio*, 438 U. S. 586; *Eddings* v. *Oklahoma*, 455 U. S. 104. Pp. 4–9.

(a) The record does not support the State's contention that the trial court's ruling was no more than an application of rules restricting the use of lay opinion testimony. Pp. 5–6.

(b) Nor is there any support in the record for the State's contention that the trial court's ruling was not improper because it did not prevent petitioner from introducing evidence of past good conduct in jail, but

only foreclosed the introduction of "irrelevant" evidence of his *future* adaptability to prison life. Pp. 6–7.

(c) And, contrary to the State's suggestion, it is implausible, on the facts, to characterize the excluded evidence as cumulative and its exclusion as harmless error. Pp. 7–9.

285 S. C. 42, 328 S. E. 2d 58, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 9.

David I. Bruck, by appointment of the Court, 474 U. S. 942, argued the cause and filed briefs for petitioner.

Harold M. Coombs, Jr., Assistant Attorney General of South Carolina, argued the cause for respondent. With him on the brief was *T. Travis Medlock*, Attorney General.*

JUSTICE WHITE delivered the opinion of the Court.

Petitioner Ronald Skipper was convicted in a South Carolina trial court of capital murder and rape. The State sought the death penalty, and a separate sentencing hearing was held before the trial jury under S. C. Code § 16–3–20 (1985), which provides for a bifurcated trial and jury sentencing in capital cases. Following introduction by the State of evidence in aggravation of the offense (principally evidence of petitioner's history of sexually assaultive behavior), petitioner presented as mitigating evidence his own testimony and that of his former wife, his mother, his sister, and his grandmother. This testimony, for the most part, concerned

*A brief of *amici curiae* was filed for the State of Alabama et al. by *David Crump*, *Charles A. Graddick*, Attorney General of Alabama, *Steve Clark*, Attorney General of Arkansas, *James J. Kelly*, Chief State's Attorney of Connecticut, *Jim Smith*, Attorney General of Florida, *James T. Jones*, Attorney General of Idaho, *William L. Webster*, Attorney General of Missouri, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Gerald L. Baliles*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Archie G. McClintock*, Attorney General of Wyoming.

the difficult circumstances of his upbringing. Petitioner and his former wife, however, both testified briefly that petitioner had conducted himself well during the 7½ months he spent in jail between his arrest and trial. Petitioner also testified that during a prior period of incarceration he had earned the equivalent of a high school diploma and that, if sentenced to life imprisonment rather than to death, he would behave himself in prison and would attempt to work so that he could contribute money to the support of his family.

Petitioner also sought to introduce testimony of two jailers and one "regular visitor" to the jail to the effect that petitioner had "made a good adjustment" during his time spent in jail. The trial court, however, ruled that under the South Carolina Supreme Court's decision in *State* v. *Koon*, 278 S. C. 528, 298 S. E. 2d 769 (1982) *(Koon I)*, such evidence would be irrelevant and hence inadmissible. The decision in *Koon I*, the judge stated, stood for the rule that "whether [petitioner] can adjust or not adjust" was "not an issue in this case." App. 11.

After hearing closing arguments—during the course of which the prosecutor contended that petitioner would pose disciplinary problems if sentenced to prison and would likely rape other prisoners, *id.*, at 13–14—the jury sentenced petitioner to death. On appeal, petitioner contended that the trial court had committed constitutional error in excluding the testimony of the jailers and the visitor: the testimony of these witnesses, petitioner argued, would have constituted relevant mitigating evidence, and exclusion of such evidence was improper under this Court's decisions in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). The Supreme Court of South Carolina rejected petitioner's contention, stating:

> "The trial judge properly refused to admit evidence of [petitioner's] *future* adaptability to prison life. *State* v. *Koon*, *supra*. However, evidence of his past adaptability was admitted through testimony of his former wife,

his mother and his own testimony. This contention is without merit." 285 S. C. 42, 48, 328 S. E. 2d 58, 61–62 (1985).

We granted certiorari, 474 U. S. 900 (1985), to consider petitioner's claim that the South Carolina Supreme Court's decision is inconsistent with this Court's decisions in *Lockett* and *Eddings*, and we now reverse.

There is no disputing that this Court's decision in *Eddings* requires that in capital cases "'the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings, supra*, at 110 (quoting *Lockett, supra*, at 604 (plurality opinion of BURGER, C. J.)) (emphasis in original). Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering "any relevant mitigating evidence." 455 U. S., at 114. These rules are now well established, and the State does not question them.

Accordingly, the only question before us is whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment. It can hardly be disputed that it did. The State does not contest that the witnesses petitioner attempted to place on the stand would have testified that petitioner had been a well-behaved and well-adjusted prisoner, nor does the State dispute that the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if sentenced to life in prison. Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, see *Koon I*, *supra*, at 536, 298 S. E. 2d, at 774, there is no question but that such inferences would be "mitigating" in the sense that

they might serve "as a basis for a sentence less than death." *Lockett, supra,* at 604. Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Jurek* v. *Texas,* 428 U. S. 262, 275 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). The Court has therefore held that evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an "aggravating factor" for purposes of capital sentencing, *Jurek* v. *Texas, supra;* see also *Barefoot* v. *Estelle,* 463 U. S. 880 (1983). Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.[1] Under *Eddings,* such evidence may not be excluded from the sentencer's consideration.

The State advances several arguments as to why the exclusion of petitioner's proffered evidence was, nonetheless, not erroneous. First, the State contends that the trial court ruled only that petitioner's witnesses could not offer incompetent lay opinion testimony regarding petitioner's ability to adjust to prison life in the future. *Eddings,* the State argues, does not displace reasonable state-law rules regarding the competency of testimony. The record does not, however, support the State's contention that the trial court's

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[1] The relevance of evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense is underscored in this particular case by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison. Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." *Gardner* v. *Florida,* 430 U. S. 349, 362 (1977).

ruling was no more than an evenhanded application of rules restricting the use of opinion testimony. It is true that petitioner's request for a ruling on the admissibility of the testimony of the two jailers and the "regular visitor" was immediately preceded by an attempt to introduce his former wife's opinion (ruled inadmissible by the trial judge, App. 10) regarding his prospects for adjustment to prison life. In seeking a ruling on the testimony of the three witnesses at issue here, however, petitioner made it clear that he expected them "to testify that [petitioner] *has made* a good adjustment" to jail. *Id.*, at 11 (emphasis added). Defense counsel was not offering opinion testimony regarding future events. Under these circumstances, any ruling premised on the assumption that petitioner planned to present incompetent opinion testimony would have been—as the State conceded at oral argument—a "mistake." Such a misunderstanding could by no means justify the exclusion of nonopinion evidence bearing on the defendant's ability to adjust to prison life.

Second, the State echoes the South Carolina Supreme Court in arguing that the trial court's ruling was not improper because it did not prevent petitioner from introducing evidence of past good conduct in jail for purposes of establishing his good character, but only foreclosed the introduction of "irrelevant" evidence of his *future* adaptability to prison life. There is no clear support for this contention in the record of this case, as the trial court did not explicitly rely on any such distinction and appears to have excluded petitioner's evidence of good conduct for any purpose whatsoever. The State's proposed distinction between use of evidence of past good conduct to prove good character and use of the same evidence to establish future good conduct in prison seems to be drawn from the decision of the South Carolina Supreme Court in another case altogether, *State* v. *Koon*, 285 S. C. 1, 328 S. E. 2d 625 *(Koon II)*, cert. denied, 471 U. S. 1036 (1985). There, the court stated that although "fu-

ture adaptability to prison [is] irrelevant evidence because it does not bear on a defendant's character, prior record, or the circumstances of his offense[,] . . . [p]ast behavior in prison does bear on a defendant's character and, therefore, is relevant." 285 S. C., at 3, 328 S. E. 2d, at 626. This distinction is elusive. As we have explained above, a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.[2] Accordingly, the precise meaning and practical significance of the decision in *Koon II* and of the State's argument is difficult to assess. Assuming, however, that the rule would in any case have the effect of precluding the defendant from introducing otherwise admissible evidence for the explicit purpose of convincing the jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment, the rule would not pass muster under *Eddings*. Since the trial court's ruling in this case—whether or not it can credibly be said to be consistent with *Koon II*—at least had this effect, it cannot stand under *Eddings*.

Finally, the State seems to suggest that exclusion of the proffered testimony was proper because the testimony was merely cumulative of the testimony of petitioner and his for-

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[2] We do not hold that all facets of the defendant's ability to adjust to prison life must be treated as relevant and potentially mitigating. For example, we have no quarrel with the statement of the Supreme Court of South Carolina that "how often [the defendant] will take a shower" is irrelevant to the sentencing determination. *State* v. *Plath*, 281 S. C. 1, 15, 313 S. E. 2d 619, 627, cert. denied, 467 U. S. 1265 (1984). In the case before us, there is no credible suggestion that petitioner sought to introduce evidence of his personal hygiene practices. Rather, petitioner apparently attempted to introduce evidence suggesting that he had been a well-behaved and disciplined prisoner. Such evidence of adjustability to life in prison unquestionably goes to a feature of the defendant's character that is highly relevant to a jury's sentencing determination.

mer wife that petitioner's behavior in jail awaiting trial was satisfactory, and of petitioner's testimony that, if sentenced to prison rather than to death, he would attempt to use his time productively and would not cause trouble. We think, however, that characterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts before us. The evidence petitioner was allowed to present on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses—and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges—would quite naturally be given much greater weight by the jury. Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations. The prosecutor himself, in closing argument, made much of the dangers petitioner would pose if sentenced to prison, and went so far as to assert that petitioner could be expected to rape other inmates. Under these circumstances, it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error.

The exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender. The resulting death sentence cannot stand, although the State is of course not precluded from again seeking to impose the death sentence, provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available. *Eddings*, 455 U. S., at 117. The judgment of the Supreme Court of South Carolina

is therefore reversed insofar as it affirms the death sentence, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in the judgment.

Although I agree that petitioner's death sentence must be vacated, that result is not required by our decisions in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). I would reverse the judgment below, not because the trial court excluded "relevant mitigating evidence" within the meaning of those decisions, *id.*, at 114; see *Lockett*, *supra*, at 604–605, but because petitioner was not allowed to rebut evidence and argument used against him. See *Gardner* v. *Florida*, 430 U. S. 349 (1977).

I

In the course of cross-examining petitioner at his sentencing proceeding, the prosecutor adduced testimony that petitioner had kicked the bars of his cell following his arrest.[1] In closing argument, the prosecutor contended that petitioner was likely to commit violent crimes in prison if allowed to live, and referred to the incident in petitioner's cell to support his characterization of petitioner as a hopelessly violent man:

> "[Petitioner's] wife said he told her . . . that he had been raped in prison. With his history and what you know about him, who do you think the raper was and who do

[1] The following colloquy took place at the close of the cross-examination:

"Q: You are the fellow that when you got to the Horry County jail went to kicking the cell, right?

"A: Yes, Sir.

"Q: That's you. [T]hat's the kind of fellow you are, but you are nice today, right?" App. 7.

> you think the rapee was? And if given the opportunity again with this four time sexual abusing loser, who do you think will get raped in prison? Will it be Ronald Skipper, big old robust Ronald Skipper who knocks woman *[sic]* in the side of the head, or will it be some little boy in prison?
>
> . . . . .
>
> "These are the mitigating circumstances submitted by the defendant. . . . That the defendant has shown significant and positive adjustments to confinement and education and employment skills that enable him to be a stable and productive prisoner. Didn't he admit kicking on the bars over there? That's the kind of prisoner he is. Kicking on the bar. Kicking on the bars. . . ." App. 14.

Petitioner had offered evidence that would undermine this line of argument: the testimony of two guards and a prison visitor, all of whom would have testified that petitioner had behaved well while in prison awaiting trial. The trial court excluded that evidence, relying on the Supreme Court of South Carolina's decision in *State* v. *Koon*, 278 S. C. 528, 298 S. E. 2d 769 (1982). Petitioner was sentenced to death, and the Supreme Court of South Carolina affirmed the sentence. 285 S. C. 42, 328 S. E. 2d 58 (1985).

II

The Court correctly concludes that the exclusion of the proffered testimony violated due process. *Ante*, at 5, n. 1. In *Gardner* v. *Florida*, *supra*, we vacated a death sentence on the ground that the sentencing judge had considered a confidential presentence report without permitting the defendant to see the report. The plurality concluded that the defendant was denied due process because "the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.*, at 362 (opinion of STEVENS, J.). See also *id.*, at 364 (WHITE, J., concurring in judgment) (applying the same analysis

under the Eighth Amendment). As in *Gardner*, petitioner in this case was not permitted to "deny or explain" evidence on which his death sentence may, in part, have rested. This error was aggravated by the prosecutor's closing argument, which emphasized and exaggerated petitioner's misconduct in prison after his arrest. Therefore, petitioner's death sentence violates the rule in *Gardner*.

III

A

The Court unnecessarily abandons this narrow ground of decision for a broader one, holding that the proffered testimony was mitigating evidence that must be admitted under the Eighth Amendment. In my view, the Court's reasoning is flawed. The Eighth Amendment requires that the sentencing authority consider "relevant mitigating evidence" concerning the defendant's "character or record" and "the circumstances of the offense." *Eddings* v. *Oklahoma*, *supra*, at 114; *Lockett* v. *Ohio*, *supra*, at 604. But the States, and not this Court, retain "the traditional authority" to determine what particular evidence within the broad categories described in *Lockett* and *Eddings* is relevant in the first instance. 438 U. S., at 604, n. 12. As long as those determinations are reasonable—as long as they do not foreclose consideration of factors that may tend to reduce the defendant's culpability for his crime, see *Eddings*, *supra*, at 115–116—this Court should respect them.

I see no reason why a State could not, consistent with these principles, exclude evidence of a defendant's good behavior in jail following his arrest, as long as the evidence is not offered to rebut testimony or argument such as that tendered by the prosecution here. Such evidence has no bearing at all on the "circumstances of the offense," since it concerns the defendant's behavior after the crime has been committed. Nor does it say anything necessarily relevant

about a defendant's "character or record," as that phrase was used in *Lockett* and *Eddings*.

Those decisions clearly focus on evidence that lessens the defendant's culpability for the crime for which he was convicted. The sentencing jury in *Lockett* was barred from considering evidence of the defendant's youth, her "lack of specific intent to cause death," and "her relatively minor part in the crime." 438 U. S., at 597. Such evidence obviously bore strongly on the degree to which the defendant was morally responsible for her crime; indeed, we have since held that similar evidence *precludes* application of the death penalty for precisely this reason. *Enmund* v. *Florida*, 458 U. S. 782, 798–801 (1982). In *Eddings*, the judge refused to consider the defendant's youth and history of "beatings by a harsh father, and of severe emotional disturbance." 455 U. S., at 115. We emphasized that this evidence tended to diminish the defendant's responsibility for his acts, noting that youths "are less mature and responsible than adults," *id.*, at 116, and that they "'deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.'" *Id.*, at 115, n. 11, quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978). The type of evidence required to be admitted under *Lockett* and *Eddings* thus pertained to conduct and circumstances *prior* to the crime, and to the nature and extent of the defendant's participation in the crime. In this case, for the first time, the Court classifies as "mitigating" conduct that occurred *after* the crime and after the accused has been charged. Almost by definition, such conduct neither excuses the defendant's crime nor reduces his responsibility for its commission. It cannot, therefore, properly be considered "mitigating evidence" that the sentencer must consider under the Constitution.

B

It is useful to recall the origins of the rule the Court applies today. Ten years ago, in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), we determined that States could not carry out the death penalty without some "particularized consideration of relevant aspects of the character and record of each convicted defendant." *Id.*, at 303 (plurality opinion). See also *Roberts* v. *Louisiana*, 428 U. S. 325, 333–336 (1976) (plurality opinion). That determination flowed from the conviction that "individual culpability is not always measured by the category of the crime committed." *Furman* v. *Georgia*, 408 U. S. 238, 402 (1972) (BURGER, C. J., dissenting), quoted in *Woodson*, *supra*, at 298. See also *Roberts*, *supra*, at 333. Thus, we reasoned, it was unconstitutionally arbitrary to execute a man or woman without considering factors showing that death was not a "just and appropriate sentence." *Woodson*, *supra*, at 304. Cf. *Enmund* v. *Florida*, *supra*.

Lockett and *Eddings* followed naturally from our decision in *Woodson*. But it also follows from *Woodson* and its companion cases that States are only bound to consider those factors that are central to the fundamental justice of execution. We have recognized that society has important and legitimate interests in retribution and deterrence, and that these interests provide the necessary justification for imposing the death penalty. *Gregg* v. *Georgia*, 428 U. S. 153, 183–187 (1976) (joint opinion). Society's legitimate desire for retribution is less strong with respect to a defendant who played a minor role in the murder for which he was convicted. Cf. *Lockett*, 438 U. S., at 597. Similarly, the death penalty has little deterrent force against defendants who have reduced capacity for considered choice. Cf. *Eddings*, 455 U. S., at 115, n. 11. Evidence concerning the degree of the defendant's participation in the crime, or his age and emotional history, thus bear directly on the fundamental justice

of imposing capital punishment. That simply cannot be said of the defendant's behavior in prison following his arrest. Society's interest in retribution can hardly be lessened by the knowledge that a brutal murderer, for self-interested reasons, has been a model of deportment in prison while awaiting trial or sentence. Nor is society's important interest in deterrence served by allowing such a murderer to avoid the death penalty by following his counsel's advice to behave himself in a tightly controlled prison environment.[2]

IV

Even if a defendant's apparent capacity to adjust well to prison fell within the scope of the mitigating factors that must be considered under *Lockett* and *Eddings*, a State should have the right to exclude evidence of conduct in prison while awaiting trial or sentencing. One arrested for a capital crime, and particularly a convicted defendant awaiting sentencing, has every incentive to behave flawlessly in prison if good behavior might cause the sentencing authority to spare his life.[3] Good behavior in those circumstances would

[2] We have noted that for many types of murders, "the death penalty undoubtedly is a significant deterrent." *Gregg* v. *Georgia*, 428 U. S. 153, 185–186 (1976). See also *id.*, at 186 (actual deterrent value of death penalty in particular contexts "is a complex factual issue the resolution of which properly rests with the legislatures"). This deterrent value inevitably is diluted when defendants are allowed to escape execution based on factors that have nothing to do with their criminal responsibility. The consequences of such mistakes extend further than the cases in which they occur, for when some defendants are able to avoid execution based on irrelevant criteria, there is a far graver risk of injustice in executing others. See *Furman* v. *Georgia*, 408 U. S. 238, 311–314 (1972) (WHITE, J., concurring). I thus find it difficult to accept the proposition that the Constitution *compels* States to consider factors, such as a defendant's willingness to conform to prison rules, that plainly undermine deterrence without advancing retributive goals.

[3] After today's decision competent defense counsel in capital cases will instruct their clients to behave like Eagle Scouts while awaiting trial, and particularly while awaiting sentencing. In capital cases, this will be more important to a defendant than the customary advice of counsel in a criminal

rarely be predictive as to the conduct of the prisoner *after* sentence has been imposed. For this further reason, state courts reasonably could determine that such evidence has little or no probative value. Certainly it will not aid the sentencer in "distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman* v. *Georgia*, *supra*, at 313 (WHITE, J., concurring), quoted in *Gregg* v. *Georgia*, *supra*, at 188.

The Court's contrary determination apparently rests on the notion that the States have little or no authority to decide that certain types of evidence may have insufficient probative value to justify their admission. But cf. *ante*, at 7, n. 2. *Lockett* explicitly rejected such an approach, 438 U. S., at 604, n. 12, and for good reason. This Court has no special expertise in deciding whether particular categories of evidence are too speculative or insubstantial to merit consideration by the sentencer. Cf. *Barefoot* v. *Estelle*, 463 U. S. 880, 899–902 (1983). It makes little sense, then, to substitute our judgment of relevance for that of state courts and legislatures. Nor is such intrusive review necessary in this context to guard against fundamentally unjust executions. One cannot plausibly equate the type of evidence at issue in *Lockett* and *Eddings* with evidence that a capital defendant has refrained from assaulting anyone in prison while awaiting trial or sentencing. I would therefore leave the disposition of evidence of the kind involved here to the States, subject to the requirements of due process.

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trial to advise his client to behave himself while in the courtroom. It is indeed novel doctrine that compliance with this advice by a defendant charged with capital murder becomes a "mitigating factor" that the sentencing judge or jury must—as a matter of constitutional law—consider in passing sentence.

McLAUGHLIN *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-5189. Argued March 31, 1986—Decided April 29, 1986

On the basis of his display of an unloaded handgun in the course of a bank robbery, petitioner was convicted under 18 U. S. C. § 2113(d), which provides an enhanced penalty for assault by use of a "dangerous weapon" during a bank robbery.

Held: An unloaded handgun is a "dangerous weapon" within the meaning of § 2113(d). Pp. 17-18.

Affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

Stephen J. Cribari, by appointment of the Court, 474 U. S. 1003, argued the cause for petitioner. With him on the briefs was *Fred Warren Bennett*.

Christopher J. Wright argued the cause for the United States. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Joel M. Gershowitz*.

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether an unloaded handgun is a "dangerous weapon" within the meaning of the federal bank robbery statute.

At about 9:30 a. m. on July 26, 1984, petitioner and a companion, both wearing stocking masks and gloves, entered a bank in Baltimore. Petitioner thereupon displayed a dark handgun and ordered everyone in the bank to put his hands up and not to move. While petitioner remained in the lobby area holding the gun, his companion vaulted the counter and placed about $3,400 in a brown paper bag. The two robbers were apprehended by a police officer as they left the bank. Petitioner's gun was not loaded.

Petitioner pleaded guilty to charges of bank robbery and bank larceny and, on the basis of stipulated evidence, was found guilty of assault during a bank robbery "by the use of a dangerous weapon."[1] The latter conviction depends on the validity of the District Court's conclusion that petitioner's unloaded gun was a "dangerous weapon" within the meaning of 18 U. S. C. § 2113(d). The Court of Appeals agreed with the District Court, and so do we.[2]

Three reasons, each independently sufficient, support the conclusion that an unloaded gun is a "dangerous weapon." First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display

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[1] The federal bank robbery statute, 18 U. S. C. § 2113, provides in pertinent part:

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . .

. . . . . .

"Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

"(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; . . .

. . . . . .

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

[2] We granted certiorari, 474 U. S. 944 (1985), to resolve an apparent conflict. See, *e. g.*, *United States* v. *Wardy*, 777 F. 2d 101, 105–106 (CA2 1985); *United States* v. *Terry*, 760 F. 2d 939, 942 (CA9 1985).

of a gun instills fear in the average citizen;[3] as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

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[3] The floor debate on the provision that became § 2113(d) indicates that Congress regarded incitement of fear as sufficient to characterize an apparently dangerous article (such as a wooden gun) as "dangerous" within the meaning of the statute. See 78 Cong. Rec. 8132 (1934) (colloquy among Reps. Sumners, Blanton, and Dockweiler).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. FEDERAL LABOR RELATIONS AUTHORITY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1728. Argued January 22, 1986—Decided April 29, 1986

During contract negotiations with the Equal Employment Opportunity Commission (EEOC), respondent American Federation of Government Employees (AFGE) submitted a proposal that would require the EEOC "to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting out" by federal agencies. The EEOC refused to bargain over the proposal on the ground that it was nonnegotiable under Title VII of the Civil Service Reform Act of 1978 (Act). On AFGE's petition for review, respondent Federal Labor Relations Authority (FLRA) rejected the EEOC's contentions that (1) because AFGE's proposed contract provision concerned contracting out, the proposal was inconsistent with the Act's management rights clause, which protects an agency's authority, "in accordance with applicable laws," to make determinations as to contracting out, and (2) the Circular itself forbade negotiation over the proposal. The Court of Appeals affirmed.

Held: The writ of certiorari previously granted by this Court is dismissed as improvidently granted. The EEOC did not assert before either the FLRA or the Court of Appeals its contentions here that (1) the Circular is not an "applicable la[w]" within the meaning of the Act's management rights clause, and therefore AFGE's proposal, by requiring compliance with the Circular, would intrude on management's reserved rights, and (2) any alleged violation of the Circular would not be grievable absent AFGE's proposal because the Circular is not a "law, rule, or regulation" within the meaning of the Act's definition of "grievance." Nor had the EEOC presented to the FLRA the argument that the Circular is a "Government-wide rule or regulation" for purposes of the Act's provision that excludes such rules or regulations from the scope of the duty to bargain. The Act provides that an objection that has not been urged before the FLRA shall not be considered on judicial review unless the failure to urge the objection is excused because of extraordinary circumstances. Such statutory bar is not "waived" simply because the FLRA fails to invoke it. Since the EEOC failed to excuse its failure to raise before the FLRA its principal objections to AFGE's proposal, this Court will not consider them. Moreover, even if the EEOC's failure to raise its

"grievability" contention before the FLRA were to be excused on the ground that the FLRA, *sua sponte*, had injected the grievability issue into the proceedings, it did not excuse the EEOC's failure to raise its claim in the Court of Appeals. This Court's normal practice, applicable here, is to refrain from addressing issues not raised in the Court of Appeals.

Certiorari dismissed. Reported below: 240 U. S. App. D. C. 218, 744 F. 2d 842.

Deputy Solicitor General Kuhl argued the cause for petitioner. On the briefs were *Solicitor General Fried, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller*, and *William Kanter*.

Ruth E. Peters argued the cause for respondents. With her on the brief for respondent Federal Labor Relations Authority were *Steven H. Svartz* and *William E. Persina*. *William J. Stone* and *Mark D. Roth* filed a brief for respondent Union.*

PER CURIAM.

We granted certiorari, 472 U. S. 1026 (1985), to consider the question whether a union proposal that would require a federal agency to comply with OMB Circular A-76 (1983) Performance of Commercial Activities, which prescribes guidelines for contracting out by federal agencies, is negotiable under Title VII of the Civil Service Reform Act of 1978, 5 U. S. C. § 7101 *et seq.*

In the course of contract negotiations with petitioner, the Equal Employment Opportunity Commission (EEOC), respondent American Federation of Government Employees (AFGE) submitted the following proposal:

**Ronald A. Zumbrun* and *John H. Findley* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the National Federation of Federal Employees by *Patrick J. Riley;* and for the National Treasury Employees Union by *Lois G. Williams* and *Elaine D. Kaplan*.

"The EMPLOYER agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting out."

The EEOC took the position that this proposal was nonnegotiable under the Civil Service Reform Act (Act) and declined to bargain over it. AFGE then petitioned for review by respondent Federal Labor Relations Authority (FLRA), which is empowered by the Act to "resolv[e] issues relating to the duty to bargain" in the federal sector. 5 U. S. C. § 7105(a)(2)(E).

Before the FLRA, the EEOC's principal contention was that because the proposal concerned contracting out it was inconsistent with the Act's management rights clause, which, in pertinent part, provides that "nothing in [Title VII] shall affect the authority of any management official of any agency— . . . in accordance with applicable laws— . . . to make determinations with respect to contracting out." 5 U. S. C. § 7106(a)(2)(B) (emphasis added). The FLRA rejected this view, ruling that the proposal would not invade management's reserved rights since it would merely "require management to exercise its right to make contracting out determinations in accordance with whatever applicable laws and regulations exist at the time of such action." 10 F. L. R. A. 3 (1982). In the course of rejecting the EEOC's additional argument that the Circular itself forbade negotiation over the proposal, the FLRA went on to explain that even in the absence of AFGE's proposed contract provision "disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure." *Id.*, at 5.

A divided panel of the Court of Appeals for the District of Columbia Circuit affirmed the FLRA's decision. 240 U. S. App. D. C. 218, 744 F. 2d 842 (1984). The Court of Appeals found the EEOC's claim that any proposal regarding contracting out was barred by the management rights clause "untenable in light of the plain text of the clause."

Id., at 224, 744 F. 2d, at 848. Since management's reserved right was conditioned upon compliance with "applicable laws," and since the proposed contract language "essentially echoes the statutory requirement that contracting-out determinations be made in accordance with applicable laws," the proposal would not affect the EEOC's reserved authority to make contracting-out decisions. *Ibid.* The Court of Appeals also agreed with the FLRA that under 5 U. S. C. § 7103(a)(9)(C)(ii), which defines "grievance" to include "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment," an alleged violation of the Circular would be grievable even in the absence of AFGE's proposal. 240 U. S. App. D. C., at 227, 744 F. 2d, at 850. The dissenting judge believed that the proposal was intended to and would place additional constraints on the EEOC's reserved rights with respect to contracting out. *Id.*, at 228, 744 F. 2d, at 852 (MacKinnon, J., dissenting).

In this Court, the EEOC raises three principal arguments in support of its claim that AFGE's proposal is nonnegotiable. First, although it did not so argue to the FLRA or the Court of Appeals, the EEOC now contends that Circular A–76 is not an "applicable la[w]" within the meaning of the management rights clause, and therefore that AFGE's proposal, by requiring compliance with the Circular, would intrude on management's reserved rights. Second, and again for the first time in this Court, the EEOC asserts that an alleged violation of the Circular would not be grievable absent AFGE's proposal because the Circular is not a "law, rule, or regulation" within the meaning of § 7103(a)(9)'s definition of "grievance." Third, the EEOC suggests that the Circular *is* a "Government-wide rule or regulation" for purposes of 5 U. S. C. § 7117(a)(1), and argues that § 7117(a)(1) excludes such rules or regulations from the scope of the duty to bargain. This argument, too, was never presented to the FLRA.

Whatever their merit, we have concluded that these contentions, which are the linchpins of the EEOC's brief in this Court, are not properly before us. The Act expressly provides that when an aggrieved party seeks judicial review of a final order of the FLRA, "[n]o objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U. S. C. § 7123(c). This language is virtually identical to that found in § 10(e) of the National Labor Relations Act, 29 U. S. C. § 160(e), which provides that "[n]o objection that has not been urged before the [National Labor Relations] Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This Court has interpreted § 10(e) to mean that a Court of Appeals is "without jurisdiction to consider" an issue not raised before the Board if the failure to do so is not excused by extraordinary circumstances. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U. S. 645, 665–666 (1982). See also *Detroit Edison Co.* v. *NLRB*, 440 U. S. 301, 311, n. 10 (1979); *May Department Stores Co.* v. *NLRB*, 326 U. S. 376, 386, n. 5 (1945). The Court of Appeals for the District of Columbia Circuit has similarly held that under § 7123(c) review of "issues that an agency never placed before the Authority" is barred absent extraordinary circumstances. *Department of Treasury* v. *FLRA*, 227 U. S. App. D. C. 377, 382, 707 F. 2d 574, 579 (1983). See also *FLRA* v. *Social Security Administration*, 243 U. S. App. D. C. 338, 342, 753 F. 2d 156, 160–161 (1985). We agree with this interpretation of § 7123(c), which we think is not "waived" simply because the FLRA fails to invoke it. Section 7123(c) speaks to courts, not parties, and its plain language evinces an intent that the FLRA shall pass upon issues arising under the Act, thereby bringing its expertise to bear on the resolution of those issues. We need not decide whether an express waiver by the FLRA would be relevant

in determining whether there are "extraordinary circumstances" excusing a party's failure to raise an issue before that agency, for there is no such waiver here. We do, however, reject JUSTICE STEVENS' theory of implied waiver, which, it should be noted, is not offered as an interpretation of the exception for "extraordinary circumstances." We think that if Congress had meant there to be two exceptions to the bar raised by § 7123(c), instead of one, it would have said so.

Since the EEOC has failed to excuse its failure to raise before the FLRA what now appear to be its principal objections to AFGE's proposal, we decline to consider them. Conceivably, the EEOC's failure to apprise the FLRA of its claim that the Circular is not a "law, rule, or regulation" for purposes of the Act's definition of grievance is attributable to what appears to have been the FLRA's *sua sponte* injection of the grievability issue into these proceedings in rendering its decision. But at most that might excuse the EEOC's failure to press this claim before the FLRA; it does not excuse the EEOC's failure to raise it at any point in the Court of Appeals. This latter failure was "brought to our attention . . . in respondent's brief in opposition to the petition for certiorari," *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 816 (1985), as was the EEOC's failure to raise its claim that the Circular is not an "applicable la[w]." See Brief for FLRA in Opposition 11, n. 8, 17, n. 17. Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals. See, *e. g.*, *FTC* v. *Grolier, Inc.* 462 U. S. 19, 23, n. 6 (1983); *Rogers* v. *Lodge*, 458 U. S. 613, 628, n. 10 (1982). Under these circumstances, several central issues on which resolution of the question presented may well turn cannot be reached or resolved. Accordingly, we dismiss the writ of certiorari as improvidently granted.

It is so ordered.

JUSTICE WHITE, dissenting.

Because I agree with JUSTICE STEVENS that the Court should decide the merits of this case, I cannot join the Court's opinion or judgment.

JUSTICE STEVENS, dissenting.

In my opinion the Court should decide the merits of this case. Two federal agencies disagree about the meaning of an important federal statute; it would serve the interests of both to have the disagreement resolved as promptly as possible. To this end, neither agency has suggested that the arguments advanced by the other are not properly before the Court. Since we are now fully advised about the merits, it would be most efficient for us to resolve the issue now rather than to postpone decision until another similar case works its way up through the agency and the Court of Appeals.[1]

The Federal Labor Relations Authority (FLRA) is the agency designated by Congress to enforce the Civil Service Reform Act of 1978, 5 U. S. C. § 7101 *et seq.* We must therefore presume that the FLRA has a thorough understanding of the provisions of that Act, including § 7123(c).[2] See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844–845 (1984). Under that

[1] "[R]espondent's argument might have prevailed had it been made to the Court of Appeals. But we do not think that judicial economy is served by invoking [a contemporaneous-objection rule] at this point, *after* we have granted certiorari and the case has received plenary consideration on the merits. Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived." *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 815–816 (1985).

[2] Section 7123(c) provides that "[n]o objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances."

provision, the Authority surely knew that it could have interposed an objection to our consideration of arguments advanced by the Solicitor General on behalf of the EEOC's construction of the statute,[3] but it elected not to take such an approach in this Court.[4] In so doing, it has waived the protection of § 7123(c)—and given its palpable interest in having the merits decided, I believe it has acted wisely in doing so.[5]

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[3] See Brief for FLRA in Opposition 11, n. 8, 17, n. 17.

[4] The Court's "*per curiam*" opinion implies that its reasons for dismissing the petition for writ of certiorari were "brought to our attention . . . in respondent's brief in opposition to the petition for writ of certiorari." See *ante*, at 24. If this be true, one can only wonder why the Court decided to grant certiorari. As a matter of fact, however, the respondent FLRA's brief in opposition did not even cite § 7123(c) and did not suggest that any of the EEOC's contentions had been waived; it merely made the rhetorical point that a contention that had not been previously advanced would not appear to have much merit.

[5] Because the Court has not called for supplementary briefing on the Authority's ability to waive § 7123(c), its *per curiam* opinion in this case is the functional equivalent of a summary disposition on this point, a manner of proceeding we customarily reserve for settled issues of law. See *Wyrick* v. *Fields*, 459 U. S. 42, 51 (1982) (MARSHALL, J., dissenting); *Schweiker* v. *Hansen*, 450 U. S. 785, 791 (1981) (MARSHALL, J., dissenting); R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 5.12, p. 277 (6th ed. 1986). Until today, however, the waivability of § 7123(c) had never been addressed by this Court. (Indeed, § 7123(c) itself has never received an authoritative construction in this tribunal.) The Court nonetheless proceeds on the confident assumption that § 7123(c) should be construed *in pari materia* with § 10(e) of the National Labor Relations Act, 29 U. S. C. § 160(e), because the language of the former is "virtually identical" to the language of the latter. *Ante*, at 23. Even accepting the propriety of parallel interpretation—an assumption for which the Court adduces no support in either the Civil Service Reform Act or its legislative history—the § 10(e) cases relied on by the Court do not decide the waiver issue presented by this case. In *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U. S. 645, 665–666 (1982), the Solicitor General offered the § 10(e) defense in his brief in opposition to certiorari, see Brief for National Labor Relations Board in Opposition, O. T. 1981, No. 80–1798, p. 11; in *Detroit Edison Co.* v. *NLRB*, 440 U. S. 301, 311–312, n. 10 (1979), he offered it in his brief on the merits in response to an argument raised for the first time in petitioner's brief on the merits, see Brief for Respondent,

On the merits, I am persuaded that Circular A-76 is not one of the "applicable laws" described in 5 U. S. C. § 7106(a)(2)(B) and that requiring compliance with the Circular would intrude on management's reserved rights. Accordingly, I would reverse the judgment of the Court of Appeals.

O. T. 1978, No. 77-968, pp. 17-18; in *May Department Stores Co.* v. *NLRB*, 326 U. S. 376, 387, n. 5 (1945), the Court found "the objection . . . sufficient" to "put the Board on notice of the issue now presented." Thus, in none of these cases did this Court honor an objection not relied on by the affected agency. Moreover, all three dispositions are consistent with the practice we announced in *Oklahoma City* v. *Tuttle*, 471 U. S., at 816, that "[n]onjurisdictional defects [barring our review] should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari." Because § 7123(c) does not deprive this Court of subject-matter jurisdiction (indeed, it authorizes waiver in "extraordinary circumstances," see *Department of Treasury* v. *FLRA*, 277 U. S. App. D. C. 377, 381-384, 707 F. 2d 574, 578-581 (1983)), I would adhere to the practice we announced in *Tuttle* and decide the questions presented.

Finally, even if I were persuaded that § 7123(c) is a nonwaivable bar to our consideration of the arguments advanced by the Solicitor General for the first time in the petition for certiorari, I still would not dismiss the writ because the arguments that were properly presented to the Court of Appeals had enough force to convince one judge of that court that the FLRA's construction of the Act is erroneous. The Court does not adequately explain why its conclusion that *some* arguments cannot be advanced by the EEOC leads to the further conclusion that its entire petition must be dismissed.

TURNER *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-6646. Argued December 12, 1985—Decided April 30, 1986

Petitioner, a black man, was indicted in Virginia on charges of capital murder for fatally shooting the white proprietor of a jewelry store in the course of a robbery. During *voir dire*, the state trial judge refused petitioner's request to question the prospective jurors on racial prejudice. The jury convicted petitioner, and, after a separate sentencing hearing, recommended that he be sentenced to death, a recommendation the trial judge accepted. The Virginia Supreme Court upheld the death sentence, rejecting petitioner's argument that the trial judge deprived him of a fair trial by refusing to question the prospective jurors on racial prejudice. Petitioner then sought habeas corpus relief in Federal District Court, which rejected the same argument and denied relief, and the Court of Appeals affirmed.

Held: The judgment is reversed, and the case is remanded.

753 F. 2d 342, reversed and remanded.

JUSTICE WHITE delivered the opinion of the Court with respect to Parts I and III, concluding that a defendant accused of an interracial capital crime is entitled to have prospective jurors informed of the victim's race and questioned on the issue of racial bias. This rule is minimally intrusive. As in other cases involving "special circumstances," the trial judge retains discretion as to the form and number of questions, including whether to question the venire individually or collectively. Also, a defendant cannot complain of a failure to question the venire on racial prejudice unless he has specifically requested such an inquiry. Pp. 29–33, 36–37.

JUSTICE WHITE, joined by JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE O'CONNOR, concluded in Parts II and IV that:

(1) The risk that racial prejudice may have infected petitioner's capital sentencing is unacceptable in light of the ease with which that risk, being especially serious in view of the finality of the death sentence, could have been minimized. *Ristaino* v. *Ross*, 424 U. S. 589, distinguished. Pp. 33–36.

(2) While it is not necessary that petitioner be retried on the issue of guilt, there was an unacceptable risk of racial prejudice infecting the *capital sentencing proceeding*, and the inadequacy of the *voir dire* re-

quires that his death sentence be vacated. This unacceptable risk arose from the conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given the jury under Virginia law at the sentencing hearing, and the special seriousness of the risk of improper sentencing in a capital case. Pp. 37–38.

WHITE, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and III, in which BRENNAN, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined, and an opinion with respect to Parts II and IV, in which BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., concurred in the judgment. BRENNAN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 38. MARSHALL, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BRENNAN, J., joined, *post*, p. 45. POWELL, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 45.

J. Lloyd Snook III, by appointment of the Court, 471 U. S. 1134, argued the cause and filed briefs for petitioner.

James E. Kulp, Senior Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief were *William G. Broaddus*, Attorney General, and *Robert H. Anderson III*, Assistant Attorney General.

JUSTICE WHITE announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and III, and an opinion with respect to Parts II and IV, in which JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE O'CONNOR join.

Petitioner is a black man sentenced to death for the murder of a white storekeeper. The question presented is whether the trial judge committed reversible error at *voir dire* by refusing petitioner's request to question prospective jurors on racial prejudice.

I

On July 12, 1978, petitioner entered a jewelry store in Franklin, Virginia, armed with a sawed-off shotgun. He demanded that the proprietor, W. Jack Smith, Jr., put jewelry and money from the cash register into some jewelry bags. Smith complied with petitioner's demand, but triggered a

silent alarm, alerting the Police Department. When Alan Bain, a police officer, arrived to inquire about the alarm, petitioner surprised him and forced him to surrender his revolver.

Having learned that Smith had triggered a silent alarm, petitioner became agitated. He fired toward the rear wall of the store and stated that if he saw or heard any more police officers, he was going to start killing those in the store.[1] When a police siren sounded, petitioner walked to where Smith was stationed behind a counter and without warning shot him in the head with Bain's pistol, wounding Smith and causing him to slump incapacitated to the floor.

Officer Bain attempted to calm petitioner, promising to take him anywhere he wanted to go and asking him not to shoot again. Petitioner angrily replied that he was going to kill Smith for "snitching," and fired two pistol shots into Smith's chest, fatally wounding him. As petitioner turned away from shooting Smith, Bain was able to disarm him and place him under arrest.

A Southampton County, Virginia, grand jury indicted petitioner on charges of capital murder, use of a firearm in the commission of a murder, and possession of a sawed-off shotgun in the commission of a robbery. Petitioner requested and was granted a change of venue to Northampton County, Virginia, a rural county some 80 miles from the location of the murder.

Prior to the commencement of *voir dire*, petitioner's counsel submitted to the trial judge a list of proposed questions, including the following:

> "'The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will these facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair

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[1] In addition to Smith and Bain, a store employee and two customers were present at this time.

and impartial verdict based solely on the evidence?'" *Turner* v. *Commonwealth*, 221 Va. 513, 522, n. 8, 273 S. E. 2d 36, 42, n. 8 (1980).

The judge declined to ask this question, stating that it "has been ruled on by the Supreme Court."[2] App. 15. The judge did ask the venire, who were questioned in groups of five in petitioner's presence, whether any person was aware of any reason why he could not render a fair and impartial verdict, to which all answered "no." *Id.*, at 17, 78. At the time the question was asked, the prospective jurors had no way of knowing that the murder victim was white.

The jury that was empaneled, which consisted of eight whites and four blacks, convicted petitioner on all of the charges against him. *Id.*, at 97 and Addendum. After a separate sentencing hearing on the capital charge, the jury recommended that petitioner be sentenced to death, a recommendation the trial judge accepted. *Id.*, at 18, 19.

Petitioner appealed his death sentence to the Virginia Supreme Court. Among other points, he argued that the trial judge deprived him of his constitutional right to a fair and impartial jury by refusing to question prospective jurors on racial prejudice. The Virginia Supreme Court rejected this argument. Relying on our decision in *Ristaino* v. *Ross*, 424 U. S. 589 (1976), the court stated that a trial judge's refusal to ask prospective jurors about their racial attitudes, while perhaps not the wisest decision as a matter of policy, is not constitutionally objectionable in the absence of factors akin to those in *Ham* v. *South Carolina*, 409 U. S. 524 (1973).[3] *Turner* v. *Commonwealth*, *supra*, at 523, 273 S. E.

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[2] Whether the trial judge was referring to this Court's decision in *Ristaino* v. *Ross*, 424 U. S. 589 (1976), or to a decision of the Virginia Supreme Court, is unclear.

[3] In *Ham*, a young black man known in his small South Carolina hometown as a civil rights activist was arrested and charged with possession of marijuana. We held that the trial judge committed reversible error in refusing to honor Ham's request to question prospective jurors on racial

2d, at 42. The court held that "[t]he mere fact that a defendant is black and that a victim is white does not constitutionally mandate . . . an inquiry [into racial prejudice]." *Ibid.*[4]

Having failed in his direct appeal, petitioner sought habeas corpus relief in the Federal District Court for the Eastern District of Virginia. App. 97. Again he argued without success that the trial judge's refusal to ask prospective jurors about their racial attitudes deprived him of his right to a fair trial. *Id.*, at 102–104. The District Court noted that in *Ristaino, supra,* which involved a crime of interracial violence,[5] we held that inquiry into racial prejudice at *voir dire* was not constitutionally required because the facts of the case "'did not suggest a significant likelihood that racial prejudice might infect [the defendant's] trial.'" App. 103 (quoting 424 U. S., at 598). The court found the present case like *Ristaino* and unlike *Ham* in that "racial issues [are] not 'inextricably bound up with the facts at trial.'" App. 103.

The United States Court of Appeals for the Fourth Circuit affirmed the District Court's denial of habeas corpus relief for

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prejudice. In *Ristaino, supra,* we specified the factors which mandated an inquiry into racial prejudice in *Ham:*

"Ham's defense was that he had been framed because of his civil rights activities. His prominence in the community as a civil rights activist, if not already known to veniremen, inevitably would have been revealed to the members of the jury in the course of his presentation of that defense. Racial issues therefore were inextricably bound up with the conduct of the trial. Further, Ham's reputation as a civil rights activist and the defense he interposed were likely to intensify any prejudice that individual members of the jury might harbor." 424 U. S., at 596–597.

[4] The court also rejected petitioner's reliance on a statistical study showing that black defendants who kill white victims are sentenced to death with disproportionate frequency. The court stated that the study, which is based on statistics compiled in other States, has little utility in establishing the potential for racial prejudice in Virginia. 221 Va., at 523, n. 9, 273 S. E. 2d, at 42, n. 9.

[5] In *Ristaino,* the defendant was one of three black men charged with assaulting a white security guard with intent to murder him. The assault occurred in the course of a robbery. 424 U. S., at 590.

petitioner. *Turner* v. *Bass*, 753 F. 2d 342 (1985). Like the Virginia Supreme Court and the District Court, the Fourth Circuit found no "special circumstances" in this case analogous to those in *Ham*. The court rejected the idea that "the nature of the crime or punishment itself is . . . a special circumstance." 753 F. 2d, at 345. Relying on *Ristaino*, the court likewise found no special circumstance in the fact that petitioner is black and his victim white.[6]

We granted certiorari to review the Fourth Circuit's decision that petitioner was not constitutionally entitled to have potential jurors questioned concerning racial prejudice. 471 U. S. 1098 (1985). We reverse.

II

The Fourth Circuit's opinion correctly states the analytical framework for evaluating petitioner's argument: "The broad inquiry in each case must be . . . whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be indifferent as [they stand] unsworne." 753 F. 2d, at 345–346 (internal quotation omitted). The Fourth Circuit was correct, too, in holding that under *Ristaino* the mere fact that petitioner is black and his victim white does not constitute a "special circumstance" of constitutional proportions. What sets this case apart from *Ristaino*, however, is that in addition to petitioner's being accused of a crime against a white victim, the crime charged was a capital offense.

In a capital sentencing proceeding before a jury, the jury is called upon to make a "highly subjective, 'unique, individual-

[6] To the suggestion that it is a special circumstance that black murderers whose victims are white are executed with disproportionate frequency, the court responded by quoting our opinion in *Rosales-Lopez* v. *United States*, 451 U. S. 182 (1981), for the proposition that "'[t]here is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups.'" 753 F. 2d, at 345 (quoting 451 U. S., at 190).

ized judgment regarding the punishment that a particular person deserves.'" *Caldwell* v. *Mississippi*, 472 U. S. 320, 340, n. 7 (1985) (quoting *Zant* v. *Stephens*, 462 U. S. 862, 900 (1983) (REHNQUIST, J., concurring in judgment)). The Virginia statute under which petitioner was sentenced is instructive of the kinds of judgments a capital sentencing jury must make. First, in order to consider the death penalty, a Virginia jury must find either that the defendant is likely to commit future violent crimes or that his crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code § 19.2-264.2 (1983). Second, the jury must consider any mitigating evidence offered by the defendant. Mitigating evidence may include, but is not limited to, facts tending to show that the defendant acted under the influence of extreme emotional or mental disturbance, or that at the time of the crime the defendant's capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired." § 19.2-262.4(B). Finally, even if the jury has found an aggravating factor, and irrespective of whether mitigating evidence has been offered, the jury has discretion not to recommend the death sentence, in which case it may not be imposed. § 19.2-264.2.

Virginia's death-penalty statute gives the jury greater discretion than other systems which we have upheld against constitutional challenge. See, *e. g.*, *Jurek* v. *Texas*, 428 U. S. 262 (1976). However, our cases establish that every capital sentencer must be free to weigh relevant mitigating evidence before deciding whether to impose the death penalty, see, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 597-609 (1978) (plurality opinion), and that in the end it is the jury that must make the difficult, individualized judgment as to whether the defendant deserves the sentence of death.

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence-prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.[7]

The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. "The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983). We have struck down capital sentences when we found that the cir-

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[7] In referring to the facts of petitioner's crime, we do not retreat from our holding in *Ristaino*. The fact of interracial violence alone is not a "special circumstance" entitling the defendant to have prospective jurors questioned about racial prejudice. It should be clear, though, that our holding in *Ristaino* was not based on a blind belief that the facts presented in that case could not evoke racial prejudice. As we stated in *Rosales-Lopez* v. *United States*, 451 U. S., at 192: "It remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise [a reasonable possibility that racial prejudice would influence the jury]." *Ristaino* does not condone this possibility, but simply leaves it to the trial judge's discretion to decide what measures to take in screening out racial prejudice, absent a showing of "significant likelihood that racial prejudice might infect [the] trial." 424 U. S. at 598.

cumstances under which they were imposed "created an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim . . . or mistake.'" *Caldwell, supra,* at 343 (O'CONNOR, J., concurring in part and concurring in judgment) (citation omitted). In the present case, we find the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized.[8] By refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury.[9]

III

We hold that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the

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[8] JUSTICE POWELL's dissent takes issue with what he terms the "singularly unwise and unjustified presumption that capital jurors harbor latent racial bias." *Post,* at 53. This remark fails to distinguish between our recognition that jurors in a capital case *may* harbor racial bias, and the presumption, which we do not make, that any particular capital jurors are in fact racially prejudiced. JUSTICE POWELL implicitly recognizes such a distinction, but only when it suits his purposes; thus, he does not say that in a case like *Ham* v. *South Carolina,* 409 U. S. 524 (1973), the jurors are presumed to be prejudiced, but rather that there is "an unacceptable risk that racial prejudice will 'distort the trial.'" *Post,* at 50.

Once rhetoric is put aside, it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence, see n. 7, *supra;* the only question is at what point that risk becomes constitutionally unacceptable. Notwithstanding JUSTICE POWELL's attempt to minimize the significance of the discretion entrusted to the jury at a capital sentencing hearing, *post,* at 50–52, we are convinced that such discretion gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to factfinding. This, together with the special seriousness with which we view the risk of racial prejudice influencing a capital sentencing decision, are what distinguish this case from *Ristaino.*

[9] The right to an impartial jury is guaranteed by both the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and by principles of due process. *Ristaino,* 424 U. S., at 595, n. 6.

race of the victim and questioned on the issue of racial bias.[10] The rule we propose is minimally intrusive; as in other cases involving "special circumstances," the trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively. See *Ham* v. *South Carolina*, 409 U. S., at 527. Also, a defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry.

IV

The inadequacy of *voir dire* in this case requires that petitioner's death sentence be vacated. It is not necessary, however, that he be retried on the issue of guilt. Our judgment in this case is that there was an unacceptable risk of racial prejudice infecting the *capital sentencing proceeding*. This judgment is based on a conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case.[11] At the guilt phase of petitioner's trial, the jury had no greater discretion than it would have had if the crime charged had been noncapital murder. Thus, with respect to the guilt phase of petitioner's trial, we find this case

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[10] JUSTICE POWELL contends that inquiry into racial prejudice "in the absence of circumstances that make clear a need for it could well have the negative effect of suggesting to the jurors that race somehow is relevant to the case." *Post*, at 48–49, n. 5. Whether such a concern is purely chimerical or not is a decision we leave up to a capital defendant's counsel. Should defendant's counsel decline to request *voir dire* on the subject of racial prejudice, we in no way require or suggest that the judge broach the topic *sua sponte*.

[11] We find it unnecessary to evaluate the statistical studies which petitioner has introduced in support of the proposition that black defendants who kill whites are executed with disproportionate frequency.

to be indistinguishable from *Ristaino*, to which we continue to adhere.[12] See n. 5, *supra*.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE concurs in the judgment.

JUSTICE BRENNAN, concurring in part and dissenting in part.

The Court's judgment vacates petitioner's sentence of death while refusing to disturb his conviction. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I agree that the death sentence in this case must be vacated. But even if I did not hold that view, I would still find that the sentence was unconstitutionally imposed in this case. In my view, the constitutional right of a defendant to have a trial judge ask the members

[12] JUSTICE BRENNAN incorrectly reads into our opinion a suggestion that "the constitutional entitlement to an impartial jury attaches only at the sentencing phase." *Post*, at 43. The real question is not whether there is a constitutional right to an impartial jury throughout a criminal trial, see n. 9, *supra*, but what prophylactic rules the Constitution imposes on the States in furtherance of that right. What we held in *Ristaino*, and reaffirm today, is that absent "special circumstances" that create a particularly compelling need to inquire into racial prejudice, the Constitution leaves the conduct of *voir dire* to the sound discretion of state trial judges.

The implication of JUSTICE BRENNAN's opinion is that every crime of interracial violence is a "special circumstance." Over JUSTICE BRENNAN's dissent, however, *Ristaino* squarely rejected this approach. Moreover, we are unpersuaded by JUSTICE BRENNAN's view that "the opportunity for racial bias to taint the jury process is . . . equally a factor at the guilt [and sentencing] phase[s] of a bifurcated capital trial." *Post*, at 41. As we see it, the risk of racial bias at sentencing hearings is of an entirely different order, because the decisions that sentencing jurors must make involve far more subjective judgments than when they are deciding guilt or innocence.

of the venire questions concerning possible racial bias is triggered whenever a violent interracial crime has been committed. See *Ross* v. *Massachusetts*, 414 U. S. 1080 (1973) (MARSHALL, J., dissenting from denial of certiorari). The reality of race relations in this country is such that we simply may not presume impartiality, and the risk of bias runs especially high when members of a community serving on a jury are to be confronted with disturbing evidence of criminal conduct that is often terrifying and abhorrent. In analyzing the question of when the Constitution requires trial judges to accommodate defendants' requests for inquiries into racial prejudice, I, like the Court, am influenced by what the Court correctly describes as the "ease" with which the risk may be minimized. *Ante*, at 36.

In any event, I cannot fully join either the Court's judgment or opinion. For in my view, the decision in this case, although clearly half right, is even more clearly half wrong. After recognizing that the constitutional guarantee of an impartial jury entitles a defendant in a capital case involving interracial violence to have prospective jurors questioned on the issue of racial bias—a holding which requires that this case be reversed and remanded for new sentencing—the Court disavows the logic of its own reasoning in denying petitioner Turner a new trial on the issue of his guilt. It accomplishes this by postulating a jury role at the sentencing phase of a capital trial fundamentally different from the jury function at the guilt phase and by concluding that the former gives rise to a significantly greater risk of a verdict tainted by racism. Because I believe that the Court's analysis improperly intertwines the significance of the *risk* of bias with the *consequences* of bias, and because in my view the distinction between the jury's role at a guilt trial and its role at a sentencing hearing is a distinction without substance in so far as juror bias is concerned, I join only that portion of the Court's judgment granting petitioner a new sentencing pro-

ceeding, but dissent from that portion of the judgment refusing to vacate the conviction.

The Sixth Amendment guarantees criminal defendants an impartial jury. This is not mere exhortation for it has been noted that "the right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial." *Ham* v. *South Carolina*, 409 U. S. 524, 532 (1973) (MARSHALL, J. concurring in part and dissenting in part). Among the most important of the means designed to insure an impartial jury is the right to strike those jurors who manifest an inability to try the case solely on the basis of the evidence. This right to exclude incompetent jurors cannot be exercised meaningfully or effectively unless counsel has sufficient information with which to evaluate members of the venire. As JUSTICE WHITE noted for the Court in *Rosales-Lopez* v. *United States*, 451 U. S. 182, 188 (1981), "lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts" (footnote omitted).

Recognizing this fact, we held long ago that "essential demands of fairness" may require a judge to ask jurors whether they entertain any racial prejudice. *Aldridge* v. *United States*, 283 U. S. 308 (1931); see also *Ham* v. *South Carolina*. More recently, we attempted to refine the analysis, and declared that when there is a showing of a "likelihood" that racial or ethnic prejudice may affect the jurors, the Constitution requires a trial judge to honor a defendant's request to examine the jurors' ability to deal impartially with the evidence adduced at trial. *Rosales-Lopez*, *supra* at 190. Exercising our supervisory powers over the federal courts, we held in *Rosales-Lopez* that when a violent crime has been committed, and the victim and the accused are of different races, a *per se* inference of a "reasonable possibility" of prejudice is shown. In the present case, we deal with a criminal case from a state court involving an act of interracial vio-

lence, and are faced with the question of what factors and circumstances will elevate this presumptive "reasonable possibility" of prejudice into a constitutionally significant "likelihood" of prejudice.

The Court identifies three factors, the "conjunction" of which in its view entitled petitioner Turner as a matter of constitutional right to have the jury questioned on racial bias. These are (1) the fact that the crime committed involved interracial violence; (2) the broad discretion given the jury at the death penalty hearing and (3) the "special seriousness of the risk of improper sentencing in a capital case." *Ante*, at 37. I agree with the Court that when these three factors are present, as they were at petitioner's sentencing hearing, the trial court commits constitutional error in refusing a defense request to ask the jurors if the race of either the victim or the accused will bear on their ability to render a decision based solely on the evidence. What I cannot accept is that the judge is released from this obligation to insure an impartial jury—or, to put it another way, that the defendant is stripped of this constitutional safeguard—when a capital jury is hearing evidence concerning a crime involving interracial violence but passing "only" on the issue of guilt/innocence, rather than on the appropriate sentence.

The Court's argument is simply untenable on its face. As best I can understand it, the thesis is that since there is greater discretion entrusted to a capital jury in the sentencing phase than in the guilt phase, "there is [in the sentencing hearing] a unique opportunity for racial prejudice to operate but remain undetected." *Ante*, at 35. However, the Court's own discussion of the issues demonstrates that the opportunity for racial bias to taint the jury process is not "uniquely" present at a sentencing hearing, but is equally a factor at the guilt phase of a bifurcated capital trial.

According to the Court, a prejudiced juror sitting at a sentencing hearing might be influenced by his racial bias in deciding whether the crime committed involved aggravating

factors specified under state law; the Court notes that racial prejudice might similarly cause that juror to be less favorably inclined toward an accused's evidence of mitigating circumstances. Moreover, the Court informs us:

> "More subtle, less consciously held racial attitudes could also influence a juror's decision. . . . Fear of blacks, which could easily be stirred up by the violent facts of [a] crime, might incline a juror to favor the death penalty." *Ante*, at 35.

The flaw in this "analysis" is that there is simply no connection between the proposition advanced, the support proffered for that thesis, and the conclusion drawn. In other words, it is certainly true, as the Court maintains, that racial bias inclines one to disbelieve and disfavor the object of the prejudice, and it is similarly incontestable that subconscious, as well as express, racial fears and hatreds operate to deny fairness to the person despised; that is why we seek to insure that the right to an impartial jury is a meaningful right by providing the defense with the opportunity to ask prospective jurors questions designed to expose even hidden prejudices. But the Court never explains why these biases should be of less concern at the guilt phase than at the sentencing phase. The majority asserts that "a juror who believes that blacks are violence-prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law." *Ante*, at 35. But might not that same juror be influenced by those same prejudices in deciding whether, for example, to credit or discredit white witnesses as opposed to black witnesses at the guilt phase? Might not those same racial fears that would incline a juror to favor death not also incline a juror to favor conviction?

A trial to determine guilt or innocence is, at bottom, nothing more than the sum total of a countless number of small discretionary decisions made by each individual who sits in the jury box. The difference between conviction and acquit-

tal turns on whether key testimony is believed or rejected; on whether an alibi sounds plausible or dubious; on whether a character witness appears trustworthy or unsavory; and on whether the jury concludes that the defendant had a motive, the inclination, or the means available to commit the crime charged. A racially biased juror sits with blurred vision and impaired sensibilities and is incapable of fairly making the myriad decisions that each juror is called upon to make in the course of a trial. To put it simply, he cannot judge because he has prejudged. This is equally true at the trial on guilt as at the hearing on sentencing.

To sentence an individual to death on the basis of a proceeding tainted by racial bias would violate the most basic values of our criminal justice system. This the Court understands. But what it seems not to comprehend is that to permit an individual to be *convicted* by a prejudiced jury violates those same values in precisely the same way. The incongruity of the Court's split judgment is made apparent after it is appreciated that the opportunity for bias to poison decision-making operates at a guilt trial in the same way as it does at a sentencing hearing and after one returns to the context of the case before us. Implicit in the Court's judgment is the acknowledgment that there was a likelihood that the jury that pronounced the death sentence acted, in part, on the basis of racial prejudice. But the exact same jury convicted Turner. Does the Court really mean to suggest that the constitutional entitlement to an impartial jury attaches only at the sentencing phase? Does the Court really believe that racial biases are turned on and off in the course of one criminal prosecution?

My sense is that the Court has confused the *consequences* of an unfair trial with the *risk* that a jury is acting on the basis of prejudice. In other words, I suspect that what is really animating the Court's judgment is the sense of outrage it rightly experiences at the prospect of a man being sentenced to death on the basis of the color of his skin. Perhaps

the Court is slightly less troubled by the prospect of a racially motivated conviction unaccompanied by the death penalty, and I suppose that if, for some unimaginable reason, I had to choose between the two cases, and could only rectify one, I would remedy the case where death had been imposed. But there is no need to choose between the two cases. To state what seems to me obvious, the constitutional right implicated is the right to be judged by an impartial jury, regardless of the sentence, and the constitutional focus thus belongs on whether there is a likelihood of bias, and not on what flows from that bias. In *Ham* v. *South Carolina*, 409 U. S. 524 (1973), we reversed the conviction of a young black man who was charged and convicted with possession of marijuana; because the man was known in the community as a civil rights activist, and because we were persuaded that racial issues were inextricably bound up with the conduct of the trial, we concluded that it was likely that any prejudice that individual members of the jury might harbor would be intensified and held that under those circumstances the trial judge was required to oblige the defense request to inquire into the jury's possible racial bias. We did not reject the petitioner's claim in that case because he was sentenced only to 18 months' imprisonment. Surely one has a right to an impartial jury whether one is subject to punishment for a day or a lifetime.

The Court may believe that it is being Solomonic in "splitting the difference" in this case and granting petitioner a new sentencing hearing while denying him the other "half" of the relief demanded. Starkly put, the petitioner "wins" in that he gets to be resentenced, while the State "wins" in that it does not lose its conviction. But King Solomon did not, in fact, split the baby in two, and had he done so, I suspect that he would be remembered less for his wisdom than for his hardheartedness. Justice is not served by compromising principles in this way. I would reverse the conviction as well as the sentence in this case to insure compliance with the constitutional guarantee of an impartial jury.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, concurring in the judgment in part and dissenting in part.

For the reasons stated in my opinion in *Ross* v. *Massachusetts*, 414 U. S. 1080 (1973) (dissenting from denial of certiorari), I believe that a criminal defendant is entitled to inquire on *voir dire* about the potential racial bias of jurors whenever the case involves a violent interracial crime. As the Court concedes, "it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence." *Ante*, at 36, n. 8. To my mind that risk plainly outweighs the slight cost of allowing the defendant to choose whether to make an inquiry concerning such possible prejudice. This Court did not identify in *Ristaino* v. *Ross*, 424 U. S. 589 (1976), nor does it identify today, any additional burdens that would accompany such a rule. I therefore cannot agree with the Court's continuing rejection of the simple prophylactic rule proposed in *Ristaino*.

Even if I agreed with the Court that a *per se* rule permitting inquiry into racial bias is appropriate only in capital cases, I could not accept the Court's failure to remedy the denial of such inquiry in this capital case by reversing petitioner's conviction. Henceforth any capital defendant accused of an interracial crime may inquire into racial prejudice on *voir dire*. When, as here, the same jury sits at the guilt phase and the penalty phase, these defendants will be assured an impartial jury at both phases. Yet petitioner is forced to accept a conviction by what may have been a biased jury. This is an incongruous and fundamentally unfair result. I therefore concur only in the Court's judgment vacating petitioner's sentence, and dissent from the Court's refusal to reverse the conviction as well.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, dissenting.

The Court today adopts a *per se* rule applicable in capital cases, under which "a capital defendant accused of an interra-

cial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Ante*, at 36–37. This rule is certain to add to the already heavy burden of habeas petitions filed by prisoners under sentence of death[1] without affording any real protection beyond that provided by our decisions in *Ham* v. *South Carolina*, 409 U. S. 524 (1973), and *Ristaino* v. *Ross*, 424 U. S. 589 (1976).

In effect, the Court recognizes a presumption that jurors who have sworn to decide the case impartially nevertheless are racially biased. Such a presumption is flatly contrary to our decisions in *Ristaino* v. *Ross*, *supra*, and *Rosales-Lopez* v. *United States*, 451 U. S. 182, 190 (1981).[2] The facts of

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[1] This case has traveled through each layer of review provided to capital defendants in our state and federal systems. On July 12, 1978, petitioner committed the murder underlying this petition. Trial commenced on December 3, 1979, and the jury convicted petitioner on capital murder and other charges on December 4, 1979. Following the jury's recommendation, the trial judge sentenced petitioner to death on February 6, 1980. The Supreme Court of Virginia affirmed the convictions and sentences. *Turner* v. *Commonwealth*, 221 Va. 513, 273 S. E. 2d 36 (1980). This Court denied a petition for a writ of certiorari. 451 U. S. 1011 (1981). Petitioner then filed a petition for a writ of habeas corpus in the Circuit Court for the County of Southampton. That court denied relief, and the Supreme Court of Virginia denied review. We denied a petition for a writ of certiorari. *Turner* v. *Morris*, 462 U. S. 1112 (1983). Then, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia. By order entered May 23, 1984, the District Court denied the writ. The Court of Appeals for the Fourth Circuit affirmed. *Turner* v. *Bass*, 753 F. 2d 342 (1985). This Court granted certiorari, 471 U. S. 1096 (1985), and today reverses.

[2] "Although *Ristaino* involved an alleged criminal confrontation between a black assailant and a white victim, that fact pattern alone did not create a need of 'constitutional dimensions' to question the jury concerning racial prejudice. 424 U. S., at 596, 597. There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups. As *Ristaino* demonstrates, there is no *per se* constitutional rule in such circumstances requiring inquiry as to racial prejudice. *Id.*, at 596, n. 8. Only when there are more substantial indications of the likeli-

this case demonstrate why it is unnecessary and unwise for this Court to rule, as a matter of constitutional law, that a trial judge *always* must inquire into racial bias in a capital case involving an interracial murder, rather than leaving that decision to be made on a case-by-case basis.[3] Before today the facts that a defendant is black and his victim was white were insufficient to raise "a constitutionally significant likelihood that, absent questioning about racial prejudice," an impartial jury would not be seated. *Ristaino* v. *Ross*, *supra*, at 596.

I

Nothing in this record suggests that racial bias played any role in the jurors' deliberations. The relevant circumstances merit emphasis because they demonstrate that the fact of an interracial murder, by itself, does not create a substantial likelihood that racial issues can be expected to distort capital sentencing trials. Without further evidence that race can be expected to be a factor in such trials, there is no justification for departing from the rule of *Ham* and *Ristaino*.

Petitioner committed murder in the course of an armed robbery of a jewelry store in Franklin, Virginia. The murder was brutal. Petitioner shot the store's proprietor three

hood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion." *Rosales-Lopez* v. *United States*, 451 U. S., at 190 (plurality opinion). Although JUSTICE WHITE's opinion in *Rosales-Lopez* was for a plurality, JUSTICE REHNQUIST's opinion concurring in the result was entirely consistent with the foregoing language.

[3] "Despite its importance, the adequacy of *voir dire* is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions. See *Ristaino* v. *Ross*, 424 U. S. 589, 595 (1976), quoting *Rideau* v. *Louisiana*, 373 U. S. 723, 733 (1963) (Clark, J., dissenting). In neither instance can an appellate court easily second-guess the conclusions of the decisionmaker who heard and observed the witnesses." *Id.*, at 188.

times. The first shot did not kill, but caused the victim to fall helplessly to the floor, bleeding from a scalp wound. A police officer, who had arrived in answer to a silent alarm, pleaded with petitioner not to shoot again. But petitioner fired two more shots into his victim's chest, causing his death. The officer then managed to subdue and arrest petitioner. At trial, the evidence of petitioner's guilt was conclusive.[4] Because the local media gave the murder extensive publicity, petitioner requested and was granted a change of venue from Southampton County to Northampton County, across the Chesapeake Bay, some 80 miles away from the location of the murder. No member of the jury empaneled had read or heard about the murder.

Virginia law vests the trial judge with the responsibility to conduct *voir dire* examination of prospective jurors. *Turner* v. *Commonwealth*, 221 Va. 513, 519–522, 273 S. E. 2d 36, 40–42 (1980), cert. denied, 451 U. S. 1011 (1981). Ordinarily, the judge, rather than counsel, questions members of the venire to provide a basis for the exercise of challenges. In this case, in accordance with state practice, the judge permitted the parties to propose questions to be asked during *voir dire*. Counsel for petitioner submitted 15 questions. As the 10th question on his list, counsel requested the following:

> "'The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?'" *Id.*, at 522, n. 8, 273 S. E. 2d, at 42, n. 8.[5]

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[4] At oral argument, counsel for petitioner conceded that there was no question as to his client's guilt. Tr. of Oral Arg. 47.

[5] In the event that the Court decides that this new rule is to be applied prospectively only, the result of this decision will be to require trial judges to ask prospective jurors this simplistic question on *voir dire*. Asking such a question in the absence of circumstances that make clear a need for

As support for this proposed question, petitioner's counsel referred only to certain studies that were subsequently placed in the record. The studies purported to show that a black defendant who murders a white person is more likely to receive the death penalty than other capital defendants, but the studies included no statistics concerning administration of the death penalty in Virginia. See *Turner* v. *Commonwealth*, *supra*, at 523, n. 9, 273 S. E. 2d, at 42, n. 9. Counsel then discussed their proposed questions with the judge. The prosecutor pointed out that the case presented no racial issues beyond the fact that petitioner and his victim were of different races.

The trial judge declined to ask the proposed question, but he did ask general questions designed to uncover bias. For example, the prospective jurors were asked, "Do any of you know any reason whatsoever why you cannot render a fair and impartial verdict in this case, either for the defendant or for the Commonwealth of Virginia?" Each juror responded negatively.[6] The jury of 12 persons ultimately empaneled included four black citizens, and a black juror was selected to act as foreman.

There is nothing in the record of this trial that reflects racial overtones of any kind. From *voir dire* through the close of trial, no circumstance suggests that the trial judge's refusal to inquire particularly into racial bias posed "an impermissible threat to the fair trial guaranteed by due process." *Ristaino* v. *Ross*, 424 U. S., at 595. The Court does not purport to identify any such circumstance, or to explain why the facts that a capital defendant is of one race and his victim of

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it could well have the negative effect of suggesting to the jurors that race somehow is relevant to the case.

[6] As the facts of *Ristaino* v. *Ross* demonstrate, such a general question can prompt a juror who is aware of the defendant's race, as the jurors were in this case, to admit to racial bias. 424 U. S., at 593, and n. 5. This general inquiry into bias does not have the undesirable result of suggesting to the jurors that race is relevant to the issues in the case.

another now create a significant likelihood that racial issues will distort the jurors' consideration of the issues in the trial. *Id.*, at 597. This case illustrates that it is unnecessary for the Court to adopt a *per se* rule that constitutionalizes the unjustifiable presumption that jurors are racially biased.

II

Until today a trial judge committed an unconstitutional abuse of discretion by refusing to inquire into racial prejudice only when the defendant showed that racial issues "were inextricably bound up with the conduct of the trial."[7] *Ristaino* v. *Ross*, 424 U. S., at 597. When a defendant makes such a showing, there is an unacceptable risk that racial prejudice will "distort the trial." *Ibid.* Under such circumstances, therefore, due process requires "a *voir dire* that include[s] questioning specifically directed to racial prejudice." *Ibid.*; *Ham* v. *South Carolina*, 409 U. S., at 526–527. In *Ristaino*, however, the Court expressly declined to adopt a *per se* rule requiring *voir dire* inquiry into racial bias in every trial for an interracial crime. Neither the Constitution nor sound policy considerations supported such a *per se* approach.[8] But today the Court decides that the Constitution does require a *per se* rule in capital cases because the

[7] The circumstances of *Ham* v. *South Carolina*, 409 U. S. 524 (1973), are illustrative. There, a black defendant was tried for possession of marijuana. The defendant was well known in the community where the case was tried for his civil rights activities, and the theory of his defense was that the police had framed him in retaliation for those activities. On those facts, the Court held that it was an unconstitutional abuse of discretion for the judge to refuse to inquire into racial prejudice. Not only were racial issues a central part of the trial, but also the defendant's "reputation as a civil rights activist and the defense he interposed were likely to intensify any prejudice that individual members of the jury might harbor." *Ristaino* v. *Ross*, 424 U. S., at 597.

[8] "In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." *Id.*, at 596, n. 8.

capital jury exercises discretion at the sentencing phase. The Court's reasoning ignores the many procedural and substantive safeguards, similar to those governing the jury's decision on guilt or innocence, that circumscribe the capital jury's sentencing decision.

Under Virginia law, murder is a capital offense only if it is "willful, deliberate and premeditated" and is committed while the perpetrator is engaged in another crime or under specified aggravating circumstances. Va. Code § 18.2-31 (Supp. 1985). As in any criminal prosecution, of course, the State carries the burden of proving all elements of the capital offense beyond a reasonable doubt. Following a sentencing hearing, the death sentence may not be imposed unless the State proves beyond a reasonable doubt statutorily defined aggravating factors. Virginia law recognizes only two aggravating factors: whether, based on the defendant's criminal record, there is a probability that he would commit future crimes of violence, and whether the defendant's crime was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim."[8] Va. Code §§ 19.2-264.2, 19.2-264.4 (1983). The jury also is required to consider any relevant mitigating evidence offered by the defendant.

The existence of these significant limitations on the jury's exercise of sentencing discretion illustrates why the Court's *per se* rule is wholly unfounded. Just as the trial judge's

[8] The Supreme Court of Virginia properly has given the "vileness" clause a limiting construction to ensure that the jury's discretion in recommending capital punishment is channeled by appropriate standards. See *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). Sentence of death may be imposed on the basis of this aggravating factor only if the State makes a two-pronged showing. First, the State must prove beyond a reasonable doubt that the defendant's conduct was "'outrageously or wantonly vile, horrible or inhuman.'" *Turner* v. *Commonwealth*, 221 Va., at 526, 273 S. E. 2d, at 44-45. Second, the State must prove beyond a reasonable doubt "torture of the victim, an aggravated battery of the victim, or the perpetrator's depravity of mind." *Id.*, at 526, 273 S. E. 2d, at 45.

charge at the guilt phase instructs the jurors that they may consider only the evidence in the case and that they must determine if the prosecution has established each element of the crime beyond a reasonable doubt, the charge at the penalty phase directs the jurors to focus solely on considerations relevant to determination of appropriate punishment and to decide if the prosecution has established beyond a reasonable doubt factors warranting imposition of death. Accordingly, just as there is no reason to presume racial bias on the part of jurors who determine the guilt of a defendant who has committed a violent crime against a person of another race, there is no reason to constitutionalize such a presumption with respect to the jurors who sit to recommend the penalty in a capital case.

Nor does anything in the circumstances of this jury's recommendation of the death penalty suggest a likelihood that sentencing decisions are being made on racial grounds so as to justify adoption of a *per se* rule. There is no question that the State proved the existence of the first aggravating factor beyond a reasonable doubt. As the Supreme Court of Virginia noted, since 1974 petitioner "has been convicted of malicious maiming, escape, unlawful wounding, malicious wounding, and second-degree murder. Four of these offenses occurred in the penal system." *Turner* v. *Commonwealth*, 221 Va., at 525, n. 11, 273 S. E. 2d, at 44, n. 11. The court also expressly found that petitioner's criminal record was "one of the most extensive" it had reviewed in a capital case. *Id.*, at 531, 273 S. E. 2d, at 47. The court further observed that, although the first aggravating factor plainly supported the recommendation of death, the circumstances of this crime were "vile" because petitioner had committed an aggravated battery on his victim. *Id.*, at 527, 273 S. E. 2d, at 45.

Under the foregoing circumstances, there is no basis for concluding that the jury's sentencing decision was tainted by racial bias. The mere fact that the sentencing decision, after

the jury had found guilt and the existence of aggravating factors beyond a reasonable doubt, involved an element of discretion provides no ground for this Court to presume that the decision was infected by racial prejudice. Instead, the rule that until today afforded due process required petitioner to establish that some special circumstances in *his* case, beyond the fact of an interracial crime, raised a constitutionally significant likelihood that racial prejudice would taint the proceedings. *Ristaino* v. *Ross*, *supra*, at 596. The Court rejects that rule, and adopts a singularly unwise and unjustified presumption that capital jurors harbor latent racial bias.

III

The *per se* rule announced today may appear innocuous. But the rule is based on what amounts to a constitutional presumption that jurors in capital cases are racially biased. Such presumption unjustifiably suggests that criminal justice in our courts of law is meted out on racial grounds. It is not easy to reconcile the Court's holding today with the principles announced and applied in *Ham* v. *South Carolina*, *Ristaino* v. *Ross*, and *Rosales-Lopez* v. *United States*.[10] The manner in which petitioner was tried and sentenced, and particularly the jurors who fulfilled their civic duty to sit in his case, reflected not a trace of the racial prejudice that the Court's new rule now presumes.

For these reasons, I dissent.

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[10] The Court's opinion purports to reaffirm *Ristaino* v. *Ross*, *ante*, at 35, n. 7, and would distinguish all three of the above-cited decisions on the ground that none of them was a capital case. The decision today cannot be reconciled with the reasoning of *Ristaino* and *Rosales-Lopez* in which we expressly held that the Constitution does not require *voir dire* questioning on racial bias unless the defendant proves additional circumstances beyond the fact that the case involves an interracial crime. Moreover, those two cases rejected any constitutional presumption that jurors are racially biased.

DIAMOND ET AL. *v.* CHARLES ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-1379. Argued November 5, 1985—Decided April 30, 1986

Appellee physicians, who provide abortion services in Illinois, filed a class action in Federal District Court challenging the constitutionality of the Illinois Abortion Law of 1975, as amended, and seeking declaratory and injunctive relief. Appellant pediatrician (hereafter appellant) filed a motion to intervene as a party defendant based on his conscientious objection to abortions and on his status as a pediatrician and as a parent of a minor daughter. The District Court granted the motion without indicating whether the intervention was permissible or as of right. Ultimately, the District Court permanently enjoined the enforcement of certain provisions of the law that impose criminal liability upon physicians for violation of the prescribed standards of care for performing abortions and the requirements for furnishing a patient with particular abortion-related information. The Court of Appeals affirmed and also permanently enjoined the enforcement of another related provision. The State did not appeal to this Court, but filed a "letter of interest" under this Court's Rule 10.4, stating that its interest was identical to that advanced by it in the lower courts and essentially coterminous with appellant's position.

Held: Because appellant lacks any judicially cognizable interest in the Illinois Abortion Law, his appeal is dismissed for want of jurisdiction. Pp. 61-71.

(a) The presence of a disagreement is insufficient by itself to meet Art. III's "case" or "controversy" requirement. The party seeking judicial resolution of a dispute must also show that he personally suffered some actual or threatened injury as a result of the other party's allegedly illegal conduct. Pp. 61-62.

(b) Illinois' "letter of interest" is insufficient to bring the State into the suit as an appellant with standing to defend the statute's constitutionality in this Court. While the State, as a party below, remains a party under Rule 10.4, that status does not equate with the status of appellant. The State's failure to invoke this Court's jurisdiction leaves the Court without a "case" or "controversy" between appellee physicians and the State. Pp. 62-64.

(c) Appellant's interests in enforcement of the statute do not permit him to defend it. Only the State has a judicially cognizable interest in defending its criminal statutes. Pp. 64–65.

(d) Appellant's claims that his professional interests confer standing have no merit. As a pediatrician he has an interest, but no direct stake, in the abortion process. This abstract concern does not substitute for the concrete injury required by Art. III. Similarly, appellant's claim of conscientious objection to abortion does not provide a judicially cognizable interest. Nor can he maintain the appeal in his capacity as a parent, absent any showing that his daughter is currently a minor or otherwise incapable of asserting her own rights. And he cannot assert any constitutional right of the unborn fetus, since only the State may invoke regulatory measures to protect that interest or the power of the courts when those measures are subject to challenge. Pp. 65–67.

(e) Neither appellant's status as an intervenor below, whether permissive or as of right, nor the fact that the District Court assessed attorney's fees against him and the State, confers standing to keep the case alive in the absence of the State on this appeal. An intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon the intervenor's showing that he satisfies Art. III's requirements, and appellant has not made such a showing. As to the fee award, Art. III standing requires an injury with a nexus to the substantive character of the statute at issue, and the fee award bears no relation to the Illinois Abortion Law. Pp. 68–71.

Appeal dismissed. Reported below: 749 F. 2d 452.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined, and in Part I of which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 71. WHITE, J., concurred in the judgment.

Dennis J. Horan argued the cause for appellants. With him on the briefs were *Victor G. Rosenblum*, *Edward R. Grant*, and *Maura K. Quinlan*.

R. Peter Carey argued the cause for appellees. With him on the brief were *Colleen K. Connell*, *Frank Susman*, *Janet Benshoof*, and *Nan D. Hunter*.*

*Briefs of *amici curiae* urging reversal were filed for the United States by *Acting Solicitor General Fried*, *Acting Assistant Attorney General Willard*, *Deputy Assistant Attorney General Kuhl*, *John F. Cordes*, and *John*

JUSTICE BLACKMUN delivered the opinion of the Court.

Appellant Eugene F. Diamond is a pediatrician engaged in private practice in Illinois. He seeks to defend before this Court the constitutionality of four sections of the Illinois Abortion Law of 1975, as amended.[1] These sections impose criminal liability for the performance of an abortion under certain circumstances, and, under other circumstances, require that the woman be provided with particular abortion-related information. The State of Illinois has chosen to absent itself from this appeal, despite the fact that its statute is at stake. Because a private party whose own conduct is neither implicated nor threatened by a criminal statute has no judicially cognizable interest in the statute's defense, we dismiss the appeal for want of jurisdiction.

M. Rogers; for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* and for Senator Gordon J. Humphrey et al. by *Robert A. Destro* and *Basile J. Uddo.*

Briefs of *amici curiae* urging affirmance were filed for the Attorney General of New York by *Robert Abrams, pro se, Robert Hermann,* Solicitor General, *Rosemarie Rhodes,* Assistant Attorney General, and *Lawrence S. Kahn, Sanford M. Cohen,* and *Martha J. Olson,* Assistant Attorneys General; for the American Medical Association et al. by *Benjamin W. Heinemann, Jr., Carter G. Phillips, Newton N. Minow, Jack R. Bierig, Stephan E. Lawton, Joel I. Klein, Joseph A. Keyes, Jr.,* and *Ann E. Allen;* for the Center for Constitutional Rights et al. by *Anne E. Simon, Nadine Taub, Rhonda Copelon,* and *Judith Levin;* for the National Abortion Rights Action League et al. by *Lynn I. Miller;* for the National Organization for Women et al. by *Diane E. Thompson;* and for Planned Parenthood Federation of America, Inc., et al. by *Dara Klassel* and *Eve W. Paul.*

Briefs of *amici curiae* were filed for the Women Lawyers' Association of Los Angeles et al. by *Susan R. Schwartz, Carol Boyk, Judith Gordon,* and *Lorraine Loder;* for the Unitarian Universalist Association et al. by *Madeline Kochen;* for Senator Bob Packwood et al. by *Laurence H. Tribe* and *Kathleen M. Sullivan;* and for Susan Bandes et al. by *Arthur Kinoy.*

[1] 1975 Ill. Laws, Pub. Act 79–1126, as amended, now codified as Ill. Rev. Stat., ch. 38, ¶¶ 81–21 to 81–34 (1983). The 1975 Act was passed over the Governor's veto. Substantial portions of it already have been held to be unconstitutional. See, *e. g., Wynn* v. *Scott,* 449 F. Supp. 1302 (ND Ill. 1978), aff'd *sub nom. Wynn* v. *Carey,* 599 F. 2d 193 (CA7 1979).

I

On October 30, 1979, over gubernatorial veto, the Illinois Legislature amended the State's 1975 Abortion Law to provide for increased regulation. 1979 Ill. Laws, Pub. Act 81-1078. That very day appellees, four physicians who provide obstetric, gynecologic, and abortion services in Illinois, filed a class action in the United States District Court for the Northern District of Illinois. They alleged a deprivation of rights in violation of 42 U. S. C. § 1983 by the Illinois officials charged with enforcing the Abortion Law.[2] Appellees sought declaratory and injunctive relief.[3]

The next day, the District Court certified the plaintiff class and temporarily restrained enforcement of the entire statute. On November 8, appellant Diamond filed a motion to intervene as a party defendant, either permissively or as of right, and to be appointed guardian ad litem for fetuses who survive abortion.[4] The motion for intervention professed to be

[2] The defendants named in the complaint were the Attorney General of the State and the Director of the Illinois Department of Public Health, each in his official capacity, and the State's Attorney of Cook County, in both his official capacity and as representative of a class consisting of the State's Attorneys in all the counties of the State of Illinois. A suit against a state officer in his official capacity is, of course, a suit against the State. See *Kentucky* v. *Graham*, 473 U. S. 159, 165–166 (1985). The District Court certified a defendant class of State's Attorneys. *Charles* v. *Carey*, Civ. No. 79C 4541 (Oct. 31, 1979).

[3] On the same day another and similar action was filed in the same court by three other Illinois obstetrician-gynecologists and two Illinois clinics that provide abortion services. The two suits were consolidated by court order on Nov. 14, 1979.

[4] Doctor Diamond's motion to intervene and for appointment of guardian was joined by Doctor Jasper F. Williams and David K. Campbell. Doctor Williams, a physician engaged in private practice in Illinois, in the alternative sought appointment as guardian ad litem for unborn children subject to abortion. We are advised that Doctor Williams died on April 15, 1985, after the filing of the notice of appeal to this Court. No one has been substituted for him. Mr. Campbell, who sought intervention as the spouse of a woman of childbearing age, did not file or join a notice of appeal to this Court.

based on Doctor Diamond's conscientious objection to abortions, and on his status as a pediatrician and as a parent of an unemancipated minor daughter.[5]

Over appellees' objection, the District Court granted Diamond's motion to intervene.[6] The District Court did not indicate whether the intervention was permissive or as of right, and it did not describe how Diamond's interests in the litigation satisfied the requirements of Federal Rule of Civil Procedure 24 for intervenor status. The court denied the guardianship motion.

On November 16, the District Court entered a preliminary injunction against a number of sections of the Abortion Law, including §§ 6(1) and 6(4).[7] These sections prescribe the

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[5] Diamond claimed that under the Abortion Law as a whole fewer abortions would be performed, and that those performed in accordance with the Abortion Law would be designed to preserve the life of aborted fetuses, resulting in more live births. Diamond also rested his motion for intervention on § 13 of the Abortion Law, which provides that a physician who refuses to perform abortions based on conscientious objections will not be subject to liability. He relied, furthermore, on § 11(1), to the effect that violations of the Abortion Law constitute unprofessional conduct, and on § 3.3, which provides for parental consultation.

[6] Although the motion to intervene was on behalf of Doctor Diamond, Doctor Williams, and Mr. Campbell, see n. 4, *supra*, the District Court granted leave to intervene to Americans United for Life Legal Defense Fund, counsel for the intervenors below and for Diamond before this Court.

[7] The preliminary injunction also applied to the following sections: § 2(2) (defining "viability"); § 3.3 (parental consultation); § 3.4 (spousal consultation); § 3.5(2), in part (the portion requiring that the patient be told, *inter alia:* "The State of Illinois wants you to know that in its view the child you are carrying is a living human being whose life should be preserved. Illinois strongly encourages you not to have an abortion but to go through to childbirth"); § 4 (abortion subsequent to first trimester); §§ 5(1), (2), and (3) (definition of "viability"); § 9 (prohibition of saline amniocentesis after first trimester); § 10(i) (certification as to nonviability or as to medical indicators for abortion when fetus was viable); § 10(j) (reporting requirements for saline amniocentesis); § 10(*l*), in part (the reporting requirement as to the basis for a judgment concerning the existence of a medical emergency); and

standard of care that must be exercised by a physician in performing an abortion of a viable fetus,[8] and of a possibly viable fetus.[9] A violator of § 6(1) is subject to a term of imprisonment of between three and seven years and a fine not exceeding $10,000. Ill. Rev. Stat., ch. 38, ¶¶ 1005–8–1(5)

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§ 12, in part (the third sentence, prohibiting experimentation with or exploitation of fetal tissue).

[8] Section 6(1) then provided:

"No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable before or after birth, commits a Class 2 felony if the death of a viable fetus or infant results from such failure." Ill. Rev. Stat., ch. 38, ¶ 81–26 (1983).

On June 30, 1984, the Illinois Legislature amended § 6(1), overriding another veto of the Governor. 1984 Ill. Laws, Pub. Act 83–1128, § 1. The Court of Appeals addressed the constitutionality of § 6(1) as it appeared prior to the 1984 amendment. See *Charles* v. *Daley*, 749 F. 2d 452, 455 (CA7 1984).

[9] Section 6(4) then provided:

"No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of sustained survival of the fetus apart from the body of the mother, with or without artificial support. Any physician or person assisting in such pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus, before or after birth, is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such failure." Ill. Rev. Stat., ch. 38, ¶ 81–26 (1983).

Section 6(4) was amended by the 1984 statute cited in n. 8, *supra*, but the Court of Appeals assessed its constitutionality on the version quoted above. See *Charles* v. *Daley*, 749 F. 2d, at 455.

and 1005–9–1(1) (1983). A violator of § 6(4) is subject to a term of imprisonment of between two and five years and a fine not exceeding $10,000. Ill. Rev. Stat., ch. 38, ¶¶ 1005–8–1(6) and 1005–9–1(1) (1983).

The plaintiffs appealed the denial of the preliminary injunction as to § 2(10), which defines the term "abortifacient,"[10] and as to § 11(d), which requires a physician who prescribes an abortifacient to tell the patient what it is.[11] A violator of § 11(d) is subject to a term of imprisonment of not more than 30 days, and a fine not exceeding $500. Ill. Rev. Stat., ch. 38, ¶¶ 1005–8–3(3) and 1005–9–1(3) (1983). No cross-appeal was taken. The Court of Appeals for the Seventh Circuit instructed the District Court to enter a preliminary injunction as to §§ 2(10) and 11(d), because these statutory provisions forced physicians "to act as the mouthpiece for the State's theory of life." *Charles* v. *Carey*, 627 F. 2d 772, 789 (1980).[12]

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[10] Section 2(10) provides:

"'Abortifacient' means any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed." Ill. Rev. Stat., ch. 38, ¶ 81–22 (1983).

[11] Section 11(d) provides in relevant part:

"Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor." Ill. Rev. Stat., ch. 38, ¶ 81–31 (1983).

[12] The Court of Appeals instructed the District Court also to enter a preliminary injunction against the following sections: § 3.2(A)(1)(a)(iii); § 3.5(2); § 6(6); § 3.2(A)(1)(a) (defining the terms "by the physician who is to perform the abortion" and "the woman is provided at least 24 hours before the abortion"); § 3.2(A)(1)(b) (defining the term "from the physician at least 24 hours before the abortion is to be performed"); § 3.2(B)(1) (waiver of waiting period); § 10(k) (reporting requirement for waiver of the waiting period); § 3.2(A)(1)(a) (defining the term "with a true copy of her pregnancy test result"); and § 6(2). See 627 F. 2d, at 792, and n. 36.

On remand, the District Court permanently enjoined, among others, §§ 6(4), 2(10), and 11(d). *Charles* v. *Carey*, 579 F. Supp. 464 (1983).[13] On appeal and cross-appeal, the Court of Appeals affirmed the entry of the permanent injunction as to the three sections, and also permanently enjoined the enforcement of § 6(1). 749 F. 2d 452 (1984). The State did not appeal the grant of the permanent injunction. Diamond, however, filed a notice of appeal to this Court and a jurisdictional statement. As we have indicated, see n. 4, *supra*, Doctor Diamond is the sole appellant here. We noted probable jurisdiction. 471 U. S. 1115 (1985).

The State, through the office of its Attorney General, subsequently filed with this Court a "letter of interest," invoking our Rule 10.4, which provides: "All parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this Court . . . ." In that letter Illinois stated:

> "Although not an appellant, the Office of the Attorney General . . . is a party in the United States Supreme Court and is designated an appellee. The Illinois Attorney General's interest in this proceeding is identical to that advanced by it in the lower courts and is essentially co-terminous with the position on the issues set forth by the appellants." Letter dated July 15, 1985, to the Clerk of the Court from the Director of Advocacy, Office of the Attorney General of Illinois.

See App. to Reply Brief for Appellants A–1. Illinois' absence as an appellant requires that we examine our jurisdiction to entertain this appeal.

II

Article III of the Constitution limits the power of federal courts to deciding "cases" and "controversies." This re-

[13] Other sections of the Abortion Law had been preliminarily enjoined under a separate opinion by the District Court following remand. See *Charles* v. *Carey*, 579 F. Supp. 377 (1983).

quirement ensures the presence of the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements. This Court consistently has required, in addition, that the party seeking judicial resolution of a dispute "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct" of the other party. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979); see also *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975).

The nature of the injury is central to the Art. III inquiry, because standing also reflects a due regard for the autonomy of those most likely to be affected by a judicial decision. "The exercise of judicial power . . . can so profoundly affect the lives, liberty, and property of those to whom it extends," *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 473 (1982), that the decision to seek review must be placed "in the hands of those who have a direct stake in the outcome." *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1972). It is not to be placed in the hands of "concerned bystanders," who will use it simply as a "vehicle for the vindication of value interests." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973).

III

Had the State of Illinois invoked this Court's appellate jurisdiction under 28 U. S. C. § 1254(2) and sought review of the Court of Appeals' decision, the "case" or "controversy" requirement would have been met, for a State has standing to defend the constitutionality of its statute. Diamond argues that Illinois' "letter of interest" demonstrates the State's continued concern with the enforcement of its Abortion Law, and renders the State the functional equivalent

of an appellant. Accordingly, Diamond asserts, there is no jurisdictional problem in the case. This claim must be rejected.

It is true that, as a party below, the State remains a party here under our Rule 10.4.[14] But status as a "party" does not equate with status as an appellant. To appear before the Court as an appellant, a party must file a notice of appeal, the statutory prerequisite to invoking this Court's jurisdiction. See 28 U. S. C. § 2101(c).[15] Illinois' mere expression of interest is insufficient to bring the State into the suit as an appellant. By not appealing the judgment below, the State indicated its acceptance of that decision, and its lack of interest in defending its own statute.[16] The State's general interest may be adverse to the interests of appellees, but its failure to

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[14] The purpose of the Rule is to provide a means for a party below, who was not notified that this Court's review has been sought by another party, to make its interests known to the Court. Frequently, an appellant would seek review as to only one party below, permitting the judgment to stand as to others. See R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 6.20 (6th ed. 1986), and § 6.35 (3d ed. 1962) (describing evolution of the Rule). This Court's Rule 10.4 therefore avoids the adjudication of rights in a party's absence, but it does not provide a means to obtain review in the absence of the filing of a notice of appeal by a proper party.

[15] Title 28 U. S. C. § 2101(c) provides. "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

[16] The State's reasons for abandoning this suit are not articulated in the record. We have noted above, however, that, during the pendency of this case before the Court of Appeals, Illinois again amended its Abortion Law. 1984 Ill. Laws, Pub. Act 83-1128. At the time of the Court of Appeals' decision, which was based on the preamendment version of the Abortion Law, the amended sections were subject to a temporary restraining order. See *Keith* v. *Daley*, No. 84 C 5602 (ND Ill. 1984). The Court of Appeals declined to assess the constitutionality of the 1984 amendments and rejected challenges of mootness based on those amendments. *Charles* v. *Daley*, 749 F. 2d, at 455, 457–458. The State's inaction may well be due to its concern with the amended, not the earlier, form of the statutes under attack.

invoke our jurisdiction leaves the Court without a "case" or "controversy" between appellees and the State of Illinois. Cf. *Princeton University* v. *Schmid*, 455 U. S. 100 (1982).

Had the State sought review, this Court's Rule 10.4 makes clear that Diamond, as an intervening defendant below, also would be entitled to seek review, enabling him to file a brief on the merits, and to seek leave to argue orally. But this ability to ride "piggyback" on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join.

IV

A

Diamond claims that his interests in enforcement permit him to defend the Abortion Law, despite Illinois' acquiescence in the Court of Appeals' ruling of unconstitutionality. This claim also must fail. Doctor Diamond attempts to equate his position with that of appellees, the physicians who instituted this suit in the District Court. Appellees, however, had standing to bring suit against the state officials who were charged with enforcing the Abortion Law because appellees faced possible criminal prosecution. See, *e. g.*, *Doe* v. *Bolton*, 410 U. S. 179, 188 (1973). The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic "case" or "controversy" within the meaning of Art. III.

The conflict presented by Diamond is different. Were the Abortion Law to be held constitutional, Diamond could not compel the State to enforce it against appellees because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 619 (1973); see *Leeke* v. *Timmerman*, 454 U. S. 83 (1981); *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883 (1984). See also *Younger* v. *Harris*, 401 U. S. 37, 42 (1971); *Bailey* v. *Patterson*, 369 U. S. 31, 33 (1962). Cf. *Allen* v. *Wright*, 468 U. S. 737, 754 (1984) ("[A]n asserted

right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court").

The concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made. The State's acquiescence in the Court of Appeals' determination of unconstitutionality serves to deprive the State of the power to prosecute anyone for violating the Abortion Law. Diamond's attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with Diamond's interests. But "the power to create and enforce a legal code, both civil and criminal" is one of the quintessential functions of a State. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U. S. 592, 601 (1982). Because the State alone is entitled to create a legal code, only the State has the kind of "direct stake" identified in *Sierra Club* v. *Morton*, 405 U. S., at 740, in defending the standards embodied in that code.

B

Even if there were circumstances in which a private party would have standing to defend the constitutionality of a challenged statute,[17] this is not one of them. Diamond is not able to assert an injury in fact. A physician has standing to challenge an abortion law that poses for him a threat of criminal prosecution. *Doe* v. *Bolton*, 410 U. S., at 188; see *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 62 (1976). In addition, a physician who demonstrates that abortion funding regulations have a direct financial impact on his practice may assert the constitutional rights of other individ-

[17] The Illinois Legislature, of course, has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 41, n. 22 (1976).

uals who are unable to assert those rights themselves. See *Singleton* v. *Wulff*, 428 U. S. 106 (1976). Diamond attempts to assert an equivalent interest based upon his personal status as a doctor, a father, and a protector of the unborn. We must reject Diamond's claims that his personal and professional interests confer standing.

Diamond, who is a pediatrician, claims that if the Abortion Law were enforced, he would gain patients; fewer abortions would be performed and those that would be performed would result in more live births, because the law requires a physician to attempt to preserve the life of the aborted fetus. By implication, therefore, the pool of potential fee-paying patients would be enlarged. The possibilities that such fetuses would survive and then find their way as patients to Diamond are speculative, and "unadorned speculation will not suffice to invoke the federal judicial power." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 44 (1976). Diamond's situation, based on speculation and hoped-for fees is far different from that of the physicians in *Wulff*, *supra*, where actual fees were limited by the challenged Missouri statute.

Diamond also alleges that, as a physician, he has standing to litigate the standards of medical practice that ought to be applied to the performance of abortions.[19] Although Diamond's allegation may be cloaked in the nomenclature of a special professional interest, it is simply the expression of a desire that the Illinois Abortion Law as written be obeyed. Article III requires more than a desire to vindicate value interests. See *United States* v. *SCRAP*, 412 U. S., at 687. It requires an "'injury in fact'" that distinguishes "a person with a direct stake in the outcome of a litigation—even

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[19] Diamond's purported interest appears to rest on § 11(a) of the Abortion Law, which provides that the requirements of that law constitute the standards of conduct for the medical profession. Since that provision is neither before the Court nor integrally related to any of the sections at issue in this proceeding, it cannot confer standing on Diamond.

though small—from a person with a mere interest in the problem." *Id.*, at 689, n. 14. Diamond has an interest, but no direct stake, in the abortion process. This "abstract concern . . . does not substitute for the concrete injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S., at 40 Similarly, Diamond's claim of conscientious objection to abortion does not provide a judicially cognizable interest.

Doctor Diamond also asserts that he has standing as the father of a daughter of childbearing years. First, to the extent that Diamond's claim derives from § 3(3) of the Abortion Law, the parental notification section, he lacks standing to continue this litigation, for it does not address the validity of that provision. Second, to the extent that he claims an interest in ensuring that his daughter is not prescribed an abortifacient without prior information—a concern ostensibly triggered by the invalidation of §§ 2(10) and 11(d)—he has failed to show that he is a proper person to advance this claim on her behalf. Diamond has not shown either that his daughter is currently a minor or that she is otherwise incapable of asserting her own rights. Diamond's failure to adduce factual support renders him incapable of maintaining this appeal in his capacity as a parent. See *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 548–549 (1986).

Nor can Diamond assert any constitutional rights of the unborn fetus.[19] Only the State may invoke regulatory measures to protect that interest, and only the State may invoke the power of the courts when those regulatory measures are subject to challenge.

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[19] Diamond claims that he is asserting the rights of his prospective patients, who survive abortion, to be born with as few handicapping conditions as possible. Diamond asserted this claim before the District Court as a basis for appointment as guardian ad litem for unborn fetuses. That claim was rejected by the District Court.

V

Finally, Diamond asserts that he has standing based on two interests that relate not to the Abortion Law, but to his involvement in this litigation. Neither interest suffices.

A

Diamond's status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State on this appeal. Although intervenors are considered parties entitled, among other things, to seek review by this Court, *Mine Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335, 338 (1945), an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III. See *id.*, at 339. See also *Bryant* v. *Yellen*, 447 U. S. 352, 368 (1980).

This Court has recognized that certain public concerns may constitute an adequate "interest" within the meaning of Federal Rule of Civil Procedure 24(a)(2), see *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129, 135 (1967), and has held that an interest under Rule 24(a)(2), which provides for intervention as of right,[20] requires a "significantly protectable interest." See *Donaldson* v. *United States*, 400 U. S. 517, 531 (1971). However, the precise relationship between the interest required to satisfy the Rule and the interest required to confer standing, has led to anomalous decisions in the Courts of Appeals.[21] We need not de-

[20] Federal Rule of Civil Procedure 24(a)(2) provides for intervention "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[21] The Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing. Compare *United States* v. *39.36 Acres of Land*, 754 F. 2d 855, 859 (CA7

cide today whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III. To continue this suit in the absence of Illinois, Diamond himself must satisfy the requirements of Art. III. The interests Diamond asserted before the District Court in seeking to intervene plainly are insufficient to confer standing on him to continue this suit now.

B

At oral argument, Diamond stated that the District Court has assessed attorney's fees against him and the State, jointly and severally. This fee award, Diamond asserted, provided the requisite standing to litigate this case:

> "The standing or the real controversy thus between the parties to this case is a very real sum of money, a judgment that runs in favor of the individual plaintiff physicians in this case and against the individual defendants intervenors whom I represent." Tr. of Oral Arg. 4.

Diamond is claiming that an award of fees entered after a decision on the merits by the District Court and the Court of Appeals, and after probable jurisdiction had been noted by this Court, gives him a direct stake in the enforcement of the Illinois Abortion Law. In short, because Diamond stands to lose the amount of the fee unless the State's regulations con-

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1985) (intervention requires an interest in excess of that required for standing), cert. pending *sub nom. Save the Dunes Council, Inc.* v. *United States*, No. 85-426, with *Southern Christian Leadership Conference* v. *Kelley*, 241 U. S. App. D. C. 340, 747 F. 2d 777 (1984) (equating interest necessary to intervene with interest necessary to confer standing), and *United States* v. *American Tel. & Tel. Co.*, 206 U. S. App. D. C. 317, 642 F. 2d 1285 (1980) (intervention is proper only if the would-be intervenor has an interest in the outcome of the suit different from that of the public as a whole), with *Sagebush Rebellion, Inc.* v. *Watt*, 713 F. 2d 525 (CA9 1983) (resolving intervention questions without reference to standing doctrine), and *Planned Parenthood of Minnesota, Inc.* v. *Citizens for Community Action*, 558 F. 2d 861 (CA8 1977) (same).

cerning abortion are reinstated, he claims he has been injured by the invalidation of those regulations.[22]

But *Valley Forge Christian College*, 454 U. S., at 472, makes clear that Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue:

> "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 38, 41 (1976)."

Any liability for fees is, of course, a consequence of Diamond's decision to intervene, but it cannot fairly be traced to the Illinois Abortion Law. The fee award is wholly unrelated to the subject matter of the litigation, and bears no relation to the statute whose constitutionality is at issue here. It is true that, were the Court to resolve the case on the merits against appellees, appellees would no longer be "prevailing parties" entitled to an award of fees under 42 U. S. C. § 1988. But the mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the

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[22] While not determinative of the standing claim in this case, Diamond responded to the fee award by filing a motion to dismiss him from the litigation and name Americans United for Life, Inc., as the sole intervenor. See n. 6, *supra*. In the alternative, Diamond asked the District Court to clarify the original intervention order by stating that "AUL is an intervening defendant for all purposes, including the assessment of attorney's fees." The motion further stated that "AUL is the real party in interest." In assessing fees against appellant Diamond, the District Court stated that "the State defendants and intervenors played at least equal roles in defending the abortion statute." *Charles* v. *Daley*, No. 79-C-4541 (Apr. 22, 1985).

suit itself does not mean that the injury is cognizable under Art. III.

VI

The State of Illinois, by failing to appeal, has indicated no direct interest in upholding the four sections of the Abortion Law at issue here. Diamond has stepped in, attempting to maintain the litigation abandoned by the State in which he resides. Because he lacks any judicially cognizable interest in the Abortion Law, his appeal is dismissed for want of jurisdiction.

It is so ordered.

JUSTICE WHITE concurs in the judgment.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part and concurring in the judgment.

I join the Court's judgment and Part I of its opinion, and I agree with much of the Court's discussion of why Dr. Diamond's asserted interests in defending the Illinois Abortion Law do not satisfy the Art. III standing requirement. I write separately, however, because I do not agree with the Court's reasons for rejecting Dr. Diamond's contention that Illinois' presence as an appellee ensures that a justiciable controversy is before us. In my view, Dr. Diamond was not a proper intervenor in the Court of Appeals, and therefore Illinois is not before this Court in any capacity, because Diamond was not authorized to bring this appeal under 28 U. S. C. § 1254(2).

The Court assumes that Diamond could properly bring an appeal under § 1254(2) and therefore that Illinois is present in this Court as an appellee under this Court's Rule 10.4. The Court then asserts that Illinois is not "the functional equivalent of an appellant" by virtue of its status as a party under Rule 10.4. *Ante*, at 62–63. On this basis, the Court concludes that Illinois' "failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between

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appellees and the State of Illinois," *ante*, at 63–64, even if Illinois' interests are actually adverse to appellees' interests. I believe this analysis is needlessly inconsistent with this Court's opinion in *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297 (1983), which holds that once a case is properly brought here the case-or-controversy requirement can be satisfied even if the parties who are asserting their adverse interests before this Court are not formally aligned as adversaries.

In *Perini*, an employee injured while performing his job filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act. *Id.*, at 300. The employer denied that the employee was covered by the Act, and an Administrative Law Judge found for the employer. At that point, the Director, Office of Workers' Compensation Programs, joined the employee in an appeal to the Benefits Review Board. *Id.*, at 300–301. The Board affirmed the denial of coverage, and the employee sought review of its decision in the Court of Appeals, where the Director participated as a respondent. *Id.*, at 301. The Court of Appeals denied the employee's petition, and the Director—but not the employee—filed a petition for certiorari in this Court. *Id.*, at 301, 303. The employee did, however, file a brief in support of the Director's petition for certiorari and a brief on the merits after certiorari was granted. *Id.*, at 303.

In this Court, the employer challenged the Director's standing to seek review of the Court of Appeals' decision. *Id.*, at 302. Without deciding whether the Director had standing, we held that "the presence of [the employee] as a party respondent arguing for his coverage under the Act assures that an admittedly justiciable controversy is now before the Court." *Id.*, at 305. The basis for our holding was the employer's concession that the Director was a proper party respondent before the Court of Appeals. *Id.*, at 304. As a proper party in the Court of Appeals, the Director had "statutory authority to seek review in this Court" under 28

U. S. C. § 1254(1), which authorizes a grant of certiorari "upon the petition of any party" below. See *id.*, at 304, and n. 13. Therefore, whether or not the Director had standing in this Court, the Director's petition brought the employee before the Court as a party respondent pursuant to this Court's Rule 19.6. *Id.*, at 303–304, and n. 12. Because the employee clearly had standing, and actively asserted his adverse interests in this Court, a live case or controversy was presented. *Id.*, at 305.

In two important respects this case is directly analogous to *Perini*. First, § 1254(2) provides that "a *party* relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution . . . of the United States" may bring an appeal to this Court (emphasis added). Consequently, if Dr. Diamond was a proper party in the Court of Appeals, his statutorily authorized appeal brought this case here, just as the Director's petition for certiorari brought *Perini* to this Court. Second, since Rule 10.4 parallels, as to appeals in this Court, the provisions of Rule 19.6 for cases which come here by way of certiorari, Illinois' presence as an appellee, like the presence of the employee in *Perini* as a respondent, can satisfy the requirements of a live case or controversy even if the party who brought the case here lacks standing. I therefore disagree with the Court's apparent conclusion that the mere fact that Illinois is not an appellant ends the inquiry into whether its presence here assures a live case or controversy.

Perini is fairly distinguishable from this case, however, because in my view Dr. Diamond was not a proper intervenor, at least not in the Court of Appeals, and consequently was not a "party" authorized to bring an appeal here. Appellees contend that "[i]ntervenor claimed no justiciable interest in any of the four provisions before this Court when he sought to intervene below." Brief for Appellees 14. The Courts of Appeals have expressed differing views as to the relationship between the interest required to confer standing and the

interest required to intervene under Rule 24 of the Federal Rules of Civil Procedure. See *ante*, at 68, and n. 21. Like the Court, I find it unnecessary to decide that question, because the challenge to Diamond's standing subsumes a challenge to the sufficiency of his interest as an intervenor for purposes of Rule 24. Appellees challenged the propriety of Diamond's intervention in the District Court, and although they did not raise this issue in the Court of Appeals I believe it may properly be considered since, under *Perini*, it bears on whether a justiciable controversy is presented in this Court. If Diamond was not a proper party in the Court of Appeals, his appeal is clearly improper under § 1254(2).

Rule 24(a)(2) provides that a person

> "*shall* be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties" (emphasis added).

Rule 24(b)(2) provides that a person

> "*may* be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties" (emphasis added).

The District Court did not explain whether it granted intervention as of right under Rule 24(a)(2) or permissive intervention under Rule 24(b)(2), and hence it is necessary to consider whether the interests Diamond advanced could have made him a proper intervenor on either theory in the Court of Appeals. This Court's decision in *Donaldson* v. *United*

States, 400 U. S. 517 (1971), establishes that Diamond's asserted interests in the provisions at issue in the Court of Appeals fall well outside the ambit of Rule 24(a)(2), and it is likewise apparent that he was not entitled to permissive intervention under Rule 24(b)(2).

Donaldson held that a taxpayer was not entitled to intervene as of right in a proceeding to enforce an internal revenue summons directed to his former employer, and ordering the employer to produce its records concerning the taxpayer for use in a civil investigation of the taxpayer. The Court recognized that the taxpayer had an interest in the records because they presumably contained details of payments from his employer to him "possessing significance for federal income tax purposes." *Id.*, at 531. Nonetheless, since this interest was "nothing more than a desire" by the taxpayer to overcome his employer's "willingness, under summons, to comply and to produce records," the Court held:

> "This interest cannot be the kind contemplated by Rule 24(a)(2) when it speaks in general terms of 'an interest relating to the property or transaction which is the subject of the action.' What is obviously meant there is a significantly protectable interest." *Ibid.*

Clearly, *Donaldson*'s requirement of a "significantly protectable interest" calls for a direct and concrete interest that is accorded some degree of legal protection. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U. S. 310, 315 (1985) (noting that *Donaldson* "held that the employee's interest was not legally protectible and affirmed the denial of the employee's motions for intervention"); *New Orleans Public Service, Inc.* v. *United Gas Pipe Line Co.*, 732 F. 2d 452, 464 (CA5 1984) (en banc); *Southern Christian Leadership Conference* v. *Kelley*, 241 U. S. App. D. C. 340, 342, 747 F. 2d 777, 779 (1984) *(per curiam)*. See also Advisory Committee's Notes on Fed. Rule Civ. Proc. 24, 28 U. S. C. App., p. 567. The abstract interests advanced by Diamond are if anything less "significantly protectable" than the interest of the

taxpayer in *Donaldson*, who alleged that the summons was unlawful because it was part of an investigation for purposes of criminal prosecution. See 400 U. S., at 521. Diamond's speculative claim that his practice may benefit from the Illinois Abortion Law bespeaks a highly contingent financial interest far less tangible than that of the taxpayer in *Donaldson*, who faced a palpable threat of tax liability; Diamond's "desire that the Illinois Abortion Law as written be obeyed," *ante*, at 66, should fare no better than the taxpayer's desire to prevent his employer from putting him at risk by complying with the summons; and Diamond's asserted interests as a father and a parent are indistinguishable from the interests of any beneficiary of the provisions of a criminal law.

I discern nothing in any of the provisions of the Illinois Abortion Law that were challenged in the Court of Appeals to suggest that Illinois meant to vest physicians, parents, or daughters with "significantly protectable interest[s]." Illinois enacted a criminal law which it would itself enforce, thereby making violators liable to the public as a whole, not to those members of the public who might in some degree benefit from the law's enactment or enforcement. Under these circumstances, it seems clear as a matter of interpreting Rule 24(a)(2) that only the State has a "significantly protectable interest" in undertaking to defend the standards contained in its criminal law, since there is no indication that Illinois intended to confer legally protectible interests on particular beneficiaries of that law.

Diamond's cause is not helped by Rule 24(b)(2), for he fails to satisfy the Rule's requirement, which has remained intact since it was first adopted in 1938, that "an applicant's claim or defense and the main action have a question of law or fact in common." The words "claim or defense" manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit, as is confirmed by Rule 24(c)'s requirement that a person desiring to inter-

vene serve a motion stating "the grounds therefor" and "accompanied by a pleading setting forth the claim or defense for which intervention is sought." Thus, although permissive intervention "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation," *SEC* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 459 (1940), it plainly *does* require an interest sufficient to support a legal claim or defense which is "founded upon [that] interest" and which satisfies the Rule's commonality requirement. *Id.*, at 460. Dr. Diamond simply has no claim or defense in this sense; he asserts no actual, present interest that would permit him to sue or be sued by appellees, or the State of Illinois, or anyone else, in an action sharing common questions of law or fact with those at issue in this litigation.

This analysis is not affected by any potential liability for attorney's fees to which Diamond may be subject in connection with his intervention in this litigation. I agree with the Court that any such liability is "a byproduct of the suit itself," *ante*, at 70–71, and as such it cannot have served as a basis for intervention in the Court of Appeals. At oral argument the question was raised whether Diamond, if not a proper intervenor, could nonetheless be considered a party against whom attorney's fees may be awarded to "the prevailing party" under 42 U. S. C. § 1988. That issue, however, is not before this Court, since an award of attorney's fees is "uniquely separable from the cause of action" on the merits, *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445, 452 (1982); *FCC* v. *League of Women Voters of California*, 468 U. S. 364, 373–375, n. 10 (1984), and the proceedings in the District Court concerning attorney's fees are neither contained in the record before us nor the subject of the questions presented in Diamond's jurisdictional statement. Accordingly, I express no view as to whether an award of attorney's fees against Dr. Diamond would be

proper with respect to any proceedings in which he was not a proper intervenor.

Dr. Diamond, then, was not a proper intervenor in the Court of Appeals, although of course it would have been open to that court to allow him to file a brief as an *amicus curiae*. Accordingly, Dr. Diamond was not authorized to bring an appeal in this Court, and the appeal must be dismissed for want of jurisdiction.

BATSON *v.* KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 84-6263. Argued December 12, 1985—Decided April 30, 1986

During the criminal trial in a Kentucky state court of petitioner, a black man, the judge conducted *voir dire* examination of the jury venire and excused certain jurors for cause. The prosecutor then used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Without expressly ruling on petitioner's request for a hearing, the trial judge denied the motion, and the jury ultimately convicted petitioner. Affirming the conviction, the Kentucky Supreme Court observed that recently, in another case, it had relied on *Swain* v. *Alabama*, 380 U. S. 202, and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire.

Held:

1. The principle announced in *Strauder* v. *West Virginia*, 100 U. S. 303, that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded, is reaffirmed. Pp. 84-89.

(a) A defendant has no right to a petit jury composed in whole or in part of persons of his own race. *Strauder* v. *West Virginia*, 100 U. S. 303, 305. However, the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. By denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Pp. 85-88.

(b) The same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury. Although a prosecutor ordinarily is entitled to exercise

peremptory challenges for any reason, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. Pp. 88–89.

2. The portion of *Swain* v. *Alabama*, *supra*, concerning the evidentiary burden placed on a defendant who claims that he has been denied equal protection through the State's discriminatory use of peremptory challenges is rejected. In *Swain*, it was held that a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system as a whole was being perverted. Evidence offered by the defendant in *Swain* did not meet that standard because it did not demonstrate the circumstances under which prosecutors in the jurisdiction were responsible for striking black jurors beyond the facts of the defendant's case. This evidentiary formulation is inconsistent with equal protection standards subsequently developed in decisions relating to selection of the jury venire. A defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case. Pp. 89–96.

3. A defendant may establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. The defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The defendant may also rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race. Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut a prima facie showing by stating that he challenged the jurors on the assumption that they would be partial to the defendant because of their shared race or by affirming his good faith in individual selections. Pp. 96–98.

4. While the peremptory challenge occupies an important position in trial procedures, the above-stated principles will not undermine the contribution that the challenge generally makes to the administration of justice. Nor will application of such principles create serious administrative difficulties. Pp. 98–99.

5. Because the trial court here flatly rejected petitioner's objection to the prosecutor's removal of all black persons on the venire without requiring the prosecutor to explain his action, the case is remanded for further proceedings. P. 100.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., *post*, p. 100, and MARSHALL, J., *post*, p. 102, filed concurring opinions. STEVENS, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 108. O'CONNOR, J., filed a concurring opinion, *post*, p. 111. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 112. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 134.

J. David Niehaus argued the cause for petitioner. With him on the briefs were *Frank W. Heft, Jr.*, and *Daniel T. Goyette*.

Rickie L. Pearson, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief were *David L. Armstrong*, Attorney General, and *Carl T. Miller, Jr.*, Assistant Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Fried, Assistant Attorney General Trott*, and *Sidney M. Glazer*.*

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*Briefs of *amici curiae* urging reversal were filed for the NAACP Legal Defense and Educational Fund, Inc., by *Julius LeVonne Chambers, Charles Stephen Ralston, Steven L. Winter, Anthony G. Amsterdam*, and *Samuel Rabinove;* for the Lawyers' Committee for Civil Rights Under Law by *Barry Sullivan, Fred N. Fishman, Robert H. Kapp, Norman Redlich, William L. Robinson*, and *Norman J. Chachkin;* and for Michael McCray et al. by *Steven R. Shapiro*.

Robert E. Weiss, Donald A. Kuebler, Robert J. Miller, and *Jack E. Yelverton* filed a brief for the National District Attorneys Association, Inc., as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the National Legal Aid and Defender Association by *Patricia Unsinn;* and for Elizabeth Holtzman by *Elizabeth Holtzman, pro se*, and *Barbara D. Underwood*.

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to reexamine that portion of *Swain* v. *Alabama*, 380 U. S. 202 (1965), concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury.[1]

I

Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. On the first day of trial in Jefferson Circuit Court, the judge conducted *voir dire* examination of the venire, excused certain jurors for cause, and permitted the parties to

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[1] Following the lead of a number of state courts construing their State's Constitution, two Federal Courts of Appeals recently have accepted the view that peremptory challenges used to strike black jurors in a particular case may violate the Sixth Amendment. *Booker* v. *Jabe*, 775 F. 2d 762 (CA6 1985), cert. pending, No. 85-1028; *McCray* v. *Abrams*, 750 F. 2d 1113 (CA2 1984), cert. pending, No. 84-1426. See *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978); *Riley* v. *State*, 496 A. 2d 997, 1009-1013 (Del. 1985); *State* v. *Neil*, 457 So. 2d 481 (Fla. 1984); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N. E. 2d 499, cert. denied, 444 U. S. 881 (1979). See also *State* v. *Crespin*, 94 N. M. 486, 612 P. 2d 716 (App. 1980). Other Courts of Appeals have rejected that position, adhering to the requirement that a defendant must prove systematic exclusion of blacks from the petit jury to establish a constitutional violation. *United States* v. *Childress*, 715 F. 2d 1313 (CA8 1983) (en banc), cert. denied, 464 U. S. 1063 (1984); *United States* v. *Whitfield*, 715 F. 2d 145, 147 (CA4 1983). See *Beed* v. *State*, 271 Ark. 526, 530-531, 609 S. W. 2d 898, 903 (1980); *Blackwell* v. *State*, 248 Ga. 138, 281 S. E. 2d 599, 599-600 (1981); *Gilliard* v. *State*, 428 So. 2d 576, 579 (Miss.), cert. denied, 464 U. S. 867 (1983); *People* v. *McCray*, 57 N. Y. 2d 542, 546-549, 443 N. E. 2d 915, 916-919 (1982), cert. denied, 461 U. S. 961 (1983); *State* v. *Lynch*, 300 N. C. 534, 546-547, 268 S. E. 2d 161, 168-169 (1980). Federal Courts of Appeals also have disagreed over the circumstances under which supervisory power may be used to scrutinize the prosecutor's exercise of peremptory challenges to strike blacks from the venire. Compare *United States* v. *Leslie*, 783 F. 2d 541 (CA5 1986) (en banc), with *United States* v. *Jackson*, 696 F. 2d 578, 592-593 (CA8 1982), cert. denied, 460 U. S. 1073 (1983). See also *United States* v. *McDaniels*, 379 F. Supp. 1243 (ED La. 1974).

exercise peremptory challenges.[2] The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Counsel requested a hearing on his motion. Without expressly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to "strike anybody they want to." The judge then denied petitioner's motion, reasoning that the cross-section requirement applies only to selection of the venire and not to selection of the petit jury itself.

The jury convicted petitioner on both counts. On appeal to the Supreme Court of Kentucky, petitioner pressed, among other claims, the argument concerning the prosecutor's use of peremptory challenges. Conceding that *Swain* v. *Alabama*, *supra*, apparently foreclosed an equal protection claim based solely on the prosecutor's conduct in this case, petitioner urged the court to follow decisions of other States, *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N. E. 2d 499, cert. denied, 444 U. S. 881 (1979), and to hold that such conduct violated his rights under the Sixth Amendment and § 11 of the Kentucky Constitution to a jury drawn from a cross section of the community. Petitioner also contended

[2] The Kentucky Rules of Criminal Procedure authorize the trial court to permit counsel to conduct *voir dire* examination or to conduct the examination itself. Ky. Rule Crim. Proc. 9.38. After jurors have been excused for cause, the parties exercise their peremptory challenges simultaneously by striking names from a list of qualified jurors equal to the number to be seated plus the number of allowable peremptory challenges. Rule 9.36. Since the offense charged in this case was a felony, and an alternate juror was called, the prosecutor was entitled to six peremptory challenges, and defense counsel to nine. Rule 9.40.

that the facts showed that the prosecutor had engaged in a "pattern" of discriminatory challenges in this case and established an equal protection violation under *Swain*.

The Supreme Court of Kentucky affirmed. In a single paragraph, the court declined petitioner's invitation to adopt the reasoning of *People* v. *Wheeler*, *supra*, and *Commonwealth* v. *Soares*, *supra*. The court observed that it recently had reaffirmed its reliance on *Swain*, and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire. See *Commonwealth* v. *McFerron*, 680 S. W. 2d 924 (1984). We granted certiorari, 471 U. S. 1052 (1985), and now reverse.

II

In *Swain* v. *Alabama*, this Court recognized that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." 380 U. S., at 203–204. This principle has been "consistently and repeatedly" reaffirmed, *id.*, at 204, in numerous decisions of this Court both preceding and following *Swain*.[3] We reaffirm the principle today.[4]

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[3] See, *e. g.*, *Strauder* v. *West Virginia*, 100 U. S. 303 (1880); *Neal* v. *Delaware*, 103 U. S. 370 (1881); *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Hollins* v. *Oklahoma*, 295 U. S. 394 (1935) *(per curiam)*; *Pierre* v. *Louisiana*, 306 U. S. 354 (1939); *Patton* v. *Mississippi*, 332 U. S. 463 (1947); *Avery* v. *Georgia*, 345 U. S. 559 (1953); *Hernandez* v. *Texas*, 347 U. S. 475 (1954); *Whitus* v. *Georgia*, 385 U. S. 545 (1967); *Jones* v. *Georgia*, 389 U. S. 24 (1967) *(per curiam)*; *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320 (1970); *Castaneda* v. *Partida*, 430 U. S. 482 (1977); *Rose* v. *Mitchell*, 443 U. S. 545 (1979); *Vasquez* v. *Hillery*, 474 U. S. 254 (1986).

The basic principles prohibiting exclusion of persons from participation in jury service on account of their race "are essentially the same for grand juries and for petit juries." *Alexander* v. *Louisiana*, 405 U. S. 625, 626, n. 3 (1972); see *Norris* v. *Alabama*, *supra*, at 589. These principles are reinforced by the criminal laws of the United States. 18 U. S. C. § 243.

[4] In this Court, petitioner has argued that the prosecutor's conduct violated his rights under the Sixth and Fourteenth Amendments to an impartial jury and to a jury drawn from a cross section of the community. Peti-

A

More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In *Strauder*, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. *Id.*, at 306–307. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in *Strauder* recognized, however, that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." *Id.*, at 305.[5] "The number of our races and nationalities stands in the way of evolution of such a conception" of the demand of equal protection. *Akins* v. *Texas*, 325 U. S. 398, 403 (1945).[6] But the defendant does have the right to be

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tioner has framed his argument in these terms in an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents. On the other hand, the State has insisted that petitioner is claiming a denial of equal protection and that we must reconsider *Swain* to find a constitutional violation on this record. We agree with the State that resolution of petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments.

[5] See *Hernandez* v. *Texas*, *supra*, at 482; *Cassell* v. *Texas*, 339 U. S. 282, 286–287 (1950) (plurality opinion); *Akins* v. *Texas*, 325 U. S. 398, 403 (1945); *Martin* v. *Texas*, 200 U. S. 316, 321 (1906); *Neal* v. *Delaware*, *supra*, at 394.

[6] Similarly, though the Sixth Amendment guarantees that the petit jury will be selected from a pool of names representing a cross section of the community, *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), we have never held

tried by a jury whose members are selected pursuant to nondiscriminatory criteria. *Martin* v. *Texas*, 200 U. S. 316, 321 (1906); *Ex parte Virginia*, 100 U. S. 339, 345 (1880). The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, *Strauder*, *supra*, at 305,[7] or on the false assumption that members of his race as a group are not qualified to serve as jurors, see *Norris* v. *Alabama*, 294 U. S. 587, 599 (1935); *Neal* v. *Delaware*, 103 U. S. 370, 397 (1881).

Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder*, *supra*, at 308; see *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320, 330 (1970). The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968).[8] Those on the ve-

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that the Sixth Amendment requires that "petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population," *id.*, at 538. Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such impossibility is illustrated by the Court's holding that a jury of six persons is not unconstitutional. *Williams* v. *Florida*, 399 U. S. 78, 102–103 (1970).

[7] See *Hernandez* v. *Texas*, *supra*, at 482; *Cassell* v. *Texas*, *supra*, at 287; *Akins* v. *Texas*, *supra*, at 403; *Neal* v. *Delaware*, *supra*, at 394.

[8] See *Taylor* v. *Louisiana*, *supra*, at 530; *Williams* v. *Florida*, *supra*, at 100. See also Powell, Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1 (1966).

In *Duncan* v. *Louisiana*, decided after *Swain*, the Court concluded that the right to trial by jury in criminal cases was such a fundamental feature of the American system of justice that it was protected against state action

nire must be "indifferently chosen,"[9] to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." *Strauder*, *supra*, at 309.

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. See *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 223–224 (1946). A person's race simply "is unrelated to his fitness as a juror." *Id.*, at 227 (Frankfurter, J., dissenting). As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. 100 U. S., at 308; see *Carter* v. *Jury Comm'n of Greene County*, *supra*, at 329–330; *Neal* v. *Delaware*, *supra*, at 386.

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. See *Ballard* v. *United States*, 329 U. S. 187, 195 (1946); *McCray* v. *New York*, 461 U. S. 961, 968 (1983) (MARSHALL, J., dissenting from denial of certiorari). Discrimination within the

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by the Due Process Clause of the Fourteenth Amendment. 391 U. S., at 147–158. The Court emphasized that a defendant's right to be tried by a jury of his peers is designed "to prevent oppression by the Government." *Id.*, at 155, 156–157. For a jury to perform its intended function as a check on official power, it must be a body drawn from the community. *Id.*, at 156; *Glasser* v. *United States*, 315 U. S. 60, 86–88 (1942). By compromising the representative quality of the jury, discriminatory selection procedures make "juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities." *Akins* v. *Texas*, *supra*, at 408 (Murphy, J., dissenting).

[9] 4 W. Blackstone, Commentaries 350 (Cooley ed. 1899) (quoted in *Duncan* v. *Louisiana*, 391 U. S., at 152).

judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Strauder*, 100 U. S., at 308.

B

In *Strauder*, the Court invalidated a state statute that provided that only white men could serve as jurors. *Id.*, at 305. We can be confident that no State now has such a law. The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford "protection against action of the State through its administrative officers in effecting the prohibited discrimination." *Norris* v. *Alabama*, 294 U. S., at 589; see *Hernandez* v. *Texas*, 347 U. S. 475, 478–479 (1954); *Ex parte Virginia*, 100 U. S., at 346–347. Thus, the Court has found a denial of equal protection where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds,[10] and has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors.[11] While decisions of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury. Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, *Hill* v. *Texas*, 316 U. S. 400, 406 (1942), the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at "other stages in the selection process," *Avery* v. *Georgia*, 345 U. S. 559, 562 (1953); see *McCray* v. *New York*, *supra*, at 965, 968

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[10] *E. g.*, *Sims* v. *Georgia*, 389 U. S. 404, 407 (1967) *(per curiam)*; *Whitus* v. *Georgia*, 385 U. S., at 548–549; *Avery* v. *Georgia*, 345 U. S., at 561.

[11] See *Norris* v. *Alabama*, 294 U. S., at 589; *Martin* v. *Texas*, 200 U. S., at 319; *Neal* v. *Delaware*, 103 U. S., at 394, 397.

(MARSHALL, J., dissenting from denial of certiorari); see also *Alexander* v. *Louisiana*, 405 U. S. 625, 632 (1972).

Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause.[12] Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, *United States* v. *Robinson*, 421 F. Supp. 467, 473 (Conn. 1976), mandamus granted *sub nom. United States* v. *Newman*, 549 F. 2d 240 (CA2 1977), the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

III

The principles announced in *Strauder* never have been questioned in any subsequent decision of this Court.

[12] We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.

Nor do we express any views on the techniques used by lawyers who seek to obtain information about the community in which a case is to be tried, and about members of the venire from which the jury is likely to be drawn. See generally J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 183–189 (1977). Prior to *voir dire* examination, which serves as the basis for exercise of challenges, lawyers wish to know as much as possible about prospective jurors, including their age, education, employment, and economic status, so that they can ensure selection of jurors who at least have an open mind about the case. In some jurisdictions, where a pool of jurors serves for a substantial period of time, see *id.*, at 116–118, counsel also may seek to learn which members of the pool served on juries in other cases and the outcome of those cases. Counsel even may employ professional investigators to interview persons who have served on a particular petit jury. We have had no occasion to consider particularly this practice. Of course, counsel's effort to obtain possibly relevant information about prospective jurors is to be distinguished from the practice at issue here.

Rather, the Court has been called upon repeatedly to review the application of those principles to particular facts.[13] A recurring question in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the State. *Whitus* v. *Georgia*, 385 U. S. 545, 550 (1967); *Hernandez* v. *Texas*, *supra*, at 478–481; *Akins* v. *Texas*, 325 U. S., at 403–404; *Martin* v. *Texas*, 200 U. S. 316 (1906). That question also was at the heart of the portion of *Swain* v. *Alabama* we reexamine today.[14]

A

Swain required the Court to decide, among other issues, whether a black defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. 380 U. S., at 209–210. The record in *Swain* showed that the prosecutor

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[13] See, *e. g.*, *Vasquez* v. *Hillery*, 474 U. S. 254 (1986); *Rose* v. *Mitchell*, 443 U. S. 545 (1979); *Castaneda* v. *Partida*, 430 U. S. 482 (1977); *Alexander* v. *Louisiana*, 405 U. S., at 628–629; *Whitus* v. *Georgia*, *supra*, at 549–550; *Swain* v. *Alabama*, 380 U. S. 202, 205 (1965); *Coleman* v. *Alabama*, 377 U. S. 129 (1964); *Norris* v. *Alabama*, 294 U. S., at 589; *Neal* v. *Delaware*, 103 U. S., at 394.

[14] The decision in *Swain* has been the subject of extensive commentary. Some authors have argued that the Court should reconsider the decision. *E. g.*, Van Dyke, *supra*, at 166–167; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L. Rev. 247, 268–270 (1973); Kuhn, Jury Discrimination: The Next Phase, 41 S. Cal. L. Rev. 235, 283–303 (1968); Note, Rethinking Limitations on the Peremptory Challenge, 85 Colum. L. Rev. 1357 (1985); Note, Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race, 39 Miss. L. J. 157 (1967); Comment, *Swain v. Alabama:* A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 Va. L. Rev. 1157 (1966). See also Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611 (1985).

On the other hand, some commentators have argued that we should adhere to *Swain*. See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L. Rev. 337 (1982).

had used the State's peremptory challenges to strike the six black persons included on the petit jury venire. *Id.*, at 210. While rejecting the defendant's claim for failure to prove purposeful discrimination, the Court nonetheless indicated that the Equal Protection Clause placed some limits on the State's exercise of peremptory challenges. *Id.*, at 222–224.

The Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control, *id.*, at 214–220, and the constitutional prohibition on exclusion of persons from jury service on account of race, *id.*, at 222–224. While the Constitution does not confer a right to peremptory challenges, *id.*, at 219 (citing *Stilson* v. *United States*, 250 U. S. 583, 586 (1919)), those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury, 380 U. S., at 219.[15] To preserve the peremptory nature of the prosecutor's challenge, the Court in *Swain* declined to scrutinize his actions in a particular case by relying on a presumption that he properly exercised the State's challenges. *Id.*, at 221–222.

The Court went on to observe, however, that a State may not exercise its challenges in contravention of the Equal Protection Clause. It was impermissible for a prosecutor to use his challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.*, at 224. Accordingly, a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system was "being perverted" in that manner. *Ibid.* For example, an inference of purposeful discrimination would be raised on evidence that a prosecutor, "in case after case, whatever the

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[15] In *Swain*, the Court reviewed the "very old credentials" of the peremptory challenge system and noted the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." 380 U. S., at 219; see *id.*, at 212–219.

circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." *Id.*, at 223. Evidence offered by the defendant in *Swain* did not meet that standard. While the defendant showed that prosecutors in the jurisdiction had exercised their strikes to exclude blacks from the jury, he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case. *Id.*, at 224–228.

A number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause.[16] Since this interpretation of *Swain* has placed on defendants a crippling burden of proof,[17] prosecutors' peremptory challenges are now largely immune

[16] *E. g., United States* v. *Jenkins*, 701 F. 2d 850, 859–860 (CA10 1983); *United States* v. *Boykin*, 679 F. 2d 1240, 1245 (CA8 1982); *United States* v. *Pearson*, 448 F. 2d 1207, 1213–1218 (CA5 1971); *Thigpen* v. *State*, 49 Ala. App. 233, 241, 270 So. 2d 666, 673 (1972); *Jackson* v. *State*, 245 Ark. 331, 336, 432 S. W. 2d 876, 878 (1968); *Johnson* v. *State*, 9 Md. App. 143, 148–150, 262 A. 2d 792, 796–797 (1970); *State* v. *Johnson*, 125 N. J. Super. 438, 311 A. 2d 389 (1973) *(per curiam)*; *State* v. *Shaw*, 284 N. C. 366, 200 S. E. 2d 585 (1973).

[17] See *McCray* v. *Abrams*, 750 F. 2d, at 1120, and n. 2. The lower courts have noted the practical difficulties of proving that the State systematically has exercised peremptory challenges to exclude blacks from the jury on account of race. As the Court of Appeals for the Fifth Circuit observed, the defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges. *United States* v. *Pearson*, 448 F. 2d 1207, 1217 (1971). The court believed this burden to be "most difficult" to meet. *Ibid.* In jurisdictions where court records do not reflect the jurors' race and where *voir dire* proceedings are not transcribed, the burden would be insurmountable. See *People* v. *Wheeler*, 22 Cal. 3d, at 285–286, 583 P. 2d, at 767–768.

from constitutional scrutiny. For reasons that follow, we reject this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause.

B

Since the decision in *Swain*, we have explained that our cases concerning selection of the venire reflect the general equal protection principle that the "invidious quality" of governmental action claimed to be racially discriminatory "must ultimately be traced to a racially discriminatory purpose." *Washington* v. *Davis*, 426 U. S. 229, 240 (1976). As in any equal protection case, the "burden is, of course," on the defendant who alleges discriminatory selection of the venire "to prove the existence of purposeful discrimination." *Whitus* v. *Georgia*, 385 U. S., at 550 (citing *Tarrance* v. *Florida*, 188 U. S. 519 (1903)). In deciding if the defendant has carried his burden of persuasion, a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977). Circumstantial evidence of invidious intent may include proof of disproportionate impact. *Washington* v. *Davis*, 426 U. S., at 242. We have observed that under some circumstances proof of discriminatory impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Ibid.* For example, "total or seriously disproportionate exclusion of Negroes from jury venires," *ibid.*, "is itself such an 'unequal application of the law . . . as to show intentional discrimination,'" *id.*, at 241 (quoting *Akins* v. *Texas*, 325 U. S., at 404).

Moreover, since *Swain*, we have recognized that a black defendant alleging that members of his race have been impermissibly excluded from the venire may make out a prima

facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *Washington* v. *Davis*, *supra*, at 239–242. Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. *Alexander* v. *Louisiana*, 405 U. S., at 632. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. See *Alexander* v. *Louisiana*, *supra*, at 632; *Jones* v. *Georgia*, 389 U. S. 24, 25 (1967). Rather, the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander* v. *Louisiana*, *supra*, at 632; see *Washington* v. *Davis*, *supra*, at 241.[18]

The showing necessary to establish a prima facie case of purposeful discrimination in selection of the venire may be discerned in this Court's decisions. *E. g.*, *Castaneda* v. *Partida*, 430 U. S. 482, 494–495 (1977); *Alexander* v. *Louisiana*, *supra*, at 631–632. The defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment. *Castaneda* v. *Partida*, *supra*, at 494. In combination with that evidence, a defendant may then make a prima facie case by proving that in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time. *Id.*, at 494. Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the "result bespeaks discrimination." *Hernandez* v. *Texas*, 347

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[18] Our decisions concerning "disparate treatment" under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973); *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981); *United States Postal Service Board of Governors* v. *Aikens*, 460 U. S. 711 (1983). The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion. *Texas Dept. of Community Affairs* v. *Burdine*, *supra*, at 252–256.

U. S., at 482; see *Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, at 266.

Since the ultimate issue is whether the State has discriminated in selecting the defendant's venire, however, the defendant may establish a prima facie case "in other ways than by evidence of long-continued unexplained absence" of members of his race "from many panels." *Cassell* v. *Texas*, 339 U. S. 282, 290 (1950) (plurality opinion). In cases involving the venire, this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination." *Whitus* v. *Georgia*, 385 U. S., at 552; see *Castaneda* v. *Partida*, *supra*, at 494; *Washington* v. *Davis*, *supra*, at 241; *Alexander* v. *Louisiana*, *supra*, at 629–631. This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse. When circumstances suggest the need, the trial court must undertake a "factual inquiry" that "takes into account all possible explanatory factors" in the particular case. *Alexander* v. *Louisiana*, *supra*, at 630.

Thus, since the decision in *Swain*, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*. These decisions are in accordance with the proposition, articulated in *Arlington Heights* v. *Metropolitan Housing Development Corp.*, that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." 429 U. S., at 266, n. 14. For evidentiary require-

ments to dictate that "several must suffer discrimination" before one could object, *McCray* v. *New York*, 461 U. S., at 965 (MARSHALL, J., dissenting from denial of certiorari), would be inconsistent with the promise of equal protection to all.[19]

C

The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since *Swain*. See *Castaneda* v. *Partida*, *supra*, at 494–495; *Washington* v. *Davis*, 426 U. S., at 241–242; *Alexander* v. *Louisiana*, *supra*, at 629–631. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda* v. *Partida*, *supra*, at 494, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery* v. *Georgia*, 345 U. S., at 562. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circum-

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[19] Decisions under Title VII also recognize that a person claiming that he has been the victim of intentional discrimination may make out a prima facie case by relying solely on the facts concerning the alleged discrimination against him. See cases in n. 18, *supra*.

stances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. See *McCray* v. *Abrams*, 750 F. 2d, at 1132; *Booker* v. *Jabe*, 775 F. 2d 762, 773 (CA6 1985), cert. pending, No. 85-1028. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race. Cf. *Norris* v. *Alabama*, 294 U. S., at 598-599; see *Thompson* v. *United States*, 469 U. S. 1024, 1026 (1984) (BRENNAN, J., dissenting from denial of certiorari). Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, *supra*, at 86, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of

such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." *Alexander* v. *Louisiana*, 405 U. S., at 632. If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement." *Norris* v. *Alabama*, *supra*, at 598. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.[20] The trial court then will have the duty to determine if the defendant has established purposeful discrimination.[21]

IV

The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. Conceding that the Constitution does not guarantee a right to peremptory challenges and that *Swain* did state that their use ultimately is subject to the strictures of equal protection, the State argues that the privilege of unfettered exercise of the challenge is of vital importance to the criminal justice system.

While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the

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[20] The Court of Appeals for the Second Circuit observed in *McCray* v. *Abrams*, 750 F. 2d, at 1132, that "[t]here are any number of bases" on which a prosecutor reasonably may believe that it is desirable to strike a juror who is not excusable for cause. As we explained in another context, however, the prosecutor must give a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S., at 258.

[21] In a recent Title VII sex discrimination case, we stated that "a finding of intentional discrimination is a finding of fact" entitled to appropriate deference by a reviewing court. *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985). Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. *Id.*, at 575–576.

contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state and federal court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice.[22] In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens,[23] and the peremptory challenge system has survived. We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.[24]

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[22] While we respect the views expressed in JUSTICE MARSHALL's concurring opinion concerning prosecutorial and judicial enforcement of our holding today, we do not share them. The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race. We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes. Certainly, this Court may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination. Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution.

[23] For example, in *People* v. *Hall*, 35 Cal. 3d 161, 672 P. 2d 854 (1983), the California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years earlier, were burdensome for trial judges.

[24] In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how

V

In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. *E. g., Whitus* v. *Georgia*, 385 U. S., at 549–550; *Hernandez* v. *Texas*, 347 U. S., at 482; *Patton* v. *Mississippi*, 332 U. S., at 469.[25]

It is so ordered.

JUSTICE WHITE, concurring.

The Court overturns the principal holding in *Swain* v. *Alabama*, 380 U. S. 202 (1965), that the Constitution does not require in any given case an inquiry into the prosecutor's reasons for using his peremptory challenges to strike blacks from the petit jury panel in the criminal trial of a black defendant and that in such a case it will be presumed that the prosecutor is acting for legitimate trial-related reasons. The Court now rules that such use of peremptory challenges in a given case may, but does not necessarily, raise an inference, which the prosecutor carries the burden of refuting,

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best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, see *Booker* v. *Jabe*, 775 F. 2d, at 773, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire, see *United States* v. *Robinson*, 421 F. Supp. 467, 474 (Conn. 1976), mandamus granted *sub nom. United States* v. *Newman*, 549 F. 2d 240 (CA2 1977).

[25] To the extent that anything in *Swain* v. *Alabama*, 380 U. S. 202 (1965), is contrary to the principles we articulate today, that decision is overruled.

that his strikes were based on the belief that no black citizen could be a satisfactory juror or fairly try a black defendant.

I agree that, to this extent, *Swain* should be overruled. I do so because *Swain* itself indicated that the presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that over a period of time the prosecution had consistently excluded blacks from petit juries.* This should have warned prosecutors that using peremptories to exclude blacks on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause.

It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs. If the defendant objects, the judge, in whom the Court puts considerable trust, may determine that the prosecution must respond. If not persuaded otherwise, the judge may conclude that the challenges rest on the belief that blacks could not fairly try a black defendant. This, in effect, attributes to the prosecutor the view that all blacks should be eliminated from the entire venire. Hence, the Court's prior cases dealing with jury venires rather than petit juries are not without relevance in this case.

The Court emphasizes that using peremptory challenges to strike blacks does not end the inquiry; it is not unconstitutional, without more, to strike one or more blacks from the jury. The judge may not require the prosecutor to respond at all. If he does, the prosecutor, who in most cases has had a chance to *voir dire* the prospective jurors, will have an opportunity to give trial-related reasons for his strikes—

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*Nor would it have been inconsistent with *Swain* for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant.

some satisfactory ground other than the belief that black jurors should not be allowed to judge a black defendant.

Much litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid. But I agree with the Court that the time has come to rule as it has, and I join its opinion and judgment.

I would, however, adhere to the rule announced in *DeStefano* v. *Woods*, 392 U. S. 631 (1968), that *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), which held that the States cannot deny jury trials in serious criminal cases, did not require reversal of a state conviction for failure to grant a jury trial where the trial began prior to the date of the announcement in the *Duncan* decision. The same result was reached in *DeStefano* with respect to the retroactivity of *Bloom* v. *Illinois*, 391 U. S. 194 (1968), as it was in *Daniel* v. *Louisiana*, 420 U. S. 31 (1975) *(per curiam)*, with respect to the decision in *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), holding that the systematic exclusion of women from jury panels violated the Sixth and Fourteenth Amendments.

JUSTICE MARSHALL, concurring.

I join JUSTICE POWELL's eloquent opinion for the Court, which takes a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries. The Court's opinion cogently explains the pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Protection Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice . . . sit supinely by" and be flouted in case after case before a remedy is available.[1] I nonetheless write separately to express my views. The decision today will not end the racial discrimina-

[1] *Commonwealth* v. *Martin*, 461 Pa. 289, 299, 336 A. 2d 290, 295 (1975) (Nix, J., dissenting), quoted in *McCray* v. *New York*, 461 U. S. 961, 965, n. 2 (1983) (MARSHALL, J., dissenting from denial of certiorari).

tion that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

I

A little over a century ago, this Court invalidated a state statute providing that black citizens could not serve as jurors. *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). State officials then turned to somewhat more subtle ways of keeping blacks off jury venires. See *Swain* v. *Alabama*, 380 U. S. 202, 231–238 (1965) (Goldberg, J., dissenting); Kuhn, Jury Discrimination: The Next Phase, 41 S. Cal. L. Rev. 235 (1968); see also J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 155–157 (1977) (hereinafter Van Dyke). Although the means used to exclude blacks have changed, the same pernicious consequence has continued.

Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that practice, but the few cases setting out such figures are instructive. See *United States* v. *Carter*, 528 F. 2d 844, 848 (CA8 1975) (in 15 criminal cases in 1974 in the Western District of Missouri involving black defendants, prosecutors peremptorily challenged 81% of black jurors), cert. denied, 425 U. S. 961 (1976); *United States* v. *McDaniels*, 379 F. Supp. 1243 (ED La. 1974) (in 53 criminal cases in 1972–1974 in the Eastern District of Louisiana involving black defendants, federal prosecutors used 68.9% of their peremptory challenges against black jurors, who made up less than one-quarter of the venire); *McKinney* v. *Walker*, 394 F. Supp. 1015, 1017–1018 (SC 1974) (in 13 criminal trials in 1970–1971 in Spartansburg County, South Carolina, involving black defendants, prosecutors peremptorily challenged 82% of black jurors), affirmance order, 529 F. 2d 516 (CA4 1975).[2] Pros-

[2] See also *Harris* v. *Texas*, 467 U. S. 1261 (1984) (MARSHALL, J., dissenting from denial of certiorari); *Williams* v. *Illinois*, 466 U. S. 981 (1984) (MARSHALL, J., dissenting from denial of certiorari).

ecutors have explained to courts that they routinely strike black jurors, see *State* v. *Washington*, 375 So. 2d 1162, 1163–1164 (La. 1979). An instruction book used by the prosecutor's office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate "'any member of a minority group.'"[3] In 100 felony trials in Dallas County in 1983–1984, prosecutors peremptorily struck 405 out of 467 eligible black jurors; the chance of a qualified black sitting on a jury was 1 in 10, compared to 1 in 2 for a white.[4]

The Court's discussion of the utter unconstitutionality of that practice needs no amplification. This Court explained more than a century ago that "'in the selection of jurors to pass upon [a defendant's] life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.'" *Neal* v. *Delaware*, 103 U. S. 370, 394 (1881), quoting *Virginia* v. *Rives*, 100 U. S. 313, 323 (1880). JUSTICE REHNQUIST, dissenting, concedes that exclusion of blacks from a jury, solely because they are black, is at best based upon "crudely stereotypical and . . . in many cases hopelessly mistaken" notions. *Post*, at 138. Yet the Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes—even an action that does not serve the State's interests. Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks

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[3] Van Dyke, at 152, quoting Texas Observer, May 11, 1973, p. 9, col. 2. An earlier jury-selection treatise circulated in the same county instructed prosecutors: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated." Quoted in Dallas Morning News, Mar. 9, 1986, p. 29, col. 1.

[4] *Id.*, at 1, col. 1; see also Comment, A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process, 18 St. Louis U. L. J. 662 (1974).

lack the "intelligence, experience, or moral integrity," *Neal, supra*, at 397, to be entrusted with that role.

II

I wholeheartedly concur in the Court's conclusion that use of the peremptory challenge to remove blacks from juries, on the basis of their race, violates the Equal Protection Clause. I would go further, however, in fashioning a remedy adequate to eliminate that discrimination. Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.

Evidentiary analysis similar to that set out by the Court, *ante*, at 97–98, has been adopted as a matter of state law in States including Massachusetts and California. Cases from those jurisdictions illustrate the limitations of the approach. First, defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case. This means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race. See *Commonwealth* v. *Robinson*, 382 Mass. 189, 195, 415 N. E. 2d 805, 809–810 (1981) (no prima facie case of discrimination where defendant is black, prospective jurors include three blacks and one Puerto Rican, and prosecutor excludes one for cause and strikes the remainder peremptorily, producing all-white jury); *People* v. *Rousseau*, 129 Cal. App. 3d 526, 536–537, 179 Cal. Rptr. 892, 897–898 (1982) (no prima facie case where prosecutor peremptorily strikes only two blacks on jury panel). Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an "acceptable" level.

Second, when a defendant can establish a prima facie case, trial courts face the difficult burden of assessing prosecutors' motives. See *King* v. *County of Nassau*, 581 F. Supp. 493,

501–502 (EDNY 1984). Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, see *People* v. *Hall*, 35 Cal. 3d 161, 672 P. 2d 854 (1983), or seemed "uncommunicative," *King*, *supra*, at 498, or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case," *Hall*, *supra*, at 165, 672 P. 2d, at 856? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Nor is outright prevarication by prosecutors the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." *King*, *supra*, at 502. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As JUSTICE REHNQUIST concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. *Post*, at 138; see also THE CHIEF JUSTICE's dissenting opinion, *post*, at 123. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet. It is worth remembering that "114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in

our society as a whole." *Rose* v. *Mitchell*, 443 U. S. 545, 558–559 (1979), quoted in *Vasquez* v. *Hillery*, 474 U. S. 254, 264 (1986).

III

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. See Van Dyke, at 167–169; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L. Rev. 247, 269–270 (1973). Justice Goldberg, dissenting in *Swain*, emphasized that "[w]ere it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former." 380 U. S., at 244. I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory challenges entirely in criminal cases.

Some authors have suggested that the courts should ban prosecutors' peremptories entirely, but should zealously guard the defendant's peremptory as "essential to the fairness of trial by jury," *Lewis* v. *United States*, 146 U. S. 370, 376 (1892), and "one of the most important of the rights secured to the accused," *Pointer* v. *United States*, 151 U. S. 396, 408 (1894). See Van Dyke, at 167; Brown, McGuire, & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 New England L. Rev. 192 (1978). I would not find that an acceptable solution. Our criminal justice system "requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887). We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of

peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptory as well.

Much ink has been spilled regarding the historic importance of defendants' peremptory challenges. The approving comments of the *Lewis* and *Pointer* Courts are noted above; the *Swain* Court emphasized the "very old credentials" of the peremptory challenge, 380 U. S., at 212, and cited the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Id.*, at 219. But this Court has also repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial. *Frazier* v. *United States*, 335 U. S. 497, 505, n. 11 (1948); *United States* v. *Wood*, 299 U. S. 123, 145 (1936); *Stilson* v. *United States*, 250 U. S. 583, 586 (1919); see also *Swain*, 380 U. S., at 219. The potential for racial prejudice, further, inheres in the defendant's challenge as well. If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay.

I applaud the Court's holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause, and I join the Court's opinion. However, only by banning peremptories entirely can such discrimination be ended.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, concurring.

In his dissenting opinion, THE CHIEF JUSTICE correctly identifies an apparent inconsistency between my criticism of the Court's action in *Colorado* v. *Connelly*, 474 U. S. 1050 (1986) (memorandum of BRENNAN, J., joined by STEVENS, J.), and *New Jersey* v. *T. L. O.*, 468 U. S. 1214 (1984) (STEVENS, J., dissenting)—cases in which the Court directed the State to brief and argue questions not presented in its petition

for certiorari—and our action today in finding a violation of the Equal Protection Clause despite the failure of petitioner's counsel to rely on that ground of decision. *Post*, at 115–116, nn. 1 and 2. In this case, however—unlike *Connelly* and *T. L. O.*—the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance. In defending the Kentucky Supreme Court's judgment, Kentucky's Assistant Attorney General emphasized the State's position on the centrality of the equal protection issue:

> ". . . Mr. Chief Justice, and may it please the Court, the issue before this Court today is simply whether Swain versus Alabama should be reaffirmed. . . .
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> . . . . .
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> ". . . We believe that it is the Fourteenth Amendment that is the item that should be challenged, and presents perhaps an address to the problem. Swain dealt primarily with the use of peremptory challenges to strike individuals who were of a cognizable or identifiable group.
>
> "Petitioners show no case other than the State of California's case dealing with the use of peremptories wherein the Sixth Amendment was cited as authority for resolving the problem. So, we believe that the Fourteenth Amendment is indeed the issue. That was the guts and primarily the basic concern of Swain.
>
> . . . . .
>
> "In closing, we believe that the trial court of Kentucky and the Supreme Court of Kentucky have firmly embraced Swain, and we respectfully request that this Court affirm the opinion of the Kentucky court as well as to reaffirm Swain versus Alabama."[1]

In addition to the party's reliance on the equal protection argument in defense of the judgment, several *amici curiae*

[1] Tr. of Oral Arg. 27–28, 43.

also addressed that argument. For instance, the argument in the brief filed by the Solicitor General of the United States begins:

> "PETITIONER DID NOT ESTABLISH THAT HE WAS DEPRIVED OF A PROPERLY CONSTITUTED PETIT JURY OR DENIED EQUAL PROTECTION OF THE LAWS
>
> "A. Under *Swain* v. *Alabama* A Defendant Cannot Establish An Equal Protection Violation By Showing Only That Black Veniremen Were Subjected To Peremptory Challenge By The Prosecution In His Case"[2]

Several other *amici* similarly emphasized this issue.[3]

In these circumstances, although I suppose it is possible that reargument might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years,[4] I believe the Court acts wisely in

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[2] Brief for United States as *Amicus Curiae* 7.

[3] The argument section of the brief for the National District Attorneys Association, Inc., as *amicus curiae* in support of respondent begins as follows:

"This Court should conclude that the prosecutorial peremptory challenges exercised in this case were proper under the fourteenth amendment equal protection clause and the sixth amendment. This Court should further determine that there is no constitutional need to change or otherwise modify this Court's decision in *Swain* v. *Alabama*." *Id.*, at 5.

Amici supporting the petitioner also emphasized the importance of the equal protection issue. See, *e. g.*, Brief for NAACP Legal Defense and Educational Fund, American Jewish Committee, and American Jewish Congress as *Amici Curiae* 24–36; Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* 11–17; Brief for Elizabeth Holtzman as *Amicus Curiae* 13.

[4] See *McCray* v. *New York*, 461 U. S. 961 (1983) (opinion of STEVENS, J., respecting denial of certiorari); *id.*, at 963 (MARSHALL, J., dissenting from denial of certiorari).

The eventual federal habeas corpus disposition of *McCray*, of course, proved to be one of the landmark cases that made the issues in this case

resolving the issue now on the basis of the arguments that have already been fully presented without any special invitation from this Court.[5]

JUSTICE O'CONNOR, concurring.

I concur in the Court's opinion and judgment, but also agree with the views of THE CHIEF JUSTICE and JUSTICE WHITE that today's decision does not apply retroactively.

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ripe for review. *McCray* v. *Abrams*, 750 F. 2d 1113 (CA2 1984), cert. pending, No. 84-1426. See also Batson's cert. petition, 5-7 (relying heavily on *McCray* as a reason for review). In *McCray*, as in almost all opinions that have considered similar challenges, the Court of Appeals for the Second Circuit explicitly addressed the equal protection issue and the viability of *Swain*. 750 F. 2d, at 1118-1124. The pending petition for certiorari in *McCray* similarly raises the equal protection question that has long been central to this issue. Pet. for Cert. in No. 84-1426 (Question 2). Indeed, shortly after agreeing to hear *Batson*, the Court was presented with a motion to consolidate *McCray* and *Batson*, and consider the cases together. Presumably because the Court believed that *Batson* adequately presented the issues with which other courts had consistently grappled in considering this question, the Court denied the motion. See *Abrams* v. McCray, 471 U. S. 1097 (1985). Cf. *ibid.* (BRENNAN, MARSHALL, and STEVENS, JJ., dissenting from denial of motion to consolidate).

[5] Although I disagree with his criticism of the Court in this case, I fully subscribe to THE CHIEF JUSTICE's view, expressed today, that the Court should only address issues necessary to the disposition of the case or petition. For contrasting views, see, *e. g.*, *Bender* v. *Williamsport School Dist.*, 475 U. S. 534, 551 (1986) (BURGER, C. J., dissenting) (addressing merits even though majority of the Court has found a lack of standing); *Colorado* v. *Nunez*, 465 U. S. 324 (1984) (concurring opinion, joined by BURGER, C. J.) (expressing view on merits even though writ is dismissed as improvidently granted because state-court judgment rested on adequate and independent state grounds); *Florida* v. *Casal*, 462 U. S. 637, 639 (1983) (BURGER, C. J., concurring) (agreeing with Court that writ should be dismissed as improvidently granted because judgment rests on adequate and independent state grounds, but noting that "the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement"). See also *Colorado* v. *Connelly*, 474 U. S. 1050 (1986) (ordering parties to address issue that neither party raised); *New Jersey* v. *T. L. O.*, 468 U. S. 1214 (1984) (same).

CHIEF JUSTICE BURGER, joined by JUSTICE REHNQUIST, dissenting.

We granted certiorari to decide whether petitioner was tried "in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community." Pet. for Cert. i.

I

Today the Court sets aside the peremptory challenge, a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years. It does so on the basis of a constitutional argument that was rejected, without a single dissent, in *Swain* v. *Alabama*, 380 U. S. 202 (1965). Reversal of such settled principles would be unusual enough on its own terms, for only three years ago we said that "*stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 420 (1983). What makes today's holding truly extraordinary is that it is based on a constitutional argument that the petitioner has *expressly* declined to raise, both in this Court and in the Supreme Court of Kentucky.

In the Kentucky Supreme Court, petitioner disclaimed specifically any reliance on the Equal Protection Clause of the Fourteenth Amendment, pressing instead only a claim based on the Sixth Amendment. See Brief for Appellant 14 and Reply Brief for Appellant 1 in No. 84–SC–733–MR (Ky.). As petitioner explained at oral argument here: "We have not made an equal protection claim. . . . We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such." Tr. of Oral Arg. 6–7. Petitioner has not suggested any barrier prevented raising an equal protection claim in the Kentucky courts. In such circumstances, review of an equal protection argument is im-

proper in this Court: "'The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions . . . .'" *Illinois* v. *Gates*, 459 U. S. 1028, 1029, n. 2 (1982) (STEVENS, J., dissenting) (quoting *Cardinale* v. *Louisiana*, 394 U. S. 437, 438 (1969)). Neither the Court nor JUSTICE STEVENS offers any justification for departing from this time-honored principle, which dates to *Owings* v. *Norwood's Lessee*, 5 Cranch 344 (1809), and *Crowell* v. *Randell*, 10 Pet. 368 (1836).

Even if the equal protection issue had been pressed in the Kentucky Supreme Court, it has surely not been pressed here. This provides an additional and completely separate procedural novelty to today's decision. Petitioner's "question presented" involved only the "constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community." Pet. for Cert. i. These provisions are found in the Sixth Amendment, not the Equal Protection Clause of the Fourteenth Amendment relied upon by the Court. In his brief on the merits, under a heading distinguishing equal protection cases, petitioner noted "the irrelevance of the *Swain* analysis to the present case," Brief for Petitioner 11; instead petitioner relied solely on Sixth Amendment analysis found in cases such as *Taylor* v. *Louisiana*, 419 U. S. 522 (1975). During oral argument, counsel for petitioner was pointedly asked:

> "QUESTION: Mr. Niehaus, Swain was an equal protection challenge, was it not?
>
> "MR. NIEHAUS: Yes.
>
> "QUESTION: Your claim here is based solely on the Sixth Amendment?
>
> "MR. NIEHAUS: Yes.
>
> "QUESTION: Is that correct?
>
> "MR. NIEHAUS: That is what we are arguing, yes.

"QUESTION: You are not asking for a reconsideration of Swain, and you are making no equal protection claim here. Is that correct?

"MR. NIEHAUS: We have not made an equal protection claim. I think that Swain will have to be reconsidered to a certain extent if only to consider the arguments that are made on behalf of affirmance by the respondent and the solicitor general.

. . . . .

"MR. NIEHAUS: We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such. . . ." Tr. of Oral Arg. 5–7.

A short time later, after discussing the difficulties attendant with a Sixth Amendment claim, the following colloquy occurred:

"QUESTION: So I come back again to my question why you didn't attack Swain head on, but I take it if the Court were to overrule Swain, you wouldn't like that result.

"MR. NIEHAUS: Simply overrule Swain without adopting the remedy?

"QUESTION: Yes.

"MR. NIEHAUS: I do not think that would give us much comfort, Your Honor, no.

"QUESTION: That is a concession." *Id.*, at 10.

Later, petitioner's counsel refused to answer the Court's questions concerning the implications of a holding based on equal protection concerns:

"MR. NIEHAUS: . . . [T]here is no state action involved where the defendant is exercising his peremptory challenge.

"QUESTION: But there might be under an equal protection challenge if it is the state system that allows that kind of a strike.

"MR. NIEHAUS: I believe that is possible. I am really not prepared to answer that specific question. . . ." *Id.*, at 20.

In reaching the equal protection issue despite petitioner's clear refusal to present it, the Court departs dramatically from its normal procedure without any explanation. When we granted certiorari, we could have—as we sometimes do—directed the parties to brief the equal protection question in addition to the Sixth Amendment question. See, *e. g.*, *Paris Adult Theatre I* v. *Slaton*, 408 U. S. 921 (1972); *Colorado* v. *Connelly*, 474 U. S. 1050 (1986).[1] Even following oral argument, we could have—as we sometimes do—directed reargument on this particular question. See, *e. g.*, *Brown* v. *Board of Education*, 345 U. S. 972 (1953); *Illinois* v. *Gates*, 459 U. S. 1028 (1982); *New Jersey* v. *T. L. O.*, 468 U. S. 1214 (1984).[2] This step is particularly appropriate where re-

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[1] In *Colorado* v. *Connelly*, JUSTICE BRENNAN, joined by JUSTICE STEVENS, filed a memorandum objecting to this briefing of an additional question, explaining that "it is hardly for this Court to 'second chair' the prosecutor to alter his strategy or guard him from mistakes. Under this Court's Rule 21.1(a), '[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court.' Given petitioner's express disclaimer that [this] issue is presented, that question obviously is not 'fairly included' in the question submitted. The Court's direction that the parties address it anyway makes meaningless in this case the provisions of this Rule and is plainly cause for concern, particularly since it is clear that a similar dispensation would not be granted a criminal defendant, however strong his claim." 474 U. S., at 1052. If the Court's limited step of directing briefing on an additional point at the time certiorari was granted was "cause for concern," I would think *a fortiori* that the far more expansive action the Court takes today would warrant similar concern.

[2] JUSTICE STEVENS, joined by JUSTICE BRENNAN and JUSTICE MARSHALL, dissented from the order directing reargument in *New Jersey* v. *T. L. O.* They explained:

"The single question presented to the Court has now been briefed and argued. Evidently unable or unwilling to decide the question presented

examination of a prior decision is under consideration. See, *e. g.*, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 468 U. S. 1213 (1984) (directing reargument and briefing on issue of whether *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), should be reconsidered); *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 422 U. S. 1005 (1975) (directing reargument and briefing on issue of whether the holding in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398 (1964), should be reconsidered). Alternatively, we could have simply dismissed this petition as improvidently granted.

The Court today rejects these accepted courses of action, choosing instead to reverse a 21-year-old unanimous constitutional holding of this Court on the basis of constitutional arguments expressly disclaimed by petitioner. The only explanation for this action is found in JUSTICE STEVENS' concurrence. JUSTICE STEVENS apparently believes that this issue is properly before the Court because "the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance." *Ante*, at 109. Cf. *Illinois* v. *Gates*, *supra*, at 1029, n. 1 (STEVENS, J., dissenting) ("[T]here is no impediment to presenting a new argument as an alternative basis for *affirming* the decision below") (emphasis in original). To be sure, respondent and supporting *amici* did cite *Swain* and the Equal Protection Clause. But their arguments were largely limited to ex-

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by the parties, the Court, instead of dismissing the writ of certiorari as improvidently granted, orders reargument directed to the questions that [petitioner] decided not to bring here. . . . Volunteering unwanted advice is rarely a wise course of action.

. . . . . .

"I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review." 468 U. S., at 1215–1216.

JUSTICE STEVENS' proffered explanation notwithstanding, see *ante*, at 109 (STEVENS, J., concurring), I am at a loss to discern how one can consistently hold these views and still reach the question the Court reaches today.

plaining that *Swain* placed a negative gloss on the Sixth Amendment claim actually raised by petitioner. In any event, it is a strange jurisprudence that looks to the arguments made by respondent to determine the breadth of the questions presented for our review by petitioner. Of course, such a view is directly at odds with our Rule 21.1(a), which provides that "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." JUSTICE STEVENS does not cite, and I am not aware of, *any* case in this Court's nearly 200-year history where the alternative grounds urged by respondent to affirm a judgment were then seized upon to permit petitioner to obtain relief from that very judgment despite petitioner's failure to urge that ground.

JUSTICE STEVENS also observes that several *amici curiae* address the equal protection argument. *Ante*, at 109–110, and n. 3. But I thought it well settled that, even if a "point is made in an *amicus curiae* brief," if the claim "has never been advanced by petitioners . . . we have no reason to pass upon it." *Knetsch* v. *United States*, 364 U. S. 361, 370 (1960).

When objections to peremptory challenges were brought to this Court three years ago, JUSTICE STEVENS agreed with JUSTICE MARSHALL that the challenge involved "a significant and recurring question of constitutional law." *McCray* v. *New York*, 461 U. S. 961, 963 (1983) (MARSHALL, J., dissenting from denial of certiorari), referred to with approval, *id.*, at 961 (STEVENS, J., respecting the denial of certiorari). Nonetheless, JUSTICE STEVENS wrote that the issue could be dealt with "more wisely at a later date." *Id.*, at 962. The same conditions exist here today. JUSTICE STEVENS concedes that reargument of this case "might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years." *Ante*, at 110. Thus, at bottom his position is that we should overrule an extremely important prior constitutional decision of this Court on a claim not advanced here, even though briefing and oral

argument on this claim might convince us to do otherwise.[3] I believe that "[d]ecisions made in this manner are unlikely to withstand the test of time." *United States* v. *Leon*, 468 U. S. 897, 962 (1984) (STEVENS, J., dissenting). Before contemplating such a holding, I would at least direct reargument and briefing on the issue of whether the equal protection holding in *Swain* should be reconsidered.

II

Because the Court nonetheless chooses to decide this case on the equal protection grounds not presented, it may be useful to discuss this issue as well. The Court acknowledges, albeit in a footnote, the "'very old credentials'" of the peremptory challenge and the "'widely held belief that peremptory challenge is a necessary part of trial by jury.'" *Ante*, at 91, n. 15 (quoting *Swain*, 380 U. S., at 219). But proper resolution of this case requires more than a nodding reference to the purpose of the challenge. Long ago it was

[3] This fact alone distinguishes the cases cited by JUSTICE STEVENS as support for today's unprecedented action. See *ante*, at 111, n. 5. In *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 551 (1986) (BURGER, C. J., dissenting), *Colorado* v. *Nunez*, 465 U. S. 324 (1984) (WHITE, J., concurring), and *Florida* v. *Casal*, 462 U. S. 637, 639 (1983) (BURGER, C. J., concurring), the issues discussed were all the primary issues advanced, briefed, and argued by the petitioners in this Court or related directly to the Court's basis for deciding the case. To be sure, some of the discussion in these separate statements might be parsimoniously viewed as "[un]necessary to the disposition of the case or petition." *Ante*, at 111, n. 5. But under this approach, many dissenting opinions and dissents from the denial of certiorari would have to be condemned as well. More important, in none of these separate statements was it even suggested that it would be proper to overturn a state-court judgment on issues that had not been briefed and argued by petitioner in this Court, as the Court does today. Finally, in *Colorado* v. *Connelly*, 474 U. S. 1050 (1986), and *New Jersey* v. *T. L. O.*, 468 U. S. 1214 (1984), we directed briefing and argument on particular questions before deciding them. Such a procedure serves the desirable end of ensuring that the issues which the Court wishes to consider will be fully briefed and argued. My suggestion that the Court hear reargument of this case serves the same end.

recognized that "[t]he right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial." W. Forsyth, History of Trial by Jury 175 (1852). The peremptory challenge has been in use without scrutiny into its basis for nearly as long as juries have existed. "It was in use amongst the Romans in criminal cases, and the *Lex Servilia* (B.C. 104) enacted that the accuser and the accused should severally propose one hundred *judices*, and that each might reject fifty from the list of the other, so that one hundred would remain to try the alleged crime." *Ibid.;* see also J. Pettingal, An Enquiry into the Use and Practice of Juries Among the Greeks and Romans 115, 135 (1769).

In *Swain* JUSTICE WHITE traced the development of the peremptory challenge from the early days of the jury trial in England:

> "In all trials for felonies at common law, the defendant was allowed to challenge peremptorily 35 jurors, and the prosecutor originally had a right to challenge any number of jurors without cause, a right which was said to tend to 'infinite delayes and danger.' Coke on Littleton 156 (14th ed. 1791). Thus The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), provided that if 'they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain.' So persistent was the view that a proper jury trial required peremptories on both sides, however, that the statute was construed to allow the prosecution to direct any juror after examination to 'stand aside' until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number. Peremptories on both sides became the settled law of England, continuing in the above form until after the separation of the Colonies." 380 U. S., at 212–213 (footnotes omitted).

Peremptory challenges have a venerable tradition in this country as well:

> "In the federal system, Congress early took a part of the subject in hand in establishing that the defendant was entitled to 35 peremptories in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death, 1 Stat. 119 (1790). In regard to trials for other offenses without the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear. . . .
>
> "The course in the States apparently paralleled that in the federal system. The defendant's right of challenge was early conferred by statute, the number often corresponding to the English practice, the prosecution was thought to have retained the Crown's common-law right to stand aside, and by 1870, most if not all, States had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant." *Id.*, at 214–216 (footnotes omitted).

The Court's opinion, in addition to ignoring the teachings of history, also contrasts with *Swain* in its failure to even discuss the rationale of the peremptory challenge. *Swain* observed:

> "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed for them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high function in the best way, "justice must satisfy the appearance of justice."'" *Id.*, at 219 (quoting *In re Murchison*, 349 U. S. 133, 136 (1955)).

Permitting unexplained peremptories has long been regarded as a means to strengthen our jury system in other ways as well. One commentator has recognized:

> "The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes. . . . Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable and open to compromise. . . . [For example,] [a]lthough experience reveals that black males as a class can be biased against young alienated blacks who have not tried to join the middle class, to enunciate this in the concrete expression required of a challenge for cause is societally divisive. Instead we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not." Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan. L. Rev. 545, 553–554 (1975).

For reasons such as these, this Court concluded in *Swain* that "the [peremptory] challenge is 'one of the most important of the rights'" in our justice system. *Swain*, 380 U. S., at 219 (quoting *Pointer* v. *United States*, 151 U. S. 396, 408 (1894)). For close to a century, then, it has been settled that "[t]he denial or impairment of the right is reversible error without a showing of prejudice." *Swain*, *supra*, at 219 (citing *Lewis* v. *United States*, 146 U. S. 370 (1892)).

Instead of even considering the history or function of the peremptory challenge, the bulk of the Court's opinion is spent recounting the well-established principle that intentional exclusion of racial groups from jury venires is a

violation of the Equal Protection Clause. I too reaffirm that principle, which has been a part of our constitutional tradition since at least *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). But if today's decision is nothing more than mere "application" of the "principles announced in *Strauder*," as the Court maintains, *ante*, at 89–90, some will consider it curious that the application went unrecognized for over a century. The Court in *Swain* had no difficulty in unanimously concluding that cases such as *Strauder* did not require inquiry into the basis for a peremptory challenge. See *post*, at 135–137 (REHNQUIST, J., dissenting). More recently we held that "[d]efendants are not entitled to a jury of any particular composition . . . ." *Taylor* v. *Louisiana*, 419 U. S., at 538.

A moment's reflection quickly reveals the vast differences between the racial exclusions involved in *Strauder* and the allegations before us today:

> "Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) . . . has made the general determination that those excluded are unfit to try *any* case. Exercise of the peremptory challenge, by contrast, represents the discrete decision, made by one of two or more opposed *litigants* in the trial phase of our adversary system of justice, that the challenged venireperson will likely be more unfavorable to that litigant in that *particular case* than others on the same venire.
>
> "Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclusion bespeaks *a priori* across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular

isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its *inferiority*, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not." *United States* v. *Leslie*, 783 F. 2d 541, 554 (CA5 1986) (en banc).

Unwilling to rest solely on jury venire cases such as *Strauder*, the Court also invokes general equal protection principles in support of its holding. But peremptory challenges are often lodged, of necessity, for reasons "normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." *Swain*, *supra*, at 220. Moreover, in making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch. The process can not be indicted on the sole basis that such decisions are made on the basis of "assumption" or "intuitive judgment." *Ante*, at 97. As a result, unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum "rationality" in government actions has no application to "'an arbitrary and capricious right,'" *Swain*, *supra*, at 219 (quoting *Lewis* v. *United States*, *supra*, at 378); a constitutional principle that may invalidate state action on the basis of "stereotypic notions," *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 725 (1982), does not explain the breadth of a procedure exercised on the "'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.'" *Lewis*, *supra*, at 376 (quoting 4 W. Blackstone, Commentaries *353).

That the Court is not applying conventional equal protection analysis is shown by its limitation of its new rule to allegations of impermissible challenge *on the basis of race;* the

Court's opinion clearly contains such a limitation. See *ante*, at 96 (to establish a prima facie case, "the defendant first must show that he is a member of a cognizable *racial group*") (emphasis added); *ibid.* ("[F]inally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury *on account of their race*") (emphasis added). But if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, *Craig* v. *Boren*, 429 U. S. 190 (1976); age, *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307 (1976); religious or political affiliation, *Karcher* v. *Daggett*, 462 U. S. 725, 748 (1983) (STEVENS, J., concurring); mental capacity, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); number of children, *Dandridge* v. *Williams*, 397 U. S. 471 (1970); living arrangements, *Department of Agriculture* v. *Moreno*, 413 U. S. 528 (1973); and employment in a particular industry, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456 (1981), or profession, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955).[4]

In short, it is quite probable that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a "classification" subject to equal protection scrutiny. See *McCray* v. *Abrams*, 750 F. 2d 1113, 1139 (CA2 1984) (Meskill, J., dissenting), cert. pending, No. 84-1426. Compounding the difficulties, under conventional equal protection principles some uses of peremptories would be reviewed under "strict scrutiny and . . . sustained only if . . . suitably tailored to serve a compelling state interest," *Cleburne*, 473

[4] While all these distinctions might support a claim under conventional equal protection principles, a defendant would also have to establish standing to raise them before obtaining any relief. See *Alexander* v. *Louisiana*, 405 U. S. 625, 633 (1972).

U. S., at 440; others would be reviewed to determine if they were "substantially related to a sufficiently important government interest," *id.*, at 441; and still others would be reviewed to determine whether they were "a rational means to serve a legitimate end." *Id.* at 442.

The Court never applies this conventional equal protection framework to the claims at hand, perhaps to avoid acknowledging that the state interest involved here has historically been regarded by this Court as substantial, if not compelling. Peremptory challenges have long been viewed as a means to achieve an impartial jury that will be sympathetic toward neither an accused nor witnesses for the State on the basis of some shared factor of race, religion, occupation, or other characteristic. Nearly a century ago the Court stated that the peremptory challenge is "essential to the fairness of trial by jury." *Lewis* v. *United States*, 146 U. S., at 376. Under conventional equal protection principles, a state interest of this magnitude and ancient lineage might well overcome an equal protection objection to the application of peremptory challenges. However, the Court is silent on the strength of the State's interest, apparently leaving this issue, among many others, to the further "litigation [that] will be required to spell out the contours of the Court's equal protection holding today . . . ." *Ante*, at 102 (WHITE, J., concurring).[5]

The Court also purports to express "no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by *defense* counsel." *Ante*, at 89, n. 12 (emphasis added). But the clear and inescapable import of this novel holding will inevitably be to limit the use of this valu-

[5]The Court is also silent on whether a State may demonstrate that its use of peremptories rests not merely on "assumptions," *ante*, at 97, but on sociological studies or other similar foundations. See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L. Rev. 337, 365, and n. 124 (1982). For "[i]f the assessment of a juror's prejudices based on group affiliation is accurate, . . . then counsel has exercised the challenge as it was intended—to remove the most partial jurors." *Id.*, at 365.

able tool to both prosecutors and defense attorneys alike. Once the Court has held that *prosecutors* are limited in their use of peremptory challenges, could we rationally hold that defendants are not?[6] "Our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" *Ante*, at 107 (MARSHALL, J., concurring) (quoting *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887)).

Rather than applying straightforward equal protection analysis, the Court substitutes for the holding in *Swain* a curious hybrid. The defendant must first establish a "prima facie case," *ante*, at 93–94, of invidious discrimination, then the "burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Ante*, at 97. The Court explains that "the operation of prima facie burden of proof rules" is established in "[o]ur decisions concerning 'disparate treatment' . . . ." *Ante*, at 94, n. 18. The Court then adds, borrowing again from a Title VII case, that "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Ante*, at 98, n. 20 (quoting *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 258 (1981)).[7]

While undoubtedly these rules are well suited to other contexts, particularly where (as with Title VII) they are required by an Act of Congress,[8] they seem curiously out

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[6] "[E]very jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited." *United States* v. *Leslie*, 783 F. 2d 541, 565 (CA5 1986) (en banc).

[7] One court has warned that overturning *Swain* has "[t]he potential for stretching out criminal trials that are already too long, by making the voir dire a Title VII proceeding in miniature." *United States* v. *Clark*, 737 F. 2d 679, 682 (CA7 1984). That "potential" is clearly about to be realized.

[8] It is worth observing that Congress has been unable to locate the constitutional deficiencies in the peremptory challenge system that the Court discerns today. As the Solicitor General explains in urging a re-

of place when applied to peremptory challenges in criminal cases. Our system permits two types of challenges: challenges for cause and peremptory challenges. Challenges for cause obviously have to be explained; by definition, peremptory challenges do not. "It is called a peremptory challenge, because the prisoner may challenge peremptorily, on his own dislike, *without showing of any cause*." H. Joy, On Peremptory Challenge of Jurors 1 (1844) (emphasis added). Analytically, there is no middle ground: A challenge either has to be explained or it does not. It is readily apparent, then, that to permit inquiry into the basis for a peremptory challenge would force "the peremptory challenge [to] collapse into the challenge for cause." *United States* v. *Clark*, 737 F. 2d 679, 682 (CA7 1984). Indeed, the Court recognized without dissent in *Swain* that, if scrutiny were permitted, "[t]he challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards." *Swain*, 380 U. S., at 222.

Confronted with the dilemma it created, the Court today attempts to decree a middle ground. To rebut a prima facie case, the Court requires a "neutral explanation" for the challenge, but is at pains to "emphasize" that the "explanation need not rise to the level justifying exercise of a challenge for cause." *Ante*, at 97. I am at a loss to discern the governing principles here. A "clear and reasonably specific" explanation of "legitimate reasons" for exercising the challenge will be difficult to distinguish from a challenge for cause. Any-

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jection of the Sixth Amendment issue presented by this petition and an affirmance of the decision below, "[i]n reconciling the traditional peremptory challenge system with the requirements of the Sixth Amendment it is instructive to consider the accommodation made by Congress in the Jury Selection and Service Act of 1968, 28 U. S. C. 1861 *et seq.* . . . [T]he House Report makes clear that . . . 'the bill leaves undisturbed the right of a litigant to exercise his peremptory challenges to eliminate jurors for purely subjective reasons.'" Brief for United States as *Amicus Curiae* 20, n. 11 (quoting H. R. Rep. No. 1076, 90th Cong., 2d Sess., 5–6 (1968)).

thing short of a challenge for cause may well be seen as an "arbitrary and capricious" challenge, to use Blackstone's characterization of the peremptory. See 4 W. Blackstone, Commentaries *353. Apparently the Court envisions permissible challenges short of a challenge for cause that are just a little bit arbitrary—but not too much. While our trial judges are "experienced in supervising *voir dire*," *ante*, at 97, they have no experience in administering rules like this.

An example will quickly demonstrate how today's holding, while purporting to "further the ends of justice," *ante*, at 99, will not have that effect. Assume an Asian defendant, on trial for the capital murder of a white victim, asks prospective jury members, most of whom are white, whether they harbor racial prejudice against Asians. See *Turner* v. *Murray*, *ante*, at 36–37. The basis for such a question is to flush out any "juror who believes that [Asians] are violence-prone or morally inferior . . . ." *Ante*, at 35.[9] Assume further that all white jurors deny harboring racial prejudice but that the defendant, on trial for his life, remains unconvinced by these protestations. Instead, he continues to harbor a hunch, an "assumption," or "intuitive judgment," *ante*, at 97, that these white jurors will be prejudiced against him, presumably based in part on race. The time-honored rule before today was that peremptory challenges could be exercised on such a basis. The Court explained in *Lewis* v. *United States:*

> "[H]ow necessary it is that a prisoner (when put to defend his life) should have good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom

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[9] This question, required by *Turner* in certain capital cases, demonstrates the inapplicability of traditional equal protection analysis to a jury *voir dire* seeking an impartial jury. Surely the question rests on generalized, stereotypic racial notions that would be condemned on equal protection grounds in other contexts.

> he has conceived a prejudice even without being able to assign a reason for such his dislike." 146 U. S., at 376.

The effect of the Court's decision, however, will be to force the defendant to come forward and "articulate a neutral explanation," *ante*, at 98, for his peremptory challenge, a burden he probably cannot meet. This example demonstrates that today's holding will produce juries that the parties do not believe are truly impartial. This will surely do more than "disconcert" litigants; it will diminish confidence in the jury system.

A further painful paradox of the Court's holding is that it is likely to interject racial matters back into the jury selection process, contrary to the general thrust of a long line of Court decisions and the notion of our country as a "melting pot." In *Avery* v. *Georgia*, 345 U. S. 559 (1953), for instance, the Court confronted a situation where the selection of the venire was done through the selection of tickets from a box; the names of whites were printed on tickets of one color and the names of blacks were printed on different color tickets. The Court had no difficulty in striking down such a scheme. Justice Frankfurter observed that "opportunity for working of a discriminatory system exists whenever the mechanism for jury selection *has a component part*, such as the slips here, *that differentiates between white and colored . . . .*" *Id.*, at 564 (concurring) (emphasis added).

Today we mark the return of racial differentiation as the Court accepts a positive evil for a perceived one. Prosecutors and defense attorneys alike will build records in support of their claims that peremptory challenges have been exercised in a racially discriminatory fashion by asking jurors to state their racial background and national origin for the record, despite the fact that "such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire." *People* v. *Motton*, 39 Cal. 3d 596, 604, 704 P. 2d

176, 180, modified, 40 Cal. 3d 4b (1985) (advance sheet).[10] This process is sure to tax even the most capable counsel and judges since determining whether a prima facie case has been established will "require a continued monitoring and recording of the 'group' composition of the panel present and prospective . . . ." *People* v. *Wheeler*, 22 Cal. 3d 258, 294, 583 P. 2d 748, 773 (1978) (Richardson, J., dissenting).

Even after a "record" on this issue has been created, disputes will inevitably arise. In one case, for instance, a conviction was reversed based on the assumption that no blacks were on the jury that convicted a defendant. See *People* v. *Motton*, *supra*. However, after the court's decision was announced, Carolyn Pritchett, who had served on the jury, called the press to state that the court was in error and that she was black. 71 A. B. A. J. 22 (Nov. 1985). The California court nonetheless denied a rehearing petition.[11]

The Court does not tarry long over any of these difficult, sensitive problems, preferring instead to gloss over them as swiftly as it slides over centuries of history: "[W]e make no attempt to instruct [trial] courts how best to implement

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[10] The California Supreme Court has attempted to finesse this problem by asserting that "discrimination is more often based on appearances than verified racial descent, and a showing that the prosecution was systematically excusing persons who appear to be Black would establish a prima facie case" of racial discrimination. *People* v. *Motton*, 39 Cal. 3d, at 604, 704 P. 2d, at 180. This suggests, however, that proper inquiry here concerns not the actual race of the jurors who are excluded, but rather counsel's subjective impressions as to what race they spring from. It is unclear just how a "record" of such impressions is to be made.

[11] Similar difficulties may lurk in this case on remand. The Court states as fact that "a jury composed only of white persons was selected." *Ante*, at 83. The only basis for the Court's finding is the prosecutor's statement, in response to a question from defense counsel, that "[i]n looking at them, yes; it's an all-white jury." App. 3.

It should also be underscored that the Court today does *not* hold that petitioner has established a "prima facie case" entitling him to any form of relief. *Ante*, at 100.

our holding today." *Ante*, at 99–100, n. 24. That leaves roughly 7,000 general jurisdiction state trial judges and approximately 500 federal trial judges at large to find their way through the morass the Court creates today. The Court essentially wishes these judges well as they begin the difficult enterprise of sorting out the implications of the Court's newly created "right." I join my colleagues in wishing the Nation's judges well as they struggle to grasp how to implement today's holding. To my mind, however, attention to these "implementation" questions leads quickly to the conclusion that there is no "good" way to implement the holding, let alone a "best" way. As one apparently frustrated judge explained after reviewing a case under a rule like that promulgated by the Court today, judicial inquiry into peremptory challenges

> "from case to case will take the courts into the quagmire of quotas for groups that are difficult to define and even more difficult to quantify in the courtroom. The pursuit of judicial perfection will require both trial and appellate courts to provide speculative and impractical answers to artificial questions." *Holley* v. *J & S Sweeping Co.*, 143 Cal. App. 3d 588, 595–596, 192 Cal. Rptr. 74, 79 (1983) (Holmdahl, J., concurring) (footnote omitted).

The Court's effort to "furthe[r] the ends of justice," *ante*, at 99, and achieve hoped-for utopian bliss may be admired, but it is far more likely to enlarge the evil "sporting contest" theory of criminal justice roundly condemned by Roscoe Pound almost 80 years ago to the day. See Pound, Causes of Popular Dissatisfaction with the Administration of Justice, August 29, 1906, reprinted in The Pound Conference: Perspectives on Justice in the Future 337 (A. Levin & R. Wheeler eds. 1979). Pound warned then that "too much of the current dissatisfaction has a just origin in our judicial organization and procedure." *Id.*, at 352. I am afraid that today's newly created constitutional right will justly give rise to similar disapproval.

III

I also add my assent to JUSTICE WHITE's conclusion that today's decision does not apply retroactively. *Ante*, at 102 (concurring); see also *ante*, at 111 (O'CONNOR, J., concurring). We held in *Solem* v. *Stumes*, 465 U. S. 638, 643 (1984), that

> "'[t]he criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.' *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967)."

If we are to ignore Justice Harlan's admonition that making constitutional changes prospective only "cuts this Court loose from the force of precedent," *Mackey* v. *United States*, 401 U. S. 667, 680 (1971) (concurring in judgment), then all three of these factors point conclusively to a nonretroactive holding. With respect to the first factor, the new rule the Court announces today is not designed to avert "the clear danger of convicting the innocent." *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 416 (1966). Second, it is readily apparent that "law enforcement authorities and state courts have justifiably relied on a prior rule of law . . . ." *Solem*, 465 U. S., at 645–646. Today's holding clearly "overrule[s] [a] prior decision" and drastically "transform[s] standard practice." *Id.*, at 647. This fact alone "virtually compel[s]" the conclusion of nonretroactivity. *United States* v. *Johnson*, 457 U. S. 537, 549–550 (1982). Third, applying today's decision retroactively obviously would lead to a whole host of problems, if not utter chaos. Determining whether a defendant has made a "prima facie showing" of invidious intent, *ante*, at 97, and, if so, whether the state has a sufficient "neutral explanation" for its actions, *ibid.*, essentially requires re-

constructing the entire *voir dire*, something that will be extremely difficult even if undertaken soon after the close of the trial.[12] In most cases, therefore, retroactive application of today's decision will be "a virtual impossibility." *State* v. *Neil*, 457 So. 2d 481, 488 (Fla. 1984).

In sum, under our prior holdings it is impossible to construct even a colorable argument for retroactive application. The few States that have adopted judicially created rules similar to that announced by the Court today have all refused full retroactive application. See *People* v. *Wheeler*, 22 Cal. 3d, at 283, n. 31, 583 P. 2d, at 766, n. 31; *State* v. *Neil*, *supra*, at 488; *Commonwealth* v. *Soares*, 377 Mass. 461, 493, n. 38, 387 N. E. 2d 499, 518, n. 38, cert. denied, 444 U. S. 881 (1979).[13] I therefore am persuaded by JUSTICE WHITE's position, *ante*, at 102 (concurring), that today's novel decision is not to be given retroactive effect.

IV

An institution like the peremptory challenge that is part of the fabric of our jury system should not be casually cast aside, especially on a basis not raised or argued by the petitioner. As one commentator aptly observed:

> "The real question is whether to tinker with a system, be it of jury selection or anything else, that has done the job for centuries. We stand on the shoulders of our ancestors, as Burke said. It is not so much that the past is always worth preserving, he argued, but rather that 'it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes

[12] Petitioner concedes that it would be virtually impossible for the prosecutor in this case to recall why he used his peremptory challenges in the fashion he did. Brief for Petitioner 35.

[13] Although Delaware has suggested that it might follow a rule like that adopted by the Court today, see *Riley* v. *State*, 496 A. 2d 997 (Del. 1985), the issue of retroactive application of the rule does not appear to have been litigated in a published decision.

of society. . . .'" Younger, Unlawful Peremptory Challenges, 7 Litigation 23, 56 (Fall 1980).

At the very least, this important case reversing centuries of history and experience ought to be set for reargument next Term.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court states, in the opening line of its opinion, that this case involves only a reexamination of that portion of *Swain* v. *Alabama*, 380 U. S. 202 (1965), concerning "the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Ante*, at 82 (footnote omitted). But in reality the majority opinion deals with much more than "evidentiary burden[s]." With little discussion and less analysis, the Court also overrules one of the fundamental substantive holdings of *Swain*, namely, that the State may use its peremptory challenges to remove from the jury, on a case-specific basis, prospective jurors of the same race as the defendant. Because I find the Court's rejection of this holding both ill-considered and unjustifiable under established principles of equal protection, I dissent.

In *Swain*, this Court carefully distinguished two possible scenarios involving the State's use of its peremptory challenges to exclude blacks from juries in criminal cases. In Part III of the majority opinion, the *Swain* Court concluded that the first of these scenarios, namely, the exclusion of blacks "for reasons wholly unrelated to the outcome of the particular case on trial . . . to deny the Negro the same right and opportunity to participate in the adminstration of justice enjoyed by the white population," 380 U. S., at 224, might violate the guarantees of equal protection. See *id.*, at 222–228. The Court felt that the important and historic purposes of the peremptory challenge were not furthered by the

exclusion of blacks "in case after case, whatever the circumstances, whatever the crime *and whoever the defendant or the victim may be.*" *Id.*, at 223 (emphasis added). Nevertheless, the Court ultimately held that "the record in this case is not sufficient to demonstrate that th[is] rule has been violated . . . . Petitioner has the burden of proof and he has failed to carry it." *Id.*, at 224, 226. Three Justices dissented, arguing that the petitioner's evidentiary burden was satisfied by testimony that no black had ever served on a petit jury in the relevant county. See *id.*, at 228–247 (Goldberg, J., joined by Warren, C. J., and Douglas, J., dissenting).

Significantly, the *Swain* Court reached a very different conclusion with respect to the second kind of peremptory-challenge scenario. In Part II of its opinion, the Court held that the State's use of peremptory challenges to exclude blacks from a particular jury based the assumption or belief that they would be more likely to favor a black defendant does not violate equal protection. *Id.*, at 209–222. JUSTICE WHITE, writing for the Court, explained:

> "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a *real or imagined* partiality that is less easily designated or demonstrable. *Hayes* v. *Missouri*, 120 U. S. 68, 70 [1887]. It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' *Lewis* [v. *United States*, 146 U. S. 370,] 376 [1892], upon a juror's 'habits and associations,' *Hayes* v. *Missouri*, *supra*, at 70, or upon the feeling that 'the bare questioning [a juror's] indifference may sometimes provoke a resentment,' *Lewis*, *supra*, at 376. It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people

> summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, *which may include their group affiliations*, in the context of the case to be tried.
>
> With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory . . . ." *Id.*, at 220–222 (emphasis added; footnotes omitted).

At the beginning of Part III of the opinion, the *Swain* Court reiterated: "We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, *the particular defendant involved* and the particular crime charged." *Id.*, at 223 (emphasis added).

Even the *Swain* dissenters did not take issue with the majority's position that the Equal Protection Clause does not prohibit the State from using its peremptory challenges to exclude blacks based on the assumption or belief that they would be partial to a black defendant. The dissenters emphasized that their view concerning the evidentiary burden facing a defendant who alleges an equal protection claim based on the State's use of peremptory challenges "would

[not] mean that where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury *in a particular case.*" *Id.*, at 245 (Goldberg, J., dissenting) (emphasis added).

The Court today asserts, however, that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely . . . on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Ante*, at 89. Later, in discussing the State's need to establish a nondiscriminatory basis for striking blacks from the jury, the Court states that "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." *Ante*, at 97. Neither of these statements has anything to do with the "evidentiary burden" necessary to establish an equal protection claim in this context, and both statements are directly contrary to the view of the Equal Protection Clause shared by the majority and the dissenters in *Swain*. Yet the Court in the instant case offers absolutely no analysis in support of its decision to overrule *Swain* in this regard, and in fact does not discuss Part II of the *Swain* opinion at all.

I cannot subscribe to the Court's unprecedented use of the Equal Protection Clause to restrict the historic scope of the peremptory challenge, which has been described as "a necessary part of trial by jury." *Swain*, 380 U. S., at 219. In my view, there is simply nothing "unequal" about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so

on. This case-specific use of peremptory challenges by the State does not single out blacks, or members of any other race for that matter, for discriminatory treatment.[1] Such use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken. But as long as they are applied across-the-board to jurors of all races and nationalities, I do not see—and the Court most certainly has not explained—how their use violates the Equal Protection Clause.

Nor does such use of peremptory challenges by the State infringe upon any other constitutional interests. The Court does not suggest that exclusion of blacks from the jury through the State's use of peremptory challenges results in a violation of either the fair-cross-section or impartiality component of the Sixth Amendment. See *ante*, at 84–85, n. 4. And because the case-specific use of peremptory challenges by the State does not deny blacks the right to serve as jurors in cases involving nonblack defendants, it harms neither the excluded jurors nor the remainder of the community. See *ante*, at 87–88.

The use of group affiliations, such as age, race, or occupation, as a "proxy" for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges. See *Swain*, *supra*; *United States* v. *Leslie*, 783 F. 2d 541 (CA5 1986) (en banc); *United States* v. *Carter*, 528 F. 2d 844 (CA8 1975), cert. denied, 425 U. S. 961 (1976). Indeed, given the need for reasonable

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[1] I note that the Court does not rely on the argument that, because there are fewer "minorities" in a given population than there are "majorities," the equal use of peremptory challenges against members of "majority" and "minority" racial groups has an unequal impact. The flaws in this argument are demonstrated in Judge Garwood's thoughtful opinion for the en banc Fifth Circuit in *United States* v. *Leslie*, 783 F. 2d 541, 558–561 (1986).

limitations on the time devoted to *voir dire*, the use of such "proxies" by both the State and the defendant[2] may be extremely useful in eliminating from the jury persons who might be biased in one way or another. The Court today holds that the State may not use its peremptory challenges to strike black prospective jurors on this basis without violating the Constitution. But I do not believe there is anything in the Equal Protection Clause, or any other constitutional provision, that justifies such a departure from the substantive holding contained in Part II of *Swain*. Petitioner in the instant case failed to make a sufficient showing to overcome the presumption announced in *Swain* that the State's use of peremptory challenges was related to the context of the case. I would therefore affirm the judgment of the court below.

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[2] See, *e. g.*, *Commonwealth* v. *DiMatteo*, 12 Mass. App. 547, 427 N. E. 2d 754 (1981) (under State Constitution, trial judge properly rejected white defendant's attempted peremptory challenge of black prospective juror).

SMALIS ET AL. *v.* PENNSYLVANIA

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 85-227. Argued April 2, 1986—Decided May 5, 1986

Petitioners, husband and wife, who owned a building housing a restaurant and apartments, were charged with various crimes in connection with a fire in the building that resulted in the killing of two tenants. At the close of the prosecution's case in chief at their bench trial in a Pennsylvania state court, petitioners challenged the sufficiency of the evidence by filing a demurrer pursuant to a Pennsylvania Rule of Criminal Procedure. The trial court sustained the demurrer, and the Pennsylvania Superior Court quashed the Commonwealth's appeal on the ground that it was barred by the Double Jeopardy Clause. The Pennsylvania Supreme Court reversed, holding that the granting of a demurrer is not the functional equivalent of an acquittal and that, for purposes of considering a plea of double jeopardy, a defendant who demurs at the close of the prosecution's case in chief "elects to seek dismissal on grounds unrelated to his factual guilt or innocence."

Held: The trial judge's granting of petitioners' demurrer was an acquittal under the Double Jeopardy Clause, and the Commonwealth's appeal was barred because reversal would have led to further trial proceedings. Whether the trial is to a jury or, as here, to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause. Pp. 144-146.

507 Pa. 344, 490 A. 2d 394, reversed.

WHITE, J., delivered the opinion for a unanimous Court.

Norma Chase argued the cause for petitioners. With her on the briefs was *Thomas A. Livingston.*

Robert L. Eberhardt argued the cause and filed a brief for respondent.

Deputy Solicitor General Frey argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief was *Solicitor General Fried, Assistant Attorney General Trott,* and *Alan I. Horowitz.**

**Charles S. Sims* filed a brief for the American Civil Liberties Union et al as *amici curiae* urging reversal.

JUSTICE WHITE delivered the opinion of the Court.

At the close of the prosecution's case in chief, the trial court dismissed certain charges against petitioners on the ground that the evidence presented was legally insufficient to support a conviction. The question presented is whether the Double Jeopardy Clause bars the prosecution from appealing this ruling.

I

Petitioners, husband and wife, owned a building housing a restaurant and some apartments that burned under suspicious circumstances, killing two of the tenants. Petitioners were charged with various crimes in connection with this fire, including criminal homicide, reckless endangerment, and causing a catastrophe.[1] They opted for a bench trial, and at the close of the prosecution's case in chief challenged the sufficiency of the evidence by filing a demurrer pursuant to Pennsylvania Rule of Criminal Procedure 1124(a)(1).[2] The trial court sustained petitioners' demurrer to charges of murder, voluntary manslaughter, and causing a catastrophe, stating:

> "As the trier of fact and law, the court was not satisfied, after considering all of the facts together with all reason-

[1] Various misdemeanor charges were also filed against petitioners, as well as charges relating to a previous fire in another building that they owned. These other charges are not relevant to this petition.

[2] Pennsylvania Rule of Criminal Procedure 1124, 42 Pa. Cons. Stat. (1985 Pamphlet), provides in relevant part:

"Challenges to Sufficiency of Evidence

"(a) A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged by a:

"(1) demurrer to the evidence presented by the Commonwealth at the close of the Commonwealth's case-in-chief;

. . . . .

"(b) A demurrer to the evidence shall not constitute an admission of any facts or inferences except for the purpose of deciding the demurrer. If the demurrer is not sustained, the defendant may present evidence and the case shall proceed."

able inferences which the Commonwealth's evidence tended to prove, that there was sufficient evidence from which it could be concluded that either of the defendants was guilty beyond a reasonable doubt of setting or causing to be set the fire in question." App. to Pet. for Cert. 101a–102a.

The Commonwealth sought review of this ruling in the Superior Court of Pennsylvania, but a panel of that court quashed the appeal, holding it barred by the Double Jeopardy Clause. The Superior Court granted review en banc and affirmed. 331 Pa. Super. 307, 480 A. 2d 1046 (1984). Citing a number of our decisions as controlling authority, the court set out two relevant principles of law. First, a judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause. See, *e. g.*, *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977); *Burks* v. *United States*, 437 U. S. 1 (1978); *Sanabria* v. *United States*, 437 U. S. 54 (1978); *United States* v. *Scott*, 437 U. S. 82, 91 (1978) (dicta); *Hudson* v. *Louisiana*, 450 U. S. 40 (1981). Second, when a trial court enters such a judgment, the Double Jeopardy Clause bars an appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into further proceedings devoted to the resolution of factual issues going to the elements of the offense charged. The Superior Court concluded that because reversal of the trial court's granting of petitioners' demurrer would necessitate further trial proceedings, the Commonwealth's appeal was improper under *Martin Linen*.

The Commonwealth appealed to the Supreme Court of Pennsylvania, which reversed. *Commonwealth* v. *Zoller*, 507 Pa. 344, 490 A. 2d 394 (1985).[3] The court relied heavily on the statement in *United States* v. *Scott*, *supra*, that a trial

[3] Before the Pennsylvania Supreme Court, petitioners' case was consolidated with another case presenting the same double jeopardy issue, *Commonwealth* v. *Zoller*, 318 Pa. Super. 402, 465 A. 2d 16 (1983).

udge's ruling in a defendant's favor constitutes an acquittal only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *Id.*, at 97 (quoting *Martin Linen*, *supra*, at 571). The court gave the following explanation of why the trial court's ruling on petitioners' demurrer is not within this definition of an acquittal:

> "In deciding whether to grant a demurrer, the court does not determine whether or not the defendant is guilty on such evidence, but determines whether the evidence, if credited by the jury, is legally sufficient to warrant the conclusion that the defendant is guilty beyond a reasonable doubt. . . .
>
> "Hence, by definition, a demurrer is not a factual determination. . . . [T]he question before the trial judge in ruling on a demurrer remains purely one of law.
>
> "We conclude, therefore, that a demurrer is not the functional equivalent of an acquittal, and that the Commonwealth has the right to appeal from an order sustaining defendant's demurrer to its case-in-chief. In such a situation, the defendant himself elects to seek dismissal on grounds unrelated to his factual guilt or innocence." *Commonwealth* v. *Zoller*, *supra*, at 357–358, 490 A. 2d, at 401.

Accordingly, the Pennsylvania Supreme Court remanded the case to the Superior Court for a determination on the merits of the appeal. We granted certiorari, 474 U. S. 944 (1985), and now reverse.[4]

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[4] For purposes of our jurisdiction, the judgment of the Pennsylvania Supreme Court was final and subject to review at this time under 28 U. S. C. § 1257(3). *Harris* v. *Washington*, 404 U. S. 55 (1971). As explained in *Abney* v. *United States*, 431 U. S. 651 (1977):

"[T]he guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal

II

The Pennsylvania Supreme Court erred in holding that, for purposes of considering a plea of double jeopardy, a defendant who demurs at the close of the prosecution's case in chief "elects to seek dismissal on grounds unrelated to his factual guilt or innocence." *Commonwealth* v. *Zoller*, *supra*, at 358, 490 A. 2d, at 401. What the demurring defendant seeks is a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt.[5] Our past decisions, which we are not inclined to reconsider at this time, hold that such a ruling is an acquittal under the Double Jeopardy Clause. See, *e. g.*, *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977); *Sanabria* v. *United States*, 437 U. S. 54 (1978).[6] *United States* v. *Scott* does not overturn these precedents; indeed, it plainly indicates that the category of acquittals includes "judgment[s] . . . by the court that the evidence is insufficient to convict." 437 U.S., at 91.[7]

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trial more than once for the same offense. . . . Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Id.*, at 661–662 (footnote omitted).

[5] We of course accept the Pennsylvania Supreme Court's definition of what the trial judge must consider in ruling on a defendant's demurrer. But just as "the trial judge's characterization of his own action cannot control the classification of the action [under the Double Jeopardy Clause]," *United States* v. *Scott*, 437 U. S. 82, 96 (1978) (citation omitted), so too the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.

[6] See also *Burks* v. *United States*, 437 U. S. 1 (1978), where a Court of Appeals' reversal of the defendant's conviction on the ground that the evidence was insufficient to sustain the jury verdict "unquestionably . . . 'represente[d] a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Id.* at 10 (quoting *Martin Linen*, 430 U. S., at 571).

[7] The status of the trial court's judgment as an acquittal is not affected by the Commonwealth's allegation that the court "erred in deciding what

The Commonwealth argues that its appeal is nonetheless permissible under *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294 (1984), because resumption of petitioners' bench trial following a reversal on appeal would simply constitute "continuing jeopardy." Brief for Respondent 87–88. But *Lydon* teaches that "[a]cquittals, unlike convictions, terminate the initial jeopardy." 466 U. S., at 308. Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause. *Arizona* v. *Rumsey*, 467 U. S. 203, 211–212 (1984).[8]

When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him. The Superior Court was correct, therefore, in holding that the Double Jeopardy Clause bars a postacquittal appeal by the prosecu-

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degree of recklessness was . . . required to be shown under Pennsylvania's definition of [third-degree] murder." Tr. of Oral Arg. 24. "[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles' . . . affects the accuracy of that determination but it does not alter its essential character." *United States* v. *Scott*, 437 U. S., at 98 (quoting *id.*, at 106 (BRENNAN, J., dissenting)). Accord, *Sanabria* v. *United States*, 437 U. S. 1 (1978); *Arizona* v. *Rumsey*, 467 U. S. 203 (1984).

[8] In *Rumsey*, a trial judge sitting as a sentencer in a death-penalty proceeding entered an "acquittal," *i. e.*, a life sentence, based on an erroneous construction of the law governing a particular aggravating circumstance. The Court held that the Double Jeopardy Clause barred a second sentencing hearing. It distinguished *United States* v. *Wilson*, 420 U. S. 332 (1975), which holds that the prosecution may appeal when the trial court enters judgment n.o.v following a jury verdict of guilty. *Rumsey* explains that "[n]o double jeopardy problem was presented in *Wilson* because the appellate court, upon reviewing asserted legal errors of the trial judge, could simply order the jury's guilty verdict reinstated; no new factfinding would be necessary, and the defendant therefore would not be twice placed in jeopardy." 467 U. S., at 211–212.

tion not only when it might result in a second trial, but also if reversal would translate into "'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.'" *Martin Linen, supra*, at 570.[9]

We hold, therefore, that the trial judge's granting of petitioners' demurrer was an acquittal under the Double Jeopardy Clause, and that the Commonwealth's appeal was barred because reversal would have led to further trial proceedings.

The judgment of the Pennsylvania Supreme Court is

Reversed.

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[9] The fact that the "further proceedings" standard which the Superior Court quoted from *Martin Linen* was first articulated in *United States* v. *Jenkins*, 420 U. S. 358, 370 (1975), does not detract from its authority. *United States* v. *Scott, supra*, overrules *Jenkins* only insofar as *Jenkins* bars an appeal by the government when a defendant successfully moves for dismissal on a ground "unrelated to factual guilt or innocence. . . ." *Scott, supra*, at 99. The issue before us in *Scott* was what constitutes an acquittal under the Double Jeopardy Clause; the question of the circumstances under which an acquittal is appealable was not presented.

POLAND v. ARIZONA

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 85-5023. Argued February 24, 1986—Decided May 5, 1986*

Petitioners robbed a bank van of $281,000 in cash and killed the guards by dumping them into a lake in sacks weighted with rocks. Petitioners were convicted of first-degree murder in an Arizona state court. At a separate hearing, while finding that the statutory aggravating circumstance that the offense was committed for "pecuniary gain" was not present because it applied only to contract killings, the trial judge sentenced petitioners to death upon finding that the statutory aggravating circumstance that the offense was committed in "an especially heinous, cruel, or depraved manner" was present. The Arizona Supreme Court, while reversing and remanding for a retrial on other grounds, held that the evidence was insufficient to support a finding of the "especially heinous" circumstance, but that the trial judge erred in finding the "pecuniary gain" circumstance limited to contract killings, and that if petitioners were again convicted the judge might find this circumstance present. On remand, petitioners were again convicted of first-degree murder and the trial judge again sentenced them to death, finding that both the "pecuniary gain" and "especially heinous" circumstances were present. The Arizona Supreme Court affirmed, rejecting petitioners' argument that the Double Jeopardy Clause barred reimposition of the death penalty. The court found the evidence still insufficient to support the "especially heinous" circumstance but sufficient to support the "pecuniary gain" circumstance.

Held: Reimposing the death penalty on petitioners did not violate the Double Jeopardy Clause. Pp. 152-157.

(a) When a conviction is reversed on appeal, it is nullified and "'the slate wiped clean,'" so that if the defendant is convicted again, he may constitutionally be subjected to whatever punishment is lawful. *Bullington* v. *Missouri*, 451 U. S. 430, 442. This rationale is, however, inapplicable where a jury agrees or an appellate court decides that the prosecution "has not proved its case." *Id.*, at 443. Therefore, the relevant inquiry in these cases is whether the sentencing judge or the reviewing court has "decided that the prosecution has not proved its case"

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*Together with No. 85-5024, *Poland* v. *Arizona*, also on certiorari to the same court.

for the death penalty and hence has "acquitted" petitioners. *Bullington* v. *Missouri, supra; Arizona* v. *Rumsey*, 467 U. S. 203. Pp. 152–154.

(b) The trial judge's rejection of the "pecuniary gain" aggravating circumstance was not an "acquittal" of that circumstance for double jeopardy purposes, and did not foreclose its consideration by the reviewing court. Moreover, because the reviewing court did not find the evidence legally insufficient to justify imposition of the death penalty, there was no death penalty "acquittal" by that court. The Double Jeopardy Clause, therefore, did not foreclose a second sentencing hearing at which the "clean slate" rule applied. Pp. 154–157.

144 Ariz. 388, 698 P. 2d 183, and 144 Ariz. 412, 698 P. 2d 207, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 157.

H. K. Wilhelmsen, by appointment of the Court, 474 U. S. 943, argued the cause for petitioner. With him on the brief was *Marc E. Hammond*.

Gerald R. Grant, Assistant Attorney General of Arizona, argued the cause for respondent. With him on the brief was *Robert K. Corbin*, Attorney General.

JUSTICE WHITE delivered the opinion of the Court.

The question presented is whether the Double Jeopardy Clause bars a further capital sentencing proceeding when, on appeal from a sentence of death, the reviewing court finds the evidence insufficient to support the only aggravating factor on which the sentencing judge relied, but does not find the evidence insufficient to support the death penalty.

I

In 1977 petitioners Patrick and Michael Poland, disguised as police officers, stopped a Purolator van that was making cash deliveries to various banks in northern Arizona. After removing some $281,000 in cash from the van, petitioners took the two Purolator guards to a lake and dumped them into the water in sacks weighted with rocks. Autopsies indi-

cated that the most probable cause of the guards' death was drowning, although one may have died of a heart attack. It was not possible to determine if the guards were drugged, but there was no evidence of a struggle.

The jury disbelieved petitioners' alibi defense and convicted them of first-degree murder. Pursuant to former Ariz. Rev. Stat. Ann. § 13-454(A) (Supp. 1973), the trial judge then sat as sentencer in a separate proceeding. At the hearing, the prosecution, relying on the evidence presented at trial, argued that two statutory aggravating circumstances were present: (1) that petitioners had "committed the offense as consideration for the receipt, or in expectation of the receipt, of [something] of pecuniary value," former Ariz. Rev. Stat. Ann. § 13-454(E)(5) (Supp. 1973); and (2) that petitioners had "committed the offense in an especially heinous, cruel, or depraved manner," former Ariz. Rev. Stat. § 13-454(E)(6) (Supp. 1973). The trial judge made the following finding with respect to the "pecuniary gain" aggravating circumstance:

> "The court finds the aggravating circumstance in § 13-454 E(3) *[sic]* is not present. This presumes the legislative intent was to cover a contract killing. If this presumption is inaccurate, the evidence shows the defendants received something of pecuniary value, cash in the amount of $281,000.00.
>
> "This, then, would be an aggravating circumstance." App. 15-16.

The judge found that the "especially heinous, cruel, [or] depraved" aggravating circumstance was present, stating that the murders were "shockingly evil, insensate, and marked by debasement." *Id.*, at 16. Finding that this aggravating circumstance outweighed the mitigating evidence, the judge sentenced petitioners to death. *Id.*, at 14.

On appeal, petitioners argued that the evidence was insufficient to support the judge's finding of the "especially heinous, cruel, or depraved" aggravating circumstance. They

also argued that the jury's verdict was tainted by a jury-room discussion of evidence not admitted at trial. The Arizona Supreme Court agreed that the jury's verdict was tainted, necessitating reversal and retrial. *State* v. *Poland*, 132 Ariz. 269, 283–285, 645 P. 2d 784, 798–800 (1982). The court next held that the evidence on which the State relied at the first sentencing hearing was insufficient to support a finding of the "especially heinous, cruel, or depraved" aggravating circumstance. *Id.*, at 285, 645 P. 2d, at 800. Finally, the court stated that the trial court "mistook the law when it did not find that the defendants 'committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.'" *Ibid.* The court explained that this aggravating circumstance is not limited to situations involving contract killings, see *State* v. *Clark*, 126 Ariz. 428, 616 P. 2d 888 (1980), and added that "[u]pon retrial, if the defendants are again convicted of first degree murder, the court may find the existence of this aggravating circumstance." 132 Ariz., at 286, 645 P. 2d, at 801.

On remand, petitioners were again convicted of first-degree murder. At the sentencing hearing, the prosecution, relying on the evidence presented at the second trial and also presenting additional evidence, argued that the "pecuniary gain" and "especially heinous, cruel, or depraved" aggravating factors were present in each petitioner's case. The prosecution alleged a third aggravating circumstance in petitioner Patrick Poland's case: previous conviction of "a felony . . . involving the use or threat of violence on another person," Ariz. Rev. Stat. Ann. § 13–454(E)(2) (Supp. 1973).[1] The trial judge found all of the aggravating circumstances alleged by the prosecution, and again sentenced both petitioners to death.

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[1] On October 5, 1981, petitioner Patrick Poland, in an unrelated case, was convicted of bank robbery and use of a dangerous weapon in a bank robbery.

Petitioners argued on appeal, as they had at their second sentencing hearing, that the Double Jeopardy Clause barred reimposition of the death penalty. Their theory was that the Arizona Supreme Court's decision on their first appeal that the evidence failed to support the "especially heinous, cruel, or depraved" aggravating circumstance amounted to an "acquittal" of the death penalty. Cf. *Bullington* v. *Missouri*, 451 U. S. 430 (1981); *Arizona* v. *Rumsey*, 467 U. S. 203 (1984). A majority of the Arizona Supreme Court rejected this argument, stating:

> "Our holding in *Poland I* . . . was simply that the death penalty could not be based solely upon [the 'especially heinous, cruel, or depraved'] aggravating circumstance because there was insufficient evidence to support it. This holding was not tantamount to a death penalty 'acquittal.'" *State* v. *Poland (Patrick)*, 144 Ariz. 388, 404, 698 P. 2d 183, 199 (1985).

Accord, *State* v. *Poland (Michael)*, 144 Ariz. 412, 698 P. 2d 207 (1985).

The court found the evidence still insufficient to support the "especially heinous, cruel, or depraved" aggravating circumstance, but sufficient to support the "pecuniary gain" aggravating circumstance with respect to both defendants and the "prior conviction involving violence" circumstance with respect to Patrick Poland. *State* v. *Poland (Patrick)*, *supra*, at 404–406, 698 P. 2d, at 199–201; accord, *State* v. *Poland (Michael)*, *supra*. After again reviewing and independently weighing the mitigating and aggravating circumstances, the court concluded that the death penalty was appropriate in each petitioner's case. We granted certiorari to consider whether reimposing the death penalties on petitioners violated the Double Jeopardy Clause. 474 U. S. 816 (1985). We hold that it did not.

II

In *Bullington* v. *Missouri*, *supra*, this Court held that a defendant sentenced to life imprisonment by a capital sentencing jury is protected by the Double Jeopardy Clause against imposition of the death penalty in the event that he obtains reversal of his conviction and is retried and reconvicted. The Court recognized the usual rule to be that when a defendant obtains reversal of his conviction on appeal,

> "the original conviction has been nullified and 'the slate wiped clean.' Therefore, if the defendant is convicted again, he constitutionally may be subjected to whatever punishment is lawful, subject only to the limitation that he receive credit for time served." *Id.*, at 442 (quoting *North Carolina* v. *Pearce*, 395 U. S. 711, 721 (1969)).

However, the Court found that its prior decisions had created an exception to this rule: "[T]he 'clean slate' rationale . . . is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case." *Bullington*, 451 U. S., at 443.[2] Although it is usually "impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the gov-

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[2] Thus, a defendant charged with first-degree murder but only convicted of the lesser included offense of second-degree murder has been acquitted of the greater charge for purposes of the Double Jeopardy Clause. In the event his conviction is reversed on appeal, "a retrial on the first-degree murder charge [is] barred by the Double Jeopardy Clause, because the defendant 'was forced to run the gantlet once on that charge and the jury refused to convict him.'" *Bullington*, 451 U. S., at 443 (quoting *Green* v. *United States*, 355 U. S. 184, 190 (1957)).

Also, when a defendant's conviction is overturned on appeal on the grounds that the evidence was insufficient to convict, the Double Jeopardy Clause forbids a retrial. "'Since we necessarily accord absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.'" *Bullington*, *supra*, at 442–443 (quoting *Burks* v. *United States*, 437 U. S. 1, 16 (1978)).

ernment has failed to prove its case,'" *ibid.* (quoting *Burks* v. *United States*, 437 U. S. 1, 15 (1978)), the Court found that Missouri, by "enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, . . . *explicitly requires* the jury to determine whether the prosecution has 'proved its case,'" *id.*, at 444 (emphasis in original).[3] Accordingly, the Court held that the jury's decision to sentence Bullington to life imprisonment after his first conviction should be treated as an "acquittal" of the death penalty under the Double Jeopardy Clause.

Recently, the Court held that the rationale of *Bullington* applies to the Arizona capital sentencing scheme at issue in this case. *Arizona* v. *Rumsey*, *supra*.[4] In *Rumsey*, the

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[3]The "case" to which the Court referred in *Bullington* was the prosecution's case that the defendant deserved the death penalty. The analogy drawn was between a death sentence and a verdict of guilty, a life sentence and a verdict of innocent. The Court emphasized that the sentencer was required to make a choice between "two alternative verdicts," 451 U. S., at 438, a statement inconsistent with the view that for double jeopardy purposes the capital sentencer should be seen as rendering a series of mini-verdicts on each aggravating circumstance. See also *Arizona* v. *Rumsey*, 467 U. S. 203, 209–210 (1984) ("The sentencer—the trial judge in Arizona—is required to choose between two options: death, and life imprisonment without possibility of parole for 25 years").

[4]The Court explained the similarities between the Arizona and Missouri systems as follows:

"The capital sentencing proceeding in Arizona shares the characteristics of the Missouri proceeding that make it resemble a trial for purposes of the Double Jeopardy Clause. The sentencer—the trial judge in Arizona—is required to choose between two options: death, and life imprisonment without possibility of parole for 25 years. The sentencer must make the decision guided by detailed statutory standards defining aggravating and mitigating circumstances; in particular, death may not be imposed unless at least one aggravating circumstance is found, whereas death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency. The sentencer must make findings with respect to each of the statutory aggravating and mitigating circumstances, and the sentencing hearing involves the submission of evidence and the presentation of argument. The usual rules of evidence

trial judge erred in exactly the same way as the trial judge did at petitioners' first sentencing hearing in these cases, by construing the "pecuniary gain" aggravating circumstance as limited to "murder for hire" situations. Unlike the trial judge in this case, however, the trial judge in *Rumsey* found no aggravating circumstances, and entered a sentence of life imprisonment. This Court held that "[t]he double jeopardy principle relevant to [Rumsey's] case is the same as that invoked in *Bullington:* an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." *Id.*, at 211.

Under *Bullington* and *Rumsey*, therefore, the relevant inquiry in the cases before us is whether the sentencing judge or the reviewing court has "decid[ed] that the prosecution has not proved its case" for the death penalty and hence has "acquitted" petitioners. *Bullington*, 451 U. S., at 443.

III

At no point during petitioners' first capital sentencing hearing and appeal did either the sentencer or the reviewing court hold that the prosecution had "failed to prove its case" that petitioners deserved the death penalty. Plainly, the sentencing judge did not acquit, for he imposed the death penalty. While the Arizona Supreme Court held that the sentencing judge erred in relying on the "especially heinous, cruel, or depraved" aggravating circumstance, it did not hold that the prosecution had failed to prove its case for the death penalty. Indeed, the court clearly indicated that there had been no such failure by remarking that "the trial court mistook the law when it did not find that the defendants 'committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value,'" and that

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govern the admission of evidence of aggravating circumstances, and the State must prove the existence of aggravating circumstances beyond a reasonable doubt. . . . [T]hese characteristics make the Arizona capital sentencing proceeding indistinguishable for double jeopardy purposes from the capital sentencing proceeding in Missouri." *Ibid.* (citations omitted).

"[u]pon retrial, if the defendants are again convicted of first degree murder, the court may find the existence of this aggravating circumstance," 132 Ariz., at 286, 645 P. 2d, at 800, 801.

Petitioners argue, however, that the Arizona Supreme Court "acquitted" them of the death penalty by finding the "evidence [insufficient] to support the sole aggravating circumstances found by the sentencer." Brief for Petitioners 16. Petitioners' implicit argument is, first, that the sentencing judge "acquitted" them of the "pecuniary gain" aggravating circumstance, and second, that the Double Jeopardy Clause rendered this "acquittal" final, so that the evidence relating to this circumstance was effectively removed from the case at the time of petitioners' first appeal.[5]

We reject the fundamental premise of petitioners' argument, namely, that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes. *Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has "decided that the prosecution has not proved its case" *that the death penalty is appropriate.*[6] We are not prepared

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[5] Petitioners have not made this argument with any clarity, but we can discern no other plausible basis for their contention that the Arizona Supreme Court "acquitted" them of the death penalty at the time of their first appeal. Any suggestion that the court *intended* to acquit them is negated by the language in *Poland I* and is rendered even more untenable by the court's statement at the time of the second appeal that "[o]ur holding in *Poland I*, however, was . . . not tantamount to a death penalty 'acquittal.'" *State* v. *Poland*, 144 Ariz., at 404, 698 P. 2d, at 199.

Petitioners seem to attach importance to the fact that the prosecution did not cross-appeal the trial judge's finding regarding the "pecuniary gain" aggravating circumstance. However, the Arizona Supreme Court did not accord any significance to the prosecution's failure to cross-appeal, and we certainly cannot say that as a matter of state law the court was precluded from considering the evidence regarding the "pecuniary gain" aggravating circumstance.

[6] See n. 3, *supra*.

to extend *Bullington* further and view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance. Such an approach would push the analogy on which *Bullington* is based past the breaking point.

Aggravating circumstances are not separate penalties or offenses, but are "standards to guide the making of [the] choice" between the alternative verdicts of death and life imprisonment. 451 U. S., at 438. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself "convict" a defendant (*i. e.*, require the death penalty), and the failure to find any particular aggravating circumstance does not "acquit" a defendant (*i. e.*, preclude the death penalty).

It is true that the sentencer must find *some* aggravating circumstance before the death penalty may be imposed, and that the sentencer's finding, albeit erroneous, that no aggravating circumstance is present is an "acquittal" barring a second death sentence proceeding. *Arizona* v. *Rumsey*, 467 U. S. 203 (1984). This is because

> "the law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" *United States* v. *Scott*, 437 U. S. 82, 91 (1978) (quoting *Green* v. *United States*, 355 U. S. 184, 188 (1957)).

This concern with protecting the finality of acquittals is not implicated when, as in these cases, a defendant is sentenced to death, *i. e.*, "convicted." There is no cause to shield such a defendant from further litigation; further litigation is the only hope he has. The defendant may argue on appeal that the evidence presented at his sentencing hearing was as a matter of law insufficient to support the aggravating circum-

stances on which his death sentence was based, but the Double Jeopardy Clause does not require the reviewing court, if it sustains that claim, to ignore evidence in the record supporting another aggravating circumstance which the sentencer has erroneously rejected. Such a rule would have the odd and unacceptable result of requiring a reviewing court to enter a death penalty "acquittal" even though that court is of the view that the State has "proved its case." Our decisions in *Burks* and *Bullington* do not support such a rule, which would certainly give the prosecution cause to "complain of prejudice." *Burks*, 437 U. S., at 16. We hold, therefore, that the trial judge's rejection of the "pecuniary gain" aggravating circumstance in this case was not an "acquittal" of that circumstance for double jeopardy purposes, and did not foreclose its consideration by the reviewing court. Furthermore, because the reviewing court did not find the evidence legally insufficient to justify imposition of the death penalty, there was no death penalty "acquittal" by that court. The Double Jeopardy Clause, therefore, did not foreclose a second sentencing hearing at which the "clean slate" rule applied.

The judgment of the Supreme Court of Arizona is

Affirmed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

There is one difference between these cases and *Arizona* v. *Rumsey*, 467 U. S. 203 (1984), in which seven Members of this Court interpreted the Double Jeopardy Clause to bar imposition of a death sentence after a life sentence has been reversed on appeal: the sentencing judge in petitioners' cases made two errors of state law, while Rumsey's judge made only one. According to the majority, that makes the difference between life and death.

In *Rumsey*, the defendant was convicted of murder and robbery; the trial judge sentenced him to life imprisonment

upon finding that none of the statutory aggravating circumstances provided by Arizona law applied to the defendant's case. One of those aggravating circumstances—murder committed as consideration for pecuniary gain—the court rejected in the belief that it applied only to murders for hire. On appeal, the Supreme Court of Arizona held that murder for pecuniary gain could also include murder in the course of a robbery. Accordingly, it set aside Rumsey's life sentence and remanded for resentencing. This time, Rumsey was given a death sentence, supported by the aggravating circumstance of murder for pecuniary gain. On writ of certiorari, this Court concluded that the Arizona death-sentencing procedure is equivalent to a trial for purposes of the Double Jeopardy Clause, under the doctrine of *Bullington* v. *Missouri*, 451 U. S. 430 (1981). We then concluded that Rumsey's initial life sentence had constituted an "acquittal" on the merits of the central issue of the proceeding: whether death was the appropriate punishment for the offense. Under traditional double jeopardy principles, retrial of that issue was thereafter precluded, even though the "acquittal" was predicated upon a mistaken interpretation of state law. *Rumsey*, *supra*, at 211.

Petitioners, Patrick and Michael Poland, were convicted of the murders of two guards in the course of a robbery. Like the trial court in *Rumsey*, the sentencing court rejected the aggravating circumstance of murder for pecuniary gain, believing that it applied only to murders for hire. Unlike the *Rumsey* court, however, the trial judge did not then impose a life sentence. Instead, he concluded that another of the statutory aggravating circumstances was present: that the murders were "especially heinous, cruel, or depraved." Based on this sole aggravating circumstance, therefore, the court sentenced petitioners to death. On joint appeal, the Arizona Supreme Court reviewed the death sentences and concluded that the evidence was insufficient as a matter of state law to establish that the murders had been "especially heinous,

cruel, or depraved," because the State had not proved that the victims had suffered, as state law requires. App. 61. Before remanding, however, the court took the opportunity, *sua sponte*, to note that murder for pecuniary gain was not limited to murders for hire, and therefore was available as a possible alternative basis for a death sentence. On remand, the trial court once more sentenced petitioners to death, again concluding that the murders were "especially heinous, cruel, or depraved," and also that they were committed for pecuniary gain.* The Arizona Supreme Court again reversed the aggravating circumstance of "especially heinous, cruel, or depraved," but this time upheld the death sentences on the ground of pecuniary gain.

The Court makes much of the fact that, unlike Rumsey, petitioners never received sentences of life imprisonment. Yet the majority fails to recognize the teaching of *Burks* v. *United States*, 437 U. S. 1 (1978). In *Burks*, we held that an appellate reversal of a conviction, based on the legal conclusion that the evidence was insufficient to support the verdict, has the same effect under the Double Jeopardy Clause as an acquittal at trial. *Id.*, at 16. "To hold otherwise," the Court concluded, "would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court." *Id.*, at 11. That arbitrary distinction is precisely the one that the Court creates today. The initial death sentences that petitioners received were "convictions," see *Rumsey*, *supra*, and their reversal for insufficiency of the evidence to support the sole aggravating circumstance found by the sentencing judge must, under *Burks*, be accorded the same effect as an "acquittal" at trial—the same effect as Rumsey's life sentence. As much as Rumsey's life sentence constituted the all-important "acquittal on the merits," even

*With respect to petitioner Patrick Poland, an additional aggravating factor was invoked to support the second death sentence, based on events subsequent to the first penalty proceeding.

though predicated on an error of law, so, too, did the reversal of petitioners' death sentences.

The analogy, first drawn in *Bullington* v. *Missouri*, *supra*, between an acquittal at trial and an "acquittal" of death at sentencing, is not perfect, and the imperfections perhaps can explain the majority's mischaracterization of the issue in these cases. At trial, a defendant is charged with an offense containing certain specified elements; he is either convicted or acquitted of that offense, the trier of fact having concluded that the prosecution has or has not proved all the elements of the offense. The sentencing proceeding, however, is quite different. In Arizona, for example, a death sentence may be imposed if any one of seven statutory aggravating factors is proved. While it might be possible to treat each aggravating circumstance as a separate "offense," of which a defendant is either convicted or acquitted, this Court has taken a different approach. We have said that "on the merits" of a capital proceeding, the "central issue [is] whether death was the appropriate punishment for [the] offense." *Rumsey*, 467 U. S., at 211. Thus, the "offense" for which the defendant receives his "conviction" or "acquittal" is that of the appropriateness of the death penalty, not the elements of any particular aggravating factor. *Ante*, at 153, n. 3.

In these cases, the trial judge found death to be the appropriate punishment because petitioners' offenses were "especially heinous, cruel, or depraved." On appeal, the Arizona Supreme Court held that the sole basis offered by the trial court to support its "conviction" of petitioners was insufficient as a matter of law.

The majority believes that, since other aggravating circumstances might have been found to support the "convictions," it was permissible to remand the cases for further factfinding on those alternative factors. But this overlooks what our cases have said a conviction *is* in the sentencing context—a determination that death is the appropriate penalty, not separate trials on the existence of all statutory aggravat-

ng circumstances, conducted *seriatim*. In these cases, that etermination was reversed because there was insufficient vidence to support the ground relied on by the trial judge in eaching it. Any remand for further factfinding on the ques-ion whether the death sentence should be imposed was hereafter prohibited. See *Rumsey*, *supra*, at 211–212. In o other circumstance would the Double Jeopardy Clause ountenance the offer of a second chance to the State and the rial judge to find a better theory upon which to base a con-iction. Nor should it do so here. I dissent.

LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS *v.* McCREE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1865. Argued January 13, 1986—Decided May 5, 1986

At respondent's Arkansas state-court trial for capital felony murder, the judge at *voir dire* removed for cause, over respondent's objections, those prospective jurors who stated that they could not under any circumstances vote for the imposition of the death penalty—that is, so-called "*Witherspoon*-excludables" under the principles of *Witherspoon* v. *Illinois*, 391 U. S. 510. The jury convicted respondent, but at the sentencing phase of the trial it rejected the State's request for the death penalty and set punishment at life imprisonment without parole. The conviction was affirmed on appeal, and respondent's petition for state postconviction relief was denied. He then sought federal habeas corpus relief, contending that the "death qualification" of the jury by the removal for cause of the "*Witherspoon*-excludables" violated his rights under the Sixth and Fourteenth Amendments to have his guilt or innocence determined by an impartial jury selected from a representative cross section of the community. The District Court ruled that "death qualification" of the jury prior to the guilt phase of the bifurcated trial violated both the fair-cross-section and the impartiality requirements of the Constitution. The Court of Appeals affirmed on the ground that removal for cause of "*Witherspoon*-excludables" violated respondent's Sixth Amendment right to a jury selected from a fair cross section of the community.

Held: The Constitution does not prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial. This is so even assuming, *arguendo*, that the social science studies introduced in the courts below were adequate to establish that "death qualification" in fact produces juries somewhat more "conviction-prone" than "non-death-qualified" juries. Pp. 173-183.

(a) "Death qualification" of a jury does not violate the fair-cross-section requirement of the Sixth Amendment, which applies to jury panels or venires but does not require that petit juries actually chosen reflect the composition of the community at large. Even if the requirement were extended to petit juries, the essence of a fair-cross-section claim is the systematic exclusion of a "distinctive group" in the commu-

nity—such as blacks, women, and Mexican-Americans—for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case. Groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the "*Witherspoon*-excludables" at issue here, are not "distinctive groups" for fair-cross-section purposes. "Death qualification" is carefully designed to serve the State's legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial. Pp. 173–177.

(b) Nor does "death qualification" of a jury violate the constitutional right to an impartial jury on the theory asserted by respondent that, because all individual jurors are to some extent predisposed towards one result or another, a constitutionally impartial jury can be constructed only by "balancing" the various predispositions of the individual jurors, and when the State "tips the scales" by excluding prospective jurors with a particular viewpoint, an impermissibly partial jury results. An impartial jury consists of nothing more than jurors who will conscientiously apply the law and find the facts. Respondent's view of jury impartiality is both illogical and impractical. Neither *Witherspoon*, *supra*, nor *Adams* v. *Texas*, 448 U. S. 38, supports respondent's contention that a State violates the Constitution whenever it "slants" the jury by excluding a group of individuals more likely than the population at large to favor the defendant. Here, the removal for cause of "*Witherspoon*-excludables" serves the State's entirely proper interest in obtaining a single jury (as required by Arkansas law) that could impartially decide all of the issues at both the guilt and the penalty phases of respondent's trial. Moreover, both *Witherspoon* and *Adams* dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to far greater concern over the effects of an "imbalanced" jury. The case at bar, by contrast, deals not with capital sentencing, but with the jury's more traditional role of finding the facts and determining the guilt or innocence of a criminal defendant, where jury discretion is more channeled. Pp. 177–183.

758 F. 2d 226, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BLACKMUN, J., concurred in the result. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 184.

John Steven Clark, Attorney General of Arkansas, argued the cause for petitioner. With him on the briefs were *Jack*

Gillean, Assistant Attorney General, *Victra L. Fewell*, and *Leslie M. Powell*.

Samuel R. Gross argued the cause for respondent. With him on the brief were *John Charles Boger*, *James S. Liebman*, *William R. Wilson, Jr.*, and *Anthony G. Amsterdam*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Susan Crump*, *David Crump*, *Charles K. Graddick*, Attorney General of Alabama, *John J. Kelly*, Chief State's Attorney of Connecticut, *Jim Smith*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *James Thomas Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Edwin Lloyd Pittman*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Paul Bardacke*, Attorney General of New Mexico, *David B. Frohnmayer*, Attorney General of Oregon, *Mark V. Meierhenry*, Attorney General of South Dakota, *Jim Mattox*, Attorney General of Texas, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Stephen E. Merrill*, Attorney General of New Hampshire; and for the State of Arizona et al. by *Michael C. Turpen*, Attorney General of Oklahoma, and *David W. Lee*, *Hugh A. Manning*, *Tomilou Gentry Liddell*, *Robert A. Nance*, and *Jean M. LeBlanc*, Assistant Attorneys General, *Robert K. Corbin*, Attorney General of Arizona, *John Van de Kamp*, Attorney General of California, *Charles M. Oberly*, Attorney General of Delaware, *David L. Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *Stephen H. Sachs*, Attorney General of Maryland, *Robert M. Spire*, Attorney General of Nebraska, *Brian McKay*, Attorney General of Nevada, *Stephen E. Merrill*, Attorney General of New Hampshire, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Travis Medlock*, Attorney General of South Carolina, *W. J. Michael Cody*, Attorney General of Tennessee, *David L. Wilkinson*, Attorney General of Utah, *William G. Broaddus*, Attorney General of Virginia, and *Archie G. McClintock*, Attorney General of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the National Center on Institutions and Alternatives by *Allan Blumstein* and *Eric M. Freedman*; for Robert Popper et al. by *Robert Popper, pro se*; and for Billy Junior Woodward by *Reed E. Hundt* and *Thomas M. Carpenter*.

Donald N. Bersoff filed a brief for the American Psychological Association as *amicus curiae*.

JUSTICE REHNQUIST delivered the opinion of the Court.

In this case we address the question left open by our decision nearly 18 years ago in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968): Does the Constitution prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial? See *id.*, at 520, n. 18; *Bumper* v. *North Carolina*, 391 U. S. 543, 545 (1968). We hold that it does not.

Respondent Ardia McCree filed a habeas corpus petition in the United States District Court for the Eastern District of Arkansas claiming that such removal for cause violated the Sixth and Fourteenth Amendments and, after McCree's case was consolidated with another habeas case involving the same claim on remand from the Court of Appeals for the Eighth Circuit, the District Court ruled in McCree's favor and granted habeas relief. *Grigsby* v. *Mabry*, 569 F. Supp. 1273 (1983). A sharply divided Eighth Circuit affirmed, *Grigsby* v. *Mabry*, 758 F. 2d 226 (1985) (en banc), creating a conflict with recent decisions of the Fourth, Fifth, Seventh, and Eleventh Circuits. See *Keeten* v. *Garrison*, 742 F. 2d 129, 133–135 (CA4 1984), cert. pending, No. 84–6187; *Smith* v. *Balkcom*, 660 F. 2d 573, 576–578 (CA5 1981), modified on other grounds, 671 F. 2d 858, cert. denied *sub nom. Tison* v. *Arizona*, 459 U. S. 882 (1982); *Spinkellink* v. *Wainwright*, 578 F. 2d 582, 594 (CA5 1978), cert. denied, 440 U. S. 976 (1979); *United States ex rel. Clark* v. *Fike*, 538 F. 2d 750, 761–762 (CA7 1976), cert. denied, 429 U. S. 1064 (1977); and *Corn* v. *Zant*, 708 F. 2d 549, 564 (CA11 1983), cert. denied, 467 U. S. 1220 (1984). We granted certiorari to resolve the conflict, 474 U. S. 816 (1985), and now reverse the judgment of the Eighth Circuit.

On the morning of February 14, 1978, a combination gift shop and service station in Camden, Arkansas, was robbed,

and Evelyn Boughton, the owner, was shot and killed. That afternoon, Ardia McCree was arrested in Hot Springs, Arkansas, after a police officer saw him driving a maroon and white Lincoln Continental matching an eyewitness' description of the getaway car used by Boughton's killer. The next evening, McCree admitted to police that he had been at Boughton's shop at the time of the murder. He claimed, however, that a tall black stranger wearing an overcoat first asked him for a ride, then took McCree's rifle out of the back of the car and used it to kill Boughton. McCree also claimed that, after the murder, the stranger rode with McCree to a nearby dirt road, got out of the car, and walked away with the rifle. McCree's story was contradicted by two eyewitnesses who saw McCree's car between the time of the murder and the time when McCree said the stranger got out and walked away, and who stated that they saw only one person in the car. The police found McCree's rifle and a bank bag from Boughton's shop alongside the dirt road. Based on ballistics tests, a Federal Bureau of Investigation officer testified that the bullet that killed Boughton had been fired from McCree's rifle.

McCree was charged with capital felony murder in violation of Ark. Stat. Ann. § 41-1501(1)(a) (1977). In accordance with Arkansas law, see *Neal* v. *State*, 259 Ark. 27, 31, 531 S. W. 2d 17, 21 (1975), the trial judge at *voir dire* removed for cause, over McCree's objections, those prospective jurors who stated that they could not under any circumstances vote for the imposition of the death penalty. Eight prospective jurors were excluded for this reason. The jury convicted McCree of capital felony murder, but rejected the State's request for the death penalty, instead setting McCree's punishment at life imprisonment without parole. McCree's conviction was affirmed on direct appeal, *McCree* v. *State*, 266 Ark. 465, 585 S. W. 2d 938 (1979), and his petition for state postconviction relief was denied.

McCree then filed a federal habeas corpus petition raising, *inter alia*, the claim that "death qualification," or the removal for cause of the so-called "*Witherspoon*-excludable" prospective jurors,[1] violated his right under the Sixth and Fourteenth Amendments to have his guilt or innocence determined by an impartial jury selected from a representative cross section of the community. By stipulation of the parties, this claim was consolidated with another pending habeas case involving the same claim, which had been remanded by the Eighth Circuit for an evidentiary hearing in the District Court. App. 9–11; *Grigsby* v. *Mabry*, 637 F. 2d 525 (1980). The District Court denied the remainder of McCree's petition, and the Eighth Circuit affirmed. *McCree* v. *Housewright*, 689 F. 2d 797 (1982), cert. denied, 460 U. S. 1088 (1983).

The District Court held a hearing on the "death qualification" issue in July 1981, receiving in evidence numerous social science studies concerning the attitudes and beliefs of "*Witherspoon*-excludables," along with the potential effects of excluding them from the jury prior to the guilt phase of a bifurcated capital trial. In August 1983, the court concluded, based on the social science evidence, that "death qualification" produced juries that "were more prone to convict" capital defendants than "non-death-qualified" juries. *Grigsby* v. *Mabry*, 569 F. Supp., at 1323. The court ruled

[1] In *Wainwright* v. *Witt*, 469 U. S. 412 (1985), this Court emphasized that the Constitution does not require "ritualistic adherence" to the "talismanic" standard for juror exclusion set forth in footnote 21 of the *Witherspoon* opinion. 469 U. S., at 419, 423. Rather, the proper constitutional standard is simply whether a prospective juror's views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.*, at 433, quoting *Adams* v. *Texas*, 448 U. S. 38, 45 (1980). Thus, the term "*Witherspoon*-excludable" is something of a misnomer. Nevertheless, because the parties and the courts below have used the term "*Witherspoon*-excludables" to identify the group of prospective jurors at issue in this case, we will use the same term in this opinion.

that "death qualification" thus violated both the fair-cross-section and impartiality requirements of the Sixth and Fourteenth Amendments, and granted McCree habeas relief. *Id.*, at 1324.[2]

The Eighth Circuit found "substantial evidentiary support" for the District Court's conclusion that the removal for cause of "*Witherspoon*-excludables" resulted in "conviction-prone" juries, and affirmed the grant of habeas relief on the ground that such removal for cause violated McCree's constitutional right to a jury selected from a fair cross section of the community. *Grigsby* v. *Mabry*, 758 F. 2d, at 229. The Eighth Circuit did not address McCree's impartiality claim. *Ibid.* The Eighth Circuit left it up to the discretion of the State "to construct a fair process" for future capital trials that would comply with the Sixth Amendment. *Id.*, at 242–243. Four judges dissented. *Id.*, at 243–251.

Before turning to the legal issues in the case, we are constrained to point out what we believe to be several serious flaws in the evidence upon which the courts below reached the conclusion that "death qualification" produces "conviction-prone" juries.[3] McCree introduced into evi-

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[2] James Grigsby, the habeas petitioner with whose case McCree's had been consolidated, died prior to the District Court's decision, so his case became moot. *Grigsby* v. *Mabry*, 569 F. Supp., at 1277, n. 2. Dewayne Hulsey, a third habeas petitioner whose "death qualification" claim was consolidated with Grigsby's and McCree's, was found to be procedurally barred, under *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), from asserting the claim. *Hulsey* v. *Sargent*, 550 F. Supp. 179 (ED Ark. 1981).

[3] McCree argues that the "factual" findings of the District Court and the Eighth Circuit on the effects of "death qualification" may be reviewed by this Court only under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). Because we do not ultimately base our decision today on the invalidity of the lower courts' "factual" findings, we need not decide the "standard of review" issue. We are far from persuaded, however, that the "clearly erroneous" standard of Rule 52(a) applies to the kind of "legislative" facts at issue here. See generally *Dunagin* v. *City of Oxford, Mississippi*, 718 F. 2d 738, 748, n. 8 (CA5 1983) (en banc) (plurality opinion of Reavley, J.). The difficulty with applying such a standard to

dence some 15 social science studies in support of his constitutional claims, but only 6 of the studies even purported to measure the potential effects on the guilt-innocence determination of the removal from the jury of "*Witherspoon*-excludables."[4] Eight of the remaining nine studies dealt solely with generalized attitudes and beliefs about the death penalty and other aspects of the criminal justice system, and were thus, at best, only marginally relevant to the constitutionality of McCree's conviction.[5] The 15th and final study

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"legislative" facts is evidenced here by the fact that at least one other Court of Appeals, reviewing the same social science studies as introduced by McCree, has reached a conclusion contrary to that of the Eighth Circuit. See *Keeten* v. *Garrison*, 742 F. 2d 129, 133, n. 7 (CA4 1984) (disagreeing that studies show relationship between generalized attitudes and behavior as jurors), cert. pending, No. 84-6187.

[4]The Court of Appeals described the following studies as "conviction-proneness surveys": H. Zeisel, Some Data on Juror Attitudes Toward Capital Punishment (University of Chicago Monograph 1968) (Zeisel); W. Wilson, Belief in Capital Punishment and Jury Performance (unpublished manuscript, University of Texas, 1964) (Wilson); Goldberg, Toward Expansion of *Witherspoon:* Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 53 (1970) (Goldberg); Jurow, New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process, 84 Harv. L. Rev. 567 (1971) (Jurow); and Cowan, Thompson, & Ellsworth, The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 Law & Hum. Behav. 53 (1984) (Cowan-Deliberation). In addition, McCree introduced evidence on this issue from a Harris Survey conducted in 1971. Louis Harris & Associates, Inc., Study No. 2016 (1971) (Harris-1971).

[5]The Court of Appeals described the following studies as "attitudinal and demographic surveys": Bronson, On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. Colo. L. Rev. 1 (1970); Bronson, Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California, 3 Woodrow Wilson L. J. 11 (1980); Fitzgerald & Ellsworth, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 Law & Hum. Behav. 31 (1984); and Precision Research, Inc., Survey No. 1286 (1981). In addition, McCree introduced evidence on these issues from Thompson, Cowan, Ellsworth, & Har-

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dealt with the effects on prospective jurors of *voir dire* questioning about their attitudes toward the death penalty,[6] an issue McCree raised in his brief to this Court but that counsel for McCree admitted at oral argument would not, standing alone, give rise to a constitutional violation.[7]

Of the six studies introduced by McCree that at least purported to deal with the central issue in this case, namely, the potential effects on the determination of guilt or innocence of excluding "*Witherspoon*-excludables" from the jury, three were also before this Court when it decided *Witherspoon*.[8] There, this Court reviewed the studies and concluded:

> "The data adduced by the petitioner . . . are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors

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rington, Death Penalty Attitudes and Conviction Proneness, 8 Law & Hum. Behav. 95 (1984); Ellsworth, Bukaty, Cowan, & Thompson, The Death-Qualified Jury and the Defense of Insanity, 8 Law & Hum. Behav. 81 (1984); A. Young, Arkansas Archival Study (unpublished, 1981); and various Harris, Gallup, and National Opinion Research Center polls conducted between 1953 and 1981.

[6] McCree introduced evidence on this issue from Haney, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 Law & Hum. Behav. 121 (1984).

[7] We would in any event reject the argument that the very process of questioning prospective jurors at *voir dire* about their views of the death penalty violates the Constitution. McCree concedes that the State may challenge for cause prospective jurors whose opposition to the death penalty is so strong that it would prevent them from impartially determining a capital defendant's guilt or innocence. *Ipso facto*, the State must be given the opportunity to identify such prospective jurors by questioning them at *voir dire* about their views of the death penalty.

[8] The petitioner in *Witherspoon* cited the Wilson and Goldberg studies, and a prepublication draft of the Zeisel study. 391 U. S., at 517, n. 10; see n. 4, *supra*.

> opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was." 391 U. S. at 517–518 (footnote omitted).

It goes almost without saying that if these studies were "too tentative and fragmentary" to make out a claim of constitutional error in 1968, the same studies, unchanged but for having aged some 18 years, are still insufficient to make out such a claim in this case.

Nor do the three post-*Witherspoon* studies introduced by McCree on the "death qualification" issue provide substantial support for the "*per se* constitutional rule" McCree asks this Court to adopt. All three of the "new" studies were based on the responses of individuals randomly selected from some segment of the population, but who were not actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant.[9] We have serious doubts about the value of these studies in predicting the behavior of actual jurors. See *Grigsby* v. *Mabry*, 758 F. 2d, at 248, n. 7 (J. Gibson, J., dissenting). In addition, two of the three "new" studies did not even attempt to simulate the process of jury deliberation,[10] and none of the "new" studies was able to predict to what extent, if any, the presence of one or more "*Witherspoon*-excludables" on a

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[9] The Harris-1971 study polled 2,068 adults from throughout the United States, the Cowan-Deliberation study involved 288 jury-eligible residents of San Mateo and Santa Clara Counties in California, and the Jurow study was based on the responses of 211 employees of the Sperry Rand Corporation in New York.

[10] The Harris-1971 and Jurow studies did not allow for group deliberation, but rather measured only individual responses.

guilt-phase jury would have altered the outcome of the guilt determination.[11]

Finally, and most importantly, only one of the six "death qualification" studies introduced by McCree even attempted to identify and account for the presence of so-called "nullifiers," or individuals who, because of their deep-seated opposition to the death penalty, would be unable to decide a capital defendant's guilt or innocence fairly and impartially.[12] McCree concedes, as he must, that "nullifiers" may properly be excluded from the guilt-phase jury, and studies that fail to take into account the presence of such "nullifiers" thus are fatally flawed.[13] Surely a "*per se* constitutional rule" as far-

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[11] JUSTICE MARSHALL's dissent refers to an "essential unanimity" of support among social-science researchers and other academics for McCree's assertion that "death qualification" has a significant effect on the outcome of jury deliberations at the guilt phase of capital trials. See *post*, at 189. At least one of the articles relied upon by the dissent candidly acknowledges, however, that its conclusions ultimately must rest on "[a] certain amount of . . . conjecture" and a willingness "to transform behavioral suspicions into doctrine." Finch & Ferraro, The Empirical Challenge to Death-Qualified Juries: On Further Examination, 65 Neb. L. Rev. 21, 67 (1986). As the authors of the article explain:

"[U]ncertainty inheres in every aspect of the capital jury's operation, whether one focuses on the method of identifying excludable jurors or the deliberative process through which verdicts are reached. So it is that, some seventeen years after *Witherspoon*, no definitive conclusions can be stated as to the frequency or the magnitude of the effects of death qualification.

. . . . .

"Nor is it likely that further empirical research can add significantly to the current understanding of death qualification. The true magnitude of the phenomenon of conviction proneness is probably unmeasurable, given the complexity of capital cases and capital adjudication." *Id.*, at 66–67 (footnote omitted).

[12] Only the Cowan-Deliberation study attempted to take into account the presence of "nullifiers."

[13] The effect of this flaw on the outcome of a particular study is likely to be significant. The Cowan-Deliberation study revealed that approximately 37% of the "*Witherspoon*-excludables" identified in the study were also "nullifiers."

reaching as the one McCree proposes should not be based on the results of the lone study that avoids this fundamental flaw.

Having identified some of the more serious problems with McCree's studies, however, we will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that "death qualification" in fact produces juries somewhat more "conviction-prone" than "non-death-qualified" juries. We hold, nonetheless, that the Constitution does not prohibit the States from "death qualifying" juries in capital cases.

The Eighth Circuit ruled that "death qualification" violated McCree's right under the Sixth Amendment, as applied to the States via incorporation through the Fourteenth Amendment, see *Duncan* v. *Louisiana*, 391 U. S. 145, 148–158 (1968), to a jury selected from a representative cross section of the community. But we do not believe that the fair-cross-section requirement can, or should, be applied as broadly as that court attempted to apply it. We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. See *Duren* v. *Missouri*, 439 U. S. 357, 363–364 (1979); *Taylor* v. *Louisiana*, 419 U. S. 522, 538 (1975) ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population"); cf. *Batson* v. *Kentucky*, *ante*, at 84–85, n. 4 (expressly declining to address "fair-cross-section" challenge to discriminatory use of peremptory challenges).[14] The limited

[14] The only case in which we have intimated that the fair-cross-section requirement might apply outside the context of jury panels or venires, *Ballew* v. *Georgia*, 435 U. S. 223 (1978) (opinion of BLACKMUN, J.), did not involve jury *selection* at all, but rather the *size* of the petit jury. JUSTICE BLACKMUN's opinion announcing the judgment, and the opinions concurring in the judgment which agreed with him, expressed the view that Georgia's limitation of the size of juries to five "prevents juries from truly representing their communities," *id.*, at 239.

scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly "representative" petit jury, see *ante*, at 85–86, n. 6, a basic truth that the Court of Appeals itself acknowledged for many years prior to its decision in the instant case. See *United States* v. *Childress*, 715 F. 2d 1313 (CA8 1983) (en banc), cert. denied, 464 U. S. 1063 (1984); *Pope* v. *United States*, 372 F. 2d 710, 725 (CA8 1967) (Blackmun, J.) ("The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn"), vacated on other grounds, 392 U. S. 651 (1968). We remain convinced that an extension of the fair-cross-section requirement to petit juries would be unworkable and unsound, and we decline McCree's invitation to adopt such an extension.

But even if we were willing to extend the fair-cross-section requirement to petit juries, we would still reject the Eighth Circuit's conclusion that "death qualification" violates that requirement. The essence of a "fair-cross-section" claim is the systematic exclusion of "a 'distinctive' group in the community." *Duren*, *supra*, at 364. In our view, groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the "*Witherspoon*-excludables" at issue here, are not "distinctive groups" for fair-cross-section purposes.

We have never attempted to precisely define the term "distinctive group," and we do not undertake to do so today. But we think it obvious that the concept of "distinctiveness" must be linked to the purposes of the fair-cross-section requirement. In *Taylor*, *supra*, we identified those purposes as (1) "guard[ing] against the exercise of arbitrary power" and ensuring that the "commonsense judgment of the community" will act as "a hedge against the overzealous or mistaken prosecutor," (2) preserving "public confidence in the

fairness of the criminal justice system," and (3) implementing our belief that "sharing in the administration of justice is a phase of civic responsibility." *Id.*, at 530–531.

Our prior jury-representativeness cases, whether based on the fair-cross-section component of the Sixth Amendment or the Equal Protection Clause of the Fourteenth Amendment, have involved such groups as blacks, see *Peters* v. *Kiff*, 407 U. S. 493 (1972) (opinion of MARSHALL, J.) (equal protection), women, see *Duren*, *supra* (fair cross section); *Taylor*, *supra* (same), and Mexican-Americans, see *Castaneda* v. *Partida*, 430 U. S. 482 (1977) (equal protection). The wholesale exclusion of these large groups from jury service clearly contravened all three of the aforementioned purposes of the fair-cross-section requirement. Because these groups were excluded for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case, the exclusion raised at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community. In addition, the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an "appearance of unfairness." Finally, such exclusion improperly deprived members of these often historically disadvantaged groups of their right as citizens to serve on juries in criminal cases.

The group of "*Witherspoon*-excludables" involved in the case at bar differs significantly from the groups we have previously recognized as "distinctive." "Death qualification," unlike the wholesale exclusion of blacks, women, or Mexican-Americans from jury service, is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of

a capital trial.[15] There is very little danger, therefore, and McCree does not even argue, that "death qualification" was instituted as a means for the State to arbitrarily skew the composition of capital-case juries.[16]

Furthermore, unlike blacks, women, and Mexican-Americans, "*Witherspoon*-excludables" are singled out for exclusion in capital cases on the basis of an attribute that is within the individual's control. It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. Because the group of "*Witherspoon*-excludables" includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, "death qualification" hardly can be said to create an "appearance of unfairness."

Finally, the removal for cause of "*Witherspoon*-excludables" in capital cases does not prevent them from serving as jurors in other criminal cases, and thus leads to no substantial deprivation of their basic rights of citizenship. They are treated no differently than any juror who expresses the view that he would be unable to follow the law in a particular case.

In sum, "*Witherspoon*-excludables," or for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a

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[15] See *Rector* v. *State*, 280 Ark. 385, 396–397, 659 S. W. 2d 168, 173–174 (1983), cert. denied, 466 U. S. 988 (1984). McCree does not dispute the existence of this interest, but merely contends that it is not substantial. See Brief for Respondent 74–79.

[16] McCree asserts that the State often will request the death penalty in particular cases solely for the purpose of "death qualifying" the jury, with the intent ultimately to "waive" the death penalty after a conviction is obtained. We need not consider the implications of this assertion, since the State did not "waive" the death penalty in McCree's case.

particular case, may be excluded from jury service without contravening any of the basic objectives of the fair-cross-section requirement. See *Lockett* v. *Ohio*, 438 U. S. 586, 597 (1978) ("Nothing in *Taylor*, however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge"). It is for this reason that we conclude that "*Witherspoon*-excludables" do not constitute a "distinctive group" for fair-cross-section purposes, and hold that "death qualification" does not violate the fair-cross-section requirement.

McCree argues that, even if we reject the Eighth Circuit's fair-cross-section holding, we should affirm the judgment below on the alternative ground, adopted by the District Court, that "death qualification" violated his constitutional right to an impartial jury. McCree concedes that the individual jurors who served at his trial were impartial, as that term was defined by this Court in cases such as *Irvin* v. *Dowd*, 366 U. S. 717, 723 (1961) ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court"), and *Reynolds* v. *United States*, 98 U. S. 145 (1879). He does not claim that pretrial publicity, see *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), *ex parte* communications, see *Remmer* v. *United States*, 347 U. S. 227 (1954), or other undue influence, see *Estes* v. *Texas*, 381 U. S. 532 (1965), affected the jury's deliberations. In short, McCree does not claim that his conviction was tainted by any of the kinds of jury bias or partiality that we have previously recognized as violative of the Constitution. Instead, McCree argues that his jury lacked impartiality because the absence of "*Witherspoon*-excludables" "slanted" the jury in favor of conviction.

We do not agree. McCree's "impartiality" argument apparently is based on the theory that, because all individual jurors are to some extent predisposed towards one result or another, a constitutionally impartial *jury* can be constructed

only by "balancing" the various predispositions of the individual *jurors*. Thus, according to McCree, when the State "tips the scales" by excluding prospective jurors with a particular viewpoint, an impermissibly partial jury results. We have consistently rejected this view of jury impartiality, including as recently as last Term when we squarely held that an impartial *jury* consists of nothing more than "*jurors* who will conscientiously apply the law and find the facts." *Wainwright* v. *Witt*, 469 U. S. 412, 423 (1985) (emphasis added); see also *Smith* v. *Phillips*, 455 U. S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it"); *Irvin* v. *Dowd*, *supra*, at 722 ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors").

The view of jury impartiality urged upon us by McCree is both illogical and hopelessly impractical. McCree characterizes the jury that convicted him as "slanted" by the process of "death qualification." But McCree admits that exactly the same 12 individuals could have ended up on his jury through the "luck of the draw," without in any way violating the constitutional guarantee of impartiality. Even accepting McCree's position that we should focus on the *jury* rather than the individual *jurors*, it is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a state-ordained process, yet impartial when exactly the same jury results from mere chance. On a more practical level, if it were true that the Constitution required a certain mix of individual viewpoints on the jury, then trial judges would be required to undertake the Sisyphean task of "balancing" juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on. Adopting McCree's concept of jury impartiality would also likely require the elimination of peremptory challenges, which are commonly used by both

the State and the defendant to attempt to produce a jury favorable to the challenger.

McCree argues, however, that this Court's decisions in *Witherspoon* and *Adams* v. *Texas*, 448 U. S. 38 (1980), stand for the proposition that a State violates the Constitution whenever it "slants" the jury by excluding a group of individuals more likely than the population at large to favor the criminal defendant. We think McCree overlooks two fundamental differences between *Witherspoon* and *Adams* and the instant case, and therefore misconceives the import and scope of those two decisions.

First, the Court in *Witherspoon* viewed the Illinois system as having been deliberately slanted for the purpose of making the imposition of the death penalty more likely. The Court said:

> "But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.
>
> "It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' *Fay* v. *New York*, 332 U. S. 261, 294 [1947]. See *Tumey* v. *Ohio*, 273 U. S. 510 [1927]. It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." 391 U. S., at 520–521 (footnotes omitted).

In *Adams* v. *Texas*, *supra*, the Court explained the rationale for *Witherspoon* as follows:

> "In this context, the Court held that a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during *voir dire* exami-

> nation that they had conscientious scruples against or were otherwise opposed to capital punishment. The State was held to have no valid interest in such a broad-based rule of exclusion, since '[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him . . . and can thus obey the oath he takes as a juror.' *Witherspoon* v. *Illinois*, 391 U. S., at 519." 448 U. S., at 43.

Adams, in turn, involved a fairly straightforward application of the *Witherspoon* rule to the Texas capital punishment scheme. See *Adams*, *supra*, at 48 (Texas exclusion statute "focuses the inquiry directly on the prospective juror's beliefs about the death penalty, and hence clearly falls within the scope of the *Witherspoon* doctrine").

Here, on the other hand, the removal for cause of "*Witherspoon*-excludables" serves the State's entirely proper interest in obtaining a single jury that could impartially decide all of the issues in McCree's case. Arkansas by legislative enactment and judicial decision provides for the use of a unitary jury in capital cases. See Ark. Stat. Ann. § 41–1301(3) (1977); *Rector* v. *State*, 280 Ark. 385, 395, 659 S. W. 2d 168, 173 (1983), cert. denied, 466 U. S. 988 (1984). We have upheld against constitutional attack the Georgia capital sentencing plan which provided that the same jury must sit in both phases of a bifurcated capital murder trial, *Gregg* v. *Georgia*, 428 U. S. 153, 158, 160, 163 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.), and since then have observed that we are "unwilling to say that there is any one right way for a State to set up its capital sentencing scheme." *Spaziano* v. *Florida*, 468 U. S. 447, 464 (1984).

The Arkansas Supreme Court recently explained the State's legislative choice to require unitary juries in capital cases:

> "It has always been the law in Arkansas, except when the punishment is mandatory, that the same jurors who have the responsibility for determining guilt or inno-

> cence must also shoulder the burden of fixing the punishment. That is as it should be, for the two questions are necessarily interwoven." *Rector, supra*, at 395, 659 S. W. 2d, at 173.

Another interest identified by the State in support of its system of unitary juries is the possibility that, in at least some capital cases, the defendant might benefit at the sentencing phase of the trial from the jury's "residual doubts" about the evidence presented at the guilt phase. The dissenting opinion in the Court of Appeals also adverted to this interest:

> "[A]s several courts have observed, jurors who decide both guilt and penalty are likely to form residual doubts or 'whimsical' doubts . . . about the evidence so as to bend them to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases. To divide the responsibility . . . to some degree would eliminate the influence of such doubts." 758 F. 2d, at 247–248 (J. Gibson, J., dissenting) (citations omitted).

JUSTICE MARSHALL's dissent points out that some States which adhere to the unitary jury system do not allow the defendant to argue "residual doubts" to the jury at sentencing. But while this may justify skepticism as to the extent to which such States are willing to go to allow defendants to capitalize on "residual doubts," it does not wholly vitiate the claimed interest. Finally, it seems obvious to us that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase; if two different juries were to be required, such testimony would have to be presented twice, once to each jury. As the Arkansas Supreme Court has noted, "[s]uch repetitive trials could not be consistently fair to the State and perhaps not even to the accused." *Rector, supra*, at 396, 659 S. W. 2d, at 173.

Unlike the Illinois system criticized by the Court in *Witherspoon*, and the Texas system at issue in *Adams*, the Arkansas system excludes from the jury only those who may properly be excluded from the penalty phase of the deliberations under *Witherspoon*, *Adams*, and *Wainwright* v. *Witt*, 469 U. S. 412 (1985).[17] That State's reasons for adhering to its preference for a single jury to decide both the guilt and penalty phases of a capital trial are sufficient to negate the inference which the Court drew in *Witherspoon* concerning the lack of any neutral justification for the Illinois rule on jury challenges.

Second, and more importantly, both *Witherspoon* and *Adams* dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to far greater concern over the possible effects of an "imbalanced" jury. As we emphasized in *Witherspoon:*

> "[I]n Illinois, as in other States, the jury is given broad discretion to decide whether or not death *is* 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision.
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> ". . . . Guided by neither rule nor standard, 'free to select or reject as it [sees] fit,' a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." 391 U. S., at 519 (emphasis in original; footnotes omitted).

Because capital sentencing under the Illinois statute involved such an exercise of essentially unfettered discretion, we held that the State violated the Constitution when it "crossed the

[17] The rule applied by Arkansas to exclude these prospective jurors was scarcely a novel one; as long ago as *Logan* v. *United States*, 144 U. S. 263 (1892), this Court approved such a practice in the federal courts, commenting that it was also followed "by the courts of every State in which the question has arisen." *Id.*, at 298.

line of neutrality" and "produced a jury uncommonly willing to condemn a man to die." *Id.*, at 520–521.

In *Adams*, we applied the same basic reasoning to the Texas capital sentencing scheme, which, although purporting to limit the jury's role to answering several "factual" questions, in reality vested the jury with considerable discretion over the punishment to be imposed on the defendant. See 448 U. S., at 46 ("This process is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths"); cf. *Jurek* v. *Texas*, 428 U. S. 262, 273 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) ("Texas law essentially requires that . . . in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it"). Again, as in *Witherspoon*, the discretionary nature of the jury's task led us to conclude that the State could not "exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty." *Adams*, 448 U. S., at 50.

In the case at bar, by contrast, we deal not with capital sentencing, but with the jury's more traditional role of finding the facts and determining the guilt or innocence of a criminal defendant, where jury discretion is more channeled. We reject McCree's suggestion that *Witherspoon* and *Adams* have broad applicability outside the special context of capital sentencing,[18] and conclude that those two decisions do not support the result reached by the Eighth Circuit here.

In our view, it is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints. Prospective jurors

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[18] The majority in *Adams* rejected the dissent's claim that there was "no plausible distinction between the role of the jury in the guilt/innocence phase of the trial and its role, as defined by the State of Texas, in the sentencing phase." 448 U. S., at 54 (REHNQUIST, J., dissenting).

come from many different backgrounds, and have many different attitudes and predispositions. But the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case. We hold that McCree's jury satisfied both aspects of this constitutional standard. The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE BLACKMUN concurs in the result.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

Eighteen years ago, this Court vacated the sentence of a defendant from whose jury the State had excluded all venirepersons expressing any scruples against capital punishment. Such a practice, the Court held, violated the Constitution by creating a "tribunal organized to return a verdict of death." *Witherspoon* v. *Illinois*, 391 U. S. 510, 521 (1968). The only venirepersons who could be constitutionally excluded from service in capital cases were those who "made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment" or that they could not assess the defendant's guilt impartially. *Id.*, at 522–523, n. 21.

Respondent contends here that the "death-qualified" jury that convicted him, from which the State, as authorized by *Witherspoon*, had excluded all venirepersons unwilling to consider imposing the death penalty, was in effect "organized to return a verdict" of guilty. In support of this claim, he has presented overwhelming evidence that death-qualified juries are substantially more likely to convict or to convict on more serious charges than juries on which unalterable opponents of capital punishment are permitted to serve. Re-

spondent does not challenge the application of *Witherspoon* to the jury in the sentencing stage of bifurcated capital cases. Neither does he demand that individuals unable to assess culpability impartially ("nullifiers") be permitted to sit on capital juries. All he asks is the chance to have his guilt or innocence determined by a jury like those that sit in noncapital cases—one whose composition has not been tilted in favor of the prosecution by the exclusion of a group of prospective jurors uncommonly aware of an accused's constitutional rights but quite capable of determining his culpability without favor or bias.

With a glib nonchalance ill-suited to the gravity of the issue presented and the power of respondent's claims, the Court upholds a practice that allows the State a special advantage in those prosecutions where the charges are the most serious and the possible punishments, the most severe. The State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will, under today's decision, give the prosecution license to empanel a jury especially likely to return that very verdict. Because I believe that such a blatant disregard for the rights of a capital defendant offends logic, fairness, and the Constitution, I dissent.

I

Respondent is not the first to argue that "death qualification" poses a substantial threat to the ability of a capital defendant to receive a fair trial on the issue of his guilt or innocence. In 1961, one scholar observed that "Jurors hesitant to levy the death penalty would . . . seem more prone to resolve the many doubts as to guilt or innocence in the defendant's favor than would jurors qualified on the 'pound of flesh' approach." Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Texas L. Rev. 545, 549 (1961).

When he claimed that the exclusion of scrupled jurors from his venire had violated his constitutional right to an impartial

jury, the petitioner in *Witherspoon* v. *Illinois*, *supra*, sought to provide empirical evidence to corroborate Oberer's intuition. See Brief for Petitioner in *Witherspoon* v. *Illinois*, O. T. 1967, No. 1015, pp. 28–33. The data on this issue, however, consisted of only three studies and one preliminary summary of a study.[1] Although the data certainly supported the validity of Witherspoon's challenge to his conviction, these studies did not provide the Court with the firmest basis for constitutional adjudication. As a result, while it reversed Witherspoon's death sentence, the Court was unable to conclude that "the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction," 391 U. S., at 518, and declined to reverse Witherspoon's conviction. Nonetheless, the Court was careful to note:

> "[A] defendant convicted by [a properly death-qualified] jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution." *Id.*, at 520, n. 18.

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[1] The *Witherspoon* Court had before it only a preliminary summary of the results of H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment (University of Chicago Monograph 1968), "not the data nor the analysis that underlay his conclusions, nor indeed his final conclusions themselves." *Hovey* v. *Superior Court*, 28 Cal. 3d 1, 30, n. 63, 616 P. 2d 1301, 1317, n. 63 (1980).

In the wake of *Witherspoon*, a number of researchers set out to supplement the data that the Court had found inadequate in that case. The results of these studies were exhaustively analyzed by the District Court in this case, see *Grigsby* v. *Mabry*, 569 F. Supp. 1273, 1291–1308 (ED Ark. 1983) *(Grigsby II)*, and can be only briefly summarized here.[2] The data strongly suggest that death qualification excludes a significantly large subset—at least 11% to 17%—of potential jurors who could be impartial during the guilt phase of trial.[3] Among the members of this excludable class are a disproportionate number of blacks and women. See *id.*, at 1283, 1293–1294.

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[2] Most of the studies presented here were also comprehensively summarized in *Hovey* v. *Superior Court*, *supra*. Because the California Supreme Court found the studies had not accounted for jurors who could be excluded because they would automatically vote for the death penalty where possible, that court ultimately rejected a defendant's constitutional challenge to death qualification. But see Kadane, After *Hovey*: A Note on Taking Account of the Automatic Death Penalty Jurors, 8 Law & Hum. Behav. 115 (1984).

[3] Bronson, On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 12 U. Colo. L. Rev. 1 (1970) (using classification only approximating *Witherspoon* standard, and finding 11% of subjects *Witherspoon*-excludable); Bronson, Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California, 3 Woodrow Wilson L. J. 11 (1980) (using more appropriate *Witherspoon* question and finding 93% overlap of "strongly opposed" group in prior Bronson study with *Witherspoon*-excludables); Jurow, New Data on the Effect of a "Death Qualified Jury" on the Guilt Determination Process, 84 Harv. L. Rev. 567 (1971) (finding only 10% of sample excludable, but likely to have underestimated size of class in general population because sample 99% white and 80% male); Fitzgerald & Ellsworth, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 Law & Hum. Behav. 31 (1984) (random sample with nullifiers screened out finding 17% still excludable under *Witherspoon*); A. Young, Arkansas Archival Study (unpublished, 1981) (14% of jurors questioned in *voir dire* transcripts excludable); Precision Research, Inc., Survey No. 1286 (1981) (11% excludable, not counting nullifiers); see 569 F. Supp., at 1285; *Grigsby* v. *Mabry*, 758 F. 2d 226, 231 (CA8 1985).

The perspectives on the criminal justice system of jurors who survive death qualification are systematically different from those of the excluded jurors. Death-qualified jurors are, for example, more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions. *Id.*, at 1283, 1293, 1304. This pro-prosecution bias is reflected in the greater readiness of death-qualified jurors to convict or to convict on more serious charges. *Id.*, at 1294–1302; *Grigsby* v. *Mabry*, 758 F. 2d 226, 233–236 (CA8 1985). And, finally, the very process of death qualification—which focuses attention on the death penalty before the trial has even begun—has been found to predispose the jurors that survive it to believe that the defendant is guilty. 569 F. Supp., at 1302–1305; 758 F. 2d, at 234.

The evidence thus confirms, and is itself corroborated by, the more intuitive judgments of scholars and of so many of the participants in capital trials—judges, defense attorneys, and prosecutors. See 569 F. Supp., at 1322.[4]

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[4] The Court reasons that because the State did not "waive" the death penalty in respondent's case, we "need not consider the implications" of respondent's assertion that "the State often will request the death penalty in particular cases solely for the purpose of 'death qualifying' the jury, with the intent ultimately to 'waive' the death penalty after a conviction is obtained." *Ante*, at 176, n. 16. If, by this, the Court intended to limit the effects of its decision to the case pending before us, I would gladly join that effort. However, I see all too few indications in the Court's opinion that future constitutional challenges to death-qualified juries stand much chance of success here. In view of the sweep of the Court's opinion and the fact that, in any particular case, a defendant will never be able to demonstrate with any certainty that the prosecution's decision to seek the death penalty was merely a tactical ruse, I find the Court's refusal to consider the potential for this abuse rather disingenuous. See *Grigsby* v. *Mabry*, 483 F. Supp. 1372, 1389, n. 24 (ED Ark. 1980) *(Grigsby I)* (suggesting possibility that prosecutor had initially sought death penalty merely to get more conviction-prone, death-qualified jury). Cf. Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of

II

A

Respondent's case would of course be even stronger were he able to produce data showing the prejudical effects of death qualification upon actual trials. Yet, until a State permits two separate juries to deliberate on the same capital case and return simultaneous verdicts, defendants claiming prejudice from death qualification should not be denied recourse to the only available means of proving their case, recreations of the *voir dire* and trial processes. See *Grigsby v. Mabry*, 758 F. 2d, at 237 ("[I]t is the courts who have often stood in the way of surveys involving real jurors and we should not now reject a study because of this deficiency").

The chief strength of respondent's evidence lies in the essential unanimity of the results obtained by researchers using diverse subjects and varied methodologies. Even the Court's haphazard jabs cannot obscure the power of the array. Where studies have identified and corrected apparent flaws in prior investigations, the results of the subsequent work have only corroborated the conclusions drawn in the earlier efforts. Thus, for example, some studies might be faulted for failing to distinguish within the class of *Witherspoon*-excludables, between nullifiers (whom respondent concedes may be excluded from the guilt phase) and those who could assess guilt impartially. Yet their results are entirely consistent with those obtained after nullifiers had indeed been excluded. See, *e. g.*, Cowan, Thompson, & Ellsworth, The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 Law & Hum. Behav. 53 (1984). And despite the failure of certain studies to "allow for group deliberations," *ante*, at

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Fair Trial on Issue of Guilt?, 39 Texas L. Rev. 545, 555, n. 45b (1961) (reporting testimony of one prosecutor that there might be other prosecutors who death-qualified a jury "without hope of obtaining a death verdict but in the expectation that a jury so selected would impose a higher penalty than might otherwise be obtained").

171, n. 10, the value of their results is underscored by the discovery that initial verdict preferences, made prior to group deliberations, are a fair predictor of how a juror will vote when faced with opposition in the jury room. See Cowan, Thompson, & Ellsworth, *supra*, at 68–69; see also R. Hastie, S. Penrod, & N. Pennington, Inside the Jury 66 (1983); H. Kalven & H. Zeisel, The American Jury 488 (1966).

The evidence adduced by respondent is quite different from the "tentative and fragmentary" presentation that failed to move this Court in *Witherspoon*. 391 U. S., at 517. Moreover, in contrast to *Witherspoon*, the record in this case shows respondent's case to have been "subjected to the traditional testing mechanisms of the adversary process," *Ballew* v. *Georgia* 435 U. S. 223, 246 (1978) (POWELL, J., concurring in judgment). At trial, respondent presented three expert witnesses and one lay witness in his case in chief, and two additional lay witnesses in his rebuttal. Testimony by these witnesses permitted the District Court, and allows this Court, better to understand the methodologies used here and their limitations. Further testing of respondent's empirical case came at the hands of the State's own expert witnesses. Yet even after considering the evidence adduced by the State, the Court of Appeals properly noted: "there are no studies which contradict the studies submitted [by respondent]; in other words, all of the documented studies support the district court's findings." 758 F. 2d, at 238.

B

The true impact of death qualification on the fairness of a trial is likely even more devastating than the studies show. *Witherspoon* placed limits on the State's ability to strike scrupled jurors for cause, unless they state "unambiguously that [they] would automatically vote against the imposition of capital punishment no matter what the trial might reveal," 391 U. S., at 516, n. 9. It said nothing, however, about the prosecution's use of peremptory challenges to eliminate ju-

rors who do not meet that standard and would otherwise survive death qualification. See Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 85, n. 391 (1980). There is no question that peremptories have indeed been used to this end, thereby expanding the class of scrupled jurors excluded as a result of the death-qualifying *voir dire* challenged here. See, *e. g.*, *People* v. *Velasquez*, 26 Cal. 3d 425, 438, n. 9, 606 P. 2d 341, 348, n. 9 (1980) (prosecutor informed court during *voir dire* that if a venireperson expressing scruples about the death penalty "were not a challenge for cause, I would kick her off on a peremptory challenge"). The only study of this practice has concluded: "For the five-year period studied a prima facie case has been demonstrated that prosecutors in Florida's Fourth Judicial Circuit systematically used their peremptory challenges to eliminate from capital juries venirepersons expressing opposition to the death penalty." Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1, 39 (1982).[5]

Judicial applications of the *Witherspoon* standard have also expanded the class of jurors excludable for cause. While the studies produced by respondent generally classified a subject as a *Witherspoon*-excludable only upon his unambiguous refusal to vote death under any circumstance, the courts have never been so fastidious. Trial and appellate courts have frequently excluded jurors even in the absence of unambiguous expressions of their absolute opposition to capital punishment. Schnapper, Taking *Witherspoon* Seriously: The Search for Death-Qualified Jurors, 62 Texas L. Rev. 977,

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[5] At this point, the remedy called for is not the wholesale removal of the prosecution's power to make peremptory challenges, but merely the elimination of death qualification. But cf. *Batson* v. *Kentucky*, *ante*, p. 102 (MARSHALL, J., concurring). Without the extensive *voir dire* now allowed for death qualification, the prosecution would lack sufficient information to be able to expand the scope of *Witherspoon* through the use of peremptories. See n. 8, *infra*.

993–1032 (1984). And this less demanding approach will surely become more common in the wake of this Court's decision in *Wainwright* v. *Witt*, 469 U. S. 412 (1985). Under *Witt*, a juror who does not make his attitude toward capital punishment "unmistakably clear," *Witherspoon*, 391 U. S., at 522, n. 21, may nonetheless be excluded for cause if the trial court is left with the impression that his attitude will "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Witt*, *supra*, at 433 (quoting *Adams* v. *Texas*, 448 U. S. 38, 45 (1980)). It thus "seems likely that *Witt* will lead to more conviction-prone panels" since "'scrupled' jurors—those who generally oppose the death penalty but do not express an unequivocal refusal to impose it—usually share the pro-defendant perspective of excludable jurors." See Finch & Ferraro, The Empirical Challenge to Death Qualified Juries: On Further Examination, 65 Neb. L. Rev. 21, 63 (1986).

C

Faced with the near unanimity of authority supporting respondent's claim that death qualification gives the prosecution a particular advantage in the guilt phase of capital trials, the majority here makes but a weak effort to contest that proposition. Instead, it merely assumes for the purposes of this opinion "that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries," *ante*, at 173, and then holds that this result does not offend the Constitution. This disregard for the clear import of the evidence tragically misconstrues the settled constitutional principles that guarantee a defendant the right to a fair trial and an impartial jury whose composition is not biased toward the prosecution.

III

In *Witherspoon* the Court observed that a defendant convicted by a jury from which those unalterably opposed to the death penalty had been excluded "might still attempt to es-

tablish that the jury was less than neutral with respect to *guilt*." 391 U. S., at 520, n. 18. Respondent has done just that. And I believe he has succeeded in proving that his trial by a jury so constituted violated his right to an impartial jury, guaranteed by both the Sixth Amendment and principles of due process, see *Ristaino* v. *Ross*, 424 U. S. 589, 595, n. 6 (1976). We therefore need not rely on respondent's alternative argument that death qualification deprived him of a jury representing a fair cross section of the community.[6]

A

Respondent does not claim that any individual on the jury that convicted him fell short of the constitutional standard for impartiality. Rather, he contends that, by systematically excluding a class of potential jurors less prone than the population at large to vote for conviction, the State gave itself an unconstitutional advantage at his trial. Thus, according to respondent, even though a nonbiased selection procedure might have left him with a jury composed of the very same

[6] With respect to the Court's discussion of respondent's fair-cross-section claim, however, I must note that there is no basis in either precedent or logic for the suggestion that a state law authorizing the prosecution before trial to exclude from jury service all, or even a substantial portion of, the members of a "distinctive group" would not constitute a clear infringement of a defendant's Sixth Amendment right. "The desired interaction of a cross section of the community does not take place within the venire; it is only effectuated by the jury that is selected and sworn to try the issues." *McCray* v. *New York*, 461 U. S. 961, 968 (1983) (MARSHALL, J., dissenting from denial of certiorari); see *McCray* v. *Abrams*, 750 F. 2d 1113, 1128–1129 (CA2 1984), cert. pending, No. 84–1426. The right to have a particular group represented on venires is of absolutely no value if every member of that group will automatically be excluded from service as soon as he is found to be a member of that group. Whether a violation of the fair-cross-section requirement has occurred can hardly turn on *when* the wholesale exclusion of a group takes place. If, for example, blacks were systematically struck from petit juries pursuant to state law, the effect—and the infringement of a defendant's Sixth Amendment rights—would be the same as if they had never been included on venires in the first place.

individuals that actually sat on his panel, the process by which those 12 individuals were chosen violated the Constitution.

I am puzzled by the difficulty that the majority has in understanding the "logic of the argument." *Ante*, at 178. For the logic is precisely that which carried the day in *Witherspoon*, and which has never been repudiated by this Court—not even today, if the majority is to be taken at its word. There was no question in *Witherspoon* that if the defendant's jury had been chosen by the "luck of the draw," the same 12 jurors who actually sat on his case might have been selected. Nonetheless, because the State had removed from the pool of possible jurors all those expressing general opposition to the death penalty, the Court overturned the defendant's conviction, declaring "that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." 391 U. S., at 521. Witherspoon had been denied a fair sentencing determination, the Court reasoned, not because any member of his jury lacked the requisite constitutional impartiality, but because the manner in which that jury had been selected "stacked the deck" against him. *Id.*, at 523. Here, respondent adopts the approach of the *Witherspoon* Court and argues simply that the State entrusted the determination of his guilt and the level of his culpability to a tribunal organized to convict.

The Court offers but two arguments to rebut respondent's constitutional claim. First, it asserts that the "State's reasons for adhering to its preference for a single jury to decide both the guilt and penalty phases of a capital trial are sufficient to negate the inference which the Court drew in *Witherspoon* concerning the lack of any neutral justification for the Illinois rule on jury challenges." *Ante*, at 182. This argument, however, does not address the question whether death qualification infringes a defendant's constitutional interest in "a completely fair determination of guilt or innocence,"

Witherspoon, 391 U. S., at 520, n. 18. It merely indicates the state interest that must be considered once an infringement of that constitutional interest is found.

The Court's second reason for rejecting respondent's challenge to the process that produced his jury is that the notion of "neutrality" adumbrated in *Witherspoon* must be confined to "the special context of capital sentencing, where the range of jury discretion necessarily gave rise to far greater concern over the possible effects of an 'imbalanced' jury." *Ante*, at 182. But in the wake of this Court's decision in *Adams* v. *Texas*, 448 U. S. 38 (1980), this distinction is simply untenable.

B

In *Adams*, this Court applied the principles of *Witherspoon* to the Texas death-penalty scheme. Under that scheme, if a defendant is convicted of a capital offense, a separate sentencing proceeding is held at which additional aggravating or mitigating evidence is admissible. The jury then must answer three questions based on evidence adduced during either phase of the trial:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in reponse to the provocation, if any, by the deceased." Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon Supp. 1986).

See *Adams*, *supra*, at 40–41. If the jury finds beyond a reasonable doubt that the answer to each of these questions is "yes," the court must impose a death sentence; a single "no"

answer requires the court to impose a sentence of life imprisonment. With the role of the jury so defined, *Adams* held that Texas could not constitutionally exclude every prospective juror unable to state under oath that "the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." Tex. Penal Code Ann. § 12.31(b) (1974); see *Adams*, *supra*, at 42. The "process" of answering the statutory questions, the Court observed, "is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths." 448 U. S., at 46. Consequently, while Texas could constitutionally exclude jurors whose scruples against the death penalty left them unable "to answer the statutory questions without conscious distortion or bias," *ibid.*, it could not exclude those

> "[who] aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." *Id.*, at 50.

The message of *Adams* is thus that even where the role of the jury at the penalty stage of a capital trial is limited to what is essentially a factfinding role, the right to an impartial jury established in *Witherspoon* bars the State from skewing the composition of its capital juries by excluding scrupled jurors who are nonetheless able to find those facts without distortion or bias. This proposition cannot be limited to the penalty stage of a capital trial, for the services that Adams'

jury was called upon to perform at his penalty stage "are nearly indistinguishable" from those required of juries at the culpability phase of capital trials. Gillers, Proving the Prejudice of Death-Qualified Juries after *Adams v. Texas*, 47 U. Pitt. L. Rev. 219, 247 (1985). Indeed, JUSTICE REHNQUIST noted in *Adams* that he could "see no plausible distinction between the role of the jury in the guilt/innocence phase of the trial and its role, as defined by the State of Texas, in the sentencing phase." 448 U. S., at 54 (dissenting). Contrary to the majority's suggestion, *ante* at 183, this point was at no time repudiated by the *Adams* Court. And the absence of a reply to JUSTICE REHNQUIST was not an oversight. At the penalty stage of his trial, Adams' jury may have been called upon to do something more than ascertain the existence *vel non* of specific historical facts. Yet the role assigned a jury at a trial's culpability phase is little different, for there the critical task of the jury will frequently be to determine not whether defendant actually inflicted the fatal wound, but rather whether his level of culpability at the time of the murder makes conviction on capital murder charges, as opposed to a lesser count, more appropriate. Representing the conscience of the community, the jurors at both stages "unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths." 448 U. S., at 46.

Adams thus provides clear precedent for applying the analysis of *Witherspoon* to the guilt phase of a criminal trial. Indeed, respondent's case is even stronger than Witherspoon's. The Court in *Witherspoon* merely presumed that the exclusion of scrupled jurors would unacceptably increase the likelihood that the defendant would be condemned to death. Respondent here has gone much further and laid a solid empirical basis to support his claim that the juries produced by death qualification are substantially more likely to convict.

IV

A

One need not rely on the analysis and assumptions of *Adams* and *Witherspoon* to demonstrate that the exclusion of opponents of capital punishment capable of impartially determining culpability infringes a capital defendant's constitutional right to a fair and impartial jury. For the same conclusion is compelled by the analysis that in *Ballew* v. *Georgia*, 435 U. S. 223 (1978), led a majority of this Court[7] to hold that a criminal conviction rendered by a 5-person jury violates the Sixth and Fourteenth Amendments.

Faced with an effort by Georgia to reduce the size of the jury in a criminal case beyond the 6-member jury approved by this Court in *Williams* v. *Florida*, 399 U. S. 78 (1970), this Court articulated several facets of the inquiry whether the reduction impermissibly "inhibit[ed] the functioning of the jury as an institution to a significant degree." *Ballew*, *supra*, at 231. First, the Court noted that "recent empirical data" had suggested that a five-member jury was "less likely to foster effective group deliberation" and that such a decline in effectiveness would likely lead "to inaccurate factfinding and incorrect application of the common sense of the community to the facts." *Id.*, at 232. The Court advanced several explanations for this phenomenon:

> "As juries decrease in size . . . , they are less likely to have members who remember each of the important pieces of evidence or argument. Furthermore, the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result. When individual and group decisionmaking were com-

[7] Although the opinion of JUSTICE BLACKMUN in *Ballew* was cosigned by only JUSTICE STEVENS, three other Justices specifically joined that opinion "insofar as it holds that the Sixth and Fourteenth Amendments require juries in criminal trials to contain more than five persons." 435 U. S., at 246 (opinion of BRENNAN, J., joined by Stewart and MARSHALL, JJ.).

pared, it was seen that groups performed better because prejudices of individuals were frequently counterbalanced, and objectivity resulted." *Id.*, at 233 (footnotes omitted).

The Court also cited empirical evidence suggesting "that the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and that the variance amounts to an imbalance to the detriment of one side, the defense." *Id.*, at 236. Lastly, the Court observed that further reductions in jury size would also foretell problems "for the representation of minority groups in the community." *Ibid.*

B

Each of the concerns that led this Court in *Ballew* to find that a misdemeanor defendant had been deprived of his constitutional right to a fair trial by jury is implicated by the process of death qualification, which threatens a defendant's interests to an even greater extent in cases where the stakes are substantially higher. When compared to the juries that sit in all other criminal trials, the death-qualified juries of capital cases are likely to be deficient in the quality of their deliberations, the accuracy of their results, the degree to which they are prone to favor the prosecution, and the extent to which they adequately represent minority groups in the community.

The data considered here, as well as plain common sense, leave little doubt that death qualification upsets the "counterbalancing of various biases" among jurors that *Ballew* identified as being so critical to the effective functioning of juries. *Id.*, at 234. The evidence demonstrates that "a person's attitude toward capital punishment is an important indicator of a whole cluster of attitudes about crime control and due process." Fitzgerald & Ellsworth, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 Law & Hum. Behav. 31, 46 (1984). Members of the excluded group have been shown to be significantly more concerned with the con-

stitutional rights of criminal defendants and more likely to doubt the strength of the prosecution's case. No doubt because diversity promotes controversy, which in turn leads to a closer scrutiny of the evidence, one study found that "the members of mixed juries [composed of *Witherspoon*-excludables as well as death-qualified jurors] remember the evidence better than the members of death-qualified juries." Cowan, Thompson, & Ellsworth, 8 Law & Hum. Behav., at 76. This study found that not only is the recall of evidence by a death-qualified jury likely to be below the standard of ordinary juries, but its testing of that evidence will be less rigorous. *Id.*, at 75. It thus appears that in the most serious criminal cases—those in which the State has expressed an intention to seek the death penalty—the ability of the jury to find historical truth may well be impaired.

The role of a jury in criminal cases, however, is not limited to the determination of historical facts. The task of ascertaining the level of a defendant's culpability requires a jury to decide not only whether the accused committed the acts alleged in the indictment, but also the extent to which he is morally blameworthy. Thus, especially in capital cases, where a defendant invariably will be charged with lesser included offenses having factual predicates similar to those of the capital murder charges, see *Beck* v. *Alabama* 447 U. S. 625 (1980), it may be difficult to classify a particular verdict as "accurate" or "inaccurate." However, the *Ballew* Court went beyond a concern for simple historical accuracy and questioned any jury procedure that systematically operated to the "detriment of . . . the defense." 435 U. S., at 236.

With even more clarity than the data considered in *Ballew*, the studies adduced by respondent show a broad pattern of "biased decisionmaking," *Ballew*, *supra*, at 239. It is not merely that the jurors who survive death qualification are more likely to accept the word of the prosecution and be satisfied with a lower standard of proof than those who are excluded. The death-qualified jurors are actually more likely

to convict than their peers. Whether the verdict against a particular capital defendant will actually be different depends on the strength of the evidence against him, the likelihood that, absent death qualification, one or more *Witherspoon*-excludables would have sat on his jury, and a host of other factors. See Gillers, 47 U. Pitt. L. Rev., at 232–238. However, *Ballew* points to the importance of considering the effects of a particular jury procedure over a range of cases, and not focusing on the fairness of any single trial. Because it takes only one juror unwilling to find that the prosecution has met its burden for a trial to end in either a mistrial or a compromise verdict, "it can be confidently asserted that, over time, some persons accused of capital crimes will be convicted of offenses—and to a higher degree—who would not be so convicted" had all persons able to assess their guilt impartially been permitted to sit on their juries. *Hovey* v. *Superior Court*, 28 Cal. 3d 1, 25, n. 57, 616 P. 2d 1301, 1314, n. 57 (1980).

Death qualification also implicates the *Ballew* Court's concern for adequate representation of minority groups. Because opposition to capital punishment is significantly more prevalent among blacks than among whites, the evidence suggests that death qualification will disproportionately affect the representation of blacks on capital juries. Though perhaps this effect may not be sufficient to constitute a violation of the Sixth Amendment's fair-cross-section principle, see *Duren* v. *Missouri*, 439 U. S. 357, 363–364 (1979), it is similar in magnitude to the reduction in minority representation that the *Ballew* Court found to be of "constitutional significance" to a defendant's right to a fair jury trial, 435 U. S., at 239. See White, Death-Qualified Juries: The "Prosecution Proneness" Argument Reexamined, 41 U. Pitt. L. Rev. 353, 387–389 (1980).

The principle of "impartiality" invoked in *Witherspoon* is thus not the only basis for assessing whether the exclusion of jurors unwilling to consider the death penalty but able impar-

tially to determine guilt infringes a capital defendant's constitutional interest in a fair trial. By identifying the critical concerns that are subsumed in that interest, the *Ballew* Court pointed to an alternative approach to the issue, drawing on the very sort of empirical data that respondent has presented here. And viewed in light of the concerns articulated in *Ballew*, the evidence is sufficient to establish that death qualification constitutes a substantial threat to a defendant's Sixth and Fourteenth Amendment right to a fair jury trial—a threat constitutionally acceptable only if justified by a sufficient state interest.

C

Respondent's challenge to the impartiality of death-qualified juries focuses upon the imbalance created when jurors particularly likely to look askance at the prosecution's case are systematically excluded from panels. He therefore appears to limit his constitutional claim to only those cases in which jurors have actually been struck for cause because of their opposition to the death penalty. Tr. of Oral Arg. 26. However, this limitation should not blind the Court to prejudice that occurs even in cases in which no juror has in fact been excluded for refusing to consider the death penalty.

There is considerable evidence that the very process of determining whether any potential jurors are excludable for cause under *Witherspoon* predisposes jurors to convict. One study found that exposure to the *voir dire* needed for death qualification "increased subjects' belief in the guilt of the defendant and their estimate that he would be convicted." Haney, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 Law & Hum. Behav. 121, 128 (1984). See *Hovey*, *supra*, at 73, 616 P. 2d, at 1349. Even if this prejudice to the accused does not constitute an independent due process violation, it surely should be taken into account in any inquiry into the effects of death qualification. "[T]he process effect may function additively

to worsen the perspective of an already conviction-prone jury whose composition has been distorted by the outcome of this selection process . . . ." Haney, Examining Death Qualification: Further Analysis of the Process Effect, 8 Law & Hum. Behav. 133, 151 (1984).

The majority contends that any prejudice attributed to the process of death-qualifying jurors is justified by the State's interest in identifying and excluding nullifiers before the guilt stage of trial. *Ante*, at 170, n. 7. It overlooks, however, the ease with which nullifiers could be identified before trial without any extended focus on how jurors would conduct themselves at a capital sentencing proceeding. Potential jurors could be asked, for example, "if there be any reason why any of them could not fairly and impartially try the issue of defendant's guilt in accordance with the evidence presented at the trial and the court's instructions as to the law." *Grigsby II*, 569 F. Supp., at 1310.[8] The prejudice attributable to the current pretrial focus on the death penalty should therefore be considered here and provides but another reason for concluding that death qualification infringes a capital defendant's "interest in a completely fair determination of guilt or innocence." *Witherspoon*, 391 U. S., at 520, n. 18.

V

As the *Witherspoon* Court recognized, "the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment" may be accommodated without infringing a capital defendant's interest in a fair determination of his guilt if the State uses "one jury to decide guilt and another to

[8] Restriction of *voir dire* to this inquiry would limit the ability of the prosecution to use its peremptory challenges to strike those jurors who would have been excluded for cause under the current system of death qualification. And the power of this inquiry to root out *all* prejudices and biases, no matter how great a threat they pose to the fairness of a guilt determination, has only recently been established by this Court as a matter of law. See *Turner* v. *Murray*, *ante*, p. 28. But see *ante*, at 45 (MARSHALL, J., concurring in judgment in part and dissenting in part).

fix punishment." *Ibid.* Any exclusion of death-penalty opponents, the Court reasoned, could await the penalty phase of a trial. The question here is thus whether the State has *other* interests that require the use of a single jury and demand the subordination of a capital defendant's Sixth and Fourteenth Amendment rights.

The only two reasons that the Court invokes to justify the State's use of a single jury are efficient trial management and concern that a defendant at his sentencing proceedings may be able to profit from "residual doubts" troubling jurors who have sat through the guilt phase of his trial. The first of these purported justifications is merely unconvincing. The second is offensive.

In *Ballew*, the Court found that the State's interest in saving "court time and . . . financial costs" was insufficient to justify further reductions in jury size. 435 U. S., at 243–244. The same is true here. The additional costs that would be imposed by a system of separate juries are not particularly high.

> "First, capital cases constitute a relatively small number of criminal trials. Moreover, the number of these cases in which a penalty determination will be necessary is even smaller. A penalty determination will occur only where a verdict on guilt has been returned that authorizes the possible imposition of capital punishment, and only where the prosecutor decides that a death sentence should be sought. Even in cases in which a penalty determination will occur, the impaneling of a new penalty jury may not always be necessary. In some cases, it may be possible to have alternate jurors replace any 'automatic life imprisonment' jurors who served at the guilt determination trial." Winick, 81 Mich. L. Rev., at 57.

In a system using separate juries for guilt and penalty phases, time and resources would be saved every time a capital case did not require a penalty phase. The *voir dire*

needed to identify nullifiers before the guilt phase is less extensive than the questioning that under the current scheme is conducted before *every* capital trial. The State could, of course, choose to empanel a death-qualified jury at the start of every trial, to be used only if a penalty stage is required. However, if it opted for the cheaper alternative of empaneling a death-qualified jury only in the event that a defendant were convicted of capital charges, the State frequently would be able to avoid retrying the entire guilt phase for the benefit of the penalty jury. Stipulated summaries of prior evidence might, for example, save considerable time. Thus, it cannot fairly be said that the costs of accommodating a defendant's constitutional rights under these circumstances are prohibitive, or even significant.

Even less convincing is the Court's concern that a defendant be able to appeal at sentencing to the "residual doubts" of the jurors who found him guilty. Any suggestion that the current system of death qualification "may be in the defendant's best interests, seems specious unless the state is willing to grant the defendant the option to waive this paternalistic protection in exchange for better odds against conviction." Finch & Ferraro, 65 Neb. L. Rev., at 69. Furthermore, this case will stand as one of the few times in which any legitimacy has been given to the power of a convicted capital defendant facing the possibility of a death sentence to argue as a mitigating factor the chance that he might be innocent. Where a defendant's sentence but not his conviction has been set aside on appeal, States have routinely empaneled juries whose only duty is to assess punishment, thereby depriving defendants of the chance to profit from the "residual doubts" that jurors who had already sat through a guilt phase might bring to the sentencing proceeding. In its statute authorizing resentencing without any reassessment of culpability, Arkansas has noted: "it is a waste of judicial resources to require the retrying of an error-free trial if the State wishes to seek to reimpose the death penalty." 1983 Ark. Gen. Act.

No. 546, § 3, note following Ark. Rev. Stat. Ann. § 41-1358 (Supp. 1985).

But most importantly, it ill-behooves the majority to allude to a defendant's power to appeal to "residual doubts" at his sentencing when this Court has consistently refused to grant certiorari in state cases holding that these doubts cannot properly be considered during capital sentencing proceedings. See *Burr* v. *Florida*, 474 U. S. 879 (1985) (MARSHALL, J., dissenting from denial of certiorari); *Heiney* v. *Florida*, 469 U. S. 920 (1984) (MARSHALL, J., dissenting from denial of certiorari); *Burford* v. *State*, 403 So. 2d 943 (Fla. 1981), cert. denied, 454 U. S. 1164 (1982). Any suggestion that capital defendants will benefit from a single jury thus is more than disingenuous. It is cruel.

VI

On occasion, this Court has declared what I believe should be obvious—that when a State seeks to convict a defendant of the most serious and severely punished offenses in its criminal code, any procedure that "diminish[es] the reliability of the guilt determination" must be struck down. *Beck* v. *Alabama*, 447 U. S., at 638. But in spite of such declarations, I cannot help thinking that respondent here would have stood a far better chance of prevailing on his constitutional claims had he not been challenging a procedure peculiar to the administration of the death penalty. For in no other context would a majority of this Court refuse to find any constitutional violation in a state practice that systematically operates to render juries more likely to convict, and to convict on the more serious charges. I dissent.

CALIFORNIA v. CIRAOLO

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 84-1513. Argued December 10, 1985—Decided May 19, 1986

The Santa Clara, Cal., police received an anonymous telephone tip that marijuana was growing in respondent's backyard, which was enclosed by two fences and shielded from view at ground level. Officers who were trained in marijuana identification secured a private airplane, flew over respondent's house at an altitude of 1,000 feet, and readily identified marijuana plants growing in the yard. A search warrant was later obtained on the basis of one of the officer's naked-eye observations; a photograph of the surrounding area taken from the airplane was attached as an exhibit. The warrant was executed, and marijuana plants were seized. After the California trial court denied respondent's motion to suppress the evidence of the search, he pleaded guilty to a charge of cultivation of marijuana. The California Court of Appeal reversed on the ground that the warrantless aerial observation of respondent's yard violated the Fourth Amendment.

Held: The Fourth Amendment was not violated by the naked-eye aerial observation of respondent's backyard. Pp. 211-215.

(a) The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy, which involves the two inquiries of whether the individual manifested a subjective expectation of privacy in the object of the challenged search, and whether society is willing to recognize that expectation as reasonable. *Katz v. United States*, 389 U. S. 347. In pursuing the second inquiry, the test of legitimacy is not whether the individual chooses to conceal assertedly "private activity," but whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. Pp. 211-212.

(b) On the record here, respondent's expectation of privacy from *all* observations of his backyard was unreasonable. That the backyard and its crop were within the "curtilage" of respondent's home did not itself bar all police observation. The mere fact that an individual has taken measures to restrict some views of his activities does not preclude an officer's observation from a public vantage point where he has a right to be and which renders the activities clearly visible. The police observations here took place within public navigable airspace, in a physically nonintrusive manner. The police were able to observe the plants

readily discernible to the naked eye as marijuana, and it was irrelevant that the observation from the airplane was directed at identifying the plants and that the officers were trained to recognize marijuana. Any member of the public flying in this airspace who cared to glance down could have seen everything that the officers observed. The Fourth Amendment simply does not require police traveling in the public airways at 1,000 feet to obtain a warrant in order to observe what is visible to the naked eye. Pp. 212–215.

161 Cal. App. 3d 1081, 208 Cal. Rptr. 93, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 215.

Laurence K. Sullivan, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *John K. Van de Kamp*, Attorney General, *Steve White*, Chief Assistant Attorney General, and *Eugene W. Kaster*, Deputy Attorney General.

Marshall Warren Krause, by appointment of the Court, 472 U. S. 1025, argued the cause for respondent. With him on the brief was *Pamela Holmes Duncan*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Linley E. Pearson*, Attorney General of Indiana, *William E. Daily* and *Lisa M. Paunicka*, Deputy Attorneys General, *Charles A. Graddick*, Attorney General of Alabama, *Charles M. Oberly*, Attorney General of Delaware, *Michael J. Bowers*, Attorney General of Georgia, *Neil F. Hartigan*, Attorney General of Illinois, *Robert T. Stephan*, Attorney General of Kansas, *David L. Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Francis X. Bellotti*, Attorney General of Massachusetts, *William L. Webster*, Attorney General of Missouri, *Robert M. Spire*, Attorney General-Designate of Nebraska, *Brian McKay*, Attorney General of Nevada, *Stephen E. Merrill*, Attorney General of New Hampshire, *Paul Bardacke*, Attorney General of New Mexico, *Anthony Celebrezze*, Attorney General of Ohio, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Travis Medlock*, Attorney General of South Carolina, *Jeffrey Amestoy*, Attorney General of Vermont, *Gerald L. Baliles*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Archie G. McClintock*, Attorney General of

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether the Fourth Amendment is violated by aerial observation without a warrant from an altitude of 1,000 feet of a fenced-in backyard within the curtilage of a home.

I

On September 2, 1982, Santa Clara Police received an anonymous telephone tip that marijuana was growing in respondent's backyard. Police were unable to observe the contents of respondent's yard from ground level because of a 6-foot outer fence and a 10-foot inner fence completely enclosing the yard. Later that day, Officer Shutz, who was assigned to investigate, secured a private plane and flew over respondent's house at an altitude of 1,000 feet, within navigable airspace; he was accompanied by Officer Rodriguez. Both officers were trained in marijuana identification. From the overflight, the officers readily identified marijuana plants 8 feet to 10 feet in height growing in a 15- by 25-foot plot in respondent's yard; they photographed the area with a standard 35mm camera.

On September 8, 1982, Officer Shutz obtained a search warrant on the basis of an affidavit describing the anonymous tip and their observations; a photograph depicting respondent's house, the backyard, and neighboring homes was attached to the affidavit as an exhibit. The warrant was

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Wyoming; for Americans for Effective Law Enforcement Inc. et al. by *Fred E. Inbau, Wayne W. Schmidt, James P. Manak, David Crump,* and *Daniel B. Hales;* for the Criminal Justice Legal Foundation by *Christopher N. Heard;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *George C. Smith.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *C. Douglas Floyd, Alan L. Schlosser,* and *Charles S. Sims;* for the Civil Liberties Monitoring Project by *Amitai Schwartz;* and for the National Association of Criminal Defense Lawyers by *John Kenneth Zwerling.*

executed the next day and 73 plants were seized; it is not disputed that these were marijuana.

After the trial court denied respondent's motion to suppress the evidence of the search, respondent pleaded guilty to a charge of cultivation of marijuana. The California Court of Appeal reversed, however, on the ground that the warrantless aerial *observation* of respondent's yard which led to the issuance of the warrant violated the Fourth Amendment. 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (1984). That court held first that respondent's backyard marijuana garden was within the "curtilage" of his home, under *Oliver* v. *United States*, 466 U. S. 170 (1984). The court emphasized that the height and existence of the two fences constituted "objective criteria from which we may conclude he manifested a reasonable expectation of privacy by any standard." 161 Cal. App. 3d, at 1089, 208 Cal. Rptr., at 97.

Examining the particular method of surveillance undertaken, the court then found it "significant" that the flyover "was not the result of a routine patrol conducted for any other legitimate law enforcement or public safety objective, but was undertaken for the specific purpose of observing this particular enclosure within [respondent's] curtilage." *Ibid.* It held this focused observation was "a direct and unauthorized intrusion into the sanctity of the home" which violated respondent's reasonable expectation of privacy. *Id.*, at 1089–1090, 208 Cal. Rptr., at 98 (footnote omitted). The California Supreme Court denied the State's petition for review.

We granted the State's petition for certiorari, 471 U. S. 1134 (1985). We reverse.

The State argues that respondent has "knowingly exposed" his backyard to aerial observation, because all that was seen was visible to the naked eye from any aircraft flying overhead. The State analogizes its mode of observation to a knothole or opening in a fence: if there is an opening, the police may look.

The California Court of Appeal, as we noted earlier, accepted the analysis that unlike the casual observation of a private person flying overhead, this flight was focused specifically on a small suburban yard, and was not the result of any routine patrol overflight. Respondent contends he has done all that can reasonably be expected to tell the world he wishes to maintain the privacy of his garden within the curtilage without covering his yard. Such covering, he argues, would defeat its purpose as an outside living area; he asserts he has not "knowingly" exposed himself to aerial views.

II

The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz* v. *United States*, 389 U. S. 347, 360 (1967) (Harlan, J., concurring). *Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? See *Smith* v. *Maryland*, 442 U. S. 735, 740 (1979).

Clearly—and understandably—respondent has met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits. However, we need not address that issue, for the State has not challenged the finding of the California Court of Appeal that respondent had such an expectation. It can reasonably be assumed that the 10-foot fence was placed to conceal the marijuana crop from at least street-level views. So far as the normal sidewalk traffic was concerned, this fence served that purpose, because respondent "took normal precautions to maintain his privacy." *Rawlings* v. *Kentucky*, 448 U. S. 98, 105 (1980).

Yet a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or a 2-level bus. Whether respondent therefore manifested

a subjective expectation of privacy from *all* observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits, is not entirely clear in these circumstances. Respondent appears to challenge the authority of government to observe his activity from any vantage point or place if the viewing is motivated by a law enforcement purpose, and not the result of a casual, accidental observation.

We turn, therefore, to the second inquiry under *Katz*, *i. e.*, whether that expectation is reasonable. In pursuing this inquiry, we must keep in mind that "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity," but instead "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver*, *supra*, at 181–183.

Respondent argues that because his yard was in the curtilage of his home, no governmental aerial observation is permissible under the Fourth Amendment without a warrant.[1] The history and genesis of the curtilage doctrine is instructive. "At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver*, *supra*, at 180 (quoting *Boyd* v. *United States*, 116 U. S. 616, 630 (1886)). See 4 Blackstone, Commentaries *225. The

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[1] Because the parties framed the issue in the California courts below and in this Court as concerning only the reasonableness of aerial observation generally, see Pet. for Cert. i, without raising any distinct issue as to the photograph attached as an exhibit to the affidavit in support of the search warrant, our analysis is similarly circumscribed. It was the officer's observation, not the photograph, that supported the warrant. Officer Shutz testified that the photograph did not identify the marijuana as such because it failed to reveal a "true representation" of the color of the plants: "you have to see it with the naked eye." App. 36.

protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened. The claimed area here was immediately adjacent to a suburban home, surrounded by high double fences. This close nexus to the home would appear to encompass this small area within the curtilage. Accepting, as the State does, that this yard and its crop fall within the curtilage, the question remains whether naked-eye observation of the curtilage by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable.

That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. *E. g., United States* v. *Knotts*, 460 U. S. 276, 282 (1983). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz, supra*, at 351.

The observations by Officers Shutz and Rodriguez in this case took place within public navigable airspace, see 49 U. S. C. App. § 1304, in a physically nonintrusive manner; from this point they were able to observe plants readily discernible to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen

everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.[2]

The dissent contends that the Court ignores Justice Harlan's warning in his concurrence in *Katz* v. *United States*, 389 U. S., at 361–362, that the Fourth Amendment should not be limited to proscribing only physical intrusions onto private property. *Post*, at 215–216. But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications, see *Katz*, *supra*, at 362, were plainly not aimed at simple visual observations from a public place. Indeed, since *Katz* the Court has required warrants for electronic surveillance aimed at intercepting private conversations. See *United States* v. *United States District Court*, 407 U. S. 297 (1972).

Justice Harlan made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation is not being intercepted. This does not translate readily into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be ob-

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[2] The California Court of Appeal recognized that police have the right to use navigable airspace, but made a pointed distinction between police aircraft focusing on a particular home and police aircraft engaged in a "routine patrol." It concluded that the officers' "focused" observations violated respondent's reasonable expectations of privacy. In short, that court concluded that a regular police patrol plane identifying respondent's marijuana would lead to a different result. Whether this is a rational distinction is hardly relevant, although we find difficulty understanding exactly how respondent's expectations of privacy from aerial observation might differ when two airplanes pass overhead at identical altitudes, simply for different purposes. We are cited to no authority for this novel analysis or the conclusion it begat. The fact that a ground-level observation by police "focused" on a particular place is not different from a "focused" aerial observation under the Fourth Amendment.

served by a passing aircraft—or by a power company repair mechanic on a pole overlooking the yard. As Justice Harlan emphasized,

> "a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable." *Katz, supra,* at 361.

One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future "electronic" developments that could stealthily intrude upon an individual's privacy. In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye.[3]

Reversed.

JUSTICE POWELL, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

Concurring in *Katz* v. *United States*, 389 U. S. 347 (1967), Justice Harlan warned that any decision to construe the

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[3] In *Dow Chemical Co.* v. *United States, post,* p. 227, decided today, we hold that the use of an aerial mapping camera to photograph an industrial manufacturing complex from navigable airspace similarly does not require a warrant under the Fourth Amendment. The State acknowledges that "[a]erial observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." Brief for Petitioner 14–15.

Fourth Amendment as proscribing only physical intrusions by police onto private property "is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion." *Id.*, at 362. Because the Court today ignores that warning in an opinion that departs significantly from the standard developed in *Katz* for deciding when a Fourth Amendment violation has occurred, I dissent.

I

As the Court's opinion reflects, the facts of this case are not complicated. Officer Shutz investigated an anonymous report that marijuana was growing in the backyard of respondent's home. A tall fence prevented Shutz from looking into the yard from the street. The yard was directly behind the home so that the home itself furnished one border of the fence. Shutz proceeded, without obtaining a warrant, to charter a plane and fly over the home at an altitude of 1,000 feet. Observing marijuana plants growing in the fenced-in yard, Shutz photographed respondent's home and yard, as well as homes and yards of neighbors. The photograph clearly shows that the enclosed yard also contained a small swimming pool and patio. Shutz then filed an affidavit, to which he attached the photograph, describing the anonymous tip and his aerial observation of the marijuana. A warrant issued,[1] and a search of the yard confirmed Shutz' aerial observations. Respondent was arrested for cultivating marijuana, a felony under California law.

Respondent contends that the police intruded on his constitutionally protected expectation of privacy when they conducted aerial surveillance of his home and photographed his backyard without first obtaining a warrant. The Court

[1] The warrant authorized Shutz to search the home and its attached garage, as well as the yard, for marijuana, narcotics paraphernalia, records relating to marijuana sales, and documents identifying the occupant of the premises.

rejects that contention, holding that respondent's expectation of privacy in the curtilage of his home, although reasonable as to intrusions on the ground, was unreasonable as to surveillance from the navigable airspace. In my view, the Court's holding rests on only one obvious fact, namely, that the airspace generally is open to all persons for travel in airplanes. The Court does not explain why this single fact deprives citizens of their privacy interest in outdoor activities in an enclosed curtilage.

II

A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." While the familiar history of the Amendment need not be recounted here,[2] we should remember that it reflects a choice that our society should be one in which citizens "dwell in reasonable security and freedom from surveillance." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). Since that choice was made by the Framers of the Constitution, our cases construing the Fourth Amendment have relied in part on the common law for instruction on "what sorts of searches the Framers . . . regarded as reasonable." *Steagald* v. *United States*, 451 U. S. 204, 217 (1981). But we have repeatedly refused to freeze "'into constitutional law those enforcement practices that existed at the time of the Fourth Amendment's passage.'" *Id.*, at 217, n. 10, quoting *Payton* v. *New York*, 445 U. S. 573, 591, n. 33 (1980). See *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972). Rather, we have construed the Amendment "'in light of contemporary norms and conditions,'" *Steagald* v. *United States*, 451 U. S., at 217, n. 10, quoting *Payton* v. *New York*, *supra*, at 591, n. 33, in order to prevent "any stealthy encroachments" on our citizens' right to be free of arbitrary official intrusion,

[2] See, *e. g.*, *Payton* v. *New York*, 445 U. S. 573, 583–585, n. 20 (1980).

Boyd v. *United States*, 116 U. S. 616, 635 (1886). Since the landmark decision in *Katz* v. *United States*, the Court has fulfilled its duty to protect Fourth Amendment rights by asking if police surveillance has intruded on an individual's reasonable expectation of privacy.

As the decision in *Katz* held, and dissenting opinions written by Justices of this Court prior to *Katz* recognized, *e. g.*, *Goldman* v. *United States*, 316 U. S. 129, 139–141 (1942) (Murphy, J., dissenting); *Olmstead* v. *United States*, 277 U. S. 438, 474 (1928) (Brandeis, J., dissenting), a standard that defines a Fourth Amendment "search" by reference to whether police have physically invaded a "constitutionally protected area" provides no real protection against surveillance techniques made possible through technology. Technological advances have enabled police to see people's activities and associations, and to hear their conversations, without being in physical proximity. Moreover, the capability now exists for police to conduct intrusive surveillance without any physical penetration of the walls of homes or other structures that citizens may believe shelters their privacy.[3] Looking to the Fourth Amendment for protection against such "broad and unsuspected governmental incursions" into the "cherished privacy of law-abiding citizens," *United States* v. *United States District Court*, *supra*, at

[3] As was said more than four decades ago: "[T]he search of one's home or office no longer requires physical entry for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forbears and which inspired the Fourth Amendment. . . . Whether the search of private quarters is accomplished by placing on the outer walls of the sanctum a detectaphone that transmits to the outside listener the intimate details of a private conversation, or by new methods of photography that penetrate walls or overcome distances, the privacy of the citizen is equally invaded by the Government and intimate personal matters are laid bare to view." *Goldman* v. *United States*, 316 U. S. 129, 139 (1942) (Murphy, J., dissenting). Since 1942, science has developed even more sophisticated means of surveillance.

312–313 (footnote omitted), the Court in *Katz* abandoned its inquiry into whether police had committed a physical trespass. *Katz* announced a standard under which the occurrence of a search turned not on the physical position of the police conducting the surveillance, but on whether the surveillance in question had invaded a constitutionally protected reasonable expectation of privacy.

Our decisions following the teaching of *Katz* illustrate that this inquiry "normally embraces two discrete questions." *Smith* v. *Maryland*, 442 U. S. 735, 740 (1979). "The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy.'" *Ibid.*, quoting *Katz* v. *United States*, 389 U. S., at 361 (Harlan, J., concurring). The second is whether that subjective expectation "is 'one that society is prepared to recognize as "reasonable."'" *Ibid.*, quoting *Katz* v. *United States*, 389 U. S., at 361 (Harlan, J., concurring). While the Court today purports to reaffirm this analytical framework, its conclusory rejection of respondent's expectation of privacy in the yard of his residence as one that "is unreasonable," *ante*, at 213, represents a turning away from the principles that have guided our Fourth Amendment inquiry. The Court's rejection of respondent's Fourth Amendment claim is curiously at odds with its purported reaffirmation of the curtilage doctrine, both in this decision and its companion case, *Dow Chemical Co.* v. *United States*, *post*, p. 227, and particularly with its conclusion in *Dow* that society is prepared to recognize as reasonable expectations of privacy in the curtilage, *post*, at 235.

The second question under *Katz* has been described as asking whether an expectation of privacy is "legitimate in the sense required by the Fourth Amendment."[4] *Oliver* v.

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[4] In Justice Harlan's classic description, an actual expectation of privacy is entitled to Fourth Amendment protection if it is an expectation that society recognizes as "reasonable." *Katz* v. *United States*, 389 U. S., at 361 (Harlan, J., concurring). Since *Katz*, our decisions also have de-

United States, 466 U. S. 170, 182 (1984). The answer turns on "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id.*, at 182–183. While no single consideration has been regarded as dispositive, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, . . . the uses to which the individual has put a location, . . . and our societal understanding that certain areas deserve the most scrupulous protection from government invasion."[5] *Id.*, at 178. Our decisions have made clear that this inquiry often must be decided by "reference to a 'place,'" *Katz* v. *United States*, *supra*, at 361 (Harlan, J., concurring); see *Payton* v. *New York*, 445 U. S., at 589, and that a home is a place in which a subjective expectation of privacy virtually always will be legitimate, *ibid.*; see, *e. g.*, *United States* v. *Karo*, 468 U. S. 705, 713–715 (1984); *Steagald* v. *United States*, 451 U. S., at 211–212. "At the very core [of the Fourth Amendment] stands the right of a [person] to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U. S. 505, 511 (1961).

B

This case involves surveillance of a home, for as we stated in *Oliver* v. *United States*, the curtilage "has been considered part of the home itself for Fourth Amendment purposes." 466 U. S., at 180. In *Dow Chemical Co.* v. *United States*,

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scribed constitutionally protected privacy interests as those that society regards as "legitimate," using the words "reasonable" and "legitimate" interchangeably. *E. g.*, *Oliver* v. *United States*, 466 U. S. 170 (1984); *Rakas* v. *Illinois*, 439 U. S. 128, 143–144, n. 12 (1978).

[5] "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas* v. *Illinois*, 439 U. S. 128, 143–144, n. 12 (1978). This inquiry necessarily focuses on personal interests in privacy and liberty recognized by a free society.

decided today, the Court reaffirms that the "curtilage doctrine evolved to protect much the same kind of privacy as that covering the interior of a structure." *Post*, at 235. The Court in *Dow* emphasizes, moreover, that society accepts as reasonable citizens' expectations of privacy in the area immediately surrounding their homes. *Ibid.*

In deciding whether an area is within the curtilage, courts "have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. See, *e. g.*, *United States* v. *Van Dyke*, 643 F. 2d 992, 993–994 (CA4 1981); *United States* v. *Williams*, 581 F. 2d 451, 453 (CA5 1978); *Care* v. *United States*, 231 F. 2d 22, 25 (CA10), cert. denied, 351 U. S. 932 (1956)." *Oliver* v. *United States*, *supra*, at 180. The lower federal courts have agreed that the curtilage is "an area of domestic use immediately surrounding a dwelling and usually but not always fenced in with the dwelling."[6] *United States* v. *LaBerge*, 267 F. Supp. 686, 692 (Md. 1967); see *United States* v. *Van Dyke*, 643 F. 2d 992, 993, n. 1 (CA4 1984). Those courts also have held that whether an area is within the curtilage must be decided by looking at all of the facts. *Ibid.*, citing *Care* v. *United States*, 231 F. 2d 22, 25 (CA10 1956). Relevant facts include the proximity between the area claimed to be curtilage and the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. See *Care* v. *United States*, *supra*, at 25; see also *United States* v. *Van Dyke*, *supra*, at 993–994.

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[6] The Oxford English Dictionary defines curtilage as "a small court, yard, garth, or piece of ground attached to a dwelling-house, and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwelling-house and its out-buildings." 2 Oxford English Dictionary 1278 (1933).

III

A

The Court begins its analysis of the Fourth Amendment issue posed here by deciding that respondent had an expectation of privacy in his backyard. I agree with that conclusion because of the close proximity of the yard to the house, the nature of some of the activities respondent conducted there,[1] and because he had taken steps to shield those activities from the view of passersby. The Court then implicitly acknowledges that society is prepared to recognize his expectation as reasonable with respect to ground-level surveillance, holding that the yard was within the curtilage, an area in which privacy interests have been afforded the "most heightened" protection. *Ante*, at 213. As the foregoing discussion of the curtilage doctrine demonstrates, respondent's yard unquestionably was within the curtilage. Since Officer Shutz could not see into this private family area from the street, the Court certainly would agree that he would have conducted an unreasonable search had he climbed over the fence, or used a ladder to peer into the yard without first securing a warrant. See *United States* v. *Van Dyke*, *supra;* see also *United States* v. *Williams*, 581 F. 2d 451 (CA5 1978).

The Court concludes, nevertheless, that Shutz could use an airplane—a product of modern technology—to intrude visually into respondent's yard. The Court argues that respondent had no reasonable expectation of privacy from aerial observation. It notes that Shutz was "within public navigable airspace," *ante*, at 213, when he looked into and photo-

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[1] The Court omits any reference to the fact that respondent's yard contained a swimming pool and a patio for sunbathing and other private activities. At the suppression hearing, respondent sought to introduce evidence showing that he did use his yard for domestic activities. The trial court refused to consider that evidence. Tr. on Appeal 5–8 (Aug. 15, 1983).

graphed respondent's yard. It then relies on the fact that the surveillance was not accompanied by a physical invasion of the curtilage, *ibid.* Reliance on the *manner* of surveillance is directly contrary to the standard of *Katz*, which identifies a constitutionally protected privacy right by focusing on the interests of the individual and of a free society. Since *Katz*, we have consistently held that the presence or absence of physical trespass by police is constitutionally irrelevant to the question whether society is prepared to recognize an asserted privacy interest as reasonable. *E. g., United States* v. *United States District Court*, 407 U. S., at 313.

The Court's holding, therefore, must rest solely on the fact that members of the public fly in planes and may look down at homes as they fly over them. *Ante*, at 213–214. The Court does not explain why it finds this fact to be significant. One may assume that the Court believes that citizens bear the risk that air travelers will observe activities occurring within backyards that are open to the sun and air. This risk, the Court appears to hold, nullifies expectations of privacy in those yards even as to purposeful police surveillance from the air. The Court finds support for this conclusion in *United States* v. *Knotts*, 460 U. S. 276 (1983). *Ante*, at 213.

This line of reasoning is flawed. First, the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass.[8] The risk that a passenger on such a plane might observe

[8] Of course, during takeoff and landing, planes briefly fly at low enough altitudes to afford fleeting opportunities to observe some types of activity in the curtilages of residents who live within the strictly regulated takeoff and landing zones. As all of us know from personal experience, at least in passenger aircrafts, there rarely—if ever—is an opportunity for a practical observation and photographing of unlawful activity similar to that obtained by Officer Shutz in this case. The Court's analogy to commercial and private overflights, therefore, is wholly without merit.

private activities, and might connect those activities with particular people, is simply too trivial to protect against. It is no accident that, as a matter of common experience, many people build fences around their residential areas, but few build roofs over their backyards. Therefore, contrary to the Court's suggestion, *ante*, at 213, people do not "'knowingly expos[e]'" their residential yards "'to the public'" merely by failing to build barriers that prevent aerial surveillance.

The Court's reliance on *Knotts* reveals the second problem with its analysis. The activities under surveillance in *Knotts* took place on public streets, not in private homes. 460 U. S., at 281–282. Comings and goings on public streets are public matters, and the Constitution does not disable police from observing what every member of the public can see. The activity in this case, by contrast, took place within the private area immediately adjacent to a home. Yet the Court approves purposeful police surveillance of that activity and area similar to that approved in *Knotts* with respect to public activities and areas. The only possible basis for this holding is a judgment that the risk to privacy posed by the remote possibility that a private airplane passenger will notice outdoor activities is equivalent to the risk of official aerial surveillance.[9] But the Court fails to acknowledge the qualitative difference between police surveillance and other uses made of the airspace. Members of the public use the airspace for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards. Here, police conducted an overflight at low altitude solely for

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[9] Some of our precedents have held that an expectation of privacy was not reasonable in part because the individual had assumed the risk that certain kinds of private information would be turned over to the police. *United States* v. *Miller*, 425 U. S. 435, 443 (1976). None of the prior decisions of this Court is a precedent for today's decision. As JUSTICE MARSHALL has observed, it is our duty to be sensitive to the risks that a citizen "should be forced to assume in a free and open society." *Smith* v. *Maryland*, 442 U. S. 735, 750 (1979) (dissenting opinion).

the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at ground level without a warrant. It is not easy to believe that our society is prepared to force individuals to bear the risk of this type of warrantless police intrusion into their residential areas.[10]

B

Since respondent had a reasonable expectation of privacy in his yard, aerial surveillance undertaken by the police for the purpose of discovering evidence of crime constituted a "search" within the meaning of the Fourth Amendment. "Warrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule." *United States* v. *Karo*, 468 U. S., at 717. This case presents no such exception. The indiscriminate nature of aerial surveillance, illustrated by Officer Shutz' photograph of respondent's home and enclosed yard as well as those of his neighbors, poses "far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." *Id.*, at 716 (footnote omitted). Therefore, I would affirm the judgment of the California Court of Appeal ordering suppression of the marijuana plants.

IV

Some may believe that this case, involving no physical intrusion on private property, presents "the obnoxious thing in its mildest and least repulsive form." *Boyd* v. *United*

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[10] The Court's decision has serious implications for outdoor family activities conducted in the curtilage of a home. The feature of such activities that makes them desirable to citizens living in a free society, namely, the fact that they occur in the open air and sunlight, is relied on by the Court as a justification for permitting police to conduct warrantless surveillance at will. Aerial surveillance is nearly as intrusive on family privacy as physical trespass into the curtilage. It would appear that, after today, families can expect to be free of official surveillance only when they retreat behind the walls of their homes.

States, 116 U. S., at 635. But this Court recognized long ago that the essence of a Fourth Amendment violation is "not the breaking of [a person's] doors, and the rummaging of his drawers," but rather is "the invasion of his indefeasible right of personal security, personal liberty and private property." *Id.*, at 630. Rapidly advancing technology now permits police to conduct surveillance in the home itself, an area where privacy interests are most cherished in our society, without any physical trespass. While the rule in *Katz* was designed to prevent silent and unseen invasions of Fourth Amendment privacy rights in a variety of settings, we have consistently afforded heightened protection to a person's right to be left alone in the privacy of his house. The Court fails to enforce that right or to give any weight to the long-standing presumption that warrantless intrusions into the home are unreasonable.[11] I dissent.

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[11] Of course, the right of privacy in the home and its curtilage includes no right to engage in unlawful conduct there. But the Fourth Amendment requires police to secure a warrant before they may intrude on that privacy to search for evidence of suspected crime. *United States* v. *Karo*, 468 U. S. 705, 713–715 (1984).

DOW CHEMICAL CO. v. UNITED STATES, BY AND THROUGH ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-1259. Argued December 10, 1985—Decided May 19, 1986

Petitioner operates a 2,000-acre chemical plant consisting of numerous covered buildings, with outdoor manufacturing equipment and piping conduits located between the various buildings exposed to visual observation from the air. Petitioner maintains elaborate security around the perimeter of the complex, barring ground-level public views of the area. When petitioner denied a request by the Environmental Protection Agency (EPA) for an on-site inspection of the plant, EPA did not seek an administrative search warrant, but instead employed a commercial aerial photographer, using a standard precision aerial mapping camera, to take photographs of the facility from various altitudes, all of which were within lawful navigable airspace. Upon becoming aware of the aerial photography, petitioner brought suit in Federal District Court, alleging that EPA's action violated the Fourth Amendment and was beyond its statutory investigative authority. The District Court granted summary judgment for petitioner, but the Court of Appeals reversed, holding that EPA's aerial observation did not exceed its investigatory authority and that the aerial photography of petitioner's plant complex without a warrant was not a search prohibited by the Fourth Amendment.

Held:

1. The fact that aerial photography by petitioner's competitors might be barred by state trade secrets law is irrelevant to the questions presented in this case. Governments do not generally seek to appropriate trade secrets of the private sector, and the right to be free of appropriation of trade secrets is protected by law. Moreover, state tort law governing unfair competition does not define the limits of the Fourth Amendment. Pp. 231–233.

2. The use of aerial observation and photography is within EPA's statutory authority. When Congress invests an agency such as EPA with enforcement and investigatory authority, it is not necessary to identify explicitly every technique that may be used in the course of executing the statutory mission. Although § 114(a) of the Clean Air Act, which provides for EPA's right of entry to premises for inspection purposes,

does not authorize aerial observation, that section appears to expand, not restrict, EPA's general investigatory powers, and there is no suggestion in the statute that the powers conferred by § 114(a) are intended to be exclusive. EPA needs no explicit statutory provision to employ methods of observation commonly available to the public at large. Pp. 233–234.

3. EPA's taking, without a warrant, of aerial photographs of petitioner's plant complex from an aircraft lawfully in public navigable airspace was not a search prohibited by the Fourth Amendment. The open areas of an industrial plant complex such as petitioner's are not analogous to the "curtilage" of a dwelling, which is entitled to protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept. See *California* v. *Ciraolo*, *ante*, p. 207. The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant. For purposes of aerial surveillance, the open areas of an industrial complex are more comparable to an "open field" in which an individual may not legitimately demand privacy. *Oliver* v. *United States*, 466 U. S. 170. Here, EPA was not employing some unique sensory device not available to the public, but rather was employing a conventional, albeit precise, commercial camera commonly used in mapmaking. The photographs were not so revealing of intimate details as to raise constitutional concerns. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems. Pp. 234–239.

749 F. 2d 307, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined, and in Part III of which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 240.

Jane M. Gootee argued the cause for petitioner. With her on the briefs were *James H. Hanes* and *Bernd W. Sandt*.

Alan I. Horowitz argued the cause for the United States. With him on the brief were *Solicitor General Wallace*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Frey*, *Dirk D. Snel*, and *Anne S. Almy*.*

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Robin S. Conrad*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review the holding of the Court of Appeals (a) that the Environmental Protection Agency's aerial observation of petitioner's plant complex did not exceed EPA's statutory investigatory authority, and (b) that EPA's aerial photography of petitioner's 2,000-acre plant complex without a warrant was not a search under the Fourth Amendment.

I

Petitioner Dow Chemical Co. operates a 2,000-acre facility manufacturing chemicals at Midland, Michigan. The facility consists of numerous covered buildings, with manufacturing equipment and piping conduits located between the various buildings exposed to visual observation from the air. At all times, Dow has maintained elaborate security around the perimeter of the complex barring ground-level public views of these areas. It also investigates any low-level flights by aircraft over the facility. Dow has not undertaken, however, to conceal all manufacturing equipment within the complex from aerial views. Dow maintains that the cost of covering its exposed equipment would be prohibitive.

In early 1978, enforcement officials of EPA, with Dow's consent, made an on-site inspection of two powerplants in this complex. A subsequent EPA request for a second inspection, however, was denied, and EPA did not thereafter seek an administrative search warrant. Instead, EPA employed a commercial aerial photographer, using a standard floor-mounted, precision aerial mapping camera, to take photographs of the facility from altitudes of 12,000, 3,000, and 1,200 feet. At all times the aircraft was lawfully within navigable airspace. See 49 U. S. C. App. § 1304; 14 CFR § 91.79 (1985).

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and *Constance E. Brooks;* and for the Michigan Manufacturers' Association et al. by *John M. Cannon, Susan W. Wanat,* and *Ann Plunkett Sheldon.*

EPA did not inform Dow of this aerial photography, but when Dow became aware of it, Dow brought suit in the District Court alleging that EPA's action violated the Fourth Amendment and was beyond EPA's statutory investigative authority. The District Court granted Dow's motion for summary judgment on the ground that EPA had no authority to take aerial photographs and that doing so was a search violating the Fourth Amendment. EPA was permanently enjoined from taking aerial photographs of Dow's premises and from disseminating, releasing, or copying the photographs already taken. 536 F. Supp. 1355 (ED Mich. 1982).

The District Court accepted the parties' concession that EPA's "'quest for evidence'" was a "search," *id.*, at 1358, and limited its analysis to whether the search was unreasonable under *Katz* v. *United States*, 389 U. S. 347 (1967). Proceeding on the assumption that a search in Fourth Amendment terms had been conducted, the court found that Dow manifested an expectation of privacy in its exposed plant areas because it intentionally surrounded them with buildings and other enclosures. 536 F. Supp., at 1364–1366.

The District Court held that this expectation of privacy was reasonable, as reflected in part by trade secret protections restricting Dow's commercial competitors from aerial photography of these exposed areas. *Id.*, at 1366–1369. The court emphasized that use of "the finest precision aerial camera available" permitted EPA to capture on film "a great deal more than the human eye could ever see." *Id.*, at 1367.

The Court of Appeals reversed. 749 F. 2d 307 (CA6 1984). It recognized that Dow indeed had a subjective expectation of privacy in certain areas from *ground*-level intrusions, but the court was not persuaded that Dow had a subjective expectation of being free from *aerial* surveillance since Dow had taken no precautions against such observation, in contrast to its elaborate ground-level precautions. *Id.*, at 313. The court rejected the argument that it was not feasible to shield any of the critical parts of the exposed plant areas from aerial surveys. *Id.*, at 312–313. The Court of Appeals,

however, did not explicitly reject the District Court's factual finding as to Dow's subjective expectations.

Accepting the District Court finding of Dow's privacy expectation, the Court of Appeals held that it was not a reasonable expectation "[w]hen the entity observed is a multi-building complex, and the area observed is the outside of these buildings and the spaces in between the buildings." *Id.*, at 313. Viewing Dow's facility to be more like the "open field" in *Oliver* v. *United States*, 466 U. S. 170 (1984), than a home or an office, it held that the common-law curtilage doctrine did not apply to a large industrial complex of closed buildings connected by pipes, conduits, and other exposed manufacturing equipment. 749 F. 2d, at 313–314. The Court of Appeals looked to "the peculiarly strong concepts of intimacy, personal autonomy and privacy associated with the home" as the basis for the curtilage protection. *Id.*, at 314. The court did not view the use of sophisticated photographic equipment by EPA as controlling.

The Court of Appeals then held that EPA clearly acted within its statutory powers even absent express authorization for aerial surveillance, concluding that the delegation of general investigative authority to EPA, similar to that of other law enforcement agencies, was sufficient to support the use of aerial photography. *Id.*, at 315.

II

The photographs at issue in this case are essentially like those commonly used in mapmaking. Any person with an airplane and an aerial camera could readily duplicate them. In common with much else, the technology of photography has changed in this century. These developments have enhanced industrial processes, and indeed all areas of life; they have also enhanced law enforcement techniques. Whether they may be employed by competitors to penetrate trade secrets is not a question presented in this case. Governments do not generally seek to appropriate trade secrets of the pri-

vate sector, and the right to be free of appropriation of trade secrets is protected by law.

Dow nevertheless relies heavily on its claim that trade secret laws protect it from any aerial photography of this industrial complex by its competitors, and that this protection is relevant to our analysis of such photography under the Fourth Amendment. That such photography might be barred by state law with regard to competitors, however, is irrelevant to the questions presented here. State tort law governing unfair competition does not define the limits of the Fourth Amendment. Cf. *Oliver* v. *United States*, *supra* (trespass law does not necessarily define limits of Fourth Amendment). The Government is seeking these photographs in order to regulate, not to compete with, Dow. If the Government were to use the photographs to compete with Dow, Dow might have a Fifth Amendment "taking" claim. Indeed, Dow alleged such a claim in its complaint, but the District Court dismissed it without prejudice. But even trade secret laws would not bar all forms of photography of this industrial complex; rather, only photography with an intent to use any trade secrets revealed by the photographs may be proscribed. Hence, there is no prohibition of photographs taken by a casual passenger on an airliner, or those taken by a company producing maps for its mapmaking purposes.

Dow claims first that EPA has no authority to use aerial photography to implement its statutory authority for "site inspection" under § 114(a) of the Clean Air Act, 42 U. S. C. § 7414(a);[1] second, Dow claims EPA's use of aerial photogra-

[1] Section 114(a)(2) provides:

"(2) the Administrator or his authorized representative, upon presentation of his credentials—

"(A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

"(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1),

phy was a "search" of an area that, notwithstanding the large size of the plant, was within an "industrial curtilage" rather than an "open field," and that it had a reasonable expectation of privacy from such photography protected by the Fourth Amendment.

III

Congress has vested in EPA certain investigatory and enforcement authority, without spelling out precisely how this authority was to be exercised in all the myriad circumstances that might arise in monitoring matters relating to clean air and water standards. When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission. Aerial observation authority, for example, is not usually expressly extended to police for traffic control, but it could hardly be thought necessary for a legislative body to tell police that aerial observation could be employed for traffic control of a metropolitan area, or to expressly authorize police to send messages to ground highway patrols that a particular over-the-road truck was traveling in excess of 55 miles per hour. Common sense and ordinary human experience teach that traffic violators are apprehended by observation.

Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted. Environmental standards such as clean air and clean water cannot be enforced only in libraries and laboratories, helpful as those institutions may be.

Under § 114(a)(2), the Clean Air Act provides that "upon presentation of . . . credentials," EPA has a "right of entry to, upon, or through any premises." 42 U. S. C. § 7414(a)(2)(A). Dow argues this limited grant of authority to enter does not

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and sample any emissions which such person is required to sample under paragraph (1)."

authorize any aerial observation. In particular, Dow argues that unannounced aerial observation deprives Dow of its right to be informed that an inspection will be made or has occurred, and its right to claim confidentiality of the information contained in the places to be photographed, as provided in §§ 114(a) and (c), 42 U. S. C. §§ 7414(a) and (c). It is not claimed that EPA has disclosed any of the photographs outside the agency.

Section 114(a), however, appears to expand, not restrict, EPA's general powers to investigate. Nor is there any suggestion in the statute that the powers conferred by this section are intended to be exclusive. There is no claim that EPA is prohibited from taking photographs from a ground-level location accessible to the general public. EPA, as a regulatory and enforcement agency, needs no explicit statutory provision to employ methods of observation commonly available to the public at large: we hold that the use of aerial observation and photography is within EPA's statutory authority.[2]

IV

We turn now to Dow's contention that taking aerial photographs constituted a search without a warrant, thereby violating Dow's rights under the Fourth Amendment. In making this contention, however, Dow concedes that a simple flyover with naked-eye observation, or the taking of a photograph from a nearby hillside overlooking such a facility, would give rise to no Fourth Amendment problem.

In *California* v. *Ciraolo*, *ante*, p. 207, decided today, we hold that naked-eye aerial observation from an altitude of

[2] Assuming the Clean Air Act's explicit provisions for protecting trade secrets obtained by EPA as the result of its investigative efforts is somehow deemed inapplicable to the information obtained here, see 42 U. S. C. § 7414(c), Dow's fear that EPA might disclose trade secrets revealed in these photographs appears adequately addressed by federal law prohibiting such disclosure generally under the Trade Secrets Act, 18 U. S. C. § 1905, and the Freedom of Information Act, 5 U. S. C. § 552(b)(4). See *Chrysler Corp.* v. *Brown*, 441 U. S. 281 (1979).

1,000 feet of a backyard within the curtilage of a home does not constitute a search under the Fourth Amendment.

In the instant case, two additional Fourth Amendment claims are presented: whether the common-law "curtilage" doctrine encompasses a large industrial complex such as Dow's, and whether photography employing an aerial mapping camera is permissible in this context. Dow argues that an industrial plant, even one occupying 2,000 acres, does not fall within the "open fields" doctrine of *Oliver* v. *United States* but rather is an "industrial curtilage" having constitutional protection equivalent to that of the curtilage of a private home. Dow further contends that any aerial photography of this "industrial curtilage" intrudes upon its reasonable expectations of privacy. Plainly a business establishment or an industrial or commercial facility enjoys certain protections under the Fourth Amendment. See *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978); *See* v. *City of Seattle*, 387 U. S. 541 (1967).

Two lines of cases are relevant to the inquiry: the curtilage doctrine and the "open fields" doctrine. The curtilage area immediately surrounding a private house has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept. See *Ciraolo, supra*.

As the curtilage doctrine evolved to protect much the same kind of privacy as that covering the interior of a structure, the contrasting "open fields" doctrine evolved as well. From *Hester* v. *United States*, 265 U. S. 57 (1924), to *Oliver* v. *United States*, 466 U. S. 170 (1984), the Court has drawn a line as to what expectations are reasonable in the open areas beyond the curtilage of a dwelling; "open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from governmental interference or surveillance." *Oliver*, 466 U. S., at 179. In *Oliver*, we held that "an individual may not legitimately demand privacy for activities out of doors in fields, except in the area

immediately surrounding the home." *Id.*, at 178. To fall within the "open fields" doctrine the area "need be neither 'open' nor a 'field' as those terms are used in common speech." *Id.*, at 180, n. 11.

Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe. *E. g., See* v. *City of Seattle, supra.* Moreover, it could hardly be expected that Dow would erect a huge cover over a 2,000-acre tract. In contending that its entire enclosed plant complex is an "industrial curtilage," Dow argues that its exposed manufacturing facilities are analogous to the curtilage surrounding a home because it has taken every possible step to bar access from ground level.

The Court of Appeals held that whatever the limits of an "industrial curtilage" barring *ground*-level intrusions into Dow's private areas, the open areas exposed here were more analogous to "open fields" than to a curtilage for purposes of aerial observation. 749 F. 2d, at 312–314. In *Oliver*, the Court described the curtilage of a dwelling as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" 466 U. S., at 180 (quoting *Boyd* v. *United States*, 116 U. S. 616, 630 (1886)). See *California* v. *Ciraolo, supra.* The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant.

Admittedly, Dow's enclosed plant complex, like the area in *Oliver*, does not fall precisely within the "open fields" doctrine. The area at issue here can perhaps be seen as falling somewhere between "open fields" and curtilage, but lacking some of the critical characteristics of both.[3] Dow's inner

[3] In *Oliver*, we observed that "for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience." 466

manufacturing areas are elaborately secured to ensure they are not open or exposed to the public from the ground. Any actual physical entry by EPA into any enclosed area would raise significantly different questions, because "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See* v. *City of Seattle*, *supra*, at 543. The narrow issue raised by Dow's claim of search and seizure, however, concerns aerial observation of a 2,000-acre outdoor manufacturing facility *without* physical entry.[4]

We pointed out in *Donovan* v. *Dewey*, 452 U. S. 594, 598–599 (1981), that the Government has "greater latitude to conduct warrantless inspections of commercial property" because "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly

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U. S., at 182, n. 12. While we did not attempt to definitively mark the boundaries of what constitutes an open field, we noted that "[i]t is clear . . . that the term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage." *Id.*, at 180, n. 11. As *Oliver* recognized, the curtilage surrounding a home is generally a well-defined, limited area. In stark contrast, the areas for which Dow claims enhanced protection cover the equivalent of a half dozen family farms.

[4] We find it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened. Nor is this an area where Dow has made any effort to protect against aerial surveillance. Contrary to the partial dissent's understanding, *post*, at 241–242, the Court of Appeals emphasized:

"Dow did not take *any* precautions against aerial intrusions, even though the plant was near an airport and within the pattern of planes landing and taking off. If elaborate and expensive measures for ground security show that Dow has an actual expectation of privacy in ground security, as Dow argues, then taking *no* measure for aerial security should say something about its actual privacy expectation in being free from aerial observation." 749 F. 2d 307, 312 (CA6 1984) (emphasis added).

Simply keeping track of the identification numbers of any planes flying overhead, with a later followup to see if photographs were taken, does not constitute a "procedur[e] designed to protect the facility from aerial photography." *Post*, at 241.

from the sanctity accorded an individual's home." We emphasized that unlike a homeowner's interest in his dwelling, "[t]he interest of the owner of commercial property is not one in being free from any inspections." *Id.*, at 599. And with regard to regulatory inspections, we have held that "[w]hat is observable by the public is observable without a warrant, by the Government inspector as well." *Marshall* v. *Barlow's, Inc.*, 436 U. S., at 315 (footnote omitted).

Oliver recognized that in the open field context, "the public and police lawfully may survey lands from the air." 466 U. S., at 179 (footnote omitted). Here, EPA was not employing some unique sensory device that, for example, could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise, commercial camera commonly used in mapmaking. The Government asserts it has not yet enlarged the photographs to any significant degree, but Dow points out that simple magnification permits identification of objects such as wires as small as ½-inch diameter.

It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.[5]

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[5] The partial dissent emphasizes Dow's claim that under magnification power lines as small as ½-inch diameter can be observed. *Post*, at 243. But a glance at the photographs in issue shows that those power lines are observable only because of their stark contrast with the snow-white background. No objects as small as ½-inch diameter such as a class ring, for example, are recognizable, nor are there any identifiable human faces or

An electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions; other protections such as trade secret laws are available to protect commercial activities from private surveillance by competitors.[6]

We conclude that the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance;[7] such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.

We hold that the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment.

Affirmed.

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secret documents captured in such a fashion as to implicate more serious privacy concerns. Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations. "[W]e have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." *United States* v. *Karo*, 468 U. S. 705, 712 (1984). On these facts, nothing in these photographs suggests that any reasonable expectations of privacy have been infringed.

[6] The partial dissent relies heavily on Dow's claim that aerial photography of its facility is proscribed by trade secret laws. *Post*, at 248–249, and n. 11. While such laws may protect against use of photography by competitors in the same trade to advance their commercial interests, in no manner do "those laws constitute society's express determination" that *all* photography of Dow's facility violates reasonable expectations of privacy. *Post*, at 249. No trade secret law cited to us by Dow proscribes the use of aerial photography of Dow's facilities for law enforcement purposes, let alone photography for private purposes unrelated to competition such as mapmaking or simple amateur snapshots. See *supra*, at 232.

[7] Our holding here does not reach the issues raised by the Court of Appeals for the Seventh Circuit's holding regarding a "business curtilage" in *United States* v. *Swart*, 679 F. 2d 698 (CA7 1982); that case involved actual physical entry onto the business premises.

JUSTICE POWELL, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in part, and dissenting in part.

The Fourth Amendment protects private citizens from arbitrary surveillance by their Government. For nearly 20 years, this Court has adhered to a standard that ensured that Fourth Amendment rights would retain their vitality as technology expanded the Government's capacity to commit unsuspected intrusions into private areas and activities. Today, in the context of administrative aerial photography of commercial premises, the Court retreats from that standard. It holds that the photography was not a Fourth Amendment "search" because it was not accompanied by a physical trespass and because the equipment used was not the most highly sophisticated form of technology available to the Government. Under this holding, the existence of an asserted privacy interest apparently will be decided solely by reference to the manner of surveillance used to intrude on that interest. Such an inquiry will not protect Fourth Amendment rights, but rather will permit their gradual decay as technology advances.

I

Since the 1890's, petitioner Dow Chemical Company (Dow) has been manufacturing chemicals at a facility in Midland, Michigan. Its complex covers 2,000 acres and contains a number of chemical process plants. Many of these are "open-air" plants, with reactor equipment, loading and storage facilities, transfer lines, and motors located in the open areas between buildings. Dow claims that the technology used in these plants constitutes confidential business information, and that the design and configuration of the equipment located there reveal details of Dow's secret manufacturing processes.[1]

[1] The record establishes that Dow used the open-air design primarily for reasons of safety. Dow determined that, if an accident were to occur and hazardous chemicals inadvertently released, the concentration of toxic

Short of erecting a roof over the Midland complex, Dow has, as the Court states, undertaken "elaborate" precautions to secure the facility from unwelcome intrusions. *Ante*, at 229. In fact, Dow appears to have done everything commercially feasible to protect the confidential business information and property located within the borders of the facility. Security measures include an 8-foot-high chain link fence completely surrounding the facility that is guarded by security personnel and monitored by closed-circuit television, alarm systems that are triggered by unauthorized entry into the facility, motion detectors that indicate movement of persons within restricted areas, a prohibition on use of camera equipment by anyone other than authorized Dow personnel, and a strict policy under which no photographs of the facility may be taken or released without prior management review and approval.[2] In addition to these precautions, the open-air plants were placed within the internal portion of the 2,000-acre complex to conceal them from the view of members of the public outside the perimeter fence.

Dow's security program also includes procedures designed to protect the facility from aerial photography. Dow has instructed its employees that it is "concerned when other than commercial passenger flights pass over the plant property." App. 14. When "suspicious" overflights occur, such as where a plane makes several passes over the facility, employees try to obtain the plane's identification number and de-

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and explosive fumes within enclosed plants would constitute an intolerable risk to employee health and safety. Moreover, as the Court correctly observes, Dow found that the cost of enclosing the facility would be prohibitive. *Ante*, at 229, 236. The record reflects that the cost of roofing just one of the open-air plants would have been approximately $15 million in 1978. The record further shows that enclosing the plants would greatly increase the cost of routine maintenance. App. 74–75.

[2] On these and other security measures protecting the Midland facility, the District Court found that Dow has "spent at least 3.25 million dollars in each of the last ten years" preceding this litigation. 536 F. Supp. 1355, 1365 (ED Mich 1982).

scription. Working with personnel from the State Police and local airports, Dow employees then locate the pilot to determine if he has photographed the facility. If Dow learns that he has done so, Dow takes steps to prevent dissemination of photographs that show details of its proprietary technology.[3]

The controversy underlying this litigation arose out of the efforts of the Environmental Protection Agency (EPA) to check emissions from the power houses located within Dow's Midland complex for violations of federal air quality standards. After making one ground-level inspection with Dow's consent, and obtaining schematic drawings of the power houses from Dow, EPA requested Dow's permission to conduct a second inspection during which EPA proposed to photograph the facility. Dow objected to EPA's decision to take photographs and denied the request. EPA then informed Dow that it was considering obtaining a search warrant to gain entry to the plant. Inexplicably, EPA did not follow that procedure, but instead hired a private firm to take aerial photographs of the facility.

Using a sophisticated aerial mapping camera,[4] this firm took approximately 75 color photographs of various parts of

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[3] When Dow discovers that aerial photographs have been taken, it requests the photographer to turn over the film. Dow then develops the film and reviews the photographs. If the photographs depict private business information, Dow retains them and the negatives. In the event that the photographer refuses to cooperate, Dow commences litigation to protect its trade secrets.

[4] The District Court believed it was "important to an understanding of this case to provide a description of the highly effective equipment used" in photographing Dow's facility. *Id.*, at 1357, n. 2. "The aircraft used was a twin engine Beechcraft," which is "able to 'provide photographic stability, fast mobility and flight endurance required for precision photography.'" *Ibid.* (citation omitted). The camera used "cost in excess of $22,000.00 and is described by the company as the 'finest precision aerial camera available.' . . . The camera was mounted to the floor inside the aircraft and was capable of taking several photographs in precise and rapid succession." *Ibid.* (citation omitted). This technique facilitates stereoscopic examination, a type of examination that permits depth perception.

the plant. The District Court found that "some of the photographs taken from directly above the plant at 1,200 feet are capable of enlargement to a scale of 1 inch equals 20 feet *or greater*, without significant loss of detail or resolution. When enlarged in this manner, and viewed under magnification, it is possible to discern equipment, pipes, and power lines as small as ½ inch in diameter." 536 F. Supp. 1355, 1357 (ED Mich. 1982) (emphasis in original). Observation of these minute details is, as the District Court found, "a near physical impossibility" from anywhere "but *directly above*" the complex. *Ibid.* (emphasis in original). Because of the complicated details captured in the photographs, the District Court concluded, "the camera saw a great deal more than the human eye could ever see," even if the observer was located directly above the facility.[5] *Id.*, at 1367.

Several weeks later, Dow learned about the EPA-authorized overflight from an independent source. Dow filed this lawsuit, alleging that the aerial photography was an unreasonable search under the Fourth Amendment and constituted an inspection technique outside the scope of EPA's authority under the Clean Air Act, 42 U. S. C. §§ 7413, 7414.[6] The District Court upheld Dow's position on both issues and entered a permanent injunction restraining EPA from conducting future aerial surveillance and photography of the Midland facility. The Court of Appeals for the Sixth Circuit reversed. 749 F. 2d 307 (1984). It concluded that, while Dow had a reasonable expectation of privacy with respect to

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[5] As the District Court explained, when a person is "flying at 1,200 or 5,000 feet, [his] eye can discern only the basic sizes, shapes, outlines, and colors of the objects below." *Id.*, at 1367. The aerial camera used in this case, on the other hand, "successfully captured vivid images of Dow's plant which EPA could later analyze under enlarged and magnified conditions." *Ibid.*

[6] Dow also claimed that the aerial photography constituted a "taking" of its property without due process of law in violation of the Fifth Amendment. The District Court dismissed that claim without prejudice, and it is not before us.

ground-level intrusion into the enclosed buildings within its facility, it did not have such an expectation with respect to aerial observation and photography.[7] The court also held that EPA's use of aerial photography did not exceed its authority under § 114 of the Clean Air Act, 42 U. S. C. § 7414. We granted certiorari to review both of these holdings. 472 U. S. 1007 (1985).

The Court rejects Dow's constitutional claim on the ground that "the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment." *Ante*, at 239.[8] The Court does not explicitly reject application of the reasonable expectation of privacy standard of *Katz* v. *United States*, 389 U. S. 347 (1967), in this context; nor does it explain how its result squares with *Katz* and its progeny. Instead, the Court relies on questionable assertions concerning the manner of the surveillance, and on its conclusion that the Midland facility more closely resembles an "open field" than it does the "curtilage" of a private home. The Court's decision marks a drastic reduction in the Fourth Amendment protections previously afforded to private commercial premises under our decisions. Along with *California* v. *Ciraolo*, *ante*, p. 207, also decided today, the decision may signal a significant retreat from the rationale of prior Fourth Amendment decisions.

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[7] The Court of Appeals' holding rested in part on its erroneous observation that Dow had taken no steps to protect its privacy from aerial intrusions. See 749 F. 2d, at 312–313. Moreover, the court apparently assumed that Dow would have to build some kind of barrier against aerial observation in order to have an actual expectation of privacy from aerial surveillance. *Ibid.* The court did not explain the basis for this assumption or discuss why it disagreed with the District Court's conclusion that commercial overflights posed virtually no risk to Dow's privacy interests.

[8] I agree with the Court's determination that the use of aerial photography as an inspection technique, absent Fourth Amendment constraints, does not exceed the scope of EPA's authority under the Clean Air Act, 42 U. S. C. § 7414(a), and to this extent I join Part III of the Court's opinion.

II

Fourth Amendment protection of privacy interests in business premises "is . . . based upon societal expectations that have deep roots in the history of the Amendment." *Oliver* v. *United States*, 466 U. S. 170, 178, n. 8 (1984). In *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978), we observed that the "particular offensiveness" of the general warrant and writ of assistance, so despised by the Framers of the Constitution, "was acutely felt by the merchants and businessmen whose premises and products were inspected" under their authority. *Id.*, at 311. Against that history, "it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence." *Id.*, at 312. Our precedents therefore leave no doubt that proprietors of commercial premises, including corporations, have the right to conduct their business free from unreasonable official intrusion. See *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 353 (1977); *See* v. *City of Seattle*, 387 U. S. 541, 543 (1967).

In the context of administrative inspections of business premises, the Court has recognized an exception to the Fourth Amendment rule that warrantless searches of property not accessible to members of the public are presumptively unreasonable. Since the interest of the owner of commercial property is "in being free from *unreasonable* intrusions onto his property by agents of the government," not in being free from any inspections whatsoever, the Court has held that "the assurance of regularity provided by a warrant may be unnecessary under certain inspection schemes." *Donovan* v. *Dewey*, 452 U. S. 594, 599 (1981) (emphasis in original). Thus, where Congress has made a reasonable determination that a system of warrantless inspections is necessary to enforce its regulatory purpose, and where "the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic in-

spections," warrantless inspections may be permitted. *Id.*, at 600. This exception does not apply here. The Government does not contend, nor does the Court hold, that the Clean Air Act authorizes a warrantless inspection program that adequately protects the privacy interests of those whose premises are subject to inspection.

Instead, the Court characterizes our decisions in this area simply as giving the Government "'greater latitude to conduct warrantless inspections of commercial property'" because privacy interests in such property differ significantly from privacy interests in the home. *Ante*, at 237 (citation omitted). This reasoning misunderstands the relevant precedents. The exception we have recognized for warrantless inspections, limited to pervasively regulated businesses, see *Donovan* v. *Dewey*, *supra*; *United States* v. *Biswell*, 406 U. S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970), is not founded solely on the differences between the premises occupied by such businesses and homes, or on a conclusion that administrative inspections do not intrude on protected privacy interests and therefore do not implicate Fourth Amendment concerns. Rather, the exception is based on a determination that the reasonable expectation of privacy that the owner of a business does enjoy may be adequately protected by the regulatory scheme itself. *Donovan* v. *Dewey*, *supra*, at 599. We have never held that warrantless intrusions on commercial property generally are acceptable under the Fourth Amendment. On the contrary, absent a sufficiently defined and regular program of warrantless inspections, the Fourth Amendment's warrant requirement is fully applicable in the commercial context. *Marshall* v. *Barlow's, Inc.*, *supra*, at 312–315, 324; *G. M. Leasing Corp.* v. *United States*, *supra*, at 358; *See* v. *City of Seattle*, *supra*, at 543–546.

III

Since our decision in *Katz* v. *United States*, the question whether particular governmental conduct constitutes a

Fourth Amendment "search" has turned on whether that conduct intruded on a constitutionally protected expectation of privacy. *Smith* v. *Maryland*, 442 U. S. 735 (1979); *United States* v. *United States District Court*, 407 U. S. 297 (1972). In the context of governmental inspection of commercial property, the Court has relied on the standard of *Katz* to determine whether an inspection violated the Fourth Amendment rights of the owner of the property. See *Marshall* v. *Barlow's, Inc.*, *supra*, at 313, 315. Today, while purporting to consider the Fourth Amendment question raised here under the rubric of *Katz*, the Court's analysis of the issue ignores the heart of the *Katz* standard.

A

The Court correctly observes that Dow has an expectation of privacy in the buildings located on the Midland property and that society is prepared to recognize that expectation as reasonable. *Ante*, at 236. Similarly, in view of the numerous security measures protecting the entire Dow complex from intrusion on the ground, the Court properly concludes that Dow has a reasonable expectation in being free from such intrusion. *Ante*, at 236–237. Turning to the issue presented in this case, however, the Court erroneously states that the Fourth Amendment protects Dow only from "actual physical entry" by the Government "into any enclosed area." *Ibid.*

This statement simply repudiates *Katz*. The reasonable expectation of privacy standard was designed to ensure that the Fourth Amendment continues to protect privacy in an era when official surveillance can be accomplished without any physical penetration of or proximity to the area under inspection. Writing for the Court in *Katz*, Justice Stewart explained that Fourth Amendment protections would mean little in our modern world if the reach of the Amendment "turn[ed] upon the presence or absence of a physical intrusion into any given enclosure." 389 U. S., at 353. Thus, the Court's observation that the aerial photography was not accompanied by a physical trespass is irrelevant to the analysis

of the Fourth Amendment issue raised here, just as it was irrelevant in *Katz*. Since physical trespass no longer functions as a reliable proxy for intrusion on privacy, it is necessary to determine if the surveillance, whatever its form, intruded on a reasonable expectation that a certain activity or area would remain private.

B

An expectation of privacy is reasonable for Fourth Amendment purposes if it is rooted in a "source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[9] *Rakas* v. *Illinois*, 439 U. S. 128, 143–144, n. 12 (1978). Dow argues that, by enacting trade secret laws, society has recognized that it has a legitimate interest in preserving the privacy of the relevant portions of its open-air plants. As long as Dow takes reasonable steps to protect its secrets, the law should enforce its right against theft or disclosure of those secrets.[10]

As discussed above, our cases holding that Fourth Amendment protections extend to business property have expressly relied on our society's historical understanding that owners

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[9] Our decisions often use the words "reasonable" and "legitimate" interchangeably to describe a privacy interest entitled to Fourth Amendment protection. See *California* v. *Ciraolo*, *ante*, at 219–220, n. 4 (POWELL, J., dissenting).

[10] As the District Court observed: "Society has spoken in this area through Congress, the State Legislatures, and the courts. Federal law, under the Trade Secrets Act, 18 U. S. C. § 1905, makes it a crime for government employees to disclose trade secret information. The Clean Air Act itself, in Section 114(c), 42 U. S. C. § 7414(c), addresses this concern for [proprietary] information. Moreover, EPA has adopted regulations providing for protection of trade secrets. 40 CFR 2.201–2.309. Michigan law, in addition to recognizing a tort action, also makes it a crime to appropriate trade secrets, M. C. L. A. § 752.772, as well as to invade one's privacy by means of surveillance. M. C. L. A. §§ 750.539a–539b. These legislative and judicial pronouncements are reflective of a societal acceptance of Dow's privacy expectation as reasonable." 536 F. Supp., at 1367.

of such property have a legitimate interest in being free from unreasonable governmental inspection. *Marshall* v. *Barlow's, Inc.*, 436 U. S., at 311–313; see *Oliver* v. *United States*, 466 U. S., at 178, n. 8. Moreover, despite the Court's misconception of the nature of Dow's argument concerning the laws protecting the trade secrets within its open-air plants,[11] Dow plainly is correct to argue that those laws constitute society's express determination that commercial entities have a legitimate interest in the privacy of certain kinds of property. Dow has taken every feasible step to protect information claimed to constitute trade secrets from the public and particularly from its competitors. Accordingly, Dow has a reasonable expectation of privacy in its commercial facility in the sense required by the Fourth Amendment. EPA's conduct in this case intruded on that expectation because the aerial photography captured information that Dow had taken reasonable steps to preserve as private.

C

In this case, the Court does not claim that Dow's expectation of privacy is unreasonable because members of the public fly in airplanes. Whatever the merits of this position in *California* v. *Ciraolo*, *ante*, p. 207, it is inapplicable here, for it is not the case that "[a]ny member of the public flying in this airspace who cared to glance down" could have obtained the information captured by the aerial photography of Dow's facility. *California* v. *Ciraolo*, *ante*, at 213. As the District Court expressly found, the camera used to photograph the facility "saw a great deal more than the human eye could

[11] Contrary to the Court's assertion, Dow does not claim that Fourth Amendment protection of its facility is coextensive with the scope of trade secret statutes. *Ante*, at 232. Rather, Dow argues that the existence of those statutes provides support for its claim that society recognizes commercial privacy interests as reasonable.

ever see."[12] 536 F. Supp., at 1367. See *supra*, at 242–243, and n. 5. Thus, the possibility of casual observation by passengers on commercial or private aircraft provides no support for the Court's rejection of Dow's privacy interests.

The Court nevertheless asserts that Dow has no constitutionally protected privacy interests in its open-air facility because the facility more closely resembles an "open field" than a "curtilage." Of course, the Dow facility resembles neither. The purpose of the curtilage doctrine is to identify the limited outdoor area closely associated with a home. See *Oliver* v. *United States*, *supra*, at 180. The doctrine is irrelevant here since Dow makes no argument that its privacy interests are equivalent to those in the home. Moreover, the curtilage doctrine has never been held to constitute a limit on Fourth Amendment protection. Yet, the Court applies the doctrine, which affords heightened protection to homeowners, in a manner that eviscerates the protection traditionally given to the owner of commercial property. The Court offers no convincing explanation for this application.

Nor does the open field doctrine have a role to play in this case. Open fields, as we held in *Oliver*, are places in which people do not enjoy reasonable expectations of privacy and therefore are open to warrantless inspections from ground

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[12] The Court disregards the fact that photographs taken by the sophisticated camera used in this case can be significantly enlarged without loss of acuity. As explained in n. 4, *supra*, the technique used in taking these pictures facilitates stereoscopic examination, which provides the viewer of the photographs with depth perception. Moreover, if the photographs were taken on transparent slides, they could be projected on a large screen. These possibilities illustrate the intrusive nature of aerial surveillance ignored by the Court today. The only Fourth Amendment limitation on such surveillance under today's decision apparently is based on the *means* of surveillance. The Court holds that Dow had no reasonable expectation of privacy from surveillance accomplished by means of a $22,000 mapping camera, but that it does have a reasonable expectation of privacy from satellite surveillance and photography. This type of distinction is heretofore wholly unknown in Fourth Amendment jurisprudence.

and air alike. *Oliver* v. *United States*, *supra*, at 180–181. Here, the Court concedes that Dow was constitutionally protected against warrantless intrusion by the Government on the ground. The complex bears no resemblance to an open field either in fact or within the meaning of our cases.

The other basis for the Court's judgment—assorted observations concerning the technology used to photograph Dow's plant—is even less convincing. The Court notes that EPA did not use "some unique sensory device that, for example, could penetrate the walls of buildings and record conversations." *Ante*, at 238. Nor did EPA use "satellite technology" or another type of "equipment not generally available to the public." *Ibid.* Instead, as the Court states, the surveillance was accomplished by using "a conventional, albeit precise, commercial camera commonly used in mapmaking." *Ibid.* These observations shed no light on the antecedent question whether Dow had a reasonable expectation of privacy. *Katz* measures Fourth Amendment rights by reference to the privacy interests that a free society recognizes as reasonable, not by reference to the method of surveillance used in the particular case. If the Court's observations were to become the basis of a new Fourth Amendment standard that would replace the rule in *Katz*, privacy rights would be seriously at risk as technological advances become generally disseminated and available in our society.[12]

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[12] With all respect, the Court's purported distinction—for purposes of Fourth Amendment analysis—between degrees of sophistication in surveillance equipment simply cannot be supported in fact or by the reasoning of any prior Fourth Amendment decision of this Court. The camera used by the firm hired by EPA is described by the Court as a "conventional" camera commonly used in mapmaking. *Ante*, at 238. The Court suggests, if not holds, that its decision would have been different if EPA had used "satellite technology" or other equipment not "available to the public." *Ibid.* But the camera used in this case was highly sophisticated in terms of its capability to reveal minute details of Dow's confidential technology and equipment. The District Court found that the photographs revealed details as "small as ½ inch in diameter." See *supra*, at 243. Satel-

IV

I would reverse the decision of the Court of Appeals. EPA's aerial photography penetrated into a private commercial enclave, an area in which society has recognized that privacy interests legitimately may be claimed. The photographs captured highly confidential information that Dow had taken reasonable and objective steps to preserve as private. Since the Clean Air Act does not establish a defined and regular program of warrantless inspections, see *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978), EPA should have sought a warrant from a neutral judicial officer.[14] The Court's holding that the warrantless photography does not constitute an unreasonable search within the meaning of the Fourth Amendment is based on the absence of any physical trespass—a theory disapproved in a line of cases beginning with the decision in *Katz* v. *United States*. *E. g.*, *United States* v. *United States District Court*, 407 U. S. 297 (1972). These cases have provided a sensitive and reasonable means of preserving interests in privacy cherished by our society. The Court's decision today cannot be reconciled with our precedents or with the purpose of the Fourth Amendment.

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lite photography hardly could have been more informative about Dow's technology. Nor are "members of the public" likely to purchase $22,000 cameras.

[14] Our cases have explained that an administrative agency need not demonstrate "[p]robable cause in the criminal law sense" to obtain a warrant to inspect property for compliance with a regulatory scheme. *Marshall* v. *Barlow's, Inc.*, 436 U. S., at 320. Rather, an administrative warrant may issue "not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Ibid.* (footnote omitted; quoting *Camara* v. *Municipal Court*, 387 U. S. 523, 538 (1967)).

BROCK, SECRETARY OF LABOR v. PIERCE COUNTY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-385. Argued April 1, 1986—Decided May 19, 1986

During the time pertinent to this case, the Comprehensive Employment and Training Act (CETA) (later repealed) required that qualified entities (such as respondent county), receiving federal grants for programs providing job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons, comply with the statute and the regulations of the Secretary of Labor (Secretary). Section 106(b) of CETA provided that the Secretary shall investigate whenever he has reason to believe, through a complaint, an audit, or otherwise, that a grant recipient was misusing CETA funds, and further provided that the Secretary "shall" determine "the truth of the allegation or belief involved, not later than 120 days after receiving the complaint." Labor Department audits with respect to two grants that respondent had received raised questions concerning respondent's costs related to ineligible employees, and were filed with the Department's Grant Officer, but his final determinations disallowing such costs in each instance were not issued within 120 days after the audit reports were filed. On review of both final determinations, an Administrative Law Judge, although reducing the amount of the disallowance in each case, rejected respondent's contention that the Secretary could not order respondent to repay such sums because the final determination was not issued within the 120-day period and respondent had suffered prejudice because of the delay. The Court of Appeals reversed, holding that § 106(b) prevented the Secretary from acting unless his final determination was made within the 120-day period after the audits were filed.

Held: The Secretary does not lose the power to recover misused CETA funds after expiration of the 120-day period specified in § 106(b). Pp. 258-266.

(a) The mere use of the word "shall" in § 106(b), standing alone, is not enough to remove the Secretary's power to act after 120 days. Every failure of an agency to observe a procedural requirement does not void subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended that the agency lose its power to act. *Mohasco Corp.* v. *Silver*, 447 U. S. 807, distinguished. There is no merit to respondent's

contention that statutes setting deadlines for agency action should be interpreted to permit the agency to proceed after the deadline has expired only when agency inaction would prejudice a private citizen seeking some sort of redress, and that when agency inaction will injure only the Federal Treasury, courts should read a command like that of § 106(b) as a statute of limitations or jurisdictional bar. Pp. 258–262.

(b) Nothing in the legislative history suggests that Congress intended to impose a jurisdictional limitation on the Secretary's enforcement powers if he failed to issue a final determination on a complaint or audit within 120 days. Rather, the 120-day provision was clearly intended to spur the Secretary to action in discovering and rectifying abuses of grant recipients, not to limit the scope of his authority. Pp. 262–265.

(c) Nor is there any merit to the contention that the Secretary's regulations established a jurisdictional bar to the Secretary's recovery of funds. The regulations merely provided a timetable for the resolution of complaints and audits. And there is no authority in the statute or legislative history for the courts to create a remedy by treating § 106(b) like a statute of limitations that can vary depending on the complexity of the dispute or the culpability of the grant recipient. Pp. 265–266.

759 F. 2d 1398, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Andrew J. Pincus argued the cause for petitioner. With him on the briefs were *Solicitor General Fried*, *Deputy Solicitor General Geller*, *Allen H. Feldman*, *Mary-Helen Mautner*, and *Steven J. Mandel*.

Joseph F. Quinn argued the cause for respondent. With him on the brief was *William H. Griffies*.*

JUSTICE MARSHALL delivered the opinion of the Court.

Section 106(b) of the Comprehensive Employment and Training Act (CETA), 92 Stat. 1926, 29 U. S. C. § 816(b) (1976 ed., Supp. V), provides that the Secretary of Labor

*Briefs of *amici curiae* urging affirmance were filed for the St. Regis Mohawk Tribe by *Jeanne S. Whiteing;* for the County of Oakland by *Charles G. Preston;* for the City of Detroit by *David H. Fink* and *Martin A. Scott;* for the City of Chicago by *James D. Montgomery*, *Mary K. Rochford*, and *Maureen Jeannette Kelly;* and for the National Association of Counties et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, and *James L. Feldesman*.

(Secretary) "shall" issue a final determination as to the misuse of CETA funds by a grant recipient within 120 days after receiving a complaint alleging such misuse. The question presented in this case is whether the Secretary loses the power to recover misused CETA funds after that 120-day period has expired.

I

Before its repeal in 1982,[1] CETA provided for grants of federal funds to certain qualified entities known as "prime sponsors," principally state and local governments, for programs "provid[ing] job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons," 29 U. S. C. § 801 (1976 ed., Supp. V).[2] The statute contains detailed requirements concerning the operation of a CETA program and the training, pay, and terms of employment of participants in a program, see §§ 823–827. A prime sponsor must submit to the Secretary a plan detailing the operation of the proposed program and containing assurances that the program will comply with the statute and with the Secretary's regulations, § 813.

CETA grants the Secretary broad authority to ensure that CETA funds are used in accordance with the statute and regulations. The Secretary may audit a grant recipient, and in connection with such an audit may inspect records, question employees, and enter any premises upon which the program is conducted. § 835(a)(2). Any interested person, such as a participating employee, may file a complaint with the Secretary alleging that a grant recipient is failing to comply with the applicable standards. § 816.

Section 106(b), 29 U. S. C. § 816(b), which is the provision at issue in this lawsuit, requires that whenever the Secretary

[1] Effective October 13, 1982, CETA was replaced by the Job Training Partnership Act, Pub. L. 97–300, 96 Stat. 1324 (now codified at 29 U. S. C. § 1501 *et seq.* (1982 ed., and Supp. II)).

[2] Hereafter all citations to Title 29 of the United States Code will be to Supplement V of the 1976 edition, unless otherwise specified.

has reason to believe, through a complaint, an audit, or otherwise, that any grant recipient is misusing CETA funds or violating any statutory or regulatory standards, the Secretary "shall investigate the matter."[3] The same section goes on to require that the Secretary "shall" determine "the truth of the allegation or belief involved, not later than 120 days after receiving the complaint."

II

Respondent is a county in the State of Washington that received CETA funds from 1974 through 1977 pursuant to two separate grants. On September 19, 1978, the Labor Department's Office of Special Investigations filed an audit report concerning respondent's first grant. That Department's Grant Officer issued a final determination on February 13, 1981, disallowing approximately $110,000 in costs incurred by respondent on the grounds that those costs related to employees who were not eligible to participate in a CETA program. On December 11, 1978, the Department's Office of the Inspector General filed an audit report with respect to the second grant, again raising questions concerning ineligi-

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[3] The Secretary has promulgated regulations implementing § 106(b). See 20 CFR §§ 676.86, 676.88 (1982). Those regulations provide that a Labor Department Grant Officer shall receive the complaint or audit report and conduct the investigation. §§ 676.86(c), (d), (e). The Grant Officer then makes an initial determination of the truth of the allegation or belief, § 676.88(a). The Grant Officer must provide the recipient with an opportunity to resolve informally the matters contained in the initial determination, § 676.88(d), and if such informal resolution fails, the Grant Officer issues a final determination, § 676.88(e).

The regulations provide that the Grant Officer's final determination shall be the "final determination" required of the Secretary by § 106(b), even though that determination is subject to further review by an administrative law judge and the Secretary. § 676.86(a). Respondent does not contest the Secretary's interpretation of § 106(b)'s "final determination" requirement. In the present case both the Grant Officer's final determination and the Secretary's final action took place after the 120-day deadline had expired.

ble participants. On April 22, 1981, the Grant Officer issued a final determination which he corrected on May 22, 1981, finally disallowing $373,000 in costs arising out of the second grant.

Respondent sought review of both final determinations before an Administrative Law Judge (ALJ) of the Labor Department. The ALJ disallowed the smaller sums of $108,000 and $265,000, respectively, in the two cases. In both cases, respondent argued that the Secretary could not order respondent to repay these sums because the Grant Officer's final determination had been issued considerably more than 120 days after submission of the initial audit report. While conceding that the Secretary did not lose jurisdiction to make a determination after 120 days had passed, respondent argued that it had suffered prejudice because of the lengthy delay. The ALJ rejected this claim in both cases, finding no specific instances of prejudice.

The Court of Appeals for the Ninth Circuit reversed. *Pierce County* v. *United States, By and Through Dept. of Labor*, 759 F. 2d 1398 (1985). That court had previously decided, in *City of Edmonds* v. *United States Dept. of Labor*, 749 F. 2d 1419 (1985), that Congress, in enacting § 106(b), had intended to prevent the Secretary from acting on a complaint unless the Secretary's final determination was issued within 120 days from his receipt of the complaint. In the present case, the Court of Appeals decided that the statutory command to the Secretary to issue a final determination "not later than 120 days after receiving the complaint" also required the Secretary to make a determination within 120 days when the allegation or belief is a result of the Secretary's own audit rather than a third-party complaint.[4] This

[4] Because § 106(b) states that the deadline for the Secretary's final determination is "120 days after receiving the complaint," the Secretary argued before the Ninth Circuit that the deadline applies only to investigations triggered by third-party complaints, and not those triggered by the Secretary's own audit. This reading, in the Secretary's view, also com-

decision conflicts with decisions of the Second, Seventh, and Eighth Circuits.[5] We granted certiorari to resolve the conflict, 474 U. S. 944 (1985), and we now reverse.

III

As Judge Friendly noted in a case raising the identical issue, the proposition that Congress intended the Secretary to lose the authority to recover misspent funds 120 days after learning of the misuse "is not, to say the least, of the sort that commands instant assent." *St. Regis Mohawk Tribe, New York* v. *Brock*, 769 F. 2d 37, 41 (CA2 1985) (footnote omitted), cert. pending, No. 85–949. We must therefore examine carefully the statutory language and legislative history to determine whether Congress did indeed desire this somewhat incongruous result.

A

The Ninth Circuit held that the plain meaning of the statutory command that the Secretary "shall" take action within 120 days was sufficient to demonstrate that Congress meant to bar further action after that period had expired. *City of Edmonds*, 749 F. 2d, at 1421. Noting that "[s]tatutory language is generally construed according to the plain meaning of the words used by Congress 'absent a clearly expressed

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ports with the statutory purpose of protecting program participants and other interested parties who may be injured by a prime sponsor's misuse of funds. The Ninth Circuit rejected this argument, in part because the Secretary's own regulations establish a 120-day deadline for issuing determinations after an internal audit, see 20 CFR § 676.88(e) (1982). While the Secretary contends that those regulations simply constitute a self-imposed deadline, he does not challenge this aspect of the Ninth Circuit's decision. We therefore assume without deciding that the 120-day deadline was intended to apply to audit investigations.

[5] *St. Regis Mohawk Tribe, New York* v. *Brock*, 769 F. 2d 37 (CA2 1985), cert. pending, No. 85–949; *Milwaukee County* v. *Donovan*, 771 F. 2d 983 (CA7 1985), cert. pending, No. 85–1109; *City of St. Louis* v. *United States Dept. of Labor*, 787 F. 2d 342 (CA8 1986); but see *Lehigh Valley Manpower Program* v. *Donovan*, 718 F. 2d 99 (CA3 1983) (failure to comply with 120-day provision bars recovery of misspent funds).

legislative intention to the contrary,'" *ibid.* (quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980)), and finding no such contrary legislative intent, the Ninth Circuit held that the 120-day limit was jurisdictional.

The Secretary, however, notes that while § 106(b) speaks in mandatory language, it nowhere specifies the consequences of a failure to make a final determination within 120 days. The Secretary relies on a line of precedent in the Courts of Appeals to the effect that Government agencies do not lose jurisdiction for failure to comply with statutory time limits unless the statute "'*both* expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision.'" *St. Regis Mohawk Tribe, supra*, at 41 (quoting *Fort Worth National Corp.* v. *Federal Savings & Loan Ins. Corp.*, 469 F. 2d 47, 58 (CA5 1972)).[6] Having specified no consequences for the failure to make the determination required by § 106(b) within 120 days, the Secretary argues, the courts should not impute to Congress the desire to remedy such a failure by preventing the Secretary from protecting both the public fisc and the integrity of a Government program.

This Court has never expressly adopted the Circuit precedent upon which the Secretary relies. However, our

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[6] See also *National Cable Television Assn., Inc.* v. *Copyright Royalty Tribunal*, 233 U. S. App. D. C. 44, 57, n. 23, 724 F. 2d 176, 189, n. 23 (1983) (requirement in 17 U. S. C. § 804(e) that tribunal "shall" render decision within one year does not make later decision void); *Marshall* v. *N. L. Industries, Inc.*, 618 F. 2d 1220, 1224–1225 (CA7 1980) (failure to meet requirement in 29 U. S. C. § 660(c)(3) that Secretary of Labor "shall" make determination on employee's complaint within 90 days does not bar subsequent enforcement action); *Marshall* v. *Local Union 1374, Int'l Assn. of Machinists and Aerospace Workers, AFL–CIO*, 558 F. 2d 1354 (CA9 1977) (requirement of 29 U. S. C. § 482(b) that Secretary of Labor "shall" bring suit within 60 days of receiving complaint does not bar later suit).

decisions supply at least the underpinnings of those precedents. This Court has frequently articulated the "great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *United States* v. *Nashville, C. & St. L. R. Co.*, 118 U. S. 120, 125 (1886). See also *Guaranty Trust Co.* v. *United States*, 304 U. S. 126 (1938); *Stanley* v. *Schwalby*, 147 U. S. 508, 515 (1893). We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline,[7] courts should not assume that Congress intended the agency to lose its power to act.

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[7] The Administrative Procedure Act (APA), 5 U. S. C. §§ 701–706, entitles any person "adversely affected or aggrieved by agency action" to judicial review, § 702, unless the relevant statute precludes judicial review or "agency action is committed to agency discretion by law," § 701(a)(2). Clearly the statutory command that the Secretary "shall" act within 120 days does not commit such action to the Secretary's discretion. Moreover, nothing in CETA appears to bar an action to enforce the 120-day deadline. Cf. *CETA Workers Organizing Comm.* v. *City of New York*, 617 F. 2d 926, 934–936 (CA2 1980) (APA may not be used to circumvent § 106(b) complaint mechanism). Thus, it would appear that a complainant adversely affected by the Secretary's failure to act on a complaint could bring an action in the district court. The court would have the authority to "compel agency action unlawfully withheld or unreasonably delayed," § 706(1). If respondent is correct in arguing that Congress, in enacting § 106(b), intended to protect grant recipients from lengthy delays in audits, grant recipients such as respondent would be within the zone of interests protected by § 106(b), and would therefore have standing to bring an action under the APA to the same extent as a complainant. Cf. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, 153 (1970). On the other hand, were § 106(b) intended only to protect complainants, there would be no need to provide grant recipients with any remedy at all—much less the drastic remedy respondent seeks in this case—for the Secretary's failure to meet the 120-day deadline.

The Ninth Circuit rejected the *Fort Worth National* line of precedent as being inconsistent with this Court's decision in *Mohasco Corp.* v. *Silver*, 447 U. S. 807 (1980). In *Mohasco*, we held that an action filed by a private plaintiff after the expiration of the 300-day time period provided in § 706(e) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–5(e), was jurisdictionally barred. In so holding, we gave controlling weight to the literal meaning of the statutory provisions, which stated that "a charge under this section shall be filed" within the specified time limits. See 447 U. S., at 815–817. However, there are two clear differences between the present case and *Mohasco*. First, legislatures routinely create statutes of limitations for the filing of complaints, and Congress' intention to create a statute of limitations in § 706(e) was certainly unexceptional. Indeed, the plaintiff in *Mohasco* nowhere alleged that § 706(e) was not a statute of limitations, but rather contended that the word "filed" should be defined in a way that would render his action timely. 447 U. S., at 818. Section 106(b), by contrast, does not merely command the Secretary to file a complaint within a specified time, but requires him to resolve the entire dispute within that time. This is a more substantial task than filing a complaint, and the Secretary's ability to complete it within 120 days is subject to factors beyond his control. There is less reason, therefore, to believe that Congress intended such drastic consequences to follow from the Secretary's failure to meet the 120-day deadline. Second, *Mohasco* involved a private right of action, and the plaintiff's failure to file a complaint prejudiced only that plaintiff. In the present case, by contrast, public rights are at stake, and the Secretary's delay, under respondent's theory, would prejudice the rights of the taxpaying public.

Respondent suggests that statutes setting deadlines for agency action should be interpreted to permit the agency to proceed after the deadline has expired only when agency inaction would prejudice a private citizen seeking some sort of

redress. When, as in this case, agency inaction will injure only the Federal Treasury, courts should read a command like that of § 106(b) as a statute of limitations or jurisdictional bar. We disagree with this argument for two reasons. First, the protection of the public fisc is a matter that is of interest to every citizen, and we have no evidence that Congress wanted to permit the Secretary's inaction to harm that interest any more than it would permit such inaction to injure an individual claimant. Second, the 120-day deadline clearly applies to investigations triggered by private complaints alleging that the individual complainant, perhaps a program participant or subcontractor, has been injured by a grant recipient's failure to comply with CETA's requirements. Indeed, the federal courts have uniformly held that the statutory complaint mechanism is the sole means of redress for a private party injured by a grant recipient's violation of CETA.[6] Thus, even under respondent's theory, § 106(b) cannot be jurisdictional, because it would then permit the Secretary's inaction to prejudice individual complainants seeking to enforce their rights under CETA. We hold, therefore, that the mere use of the word "shall" in § 106(b), standing alone, is not enough to remove the Secretary's power to act after 120 days.[7]

B

Looking to other sources of congressional intent, we have found nothing in the history of the 1978 amendments to CETA, which added the 120-day deadline, to suggest that Congress intended to impose a jurisdictional limitation on

[6] See *Uniformed Firefighters Assn., Local 94, IAFF, AFL–CIO* v. *City of New York*, 676 F. 2d 20 (CA2 1982); *Kolman* v. *Milwaukee Area Technical College*, 548 F. Supp. 684 (ED Wis. 1982).

[7] We need not, and do not, hold that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly in the statute. In this case, we need not go beyond the normal indicia of congressional intent to conclude that § 106(b) permits the Secretary to recover misspent funds after the 120-day deadline has expired.

agency action. The only explicit discussion of the jurisdictional effect of the 120-day provision was a brief colloquy on the House floor between Representative Hawkins, one of the bill's sponsors, and Representative Obey, who offered the amendment that added the 120-day deadline:

> "Mr. HAWKINS. Mr. Chairman, we have seen the amendment. We accept the amendment.
>
> "If the gentleman would further yield, do I understand . . . that if the determination is not made in a specified time it shall not affect the Secretary's jurisdiction in the matter?
>
> "Mr. OBEY. That is correct.
>
> "Mr. HAWKINS. With that understanding we do accept the amendment." 124 Cong. Rec. 25230–25231 (1978).

Such statements by individual legislators should not be given controlling effect, but when they are consistent with the statutory language and other legislative history, they provide evidence of Congress' intent. *Grove City College* v. *Bell*, 465 U. S. 555, 567 (1984). In this case, the legislative history fully supports Representative Hawkins' interpretation of § 106(b).

One of the principal concerns underlying the 1978 amendments was the growing incidence of fraud and misuse of CETA funds by state and local governments. See H. R. Rep. No. 95–1124, pp. 3, 5, 13 (1978) (noting "widespread concern that there has been substantial fraud and abuse in the CETA program and insufficient staff devoted to monitoring and supervising the program"); S. Rep. No. 95–891, pp. 42–44 (1978). A primary purpose of the amendments was to strengthen the Secretary's hand in dealing with illegal practices. Thus the amendments contained numerous antifraud measures, including a provision for criminal sanctions, 18 U. S. C. § 665(a) (1976 ed., Supp. V), bonding requirements for grant recipients, 29 U. S. C. § 836, and authorization for the Secretary to terminate or suspend funding or to

take other corrective measures, § 816. In a separate bill, Congress created an Office of the Inspector General in the Labor Department. See Inspector General Act of 1978, Pub. L. 95–452, 92 Stat. 1101 (now codified as amended at 5 U. S. C. App. §§ 1–12. The Conference Report for the 1978 CETA amendments made it clear that Congress expected the Secretary "to provide, within the new Office of Inspector General, for a unit whose sole responsibility will be that of monitoring the CETA program." H. R. Conf. Rep. No. 95–1765, p. 123 (1978).

Congress was particularly concerned about the ability of program participants such as contractors, subgrantees, and employees to voice grievances and receive a prompt resolution. See *St. Regis Mohawk Tribe, New York* v. *Brock*, 769 F. 2d, at 43 (citing House and Senate hearings on 1978 amendments). The Senate noted that "[i]n some cases grievances have been either ignored, or there has been interminable delay in their resolution." S. Rep. No. 95–891, *supra*, at 42. In response to this problem, Congress required, in § 106(a), that each prime sponsor establish a grievance procedure that would provide for hearings and require a decision within 60 days after the filing of the grievance. After exhausting the prime sponsor's grievance machinery, an interested party could, pursuant to § 106(b), file a complaint with the Secretary. The legislative history makes it clear that Congress intended the 120-day deadline of § 106(b) to assure program participants the opportunity for a prompt resolution of grievances. Senate Report No. 95–891, *supra*, at 16, for example, states: "A party who wishes to appeal to the Secretary either the formal or the informal decision of the prime sponsor has the right to a due process hearing and a determination on the merits of the case within 120 days." Conspicuously absent is any reference to the possibility that the 120-day provision might convey rights upon the prime sponsor.

There is no indication in the legislative history that Congress was concerned that the Secretary was treating prime sponsors too harshly; to the contrary, the House and Senate Reports consistently voice Congress' belief that the Secretary had not been aggressive enough in discovering and rectifying abuses. The 120-day provision was clearly intended to spur the Secretary to action, not to limit the scope of his authority. Congress intended that "the Secretary should have maximum authority to protect the integrity of the program." S. Rep. No. 95-891, *supra*, at 21. It would be very odd if Congress had implemented that intent by cutting off the Secretary's authority to correct abuses just 120 days after learning of them.

C

Respondent provides additional arguments, which we find unpersuasive, in support of the Ninth Circuit's decision. Respondent contends that even if the statute does not establish a jurisdictional bar to the Secretary's recovery of funds, the Secretary's own regulations do so. The Secretary's regulations, however, merely provide a timetable for the resolution of complaints and audits. See n. 3, *supra*. While they arguably go beyond the statute in applying the 120-day limit to investigations triggered by audits as well as those triggered by complaints, they do not specify any consequences of a failure to meet that deadline in the event of either an audit or a complaint. Thus, even if it were possible for the Secretary to create a jurisdictional limitation not contained in the statute, the language of the regulations cannot support respondent's contention that the 120-day provision is jurisdictional with respect to audits.

Respondent urges, if we do not find § 106(b) to affect the Secretary's jurisdiction, that we treat it like a statute of limitations that can vary depending on the complexity of the dispute or the culpability of the grant recipient. There is simply no authority in the statute or legislative history for the

courts to create such a remedy. The balancing of interests that respondent proposes is a task for Congress.

IV

We hold that CETA's requirement that the Secretary "shall" take action within 120 days does not, standing alone, divest the Secretary of jurisdiction to act after that time. There is simply no indication in the statute or its legislative history that Congress intended to remove the Secretary's enforcement powers if he fails to issue a final determination on a complaint or audit within 120 days. Accordingly, the judgment of the Court of Appeals is

Reversed.

WYGANT ET AL. v. JACKSON BOARD OF EDUCATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-1340. Argued November 6, 1985—Decided May 19, 1986

The collective-bargaining agreement between respondent Board of Education (Board) and a teachers' union provided that if it became necessary to lay off teachers, those with the most seniority would be retained, except that at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. After this layoff provision was upheld in litigation arising from the Board's noncompliance with the provision, the Board adhered to it, with the result that, during certain school years, nonminority teachers were laid off, while minority teachers with less seniority were retained. Petitioners, displaced nonminority teachers, brought suit in Federal District Court, alleging violations of the Equal Protection Clause and certain federal and state statutes. Dismissing the suit on cross-motions for summary judgment, the District Court upheld the constitutionality of the layoff provision, holding that the racial preferences granted by the Board need not be grounded on a finding of prior discrimination but were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing "role models" for minority schoolchildren. The Court of Appeals affirmed.

Held: The judgment is reversed.

746 F. 2d 1152, reversed.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR, concluded that the layoff provision violates the Equal Protection Clause. Pp. 273-278.

(a) In the context of affirmative action, racial classifications must be justified by a compelling state purpose, and the means chosen by the state to effectuate that purpose must be narrowly tailored. Pp. 273-274.

(b) Societal discrimination alone is insufficient to justify a racial classification. Rather, there must be convincing evidence of prior discrimination by the governmental unit involved before allowing limited use of racial classifications to remedy such discrimination. The "role model" theory employed by the District Court would allow the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. Moreover, it does not

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bear any relationship to the harm caused by prior discriminatory hiring practices. Societal discrimination, without more, is too amorphous a basis for finding race-conscious state action and for imposing a racially classified remedy. Pp. 274–276.

(c) If the purpose of the layoff provision was to remedy prior discrimination as the Board claims, such purpose to be constitutionally valid would require the District Court to make a factual determination that the Board had a strong basis in evidence for its conclusion that remedial action was necessary. No such finding has ever been made. Pp. 277–278.

JUSTICE POWELL, joined by THE CHIEF JUSTICE and JUSTICE REHNQUIST, concluded that as a means of accomplishing purposes that otherwise may be legitimate, the layoff provision is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available. Pp. 279–284.

JUSTICE WHITE concluded that respondent Board of Education's layoff policy has the same effect and is equally violative of the Equal Protection Clause as integrating a work force by discharging whites and hiring blacks until the latter comprise a suitable percentage of the work force. Pp. 294–295.

JUSTICE O'CONNOR concluded that the layoff provision is not "narrowly tailored" to achieve its asserted remedial purpose because it acts to maintain levels of minority hiring set by a hiring goal that has no relation to the remedying of employment discrimination. Pp. 293–294.

POWELL, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and REHNQUIST, J., joined, and in all but Part IV of which O'CONNOR, J., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 284. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 294. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 295. STEVENS, J., filed a dissenting opinion, *post*, p. 313.

K. Preston Oade, Jr., argued the cause for petitioners. With him on the briefs were *Constance E. Brooks* and *Thomas Rasmussen*.

Jerome A. Susskind argued the cause and filed a brief for respondents.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Acting Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Assistant Attorney General Cooper, Samuel A. Alito, Jr., Walter W. Barnett*, and *David K. Flynn;* for the American Federation of Teach-

JUSTICE POWELL announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and JUSTICE REHNQUIST joined, and in all but Part IV of which JUSTICE O'CONNOR joined.

This case presents the question whether a school board, consistent with the Equal Protection Clause, may extend

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ers, AFL–CIO, by *Bruce A. Miller* and *Stuart M. Israel;* for the Anti-Defamation League of B'nai B'rith by *Robert A. Helman, Michele Odorizzi, Daniel M. Harris, Justin J. Finger, Meyer Eisenberg,* and *Jeffrey P. Sinensky;* for Local 36, International Association of Firefighters, AFL–CIO, et al. by *George H. Cohen;* for the Mid-America Legal Foundation by *John M. Cannon, Susan W. Wanat,* and *Ann Plunkett Sheldon;* and for the Pacific Legal Foundation by *Ronald A. Zumbrum* and *John H. Findley.*

Briefs of *amici curiae* urging affirmance were filed for the State of Minnesota et al. by *Hubert H. Humphrey III,* Attorney General of Minnesota, *John R. Tunheim,* Assistant Attorney General, and *Peter M. Ackerberg* and *Jean Boler,* Special Assistant Attorneys General, *John K. Van de Kamp,* Attorney General of California, *William J. Guste, Jr.,* Attorney General of Louisiana, *Robert M. Spire,* Attorney General of Nebraska, *Paul Bardacke,* Attorney General of New Mexico, and *Bronson C. La Follette,* Attorney General of Wisconsin; for the Affirmative Action Coordinating Center et al. by *Jeanny Mirer, Jules Lobel, Frank E. Deale,* and *Anne Simon;* for the Congressional Coalition by *Morgan D. Hodgson, Richard Ruda,* and *Linda C. Kauskay;* for the Greater Boston Civil Rights Coalition by *John Reinstein, Marjorie Heins,* and *Mark A. Michelson;* for the Jackson Education Association by *James A. White;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Walter A. Smith, Jr., R. Claire Guthrie, James Robertson, Harold R. Tyler, Jr., Norman Redlich, Thomas D. Barr, William L. Robinson, Richard T. Seymour, Norman J. Chachkin, Robert Allen Sedler,* and *Burt Neuborne;* for the Mexican American Legal Defense and Educational Fund by *Allen M. Katz, Antonia Hernandez,* and *John E. Huerta;* for the Michigan Civil Rights Commission et al. by *Frank J. Kelley,* Attorney General of Michigan, *Louis J. Caruso,* Solicitor General, and *Felix E. League, Howard E. Golberg,* and *Dianne Rubin,* Assistant Attorneys General; for the National Association for the Advancement of Colored People by *Grover G. Hankins;* for the NAACP Legal Defense and Educational Fund, Inc., by *Julius LeVonne Chambers, Ronald L. Ellis,* and *Eric Schnapper;* for the National Education Association et al. by *Robert H. Chanin;* and for the

preferential protection against layoffs to some of its employees because of their race or national origin.

I

In 1972 the Jackson Board of Education, because of racial tension in the community that extended to its schools, considered adding a layoff provision to the Collective Bargaining Agreement (CBA) between the Board and the Jackson Education Association (Union) that would protect employees who were members of certain minority groups against layoffs.[1] The Board and the Union eventually approved a new provision, Article XII of the CBA, covering layoffs. It stated:

> "In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for posi-

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National School Boards Association by *Gwendolyn H. Gregory*, *August W. Steinhilber*, and *Thomas A. Shannon*.

Briefs of *amici curiae* were filed for the City of Detroit by *Daniel B. Edelman;* for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *Thomas R. Bagby;* for the Michigan State Police Troopers Association, Inc., by *Donald L. Reisig* and *Lawrence P. Schneider;* and for the National Board, YMCA of the USA, et al. by *Judith Lichtman*.

[1] Prior to bargaining on this subject, the Minority Affairs Office of the Jackson Public Schools sent a questionnaire to all teachers, soliciting their views as to a layoff policy. The questionnaire proposed two alternatives: continuation of the existing straight seniority system, or a freeze of minority layoffs to ensure retention of minority teachers in exact proportion to the minority student population. Ninety-six percent of the teachers who responded to the questionnaire expressed a preference for the straight seniority system.

tions for which he is certificated maintaining the above minority balance." App. 13.[2]

When layoffs became necessary in 1974, it was evident that adherence to the CBA would result in the layoff of tenured nonminority teachers while minority teachers on probationary status were retained. Rather than complying with Article XII, the Board retained the tenured teachers and laid off probationary minority teachers, thus failing to maintain the percentage of minority personnel that existed at the time of the layoff. The Union, together with two minority teachers who had been laid off, brought suit in federal court, *id.*, at 30 (*Jackson Education Assn.* v. *Board of Education (Jackson I)* (mem. op.)), claiming that the Board's failure to adhere to the layoff provision violated the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. They also urged the District Court to take pendent jurisdiction over state-law contract claims. In its answer the Board denied any prior employment discrimination and argued that the layoff provision conflicted with the Michigan Teacher Tenure Act. App. 33. Following trial, the District Court *sua sponte* concluded that it lacked jurisdiction over the case, in part because there was insufficient evidence to support the plaintiffs' claim that the Board had engaged in discriminatory hiring practices prior to 1972, *id.*, at 35–37, and in part because the plaintiffs had not fulfilled the jurisdictional prerequisite to a Title VII claim by filing discrimination charges with the Equal Employment Opportunity Commission. After dismissing the federal claims, the District Court declined to exercise pendent jurisdiction over the state-law contract claims.

Rather than taking an appeal, the plaintiffs instituted a suit in state court, *Jackson Education Assn.* v. *Board of*

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[2] Article VII of the CBA defined "minority group personnel" as "those employees who are Black, American Indian, Oriental, or of Spanish descendancy." App. 15.

Education, No. 77–011484CZ (Jackson Cty. Cir. Ct. 1979) *(Jackson II)*, raising in essence the same claims that had been raised in *Jackson I*. In entering judgment for the plaintiffs, the state court found that the Board had breached its contract with the plaintiffs, and that Article XII did not violate the Michigan Teacher Tenure Act. In rejecting the Board's argument that the layoff provision violated the Civil Rights Act of 1964, the state court found that it "ha[d] not been established that the board had discriminated against minorities in its hiring practices. The minority representation on the faculty was the result of societal racial discrimination." App. 43. The state court also found that "[t]here is no history of overt past discrimination by the parties to this contract." *Id.*, at 49. Nevertheless, the court held that Article XII was permissible, despite its discriminatory effect on nonminority teachers, as an attempt to remedy the effects of societal discrimination.

After *Jackson II*, the Board adhered to Article XII. As a result, during the 1976–1977 and 1981–1982 school years, nonminority teachers were laid off, while minority teachers with less seniority were retained. The displaced nonminority teachers, petitioners here, brought suit in Federal District Court, alleging violations of the Equal Protection Clause, Title VII, 42 U. S. C. § 1983, and other federal and state statutes. On cross-motions for summary judgment, the District Court dismissed all of petitioners' claims. 546 F. Supp. 1195 (ED Mich. 1982). With respect to the equal protection claim,[3] the District Court held that the racial preferences granted by the Board need not be grounded on a finding of prior discrimination. Instead, the court decided that the racial preferences were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing "role models" for minority schoolchildren, and upheld the constitutionality of the layoff provision.

[3] Petitioners have sought review in this Court only of their claim based on the Equal Protection Clause.

The Court of Appeals for the Sixth Circuit affirmed, largely adopting the reasoning and language of the District Court. 746 F. 2d 1152 (1984). We granted certiorari, 471 U. S. 1014 (1985), to resolve the important issue of the constitutionality of race-based layoffs by public employers. We now reverse.

II

Petitioners' central claim is that they were laid off because of their race in violation of the Equal Protection Clause of the Fourteenth Amendment. Decisions by faculties and administrators of public schools based on race or ethnic origin are reviewable under the Fourteenth Amendment.[4] This Court has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality,'" *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967), quoting *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *University of California Regents* v. *Bakke*, 438 U. S. 265, 291 (1978) (opinion of POWELL, J., joined by WHITE, J.).

The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination. *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 724, n. 9 (1982); *Bakke*, *supra*, at 291–299; see *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948); see also A. Bickel, The Morality of Consent 133 (1975). In this case, Article XII of the CBA operates against whites and in favor of certain minorities, and therefore constitutes a classification based on race. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does

[4] School district collective-bargaining agreements constitute state action for purposes of the Fourteenth Amendment. *Abood* v. *Detroit Board of Ed.*, 431 U. S. 209, 218, and n. 12 (1977).

not conflict with constitutional guarantees." *Fullilove* v. *Klutznick*, 448 U. S. 448, 491 (1980) (opinion of BURGER, C. J.). There are two prongs to this examination. First, any racial classification "must be justified by a compelling governmental interest." *Palmore* v. *Sidoti*, 466 U. S. 429, 432 (1984); see *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967); cf. *Graham* v. *Richardson*, 403 U. S. 365, 375 (1971) (alienage). Second, the means chosen by the State to effectuate its purpose must be "narrowly tailored to the achievement of that goal." *Fullilove*, *supra*, at 480. We must decide whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored.

III

A

The Court of Appeals, relying on the reasoning and language of the District Court's opinion, held that the Board's interest in providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination, was sufficiently important to justify the racial classification embodied in the layoff provision. 746 F. 2d, at 1156–1157. The court discerned a need for more minority faculty role models by finding that the percentage of minority teachers was less than the percentage of minority students. *Id.*, at 1156.

This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination. This Court's reasoning in *Hazelwood School District* v. *United States*, 433 U. S. 299 (1977), illustrates that the relevant analysis in cases involving proof of discrimination by statistical disparity focuses on those disparities that demonstrate such prior governmental discrimination. In *Hazelwood* the Court concluded that, absent employment

discrimination by the school board, "'nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.'" *Id.*, at 307, quoting *Teamsters* v. *United States*, 431 U. S. 324, 340, n. 20 (1977). See also 746 F. 2d, at 1160 (Wellford, J., concurring) ("Had the plaintiffs in this case presented data as to the percentage of qualified minority teachers in the relevant labor market to show that defendant Board's hiring of black teachers over a number of years had equalled that figure, I believe this court may well have been required to reverse . . ."). Based on that reasoning, the Court in *Hazelwood* held that the proper comparison for determining the existence of actual discrimination by the school board was "between the racial composition of [the school's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market." 433 U. S., at 308. *Hazelwood* demonstrates this Court's focus on prior discrimination as the justification for, and the limitation on, a State's adoption of race-based remedies. See also *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971).

Unlike the analysis in *Hazelwood*, the role model theory employed by the District Court has no logical stopping point. The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. Indeed, by tying the required percentage of minority teachers to the percentage of minority students, it requires just the sort of year-to-year calibration the Court stated was unnecessary in *Swann*, 402 U. S., at 31–32:

> "At some point these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. . . . Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition

> of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."

See also *id.*, at 24.

Moreover, because the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students. See *United States* v. *Hazelwood School District*, 392 F. Supp. 1276, 1286–1287 (ED Mo. 1975), rev'd, 534 F. 2d 805 (CA8 1976), rev'd and remanded, 433 U. S. 299 (1977). Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) *(Brown I)*.

Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness. There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups. Nevertheless, the District Court combined irrelevant comparisons between these two groups with an indisputable statement that there has been societal discrimination, and upheld state action predicated upon racial classifications. No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

B

Respondents also now argue that their purpose in adopting the layoff provision was to remedy prior discrimination against minorities by the Jackson School District in hiring teachers. Public schools, like other public employers, operate under two interrelated constitutional duties. They are under a clear command from this Court, starting with *Brown* v. *Board of Education*, 349 U. S. 294 (1955), to eliminate every vestige of racial segregation and discrimination in the schools. Pursuant to that goal, race-conscious remedial action may be necessary. *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43, 46 (1971). On the other hand, public employers, including public schools, also must act in accordance with a "core purpose of the Fourteenth Amendment" which is to "do away with all governmentally imposed discriminations based on race." *Palmore* v. *Sidoti*, 466 U. S., at 432. These related constitutional duties are not always harmonious; reconciling them requires public employers to act with extraordinary care. In particular, a public employer like the Board must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.

Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees. In this case, for example, petitioners contended at trial that the remedial program—Article XII—had the purpose and effect of instituting a racial classification that was not justified by a remedial purpose. 546 F. Supp., at 1199. In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The ultimate burden remains with the employees to demonstrate the unconstitu-

tionality of an affirmative-action program. But unless such a determination is made, an appellate court reviewing a challenge to remedial action by nonminority employees cannot determine whether the race-based action is justified as a remedy for prior discrimination.

Despite the fact that Article XII has spawned years of litigation and three separate lawsuits, no such determination ever has been made. Although its litigation position was different, the Board in *Jackson I* and *Jackson II* denied the existence of prior discriminatory hiring practices. App. 33. This precise issue was litigated in both those suits. Both courts concluded that any statistical disparities were the result of general societal discrimination, not of prior discrimination by the Board. The Board now contends that, given another opportunity, it could establish the existence of prior discrimination. Although this argument seems belated at this point in the proceedings, we need not consider the question since we conclude below that the layoff provision was not a legally appropriate means of achieving even a compelling purpose.[5]

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[5] JUSTICE MARSHALL contends that "the plurality has too quickly assumed the absence of a legitimate factual predicate . . . for affirmative action in the Jackson schools," *post*, at 297. In support of that assertion, he engages in an unprecedented reliance on nonrecord documents that respondent has "lodged" with this Court. This selective citation to factual materials not considered by the District Court or the Court of Appeals below is unusual enough by itself. My disagreement with JUSTICE MARSHALL, however, is more fundamental than any disagreement over the heretofore unquestioned rule that this Court decides cases based on the record before it. JUSTICE MARSHALL does not define what he means by "legitimate factual predicate," nor does he demonstrate the relationship of these nonrecord materials to his undefined predicate. If, for example, his dissent assumes that general societal discrimination is a sufficient factual predicate, then there is no need to refer to respondents' lodgings as to its own employment history. No one disputes that there has been race discrimination in this country. If that fact alone can justify race-conscious action by the State, despite the Equal Protection Clause, then the dissent need not rely on nonrecord materials to show a "legitimate factual predi-

IV

The Court of Appeals examined the means chosen to accomplish the Board's race-conscious purposes under a test of "reasonableness." That standard has no support in the decisions of this Court. As demonstrated in Part II above, our decisions always have employed a more stringent standard—however articulated—to test the validity of the means chosen by a State to accomplish its race-conscious purposes. See, *e. g.*, *Palmore*, 466 U. S., at 432 ("[T]o pass constitutional muster, [racial classifications] must be 'necessary . . . to the accomplishment' of their legitimate purpose") (quoting *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964)); *Fullilove*, 448 U. S., at 480 (opinion of BURGER, C. J.) ("We recognize the need for careful judicial evaluation to assure that any . . . program that employs racial or ethnic criteria to accomplish

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cate." If, on the other hand, JUSTICE MARSHALL is assuming that the necessary factual predicate is prior discrimination by the Board, there is no escaping the need for a factual determination below—a determination that does not exist.

The real dispute, then, is not over the state of the record. It is disagreement as to what constitutes a "legitimate factual predicate." If the necessary factual predicate is *prior discrimination*—that is, that race-based state action is taken to remedy prior discrimination by the governmental unit involved—then the very nature of appellate review requires that a factfinder determine whether the employer was justified in instituting a remedial plan. Nor can the respondents unilaterally insulate themselves from this key constitutional question by conceding that they have discriminated in the past, now that it is in their interest to make such a concession. Contrary to the dissent's assertion, the requirement of such a determination by the trial court is not some arbitrary barrier set up by today's opinion. Rather, it is a necessary result of the requirement that race-based state action be remedial.

At any rate, much of the material relied on by JUSTICE MARSHALL has been the subject of the previous lawsuit in *Jackson II*, where the court concluded that it "had not been established that the board had discriminated against minorities in its hiring practices." App. 43. Moreover, as noted *supra*, at 271, in *Jackson I* the Board expressly denied that it had engaged in employment discrimination.

the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal").[6] Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose. *Fullilove, supra*, at 480 (opinion of BURGER, C. J.).[7] "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.*, at 537 (STEVENS, J., dissenting).

We have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to

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[6] The term "narrowly tailored," so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used. Or, as Professor Ely has noted, the classification at issue must "fit" with greater precision than any alternative means. Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 727, n. 26 (1974). "[Courts] should give particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense." Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 Colum. L. Rev. 559, 578–579 (1975).

[7] Several commentators have emphasized, no matter what the weight of the asserted governmental purpose, that the *means* chosen to accomplish the purpose should be narrowly tailored. In arguing for a form of intermediate scrutiny, Professor Greenawalt contends that, "while benign racial classifications call for some weighing of the importance of ends they call for even more intense scrutiny of means, especially of the administrability of less onerous alternative classifications." Greenawalt, *supra*, at 565. Professor Ely has suggested that "special scrutiny in the suspect classification context has in fact consisted not in weighing ends but rather in insisting that the classification in issue fit a constitutionally permissible state goal with greater precision than any available alternative." Ely, *supra*, at 727, n. 26. Professor Gunther argues that judicial scrutiny of legislative means is more appropriate than judicial weighing of the importance of the legislative purpose. Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection, 86 Harv. L. Rev. 1, 20–21 (1972).

eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Id.*, at 484, quoting *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 777 (1976).[8] In *Fullilove*, the challenged

[8] Of course, when a State implements a race-based plan that requires such a sharing of the burden, it cannot justify the discriminatory effect on some individuals because other individuals had approved the plan. Any "waiver" of the right not to be dealt with by the government on the basis of one's race must be made by those affected. Yet JUSTICE MARSHALL repeatedly contends that the fact that Article XII was approved by a majority vote of the Union somehow validates this plan. He sees this case not in terms of individual constitutional rights, but as an allocation of burdens "between two racial groups." *Post*, at 309. Thus, Article XII becomes a political compromise that "avoided placing the entire burden of layoffs on either the white teachers as a group or the minority teachers as a group." *Post*, at 299. But the petitioners before us today are not "the white teachers as a group." They are Wendy Wygant and other individuals who claim that they were fired from their jobs because of their race. That claim cannot be waived by petitioners' more senior colleagues. In view of the way union seniority works, it is not surprising that while a straight freeze on minority layoffs was overwhelmingly rejected, a "compromise" eventually was reached that placed the entire burden of the compromise on the most junior union members. The more senior union members simply had nothing to lose from such a compromise. See *post*, at 299 ("To petitioners, at the bottom of the seniority scale among white teachers, fell the lot of bearing the white group's proportionate share of layoffs that became necessary in 1982.") The fact that such a painless accommodation was approved by the more senior union members six times since 1972 is irrelevant. The Constitution does not allocate constitutional rights to be distributed like bloc grants within discrete racial groups; and until it does, petitioners' more senior union colleagues cannot vote away petitioners' rights.

JUSTICE MARSHALL also attempts to portray the layoff plan as one that has no real invidious effect, stating that "within the confines of constant minority proportions, it preserves the hierarchy of seniority in the selection of individuals for layoff." *Post*, at 309. That phrase merely expresses the tautology that layoffs are based on seniority except as to those nonminority teachers who are displaced by minority teachers with less seniority. This is really nothing more than group-based analysis: "each

statute required at least 10 percent of federal public works funds to be used in contracts with minority-owned business enterprises. This requirement was found to be within the remedial powers of Congress in part because the "actual 'burden' shouldered by nonminority firms is relatively light." 448 U. S., at 484.[9]

Significantly, none of the cases discussed above involved layoffs.[10] Here, by contrast, the means chosen to achieve the Board's asserted purposes is that of laying off nonminority teachers with greater seniority in order to retain minority teachers with less seniority. We have previously expressed concern over the burden that a preferential-layoffs scheme imposes on innocent parties. See *Firefighters* v. *Stotts*, 467 U. S. 561, 574–576, 578–579 (1984); see also *Steelworkers* v. *Weber*, 443 U. S. 193, 208 (1979) ("The plan does not require the discharge of white workers and their replacement with new black hirees"). In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. De-

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group would shoulder a portion of [the layoff] burden equal to its portion of the faculty." *Post*, at 299. The constitutional problem remains: the decision that petitioners would be laid off was based on their race.

[9] Similarly, the Court approved the hiring program in *Steelworkers* v. *Weber*, 443 U. S. 193, 208 (1979), in part because the plan did not "unnecessarily trammel the interests of the white employees." Since *Weber* involved a private company, its reasoning concerning the validity of the hiring plan at issue there is not directly relevant to this case, which involves a state-imposed plan. No equal protection claim was presented in *Weber*.

[10] There are cases involving alteration of strict seniority layoffs, see, *e. g.*, *Ford Motor Co.* v. *Huffman*, 345 U. S. 330 (1953); *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U. S. 521 (1949), but they do not involve the critical element here—layoffs based on race. The Constitution does not require layoffs to be based on strict seniority. But it does require the State to meet a heavy burden of justification when it implements a layoff plan based on race.

nial of a future employment opportunity is not as intrusive as loss of an existing job.

Many of our cases involve union seniority plans with employees who are typically heavily dependent on wages for their day-to-day living. Even a temporary layoff may have adverse financial as well as psychological effects. A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. "At that point, the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home." Fallon & Weiler, Conflicting Models of Racial Justice, 1984 S. Ct. Rev. 1, 58. Layoffs disrupt these settled expectations in a way that general hiring goals do not.

While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities,[11] layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored.[12] Other, less intrusive means of accomplishing

[11] The "school admission" cases, which involve the same basic concepts as cases involving hiring goals, illustrate this principle. For example, in *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974), while petitioner's complaint alleged that he had been denied admission to the University of Washington Law School because of his race, he also had been accepted at the Oregon, Idaho, Gonzaga, and Willamette Law Schools. *DeFunis* v. *Odegaard*, 82 Wash. 2d 11, 30, n. 11, 507 P. 2d 1169, 1181, n. 11 (1973). The injury to Defunis was not of the same kind or degree as the injury that he would have suffered had he been removed from law school in his third year. Even this analogy may not rise to the level of harm suffered by a union member who is laid off.

[12] We have recognized, however, that in order to provide make-whole relief to the actual, identified victims of individual discrimination, a court may in an appropriate case award competitive seniority. See *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976).

similar purposes—such as the adoption of hiring goals—are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.[13]

V

We accordingly reverse the judgment of the Court of Appeals for the Sixth Circuit.

It is so ordered.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

This case requires us to define and apply the standard required by the Equal Protection Clause when a governmental agency agrees to give preferences on the basis of race or national origin in making layoffs of employees. The specific question posed is, as JUSTICE MARSHALL puts it, "whether the Constitution prohibits a union and a local school board from developing a collective-bargaining agreement that apportions layoffs between two racially determined groups as a means of preserving the effects of an affirmative hiring policy." *Post*, at 300 (dissenting). There is no issue here of the interpretation and application of Title VII of the Civil Rights Act; accordingly, we have only the constitutional issue to resolve.

The Equal Protection Clause standard applicable to racial classifications that work to the disadvantage of "nonminorities" has been articulated in various ways. See, *e. g.*, *post*, at 301–302 (MARSHALL, J., dissenting). JUSTICE POW-

[13] The Board's definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent, n. 2, *supra*, further illustrates the undifferentiated nature of the plan. There is no explanation of why the Board chose to favor these particular minorities or how in fact members of some of the categories can be identified. Moreover, respondents have never suggested—much less formally found—that they have engaged in prior, purposeful discrimination against members of each of these minority groups.

ELL now would require that: (1) the racial classification be justified by a "'compelling governmental interest,'" and (2) the means chosen by the State to effectuate its purpose be "narrowly tailored." *Ante*, at 274. This standard reflects the belief, apparently held by all Members of this Court, that racial classifications of any sort must be subjected to "strict scrutiny," however defined. See, *e. g.*, *Fullilove* v. *Klutznick*, 448 U. S. 448, 491 (1980) (opinion of BURGER, C. J., joined by WHITE, J.) ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees"); *id.*, at 537 (STEVENS, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); *University of California Regents* v. *Bakke*, 438 U. S. 265, 291 (1978) (opinion of POWELL, J., joined by WHITE, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"); *id.*, at 361–362 ("[O]ur review under the Fourteenth Amendment should be strict—not '"strict" in theory and fatal in fact,' because it is stigma that causes fatality—but strict and searching nonetheless") (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). JUSTICES MARSHALL, BRENNAN, and BLACKMUN, however, seem to adhere to the formulation of the "strict" standard that they authored, with JUSTICE WHITE, in *Bakke:* "remedial use of race is permissible if it serves 'important governmental objectives' and is 'substantially related to achievement of those objectives.'" *Post*, at 301–302 (MARSHALL, J., dissenting), quoting *Bakke*, *supra*, at 359 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

I subscribe to JUSTICE POWELL's formulation because it mirrors the standard we have consistently applied in examining racial classifications in other contexts. In my view,

> "the analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply

> because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change." *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 724, n. 9 (1982).

Although JUSTICE POWELL's formulation may be viewed as more stringent than that suggested by JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN, the disparities between the two tests do not preclude a fair measure of consensus. In particular, as regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a "compelling" and an "important" governmental purpose may be a negligible one. The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required. See *infra*, at 289–293; *ante*, at 277–278. See also *post*, at 305 (MARSHALL, J., dissenting). Additionally, although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently "compelling," at least in the context of higher education, to support the use of racial considerations in furthering that interest. See, *e. g.*, *Bakke*, *supra*, at 311–315 (opinion of POWELL, J.). See also *post*, at 306 (MARSHALL, J., dissenting); *post*, at 315–317 (STEVENS, J., dissenting). And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies.

It appears, then, that the true source of disagreement on the Court lies not so much in defining the state interests which may support affirmative action efforts as in defining the degree to which the means employed must "fit" the ends pursued to meet constitutional standards. See, *e. g.*, *ante*, at 280, nn. 6, 7. Yet even here the Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently "narrowly tailored," or "substantially related," to the correction of prior discrimination by the state actor. See *infra*, at 289; *ante*, at 277–278; *post*, at 305 (MARSHALL, J., dissenting).

In the final analysis, the diverse formulations and the number of separate writings put forth by various Members of the Court in these difficult cases do not necessarily reflect an intractable fragmentation in opinion with respect to certain core principles. Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference.

Respondent School Board argues that the governmental purpose or goal advanced here was the School Board's desire to correct apparent prior employment discrimination against minorities while avoiding further litigation. See, *e. g.*, Brief for Respondents 15–17. See also Defendant's Brief in Support of Motion for Summary Judgment and Motion to Dismiss in No. Civ. 81–8173249 (ED Mich.), p. 16 (hereinafter cited as Defendant's Summary Judgment Brief). The Michigan Civil Rights Commission determined that the evidence before it supported the allegations of discrimination on the part of the Jackson School Board, though that determination was never reduced to formal findings because the School Board,

with the agreement of the Jackson Education Association (Union), voluntarily chose to remedy the perceived violation. Among the measures the School Board and the Union eventually agreed were necessary to remedy the apparent prior discrimination was the layoff provision challenged here; they reasoned that without the layoff provision, the remedial gains made under the ongoing hiring goals contained in the collective bargaining agreement could be eviscerated by layoffs.

The District Court and the Court of Appeals did not focus on the School Board's unquestionably compelling interest in remedying its apparent prior discrimination when evaluating the constitutionality of the challenged layoff provision. Instead, both courts reasoned that the goals of remedying "societal discrimination" and providing "role models" were sufficiently important to withstand equal protection scrutiny. I agree with the plurality that a governmental agency's interest in remedying "societal" discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny. See *ante*, at 276. See also *Bakke*, 438 U. S., at 307 (opinion of POWELL, J.). I also concur in the plurality's assessment that use by the courts below of a "role model" theory to justify the conclusion that this plan had a legitimate remedial purpose was in error.* See *ante*, at 275–276. Thus, in my view, the District Court and the Court of Appeals clearly erred in relying on these purposes and in failing to give greater attention to the School

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*The goal of providing "role models" discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty. Because this latter goal was not urged as such in support of the layoff provision before the District Court and the Court of Appeals, however, I do not believe it necessary to discuss the magnitude of that interest or its applicability in this case. The only governmental interests at issue here are those of remedying "societal" discrimination, providing "role models," and remedying apparent prior employment discrimination by the School Board.

Board's asserted purpose of rectifying its own apparent discrimination.

The error of the District Court and the Court of Appeals can be explained by reference to the fact that the primary issue argued by the parties on the cross motions for summary judgment was whether the School Board, a court, or another competent body had to have made a finding of past discrimination before or at the time of the institution of the plan in order for the plan to be upheld as remedial in purpose. 546 F. Supp. 1195, 1199–1200 (ED Mich. 1982). See also Brief in Support of Plaintiff's Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment in No. Civ. 81–8173249 (ED Mich.), pp. 5–13; Defendant's Summary Judgment Brief 11–15. The courts below ruled that a particularized, contemporaneous finding of discrimination was not necessary and upheld the plan as a remedy for "societal" discrimination, apparently on the assumption that in the absence of a specific, contemporaneous finding, any discrimination addressed by an affirmative action plan could only be termed "societal." See, *e. g.*, 546 F. Supp., at 1199. I believe that this assumption is false and therefore agree with the plurality that a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan. See *ante*, at 277–278.

A violation of federal statutory or constitutional requirements does not arise with the making of a finding; it arises when the wrong is committed. Contemporaneous findings serve solely as a means by which it can be made absolutely certain that the governmental actor truly is attempting to remedy its own unlawful conduct when it adopts an affirmative action plan, rather than attempting to alleviate the wrongs suffered through general societal discrimination. See, *e. g.*, *Fullilove* v. *Klutznick*, 448 U. S., at 498 (POWELL, J., concurring). Such findings, when voluntarily made

by a public employer, obviously are desirable in that they provide evidentiary safeguards of value both to nonminority employees and to the public employer itself, should its affirmative action program be challenged in court. If contemporaneous findings were *required* of public employers in every case as a precondition to the constitutional validity of their affirmative action efforts, however, the relative value of these evidentiary advantages would diminish, for they could be secured only by the sacrifice of other vitally important values.

The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. See, *e. g.*, *Bakke*, *supra*, at 364 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). Cf. *Steelworkers* v. *Weber*, 443 U. S. 193, 210–211 (1979) (BLACKMUN, J., concurring). This result would clearly be at odds with this Court's and Congress' consistent emphasis on "the value of voluntary efforts to further the objectives of the law." *Bakke*, *supra*, at 364 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.); see also *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417–418 (1975); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974). The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance. See S. Rep. No. 92–415, p. 10 (1971) (accompanying the amendments extending coverage of Title VII to the States) ("Discrimination by government . . . serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government").

Imposing a contemporaneous findings requirement would produce the anomalous result that what private employers may voluntarily do to correct apparent violations of Title VII, *Steelworkers* v. *Weber*, *supra*, public employers are constitutionally forbidden to do to correct their statutory and constitutional transgressions.

Such results cannot, in my view, be justified by reference to the incremental value a contemporaneous findings requirement would have as an evidentiary safeguard. As is illustrated by this case, public employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken. Where these employers, who are presumably fully aware both of their duty under federal law to respect the rights of *all* their employees and of their potential liability for failing to do so, act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a contemporaneous findings requirement should not be necessary.

This conclusion is consistent with our previous decisions recognizing the States' ability to take voluntary race-conscious action to achieve compliance with the law even in the absence of a specific finding of past discrimination. See, *e. g.*, *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144, 165–166 (1977) (reapportionment); *McDaniel* v. *Barresi*, 402 U. S. 39 (1971) (school desegregation). Indeed, our recognition of the responsible state actor's competency to take these steps is assumed in our recognition of the States' constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination. See, *e. g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971); *Green* v. *New Kent County School Board*, 391 U. S. 430, 437–438 (1968).

Of course, as JUSTICE POWELL notes, the public employer must discharge this sensitive duty with great care; in order to provide some measure of protection to the interests of its nonminority employees and the employer itself in the event that its affirmative action plan is challenged, the public employer must have a firm basis for determining that affirmative action is warranted. Public employers are not without reliable benchmarks in making this determination. For example, demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination.

To be sure, such a conclusion is not unassailable. If a voluntary affirmative action plan is subsequently challenged in court by nonminority employees, those employees must be given the opportunity to prove that the plan does not meet the constitutional standard this Court has articulated. However, as the plurality suggests, the institution of such a challenge does not automatically impose upon the public employer the burden of convincing the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld. See *ante*, at 277–278. In "reverse discrimination" suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated. The findings a court must make before upholding an affirmative action plan reflect this allocation of proof and the nature of the challenge asserted. For instance, in the example posed above, the nonminority teachers could easily demonstrate that the purpose and effect of the

plan is to impose a race-based classification. But when the Board introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the Board had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority teachers to prove their case; they continue to bear the ultimate burden of persuading the court that the Board's evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the Board's assertedly remedial action based on the statistical evidence was justified.

In sum, I do not think that the layoff provision was constitutionally infirm simply because the School Board, the Commission, or a court had not made particularized findings of discrimination at the time the provision was agreed upon. But when the plan was challenged, the District Court and the Court of Appeals did not make the proper inquiry into the legitimacy of the Board's asserted remedial purpose; instead, they relied upon governmental purposes that we have deemed insufficient to withstand strict scrutiny, and therefore failed to isolate a sufficiently important governmental purpose that could support the challenged provision.

There is, however, no need to inquire whether the provision actually had a legitimate remedial purpose based on the record, such as it is, because the judgment is vulnerable on yet another ground: the courts below applied a "reasonableness" test in evaluating the relationship between the ends pursued and the means employed to achieve them that is plainly incorrect under any of the standards articulated by this Court. Nor is it necessary, in my view, to resolve the troubling questions of whether any layoff provision could survive strict scrutiny or whether this particular layoff provision

could, when considered without reference to the hiring goal it was intended to further, pass the onerous "narrowly tailored" requirement. Petitioners have met their burden of establishing that this layoff provision is not "narrowly tailored" to achieve its asserted remedial purpose by demonstrating that the provision is keyed to a hiring goal that itself has no relation to the remedying of employment discrimination.

Although the constitutionality of the hiring goal as such is not before us, it is impossible to evaluate the necessity of the layoff provision as a remedy for the apparent prior employment discrimination absent reference to that goal. See, *e. g.*, *post*, at 306 (MARSHALL, J., dissenting). In this case, the hiring goal that the layoff provision was designed to safeguard was tied to the percentage of minority students in the school district, not to the percentage of qualified minority teachers within the relevant labor pool. The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination; it is only when it is established that the availability of minorities in the relevant labor pool substantially exceeded those hired that one may draw an inference of deliberate discrimination in employment. See *Hazelwood School District* v. *United States*, 433 U. S. 299, 308 (1977) (Title VII context). Because the layoff provision here acts to maintain levels of minority hiring that have no relation to remedying employment discrimination, it cannot be adjudged "narrowly tailored" to effectuate its asserted remedial purpose.

I therefore join in parts I, II, III, and V of the plurality's opinion, and concur in the judgment.

JUSTICE WHITE, concurring in the judgment.

The School Board's policy when layoffs are necessary is to maintain a certain proportion of minority teachers. This policy requires laying off nonminority teachers solely on the basis of their race, including teachers with seniority, and retaining other teachers solely because they are black, even

though some of them are in probationary status. None of the interests asserted by the Board, singly or together, justify this racially discriminatory layoff policy and save it from the strictures of the Equal Protection Clause. Whatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination, is quite a different matter. I cannot believe that in order to integrate a work force, it would be permissible to discharge whites and hire blacks until the latter comprised a suitable percentage of the work force. None of our cases suggest that this would be permissible under the Equal Protection Clause. Indeed, our cases look quite the other way. The layoff policy in this case—laying off whites who would otherwise be retained in order to keep blacks on the job—has the same effect and is equally violative of the Equal Protection Clause. I agree with the plurality that this official policy is unconstitutional and hence concur in the judgment.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

When this Court seeks to resolve far-ranging constitutional issues, it must be especially careful to ground its analysis firmly in the facts of the particular controversy before it. Yet in this significant case, we are hindered by a record that is informal and incomplete. Both parties now appear to realize that the record is inadequate to inform the Court's decision. Both have lodged with the Court voluminous "submissions" containing factual material that was not considered by the District Court or the Court of Appeals. Petitioners have submitted 21 separate items, predominantly statistical charts, which they assert are relevant to their claim of discrimination. Respondents have submitted public documents that tend to substantiate the facts alleged in the brief accompanying their motion for summary judgment in the District Court. These include transcripts and exhibits from two prior proceedings, in which certain questions of dis-

crimination in the Jackson schools were litigated, *Jackson Education Assn.* v. *Board of Education*, No. 4–72340 (ED Mich. 1976) *(Jackson I)*, and *Jackson Education Assn.* v. *Board of Education*, No. 77–011484CZ (Jackson Cty. Cir. Ct. 1979) *(Jackson II)*.

We should not acquiesce in the parties' attempt to try their case before this Court. Yet it would be just as serious a mistake simply to ignore altogether, as the plurality has done, the compelling factual setting in which this case evidently has arisen. No race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum.

The haste with which the District Court granted summary judgment to respondents, without seeking to develop the factual allegations contained in respondents' brief, prevented the full exploration of the facts that are now critical to resolution of the important issue before us. Respondents' acquiescence in a premature victory in the District Court should not now be used as an instrument of their defeat. Rather, the District Court should have the opportunity to develop a factual record adequate to resolve the serious issue raised by the case. I believe, therefore, that it is improper for this Court to resolve the constitutional issue in its current posture. But, because I feel that the plurality has also erred seriously in its legal analysis of the merits of this case, I write further to express my disagreement with the conclusions that it has reached.

I, too, believe that layoffs are unfair. But unfairness ought not be confused with constitutional injury. Paying no heed to the true circumstances of petitioners' plight, the plurality would nullify years of negotiation and compromise designed to solve serious educational problems in the public schools of Jackson, Michigan. Because I believe that a public employer, with the full agreement of its employees, should be permitted to preserve the benefits of a legitimate and constitutional affirmative-action hiring plan even while reducing its work force, I dissent.

I

The record and extra-record materials that we have before us persuasively suggest that the plurality has too quickly assumed the absence of a legitimate factual predicate, even under the plurality's own view, for affirmative action in the Jackson schools. The first black teacher in the Jackson public schools was hired in 1954.[1] In 1969, when minority representation on the faculty had risen only to 3.9%, the Jackson branch of the NAACP filed a complaint with the Michigan Civil Rights Commission, alleging that the Board had engaged in various discriminatory practices, including racial discrimination in the hiring of teachers. Respondents' Lodging No. 6 (complaint). The Commission conducted an investigation and concluded that each of the allegations had merit.[2]

In settlement of the complaint, the Commission issued an order of adjustment, under which the Jackson Board of Education (Board) agreed to numerous measures designed to improve educational opportunities for black public-school students. Among them was a promise to "[t]ake affirmative steps to recruit, hire and promote minority group teachers

[1] Unless otherwise indicated, the historical facts herein recited have been taken from the defendants' brief in support of its motion for summary judgment before the District Court, Record, Doc. No. 4, pp. 1–6.

[2] The Commission concluded: "Racial tension continues to be a part of the entire Jackson School System from the elementary level through high school. It would appear, therefore, that each of the allegations as stated in the complaint can be substantiated based upon organizational records, court files, school records, special committee reports and the appraisal conducted by the Superintendent of Schools." Respondents' Lodging No. 1–B, p. 11 (order of adjustment). This conclusion is supported by extra-record materials suggesting that the shortage of minority teachers was the result of past discrimination in teacher hiring. For example, the then-Superintendent of Schools testified that "an administrator . . . told me she had tried to get a position in Jackson in the early 1950's and was told that they didn't hire colored people." This was the "type of thing," he stated, that led to adoption of Article XII. Respondents' Lodging No. 3, pp. 22–23.

and counselors as positions bec[a]me available . . . ." Respondents' Lodging No. 1–B, p. 3. As a result of the Board's efforts to comply with the order over the next two years, the percentage of minority teachers increased to 8.8%.

In 1971, however, faculty layoffs became necessary. The contract in effect at that time, between the Board and the Jackson Education Association (Union), provided that layoffs would be made in reverse order of seniority. Because of the recent vintage of the school system's efforts to hire minorities, the seniority scheme led to the layoff of a substantial number of minority teachers, "literally wip[ing] out all the gain" made toward achieving racial balance. Respondent's Lodging No. 3, p. 24 (deposition of Superintendent of Schools). Once again, minority teachers on the faculty were a rarity.

By early 1972, when racial tensions in the schools had escalated to violent levels, school officials determined that the best course was full integration of the school system, including integration of the faculty. But they recognized that, without some modification of the seniority layoff system, genuine faculty integration could not take place. See App. 41; Respondents' Lodging No. 3, p. 69 (deposition of Superintendent of Schools); Respondents' Lodging No. 2, pp. 16–20 (testimony of Union Executive Director, *Jackson I*). The Minority Affairs Office of the Jackson Public Schools submitted a questionnaire to all teachers, asking them to consider the possibility of abandoning the "last hired, first fired" approach to layoffs in favor of an absolute freeze on layoffs of minority teachers. The teachers overwhelmingly voted in favor of retaining the straight seniority system. Negotiations ensued between the two camps—on the one hand, the Board, which favored a freeze of minority layoffs and, on the other, the Union, urging straight seniority—and the negotiators ultimately reached accord. One Union leader characterized the development of the layoff compromise as the most

difficult balancing of equities that he had ever encountered. Record, Doc. No. 4, p. 5.

The compromise avoided placing the entire burden of layoffs on either the white teachers as a group or the minority teachers as a group. Instead, each group would shoulder a portion of that burden equal to its portion of the faculty. Thus, the overall percentage of minorities on the faculty would remain constant. Within each group, seniority would govern which individuals would be laid off. This compromise was the provision at issue here, subsequently known as Article XII:

> "In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. . . . Each teacher so affected will be called back in reverse order for positions for which he is certified maintaining the above minority balance." App. 13.

The Board and the Union leadership agreed to the adoption of Article XII. The compromise was then presented to the teachers, who ratified it by majority vote. Each of the six times that the contract has been renegotiated, Article XII has been presented for reconsideration to the members of the Union, at least 80% of whom are white, and each time it has been ratified.

To petitioners, at the bottom of the seniority scale among white teachers, fell the lot of bearing the white group's proportionate share of layoffs that became necessary in 1982. Claiming a right not to lose their jobs ahead of minority teachers with less seniority, petitioners brought this challenge to Article XII under the Equal Protection Clause of the Fourteenth Amendment.

II

From the outset, it is useful to bear in mind what this case is not. There has been no court order to achieve racial balance, which might require us to reflect upon the existence of judicial power to impose obligations on parties not proved to have committed a wrong. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971). There is also no occasion here to resolve whether a white worker may be required to give up his or her job in order to be replaced by a black worker. See *Steelworkers* v. *Weber*, 443 U. S. 193, 208 (1979). Nor are we asked to order parties to suffer the consequences of an agreement that they had no role in adopting. See *Firefighters* v. *Stotts*, 467 U. S. 561, 575 (1984). Moreover, this is not a case in which a party to a collective-bargaining agreement has attempted unilaterally to achieve racial balance by refusing to comply with a contractual, seniority-based layoff provision. Cf. *Teamsters* v. *United States*, 431 U. S. 324, 350, 352 (1977).

The sole question posed by this case is whether the Constitution prohibits a union and a local school board from developing a collective-bargaining agreement that apportions layoffs between two racially determined groups as a means of preserving the effects of an affirmative hiring policy, the constitutionality of which is unchallenged.[3]

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[3] JUSTICE O'CONNOR rests her disposition of this case on the propriety of the hiring plan, even though petitioners have not challenged it. She appears to rely on language in the preamble to the collective-bargaining agreement, which suggests that the "goal of such [affirmative-action] policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools." Article VII.D.1, App. to Pet. for Cert. 1a. Believing that the school system's hiring "goal" ought instead to be the percentage of qualified minorities in the labor pool, JUSTICE O'CONNOR concludes that the challenged layoff provision itself is overly broad. *Ante*, at 293–294. Among the materials considered by the District Court and Court of Appeals, however, there is no evidence to show the actual proportion of minority teachers in the Jackson schools, either in relation to

III

Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us. In *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978), four Members of the Court concluded that, while racial distinctions are irrelevant to nearly all legitimate state objectives and are properly subjected to the most rigorous judicial scrutiny in most instances, they are highly relevant to the one legitimate state objective of eliminating the pernicious vestiges of past discrimination; when that is the goal, a less exacting standard of review is appropriate. We explained at length our view that, because no fundamental right was involved and because whites have none of the immutable characteristics of a suspect class, the so-called "strict scrutiny" applied to cases involving either fundamental rights or suspect classifications was not applicable. *Id.*, at 357 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). Nevertheless, we eschewed the least rigorous, "rational basis" standard of review, recognizing that any racial classification is subject to misuse. We determined that remedial use of race is permissible if it serves "important govern-

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the qualified minority labor force or in relation to the number of minority students. If the distinction between the two goals is to be considered critical to the constitutionality of the affirmative-action plan, it is incumbent on petitioners—plaintiffs below—to demonstrate that, at the time they were laid off, the proportion of minority teachers had equaled or exceeded the appropriate percentage of the minority labor force, and that continued adherence to affirmative-action goals, therefore, unjustifiably caused their injuries. This petitioners have failed to do. Outside of the First Amendment context, I know of no justification for invalidating a provision because it might, in a hypothetical case, apply improperly to other potential plaintiffs. Petitioners have attempted to fill the gap in their case by supplying statistical charts to this Court. See, *e. g.*, Petitioners' Lodging, pp. 56–62. Clearly, however, we are not equipped for such factfinding, and if the hortatory ceiling of the affirmative-action plan is indeed to be considered a significant aspect of the case, then that would be an appropriate subject of inquiry on remand.

mental objectives" and is "substantially related to achievement of those objectives." *Id.*, at 359; see also *id.*, at 387 (opinion of MARSHALL, J.); *id.*, at 402 (opinion of BLACKMUN, J.). This standard is genuinely a "strict and searching" judicial inquiry, but is "not '"strict" in theory and fatal in fact.'" *Id.*, at 362 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (quoting Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972)). The only other Justice to reach the constitutional issue in *Bakke* suggested that, remedial purpose or no, any racial distinctions "call for the most exacting judicial examination." *Id.*, at 291 (opinion of POWELL, J.).

In *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), the Court again disagreed as to the proper standard of review. Three Justices, of whom I was one, concluded that a statute reserving 10% of federal funds for minority contractors served important governmental objectives and was substantially related to achievement of those objectives, surviving attack under our *Bakke* test. 448 U. S., at 519 (MARSHALL, J., joined by BRENNAN and BLACKMUN, JJ., concurring in judgment). Three other Justices expressly declined to adopt any standard of review, deciding that the provision survived judicial scrutiny under either of the formulae articulated in *Bakke*. 448 U. S., at 492 (opinion of BURGER, C. J., joined by WHITE and POWELL, JJ.).

Despite the Court's inability to agree on a route, we have reached a common destination in sustaining affirmative action against constitutional attack. In *Bakke*, we determined that a state institution may take race into account as a factor in its decisions, 438 U. S., at 326, and in *Fullilove*, the Court upheld a congressional preference for minority contractors because the measure was legitimately designed to ameliorate the present effects of past discrimination, 448 U. S., at 520.

In this case, it should not matter which test the Court applies. What is most important, under any approach to the constitutional analysis, is that a reviewing court genuinely consider the circumstances of the provision at issue. The history and application of Article XII, assuming verification upon a proper record, demonstrate that this provision would pass constitutional muster, no matter which standard the Court should adopt.

IV

The principal state purpose supporting Article XII is the need to preserve the levels of faculty integration achieved through the affirmative hiring policy adopted in the early 1970's. Brief for Respondents 41–43. Justification for the hiring policy itself is found in the turbulent history of the effort to integrate the Jackson public schools—not even mentioned in the plurality opinion—which attests to the bona fides of the Board's current employment practices.

The record and lodgings indicate that the Commission, endowed by the State Constitution with the power to investigate complaints of discrimination and the duty to secure the equal protection of the laws, Mich. Const., Art. V, § 29, prompted and oversaw the remedial steps now under attack.[4] When the Board agreed to take specified remedial action, including the hiring and promotion of minority teachers, the Commission did not pursue its investigation of the apparent violations to the point of rendering formal findings of discrimination.

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[4] The Commission currently describes its participation in the Jackson matter as follows: "[T]he Commission investigated the allegations and sought *to remedy the apparent violations* by negotiating an order of adjustment with the Jackson Board. . . . [T]he out-of-line seniority layoff provisions in the Jackson Board of Education's employment contracts with its teachers since 1972 are consistent with overall desegregation efforts undertaken *in compliance with* the Commission's order of adjustment." Brief for Michigan Civil Rights Commission, Michigan Dept. of Civil Rights as *Amicus Curiae* 14 (emphasis added).

Instead of subjecting an already volatile school system to the further disruption of formal accusations and trials, it appears that the Board set about achieving the goals articulated in the settlement. According to the then-Superintendent of Schools, the Board was aware, at every step of the way, that "[t]he NAACP had its court suit ready if either the Board postponed the [integration] operation or abandoned the attempts. They were willing to—they were ready to go into Federal court and get a court order, as happened in Kalamazoo." Respondents' Lodging No. 3, p. 44. Rather than provoke the looming lawsuit, the Board and the Union worked with the committees to reach a solution to the racial problems plaguing the school system. In 1972, the Board explained to parents why it had adopted a voluntary integration plan:

> "Waiting for what appears the inevitable only flames passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated school system. Firmly established legal precedents mandate a change. Many citizens know this to be true.
>
> "Waiting for a court order emphasizes to many that we are quite willing to disobey the law until the court orders us not to disobey the law. . . . Further, court orders cost money for both the school system and the litigants." Respondents' Lodging No. 1, pp. 1–2 (Exhibit No. 8, *Jackson I*).

An explicit Board admission or judicial determination of culpability, which the petitioners and even the Solicitor General urge us to hold was required before the Board could undertake a race-conscious remedial plan, see Brief for Petitioners 27–29; Brief for United States as *Amicus Curiae* 29, would only have exposed the Board in this case to further litigation and liability, including individual liability under 42 U. S. C. § 1983, for past acts. It would have contributed nothing to the advancement of the community's urgent objective of integrating its schools.

The real irony of the argument urging mandatory, formal findings of discrimination lies in its complete disregard for a longstanding goal of civil rights reform, that of integrating schools without taking every school system to court. Our school desegregation cases imposed an affirmative duty on local school boards to see that "racial discrimination would be eliminated root and branch." *Green* v. *County School Board*, 391 U. S. 430, 437–438 (1968); see *Brown* v. *Board of Education*, 349 U. S. 294, 299 (1955). Petitioners would now have us inform the Board, having belatedly taken this Court's admonitions to heart, that it should have delayed further, disputing its obligations and forcing the aggrieved parties to seek judicial relief. This result would be wholly inconsistent with the national policies against overloading judicial dockets, maintaining groundless defenses, and impeding good-faith settlement of legal disputes. Only last Term, writing for the Court, THE CHIEF JUSTICE reaffirmed that civil rights litigation is no exception to the general policy in favor of settlements: "Indeed, Congress made clear its concern that civil rights plaintiffs not be penalized for 'helping to lessen docket congestion' by settling their cases out of court. . . . In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants." *Marek* v. *Chesny*, 473 U. S. 1, 10 (1985). It would defy equity to penalize those who achieve harmony from discord, as it would defy wisdom to impose on society the needless cost of superfluous litigation. The Court is correct to recognize, as it does at least implicitly today, that formal findings of past discrimination are not a necessary predicate to the adoption of affirmative-action policies, and that the scope of such policies need not be limited to remedying specific instances of identifiable discrimination. See *ante*, at 277 (opinion of POWELL, J.); *ante*, at 289–291 (opinion of O'CONNOR, J.).

Moreover, under the apparent circumstances of this case, we need not rely on any general awareness of "societal discrimination" to conclude that the Board's purpose is of suf-

ficient importance to justify its limited remedial efforts. There are allegations that the imperative to integrate the public schools was urgent. Racially motivated violence had erupted at the schools, interfering with all educational objectives. We are told that, having found apparent violations of the law and a substantial underrepresentation of minority teachers, the state agency responsible for ensuring equality of treatment for all citizens of Michigan had instituted a settlement that required the Board to adopt affirmative hiring practices in lieu of further enforcement proceedings. That agency, participating as *amicus curiae* through the Attorney General of Michigan, still stands fully behind the solution that the Board and the Union adopted in Article XII, viewing it as a measure necessary to attainment of stability and educational quality in the public schools. See n. 4, *supra*. Surely, if properly presented to the District Court, this would supply the "[e]videntiary support for the conclusion that remedial action is warranted" that the plurality purports to seek, *ante*, at 277. Since the District Court did not permit submission of this evidentiary support, I am at a loss as to why JUSTICE POWELL so glibly rejects the obvious solution of remanding for the factfinding he appears to recognize is necessary. See *ante*, at 278–279, n. 5.

Were I satisfied with the record before us, I would hold that the state purpose of preserving the integrity of a valid hiring policy—which in turn sought to achieve diversity and stability for the benefit of *all* students—was sufficient, in this case, to satisfy the demands of the Constitution.

V

The second part of any constitutional assessment of the disputed plan requires us to examine the means chosen to achieve the state purpose. Again, the history of Article XII, insofar as we can determine it, is the best source of assistance.

A

Testimony of both Union and school officials illustrates that the Board's obligation to integrate its faculty could not have been fulfilled meaningfully as long as layoffs continued to eliminate the last hired. See App. 41; Respondents' Lodging No. 3, p. 69 (deposition of Superintendent of Schools); Respondents' Lodging No. 2, pp. 16–20 (testimony of Union Executive Director, *Jackson I*). In addition, qualified minority teachers from other States were reluctant to uproot their lives and move to Michigan without any promise of protection from imminent layoff. The testimony suggests that the lack of some layoff protection would have crippled the efforts to recruit minority applicants. *Id.*, at 20, 55, 56. Adjustment of the layoff hierarchy under these circumstances was a necessary corollary of an affirmative hiring policy.

B

Under JUSTICE POWELL's approach, the community of Jackson, having painfully watched the hard-won benefits of its integration efforts vanish as a result of massive layoffs, would be informed today, simply, that preferential layoff protection is never permissible because hiring policies serve the same purpose at a lesser cost. See *ante*, at 283–284. As a matter of logic as well as fact, a hiring policy achieves no purpose at all if it is eviscerated by layoffs. JUSTICE POWELL's position is untenable.

JUSTICE POWELL has concluded, by focusing exclusively on the undisputed hardship of losing a job, that the Equal Protection Clause always bars race-conscious layoff plans. This analysis overlooks, however, the important fact that Article XII does not cause the loss of jobs; someone will lose a job under any layoff plan and, whoever it is, that person will not deserve it. Any *per se* prohibition against layoff protection, therefore, must rest upon a premise that the tradition of basing layoff decisions on seniority is so fundamental that its

modification can never be permitted. Our cases belie that premise.

The general practice of basing employment decisions on relative seniority may be upset for the sake of other public policies. For example, a court may displace innocent workers by granting retroactive seniority to victims of employment discrimination. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 775 (1976). Further, this Court has long held that "employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." *Id.*, at 778. And we have recognized that collective-bargaining agreements may go further than statutes in enhancing the seniority of certain employees for the purpose of fostering legitimate interests. See *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 339–340 (1953). Accordingly, we have upheld one collectively bargained provision that bestowed enhanced seniority on those who had served in the military before employment, *id.*, at 340, and another that gave preferred seniority status to union chairmen, to the detriment of veterans. *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U. S. 521, 529 (1949).

In *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), we specifically addressed a departure from the seniority principle designed to alleviate racial disparity. In *Weber*, a private employer and a union negotiated a collective agreement that reserved for black employees one half of all openings in a plant training program, replacing the prior system of awarding all seats on the basis of seniority. This plan tampered with the expectations attendant to seniority, and redistributed opportunities to achieve an important qualification toward advancement in the company. We upheld the challenged plan under the Civil Rights Act of 1964 because it was designed to "eliminate traditional patterns of racial segregation" in the industry and did not "unnecessarily trammel the interests of the white employees." *Id.*, at 201, 208. We required no judicial finding or employer admission of past dis-

crimination to justify that interference with the seniority hierarchy for the sake of the legitimate purposes at stake.

These cases establish that protection from layoff is not altogether unavailable as a tool for achieving legitimate societal goals. It remains to be determined whether the particular form of layoff protection embodied in Article XII falls among the permissible means for preserving minority proportions on the teaching staff.

C

Article XII is a narrow provision because it allocates the impact of an unavoidable burden proportionately between two racial groups. It places no absolute burden or benefit on one race, and, within the confines of constant minority proportions, it preserves the hierarchy of seniority in the selection of individuals for layoff. Race is a factor, along with seniority, in determining which individuals the school system will lose; it is not alone dispositive of any individual's fate. Cf. *Bakke*, 438 U. S., at 318 (opinion of POWELL, J.). Moreover, Article XII does not use layoff protection as a tool for *increasing* minority representation; achievement of that goal is entrusted to the less severe hiring policies.[5] And Article XII is narrow in the temporal sense as well. The very bilateral process that gave rise to Article XII when its adoption was necessary will also occasion its demise when remedial measures are no longer required. Finally, Article XII modifies contractual expectations that do not themselves carry any connotation of merit or achievement; it does not interfere with the "cherished American ethic" of "[f]airness in individual competition," *Bakke*, *supra*, at 319, n. 53, depriving indi-

[5] JUSTICE WHITE assumes that respondents' plan is equivalent to one that deliberately seeks to change the racial composition of a staff by firing and hiring members of predetermined races. *Ante*, at 295. That assumption utterly ignores the fact that the Jackson plan involves only the means for selecting the employees who will be chosen for layoffs already necessitated by external economic conditions. This plan does not seek to supplant whites with blacks, nor does it contribute in any way to the number of job losses.

viduals of an opportunity that they could be said to deserve. In all of these important ways, Article XII metes out the hardship of layoffs in a manner that achieves its purpose with the smallest possible deviation from established norms.

The Board's goal of preserving minority proportions could have been achieved, perhaps, in a different way. For example, if layoffs had been determined by lottery, the ultimate effect would have been retention of current racial percentages. A random system, however, would place every teacher in equal jeopardy, working a much greater upheaval of the seniority hierarchy than that occasioned by Article XII; it is not at all a less restrictive means of achieving the Board's goal. Another possible approach would have been a freeze on layoffs of minority teachers. This measure, too, would have been substantially more burdensome than Article XII, not only by necessitating the layoff of a greater number of white teachers, but also by erecting an absolute distinction between the races, one to be benefited and one to be burdened, in a way that Article XII avoids. Indeed, neither petitioners nor any Justice of this Court has suggested an alternative to Article XII that would have attained the stated goal in any narrower or more equitable a fashion. Nor can I conceive of one.

VI

It is no accident that this least burdensome of all conceivable options is the very provision that the parties adopted. For Article XII was forged in the crucible of clashing interests. All of the economic powers of the predominantly white teachers' union were brought to bear against those of the elected Board, and the process yielded consensus.

The concerns that have prompted some Members of this Court to call for narrowly tailored, perhaps court-ordered, means of achieving racial balance spring from a legitimate fear that racial distinctions will again be used as a means to persecute individuals, while couched in benign phraseology. That fear has given rise to mistrust of those who profess to

take remedial action, and concern that any such action "work the least harm possible to other innocent persons competing for the benefit." *Bakke, supra,* at 308 (opinion of POWELL, J.). One Justice has warned that "if innocent employees are to be made to make any sacrifices . . . , they must be represented and have had full participation rights in the negotiation process," *Firefighters* v. *Stotts,* 467 U. S., at 588, n. 3 (O'CONNOR, J., concurring), and another has called for a "principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification . . . ." *Bakke, supra,* at 294–295, n. 34 (opinion of POWELL, J.). This case answers that call.

The collective-bargaining process is a legitimate and powerful vehicle for the resolution of thorny problems, and we have favored "minimal supervision by courts and other governmental agencies over the substantive terms of collective-bargaining agreements." *American Tobacco Co.* v. *Patterson,* 456 U. S. 63, 76–77 (1982). We have also noted that "[s]ignificant freedom must be afforded employers and unions to create differing seniority systems," *California Brewers Assn.* v. *Bryant,* 444 U. S. 598, 608 (1980).[6] The perceived dangers of affirmative action misused, therefore, are naturally averted by the bilateral process of negotiation, agreement, and ratification. The best evidence that Article XII is a narrow means to serve important interests is that representatives of all affected persons, starting from diametrically opposed perspectives, have agreed to it—not once, but six times since 1972.

VII

The narrow question presented by this case, if indeed we proceed to the merits, offers no occasion for the Court to issue broad proclamations of public policy concerning the

[6] This deference is warranted only if the union represents the interests of the workers fairly; a union's breach of that duty in the form of racial discrimination gives rise to an action by the worker against the union. See *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, 207 (1944).

controversial issue of affirmative action. Rather, this case calls for calm, dispassionate reflection upon exactly what has been done, to whom, and why. If one honestly confronts each of those questions against the factual background suggested by the materials submitted to us, I believe the conclusion is inescapable that Article XII meets, and indeed surpasses, any standard for ensuring that race-conscious programs are necessary to achieve remedial purposes. When an elected school board and a teachers' union collectively bargain a layoff provision designed to preserve the effects of a valid minority recruitment plan by apportioning layoffs between two racial groups, as a result of a settlement achieved under the auspices of a supervisory state agency charged with protecting the civil rights of all citizens, that provision should not be upset by this Court on constitutional grounds.

The alleged facts that I have set forth above evince, at the very least, a wealth of plausible evidence supporting the Board's position that Article XII was a legitimate and necessary response both to racial discrimination and to educational imperatives. To attempt to resolve the constitutional issue either with no historical context whatever, as the plurality has done, or on the basis of a record devoid of established facts, is to do a grave injustice not only to the Board and teachers of Jackson and to the State of Michigan, but also to individuals and governments committed to the goal of eliminating all traces of segregation throughout the country. Most of all, it does an injustice to the aspirations embodied in the Fourteenth Amendment itself. I would vacate the judgment of the Court of Appeals and remand with instructions that the case be remanded to the District Court for further proceedings consistent with the views I have expressed.[7]

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[7] I do not envy the District Court its task of sorting out what this Court has and has not held today. It is clear, at any rate, that from among the many views expressed today, two noteworthy results emerge: a majority of the Court has explicitly rejected the argument that an affirmative-action plan must be preceded by a formal finding that the entity seeking to insti-

JUSTICE STEVENS, dissenting.

In my opinion, it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future. Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future. If so, I believe we should consider whether that public interest, and the manner in which it is pursued, justifies any adverse effects on the disadvantaged group.[1]

I

The Equal Protection Clause absolutely prohibits the use of race in many governmental contexts. To cite only a few: the government may not use race to decide who may serve on juries,[2] who may use public services,[3] who may marry,[4] and who may be fit parents.[5] The use of race in these situations is "utterly irrational" because it is completely unrelated

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tute the plan has committed discriminatory acts in the past; and the Court has left open whether layoffs may be used as an instrument of remedial action.

[1] "In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?" *Cleburne* v. *Cleburne Living Center*, 473 U. S. 432, 453 (1985) (STEVENS, J., concurring).

[2] *Batson* v. *Kentucky*, *ante*, p. 79; *Vasquez* v. *Hillery*, 474 U. S. 254 (1985); *Rose* v. *Mitchell*, 443 U. S. 545 (1979); *Strauder* v. *West Virginia*, 100 U. S. 303 (1880).

[3] *Turner* v. *City of Memphis*, 369 U. S. 350 (1962) *(per curiam)*; *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961).

[4] *Loving* v. *Virginia*, 388 U. S. 1 (1967).

[5] *Palmore* v. *Sidoti*, 466 U. S. 429 (1984).

to any valid public purpose;[6] moreover, it is particularly pernicious because it constitutes a badge of oppression that is unfaithful to the central promise of the Fourteenth Amendment.

Nevertheless, in our present society, race is not always irrelevant to sound governmental decisionmaking.[7] To take the most obvious example, in law enforcement, if an undercover agent is needed to infiltrate a group suspected of ongoing criminal behavior—and if the members of the group are all of the same race—it would seem perfectly rational to employ an agent of that race rather than a member of a different racial class. Similarly, in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers.

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[6] *Cleburne*, 473 U. S., at 452 (STEVENS, J., concurring in judgment) ("It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color"). See also *Palmore* v. *Sidoti*, 466 U. S., at 432 ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category").

[7] As JUSTICE MARSHALL explains, although the Court's path in *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978), and *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), is tortuous, the path at least reveals that race consciousness does not automatically violate the Equal Protection Clause. In those opinions, only two Justices of the Court suggested that race-conscious governmental efforts were inherently unconstitutional. See *id.*, at 522 (Stewart, J., dissenting, joined by REHNQUIST, J.). Cf. *id.*, at 548 (STEVENS, J., dissenting) ("Unlike Mr. Justice Stewart and MR. JUSTICE REHNQUIST, . . . I am not convinced that the Clause contains an absolute prohibition against any statutory classification based on race"). Notably, in this Court, petitioners have presented solely a constitutional theory, and have not pursued any statutory claims. Cf. *Bakke*, 438 U. S. at 408 (STEVENS, J., concurring in judgment in part and dissenting in part) (suggesting that constitutional issue need not be reached because statutory issue was dispositive).

In the context of public education,[8] it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.

In this case, the collective-bargaining agreement between the Union and the Board of Education succinctly stated a valid public purpose—"recognition of the desirability of multi-ethnic representation on the teaching faculty," and thus "a policy of actively seeking minority group personnel." App. to Pet. for Cert. 22a. Nothing in the record—not a shred of evidence—contradicts the view that the Board's attempt to employ, and to retain, more minority teachers in the Jackson public school system served this completely sound educational purpose. Thus, there was a rational and unques-

[8] The Court has frequently emphasized the role of public schools in our national life. See *Board of Education* v. *Pico*, 457 U. S. 853, 864 (1982) (plurality opinion) ("[P]ublic schools are vitally important . . . as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system'"); *Ambach* v. *Norwick*, 441 U. S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions"); *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 30 (1973) ("'[T]he grave significance of education both to the individual and to our society' cannot be doubted"); *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954) ("[E]ducation . . . is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment").

tionably legitimate basis for the Board's decision to enter into the collective-bargaining agreement that petitioners have challenged, even though the agreement required special efforts to recruit and retain minority teachers.

II

It is argued, nonetheless, that the purpose should be deemed invalid because, even if the Board of Education's judgment in this case furthered a laudable goal, some other boards might claim that their experience demonstrates that segregated classes, or segregated faculties, lead to better academic achievement. There is, however, a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason.

The exclusionary decision rests on the false premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. As noted, that premise is "utterly irrational," *Cleburne* v. *Cleburne Living Center*, 473 U. S. 432, 452 (1985), and repugnant to the principles of a free and democratic society. Nevertheless, the fact that persons of different races do, indeed, have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not. Thus, consideration of whether the consciousness of race is exclusionary or inclusionary plainly distinguishes the Board's valid purpose in this case from

a race-conscious decision that would reinforce assumptions of inequality.[9]

III

Even if there is a valid purpose to the race consciousness, however, the question that remains is whether that public purpose transcends the harm to the white teachers who are disadvantaged by the special preference the Board has given to its most recently hired minority teachers. In my view, there are two important inquiries in assessing the harm to the disadvantaged teacher. The first is an assessment of the procedures that were used to adopt, and implement, the race-conscious action.[10] The second is an evaluation of the nature of the harm itself.

In this case, there can be no question about either the fairness of the procedures used to adopt the race-conscious pro-

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[9] Cf. *Palmore* v. *Sidoti*, 466 U. S., at 434 ("The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody"); *Buchanan* v. *Warley*, 245 U. S. 60, 81 (1917) (rejecting legitimacy of argument that the "proposed segregation will promote the public peace by preventing race conflicts").

[10] Cf. *Fullilove*, 448 U. S., at 548–549 (STEVENS, J., dissenting) (A race-based classification "does impose a special obligation to scrutinize any governmental decisionmaking process that draws nationwide distinctions between citizens on the basis of their race and incidentally also discriminates against noncitizens in the preferred racial classes. For just as procedural safeguards are necessary to guarantee impartial decisionmaking in the judicial process, so can they play a vital part in preserving the impartial character of the legislative process"). That observation is, of course, equally applicable to a context in which the governmental decision is reached through a nonlegislative process. Significantly, a reason given for what this Court frequently calls "strict scrutiny" of certain classifications is the notion that the disadvantaged class is one that has been unable to enjoy full procedural participation. See *United States* v. *Carolene Products, Co.*, 304 U. S. 144, 152–153, n. 4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"); J. Ely, Democracy and Distrust 75–77 (1980).

vision, or the propriety of its breadth. As JUSTICE MARSHALL has demonstrated, the procedures for adopting this provision were scrupulously fair. The Union that represents the petitioners negotiated the provision and agreed to it; the agreement was put to a vote of the membership, and overwhelmingly approved. Again, not a shred of evidence in the record suggests *any* procedural unfairness in the adoption of the agreement. Similarly, the provision is specifically designed to achieve its objective—retaining the minority teachers that have been specially recruited to give the Jackson schools, after a period of racial unrest, an integrated faculty.[11] Thus, in striking contrast to the procedural inadequacy and unjustified breadth of the race-based classification in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980),[12] the race-conscious layoff policy here was adopted with full participation of the disadvantaged individuals and with a narrowly circumscribed berth for the policy's operation.

Finally, we must consider the harm to the petitioners. Every layoff, like every refusal to employ a qualified applicant, is a grave loss to the affected individual. However, the undisputed facts in this case demonstrate that this serious consequence to the petitioners is not based on any lack of respect for their race, or on blind habit and stereotype.[13] Rather, petitioners have been laid off for a combination of

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[11] The layoff provision states:

"In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff." App. to Pet. for Cert. 23a.

The layoff provision follows the agreement's statement of the goal of an increased minority presence on the faculty and of the commitment to active minority recruiting and hiring efforts. *Id.*, at 22a–23a.

[12] See 448 U. S., at 532 (STEVENS, J., dissenting).

[13] Cf. *Mathews* v. *Lucas*, 427 U. S. 495, 520–521 (1976) (STEVENS, J., dissenting).

two reasons: the economic conditions that have led Jackson to lay off some teachers, and the special contractual protections intended to preserve the newly integrated character of the faculty in the Jackson schools. Thus, the same harm might occur if a number of gifted young teachers had been given special contractual protection because their specialties were in short supply and if the Jackson Board of Education faced a fiscal need for layoffs. A Board decision to grant immediate tenure to a group of experts in computer technology, an athletic coach, and a language teacher, for example, might reduce the pool of teachers eligible for layoffs during a depression and therefore have precisely the same impact as the racial preference at issue here. In either case, the harm would be generated by the combination of economic conditions and the special contractual protection given a different group of teachers—a protection that, as discussed above, was justified by a valid and extremely strong public interest.[14]

IV

We should not lightly approve the government's use of a race-based distinction. History teaches the obvious dangers

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[14] The fact that the issue arises in a layoff context, rather than a hiring context, has no bearing on the equal-protection question. For if the Board's interest in employing more minority teachers is sufficient to justify providing them with an extra incentive to accept jobs in Jackson, Michigan, it is also sufficient to justify their retention when the number of available jobs is reduced. JUSTICE POWELL's suggestion, *ante*, at 282–284, that there is a distinction of constitutional significance under the Equal Protection Clause between a racial preference at the time of hiring and an identical preference at the time of discharge is thus wholly unpersuasive. He seems to assume that a teacher who has been working for a few years suffers a greater harm when he is laid off than the harm suffered by an unemployed teacher who is refused a job for which he is qualified. In either event, the adverse decision forecloses "only one of several opportunities" that may be available, *ante*, at 283, to the disappointed teacher. Moreover, the distinction is artificial, for the layoff provision at issue in this case was included as part of the terms of the *hiring* of minority and other teachers under the collective-bargaining agreement.

of such classifications.[15] Our ultimate goal must, of course, be "to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race."[16] In this case, however, I am persuaded that the decision to include more minority teachers in the Jackson, Michigan, school system served a valid public purpose, that it was adopted with fair procedures and given a narrow breadth, that it transcends the harm to petitioners, and that it is a step toward that ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race. I would therefore affirm the judgment of the Court of Appeals.

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[15] See, *e. g.*, *Fullilove*, 448 U. S., at 534, n. 5 (STEVENS, J., dissenting).
[16] *Id.*, at 547.

HENDERSON ET AL. v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1744. Argued April 1, 1986—Decided May 19, 1986

The Speedy Trial Act (Act) commands that a defendant be tried within 70 days of the latest of either the filing of an indictment or information, or the first appearance before a judge or magistrate. However, a provision of the Act, 18 U. S. C. § 3161(h)(1)(F) (hereafter subsection (F)), excludes from this time "[a]ny period of delay resulting from other proceedings concerning the defendant, including . . . delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." With regard to petitioners, who were ultimately convicted in Federal District Court of charges relating to the manufacture, possession, and distribution of controlled substances, the Act's 70-day period commenced on September 3, 1980, but the trial did not begin until November 1, 1982, because of various delays, including those resulting from overlapping filings by petitioners and the Government with respect to a motion to suppress certain evidence, a hearing and posthearing submissions by the parties on that motion, petitioners' motion for reconsideration of the court's denial of the motion to suppress, and petitioners' motion to dismiss the indictment because of violation of the Act. The Court of Appeals affirmed petitioners' convictions, rejecting their contention that under subsection (F) only delays that were "reasonably necessary" could be excluded from the Act's 70-day period.

Held:

1. Congress intended subsection (F) to exclude from the Act's 70-day limitation all time between the filing of a pretrial motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is "reasonably necessary." The plain terms of the statute exclude all time between the filing of and the hearing on a motion, whether that hearing was prompt or not. Moreover, Congress' express use of the phrase "reasonable period of delay" in another provision of the statute indicates that the exclusion of the period defined in subsection (F) was intended to be automatic. The legislative history also supports this reading of subsection (F). Nor does the phrase "or other prompt disposition" in subsection (F) imply that only reasonably necessary delays may be excluded between the time of filing and the conclusion of

the hearing. That language was intended to apply to situations where motions are decided on the papers filed without a hearing. Pp. 326–330.

2. Subsection (F) also excludes time after a hearing on a motion where the District Court awaits additional filings from the parties that are needed for proper disposition of the motion. Although the language of the statute is not clear on this point, its structure requires that such time be excluded. Pp. 330–331.

3. Under the facts in this case, there were only 69 nonexcludable days of delay before petitioners' trial, and therefore the Act was not violated. Pp. 331–333.

746 F. 2d 619, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 333.

Denise Anton argued the cause for petitioners. With her on the briefs were *Alex Reisman* and *Paul G. Sloan*.

Roger Clegg argued the cause for the United States. On the brief were *Solicitor General Fried*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, *Charles A. Rothfeld*, and *Patty Merkamp Stemler*.

JUSTICE POWELL delivered the opinion of the Court.

The Speedy Trial Act, 18 U. S. C. § 3161 *et seq.* (1982 ed. and Supp. II), as amended in 1979 and in 1984, commands that a defendant be tried within 70 days of the latest of either the filing of an indictment or information, or the first appearance before a judge or magistrate. Section 3161(h)(1)(F) excludes from this time "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." This case requires us to decide the narrow questions whether that exclusion is limited to reasonably necessary delays, and whether it applies to delays occasioned by the filing of posthearing briefs on motions.

I

A jury convicted petitioners of charges arising out of manufacture, possession, and distribution of controlled sub-

stances.[1] The evidence at trial showed that in February and April 1980 petitioner Henderson, under the alias "Richard Martin," placed orders with a scientific supply company in Ohio for chemicals that could be used in the manufacture of illegal drugs. The orders attracted the attention of the Drug Enforcement Agency. Agents obtained a warrant from a United States Magistrate, authorizing installation of an electronic transmitter in one of the chemical containers. Henderson drove from California to Ohio, picked up the second order of chemicals on June 24, and headed west. Agents lost the tracking signal despite their following by both car and plane, only to receive it later in July from petitioner Freedman's house near Watsonville, California. A search pursuant to warrant on July 17 revealed an illicit drug factory. The last of the codefendants, Peter Bell, was arraigned on September 3, 1980.[2]

The Speedy Trial Act requires that trial begin within 70 days of the latest indictment, information, or appearance—in this case, September 3. 18 U. S. C. § 3161(c)(1). A timely trial would have commenced on November 12, 1980, barring periods of excludable delay. Overlapping filings by petitioners and the Government, however, kept a suppression motion pending from its filing on November 3, 1980, through a hear-

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[1] The jury convicted all three petitioners of conspiracy to manufacture and possess with intent to distribute methamphetamine and phenyl-2-propanone, see 21 U. S. C. § 846; petitioners Thornton and Freedman of manufacture and possession with intent to distribute of methamphetamine, see § 842(a)(1); and petitioner Henderson of traveling interstate with intent to promote the manufacture and possession of methamphetamine, see 18 U. S. C. § 1952(a)(3).

[2] Codefendant Bell was severed from petitioners' trial on November 1, 1982. All defendants who are joined for trial generally fall within the speedy trial computation of the latest codefendant. See 18 U. S. C. § 3161(h)(7). Once Bell was joined with petitioners in the September 3 superseding indictment, their 70-day period was measured with respect to his.

ing on that motion on March 25, 1981.[3] The court deferred decision on the motion pending receipt of posthearing submissions from the parties, the last of which was filed on December 15, 1981. See App. 29–31. The District Court finally denied the motion to suppress on January 19, 1982.

From January 25 to May 10, 1982, both parties filed additional motions before the District Court—on January 25 the Government moved to set the case for trial, and on March 23 petitioners moved to reconsider the motion to suppress. On February 3, the court held a hearing on the Government's motion and granted a continuance through April 21 to allow defense counsel to file a motion for reconsideration of the order denying the suppression motion.[4] After a hearing on May 10, the court denied petitioners' motion to reconsider the motion to suppress, and set a trial date of September 13, 1982. The court also entered an order excluding, for purposes of the Act, the time from May 10 to September 13 based on a provision of the Act that allows such exclusion by the Court to satisfy the "ends of justice." *Id.*, at 32–33; see 18 U. S. C. § 3161(h)(8)(A).[5]

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[3] On November 3, 1980, petitioners filed a motion to suppress evidence. 2 Record, Doc. Nos. 24–26. On November 24, petitioners filed a supplemental memorandum concerning alleged misrepresentations in the affidavit supporting the search warrant. On its own motion, the District Court rescheduled the hearing from November 26, 1980, to January 14, 1981, and again to January 28, 1981. A third continuance, at petitioner Freedman's request, moved the hearing date to February 18, 1981. Meanwhile, on January 13, petitioners filed a motion to reveal the identity of a confidential informant. At the February 18 hearing, petitioners requested and received a continuance to March 2 to reply to the Government's responses, filed only the day before. The hearing was held instead on March 25 after a 21-day continuance from the court on March 4.

[4] Petitioners filed the motion on March 23; the Government filed its response on April 14, 1982. 3 Record, Doc. Nos. 74–75.

[5] Section 3161(h)(8)(A) provides for the exclusion of

"[a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such con-

On July 23, 1982, Thornton filed a motion to dismiss the superseding indictment for violation of the Speedy Trial Act. The other two petitioners subsequently joined this motion. The District Judge held a hearing almost two months later, on September 8, and denied the motion from the bench on that date. He filed a memorandum and order outlining his reasons exactly 30 days later. At that time, the judge also entered an order excluding the time from October 8 to November 1, again based on the "interests of justice." 3 Record, Doc. Nos. 98–99. Trial commenced on November 1, 1982.

Petitioners appealed their convictions, arguing, *inter alia*, that the District Court could exclude from their Speedy Trial Act computation only delays that were "reasonably necessary." 746 F. 2d 619, 622 (CA9 1984). The Court of Appeals held that the statute "excludes delays resulting from pretrial motions without qualification." *Ibid.* The court noted that Congress had explicitly provided that the excludability of certain other delays depended on their reasonableness, but had not done so for delays from pretrial motions. *Ibid.* Judge Ferguson dissented, relying on the Act's legislative history and the interpretations of other Circuits. *Id.*, at 625–626. We granted certiorari to resolve a conflict among the Circuits.[6] 474 U. S. 900 (1985). We now affirm.

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tinuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial."

[6] Several Courts of Appeals have read into 18 U. S. C. § 3161(h)(1)(F) a requirement that only delays that are "reasonably necessary" may be excluded from the computation of the 70-day period. *United States* v. *Ray*, 768 F. 2d 991, 998–999 (CA8 1985); *United States* v. *Mitchell*, 723 F. 2d

II

The Speedy Trial Act requires that a criminal trial must commence within 70 days of the latest of a defendant's indictment, information, or appearance, barring periods of excludable delay. *United States* v. *Rojas-Contreras*, 474 U. S. 231 (1985); see 18 U. S. C. § 3161(c)(1). Section 3161(h)(1)(F) (subsection (F)) excludes from these 70 days certain delays occasioned by the filing of pretrial motions:

> "(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> "(1) *Any period of delay* resulting from other proceedings concerning the defendant, including but not limited to—
>
> . . . . .
>
> "(F) *delay resulting from any pretrial motion*, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" (emphasis added).

A

On its face, subsection (F) excludes "[a]ny period of delay" caused by "any pretrial motion," "from the filing of the motion through the conclusion of the hearing." The plain terms of the statute appear to exclude all time between the filing of and the hearing on a motion whether that hearing was prompt or not. Moreover, subsection (F) does not require

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1040, 1047 (CA1 1983); *United States* v. *Janik*, 723 F. 2d 537, 543 (CA7 1983); *United States* v. *Novak*, 715 F. 2d 810, 819–820 (CA3 1983), cert. denied *sub nom. Ware* v. *United States*, 465 U. S. 1030 (1984); *United States* v. *Cobb*, 697 F. 2d 38, 44 (CA2 1982). Other Circuits have held that § 3161(h)(1)(F) excludes without qualification the entire period between the filing of the motion and the conclusion of the hearing. 746 F. 2d 619 (CA9 1984) (case below); *United States* v. *Stafford*, 697 F. 2d 1368, 1373 (CA11 1983). Cf. *United States* v. *Horton*, 705 F. 2d 1414, 1416 (CA5), cert. denied, 464 U. S. 997 (1983).

that a period of delay be "reasonable" to be excluded, although Congress clearly knew how to limit an exclusion: in § 3161(h)(7), Congress provided for exclusion of a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." Apart from this single instance, every other provision in § 3161(h) provides for exclusion of "any period of delay."[7] The provision excludes, for example, all of the time consumed by an interlocutory appeal, § 3161(h)(1)(E), by a competency examination, § 3161(h)(1)(A), and by the defendant's unavailability, § 3161(h)(3)(A). As the Court of Appeals concluded: "The difference between (7) and (1) through (6) is a strong indication that exclusion of the periods defined in (1)–(6) was intended to be automatic." 746 F. 2d, at 622.

The legislative history of the 1979 Amendments to the Act supports this reading of subsection (F).[8] That history shows that Congress was aware of the breadth of the exclusion it was enacting in subsection (F). The Senate Judiciary Com-

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[7] Section 3161(h)(1)(H), which provides for the exclusion of delay from transporting a defendant "from another district, or to and from places of examination or hospitalization," presumes that any such delay over 10 days is unreasonable.

[8] The discussion in S. Rep. No. 96–212, p. 34 (1979), see *post*, at 336–337, concerns time spent *preparing pretrial motions*. The pertinent language from the Report reads:

"Although some witnesses contended that all time consumed by motions practice, from preparation through their disposition, should be excluded, the Committee finds that approach unreasonable. This is primarily because, in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple. However, the Committee would permit through its amendments to subsection (h)(8)(B) reasonable preparation time for pretrial motions in cases presenting novel questions of law or complex facts." S. Rep. No. 96–212, at 33–34.

Our holding concerns time *after the submission of pretrial motions*. We note in such situations that the trial court is in a position to determine what, if any, additional submissions that it needs from the parties, and when those submissions are due.

mittee acknowledged that "if basic standards for prompt consideration of pretrial motions are not developed," the liberalized 1979 Amendments to subsection (F) "could become a loophole which could undermine the whole Act." S. Rep. No. 96–212, p. 34 (1979). In its subsequent consideration of subsection (F), the House of Representatives did not qualify the exclusion in any way or limit such potential abuse by statute. Instead the House adopted the Senate's version "with the intention that potentially excessive and abusive use of this exclusion be precluded by district or circuit guidelines, rules, or procedures relating to motions practice." H. R. Rep. No. 96–390, p. 10 (1979). Congress clearly envisioned that any limitations should be imposed by circuit or district court rules rather than by the statute itself.[9] Such rules, developed pursuant to § 3166(f), should provide the assurance of a speedy disposition of pretrial motions.

Petitioners largely concede these arguments and advance two other contentions for limiting subsection (F)'s exclusion to time that is "reasonably necessary" for the disposition of pretrial motions. First, they contend that the phrase "other prompt disposition" within subsection (F) implies that a district court may not unreasonably delay a criminal trial by deferring a hearing on a pretrial motion. Two of the Courts of Appeals that have limited the exclusion in subsection (F) to delays that are "reasonably necessary" have relied on this argument. *United States* v. *Janik*, 723 F. 2d 537, 543 (CA7 1983); *United States* v. *Cobb*, 697 F. 2d 38, 41–42 (CA2 1982). But a reading of subsection (F) in connection with § 3161 (h)(1)(J) (subsection (J)), which allows exclusion of up to 30

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[9] The dissent relies on district court rules as a basis for invoking petitioners' standard. *Post*, at 337–338, n. 2. The interpretation of the local rule, however, is a matter on which we should defer to the Court of Appeals for the Ninth Circuit. It found no violation of the rule.

It would be useful in the future for circuit and district court rules to include specific timetables, thereby giving substance to the obligations of prosecutors and defense counsel under the Speedy Trial Act.

days while the district court has a motion "under advisement," *i. e.*, 30 days from the time the court receives all the papers it reasonably expects, undermines this conclusion. The phrase "prompt disposition" was intended to prevent a district court from using subsection (F) to exclude time after a motion is taken under advisement when that time fails to qualify for exclusion under subsection (J).

Subsection (F), written in the disjunctive, excludes time in two situations. The first arises when a pretrial motion requires a hearing: subsection (F) on its face excludes the entire period between the filing of the motion and the conclusion of the hearing. The second situation concerns motions that require no hearing and that result in a "prompt disposition." There, the promptness requirement was "intended to provide a point at which time will cease to be excluded, where motions are decided on the papers filed without hearing." S. Rep. No. 96–212, at 34. The "point at which time will cease to be excluded" is identified by subsection (J), which permits an exclusion of 30 days from the time a motion is actually "under advisement" by the court. Without the promptness requirement in subsection (F), a court could exclude time beyond subsection (J)'s 30-day "under advisement" provision simply by designating the additional period as time "from the filing of the motion" through its "disposition" under subsection (F). As the Senate Committee on the Judiciary explained:

> "In using the words 'prompt disposition', the committee intends to make it clear that, in excluding time between filing and disposition on the papers, the Committee does not intend to permit circumvention of the 30-days, 'under advisement' provision contained in Subsection (h)(1)(J). Indeed, if motions are so simple or routine that they do not require a hearing, necessary advisement time should be considerably less than 30 days." *Ibid.*

We therefore conclude that for pretrial motions that require a hearing, the phrase "or other prompt disposition" in subsec-

tion (F) does not imply that only "reasonably necessary" delays may be excluded between the time of filing of a motion and the conclusion of the hearing thereon.

Petitioners' second argument rests on the sentence that immediately follows the extract quoted above: "Nor does the Committee intend that additional time be made eligible for exclusion by postponing the *hearing date* or other disposition of the motions beyond what is *reasonably necessary*." *Ibid.* (emphasis added). Four Courts of Appeals have relied on this legislative history to support their "reasonably necessary" qualification in subsection (F). *United States* v. *Ray*, 768 F. 2d 991, 998 (CA8 1985); *United States* v. *Mitchell*, 723 F. 2d 1040, 1047 (CA1 1983); *United States* v. *Novak*, 715 F. 2d 810, 819 (CA3 1983), cert. denied *sub nom. Ware* v. *United States*, 465 U. S. 1030 (1984); *United States* v. *Cobb*, 697 F. 2d 38, 44 (CA2 1982).

Any qualification of subsection (F)'s exclusion based on this sentence, which appears in the paragraph discussing motions decided without a hearing, would be at odds with the plain language of the statute. It also would be contrary to other passages contained in both the House and Senate Reports that specifically concern the "hearings" provision of subsection (F). See *supra*, at 327–328. We therefore decline to read into subsection (F) a "reasonably necessary" qualification based on this single sentence from the Senate Report. We instead hold that Congress intended subsection (F) to exclude from the Speedy Trial Act's 70-day limitation all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is "reasonably necessary."

B

The remaining issue is whether subsection (F) excludes time after a hearing on a motion but before the district court receives all the submissions by counsel it needs to decide that motion. Cf. § 3161(h)(1) (excluding "[a]ny period of delay re-

sulting from other proceedings concerning the defendant"). Although the language of subsection (F) is not clear on this point, we are convinced that its structure, as well as reason, requires that such time be excluded.

The provisions of the Act are designed to exclude all time that is consumed in placing the trial court in a position to dispose of a motion. See, *e. g.*, S. Rep. No. 96-212, at 9-10. District courts often find it impossible to resolve motions on which hearings have been held until the parties have submitted posthearing briefs or additional factual materials, especially where the motion presents complicated issues. It would not have been sensible for Congress to exclude automatically all the time prior to the hearing on a motion and 30 days after the motion is taken under advisement, but not the time during which the court remains unable to rule because it is awaiting the submission by counsel of additional materials. Moreover, for motions decided solely on the papers, Congress has allowed exclusion of time during which the parties are filing their briefs. 18 U. S. C. §§ 3161(h)(1)(F), (J); see *supra*, at 328-329. It is consistent with this exclusion to exclude time when the court awaits the briefs and materials needed to resolve a motion on which a hearing has been held—motions that the Senate Judiciary Committee recognized as typically more difficult than motions decided on the papers. See S. Rep. No. 96-212, at 34. We therefore hold that subsection (F) excludes time after a hearing has been held where a district court awaits additional filings from the parties that are needed for proper disposition of the motion.

III

We now calculate the number of nonexcludable days before petitioners' trial. The Act began to run on September 3, 1980, the date of arraignment of codefendant Bell. On October 22, 1980, the District Court entered—with the consent of the parties—a continuance through November 12. The District Court excluded that continuance from the Speedy Trial

Act's 70-day limit under § 3161(h)(8)(A) in "the interest of justice." App. 26–27; see 746 F. 2d, at 623–624. That exclusion is not challenged in this Court.

The motion to suppress was filed during this continuance, on November 3, 1980. App. 27. The hearing on this and subsequent motions was held on March 25, 1981. *Id.*, at 28. This time is automatically excludable under § 3161(h)(1)(F). The court declined to reach a final decision on the suppression motion at that hearing because it needed further information. *Id.*, at 28–29. The court did not receive all filings in connection with the motion until December 15, 1981, when the Government submitted its response to petitioners' memorandum and request for an evidentiary hearing. *Id.*, at 31. That time is also excludable, plus 30 days for the District Court to take the matter under advisement. We therefore exclude the period from March 25, 1981, through January 14, 1982.

On January 25, 1982, the Government filed a motion to set the case for trial, noticed for February 3. We need not decide whether this time is excludable under subsection (F) as it does not affect the disposition of this case. On February 3, the court continued the case until April 21, to afford defense counsel the opportunity to file a motion to reconsider the suppression ruling. *Ibid.* The District Court subsequently found that this time was excludable under § 3161(h)(8)(A) as a continuance necessary for the "interests of justice." *Id.*, at 34.[10] On March 23, petitioners filed their motion for reconsideration. Under subsection (F), an exclusion for this pending motion ran from March 23 until the disposition by hearing on May 10. See App. 33. At that time, the court stated that it would exclude under § 3161(h)(8)(A) the time from May 10 to September 13, the new trial date, because of the difficulty of coordinating the schedules of five defense attorneys. The court entered a similar order on September 13

[10] The unexplained failure of the District Court to find the delay from any continuance to be excludable until October 1982 has not been argued by either party before this Court, and therefore is also not before us.

that extended through the ultimate trial date of November 1, 1982. Neither of those orders is properly before us. As the case stands here, it presents 69 nonexcludable days of delay, and therefore the Speedy Trial Act was not violated.[11]

IV

The judgment of the Court of Appeals for the Ninth Circuit is affirmed.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The purpose of the Speedy Trial Act of 1974, as amended in 1979 and in 1984, 18 U. S. C. § 3161 *et seq.* (1982 ed. and Supp. II), is to quantify and make effective the Sixth Amendment right to a a speedy trial. S. Rep. No. 96-212, p. 6 (1979); S. Rep. No. 93-1021, p. 1 (1974). To this end, the Act entitles a criminal defendant to dismissal of the charges pending against him if he is not brought to trial within 70 days of his initial appearance or indictment. 18 U. S. C. §§ 3161(c), 3162. In computing the running of this 70-day period, the Act permits certain periods of time to be excluded. These exclusions are designed to take account of specific and recurring periods of delay which often occur in criminal cases; they are not to be used either to undermine the time limits established by the Act, or to subvert the very purpose the Act was designed to fulfill. Nonetheless, this is precisely the result achieved by the majority's reasoning, as it allows trial judges indefinitely to delay disposing of pretrial motions. For this reason, I dissent.

As interpreted by the majority, § 3161(h)(1)(F) (subsection (F)) excludes the entire period between the filing of the pretrial motion and the date on which the motion is finally taken under advisement. For motions requiring a hearing, all time

[11] The count is 49 days from September 3, 1980, to November 22, 1980, and 20 days from January 14, 1982, to February 3, 1982.

is excluded from the date the motion is filed through the conclusion of the hearing. *Ante*, at 329–330. There is no requirement that the hearing be held promptly, and the reason for the delay is irrelevant. Regardless of whether a hearing is postponed due to a stipulated continuance, the sudden illness of counsel, or the trial judge's decision to play golf, until the hearing is concluded, the 70-day clock remains at a standstill. Moreover, if at the conclusion of the hearing the trial judge determines that more information would be helpful to his resolution of the motion, or if the prosecutor simply announces his intention to file supplemental papers, the period of excludable delay continues indefinitely until the court receives all of the papers it reasonably expects. Only at that point is the motion considered to be "actually under advisement," and even then, § 3161(h)(1)(J) (subsection (J)) provides for an additional 30 days before the clock begins running again.

For pretrial motions that do not require a hearing, the majority reads subsection (F) to exclude the entire period of time from the filing of the motion through its "prompt disposition." *Ante*, at 329. As construed by the Court, however, the word "prompt" does not refer to the speed at which the trial court is required to handle the motion; instead, it merely serves to designate the "point at which time will cease to be excluded." *Ibid.* That is to say, Congress inserted the word "prompt" simply to distinguish the time at which the motion is taken under advisement from the "final" disposition, or resolution, of the pretrial motion by the court, and thus prevent trial courts from avoiding the 30-day limitation imposed by subsection (J) by claiming that the unlimited delay sanctioned by subsection (F) applies until the court finally disposes of (*i. e.*, decides) the pretrial motion. *Ante*, at 329.

As I see it, the majority has misread both subsection (F) and the Act as a whole. I read subsection (F) to require *all* pretrial motions, regardless of whether they require a hearing, to be disposed of promptly. There is no reason to be-

lieve that Congress did not intend the word "prompt" to mean exactly what it normally means, "performed readily or immediately"; "given without delay or hesitation." Webster's Third New International Dictionary, Unabridged, p. 1816 (1976). Reading the word "prompt" in subsection (F) as a synonym for "quick" rather than as an antonym for the word "final" is a far more logical reading of the statute, and is more in keeping with the overall purpose of the Speedy Trial Act. I also find no merit to the contention that the phrase "other prompt disposition" only applies to pretrial motions to be decided without a hearing. After all, there cannot be an "*other* prompt disposition" of a motion unless there was *a* prompt disposition in the first place, and the plain language of subsection (F) shows that Congress intended hearings on pretrial motions to be conducted just as promptly as any other disposition of such motions.

This reading of subsection (F) is consistent with the structure of the Speedy Trial Act taken as a whole. Subsection (F) allows for the exclusion of the period of delay occurring between the making of the pretrial motion and its submission to the trial court for decision. It is this portion of the pretrial proceedings that the Act commands must be "prompt," and the reason for such a requirement is clear: it forces the parties to submit all necessary papers, and the court to hold any necessary hearings and decide what information it needs, in a timely and orderly manner. As shown above, the use of the word "prompt" in this context does more than simply distinguish this point in time from the time when the motion is finally decided (*i. e.*, the "final" disposition of the motion); instead, it describes the pace at which both the parties and the court are to act in ensuring that the trial judge can rule on the pretrial motion as quickly as possible. The promptness requirement, in other words, expressly is designed to prevent endless and needless delays in the assembly of the relevant material necessary for the trial court to make a reasoned decision on the submitted pretrial motion.

Subsection (F) thus requires prompt submission of material to the court and efficient scheduling of pretrial hearings, and once the court receives all of the papers and arguments it reasonably expects, the motion is considered to be "actually under advisement by the court." Consistent with the purpose of the Act and the promptness requirement imposed by subsection (F), subsection (J) then gives the trial court no more than 30 days in which to consider the parties' contentions and finally to decide the motion. The period during which the court has the motion "under advisement" is governed by subsection (J), and contrary to the majority's holding, *ante*, at 328–329, its 30-day limitation period has no bearing on the speed with which the motion is submitted to the court for decision.

Construing subsection (F) as mandating the prompt scheduling of hearings and submission of material in order for the trial court to take the matter under advisement is supported not only by the language of the statute and the structure of the Act, but also by the legislative history. In explaining the 1979 Amendments to the Act which established subsection (F) in its present form, the Senate Judiciary Committee noted that this portion of the Act "must be read together with the proposed change in clause (ii) of subsection (h)(8)(B) involving 'preparation' for 'pretrial proceedings'." S. Rep. No. 96–212, p. 33 (1979).[1] The Committee expressly re-

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[1] Title 18 U. S. C. § 3161(h)(8)(B) governs the factors a judge is to consider in determining whether to grant an "ends of justice" continuance authorized by § 3161(h)(8)(A). Subsection (h)(8)(B)(ii) provides:

"Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section."

The majority characterizes this subsection as dealing only with "time spent *preparing pretrial motions*." *Ante*, at 327, n. 8 (emphasis in original). This description ignores the plain language of the subsection, which states that it applies to "preparation for pretrial proceedings or for the trial

jected as "unreasonable" the suggestion that "all time consumed by motions practice, from preparation through their disposition, should be excluded," finding instead that "in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple." *Id.*, at 33–34. Even in cases involving "novel questions of law or complex facts," the Committee concluded that only "reasonable preparation time for pretrial motions" would be necessary. *Id.*, at 34. Despite the narrow reading of the legislative history by the majority, therefore, the Senate Committee clearly meant exactly what it said when it declared that it did not intend that "additional time be made eligible for exclusion by postponing the hearing date or other disposition of the motions beyond what is reasonably necessary." *Ibid.*[2]

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itself." Furthermore, the majority's statement that its "holding concerns time *after the submission of pretrial motions*" shows how far removed from the purposes of the Speedy Trial Act its opinion lies. By treating the interval between the time when pretrial motions are submitted to the court and the time when the court takes the motion "under advisement" as a time not governed either by the promptness requirement of subsection (F) or the 30-day limitation imposed by subsection (J), the Court carves out a period in which the 70-day limit imposed by the Act does not apply. This construction permits potentially excessive and abusive use of the Act's exclusions, and results in the denial of a speedy trial to a criminal defendant—the precise result which the Act was designed to avoid.

[2] The majority is correct that Congress placed a great deal of reliance on the development of local guidelines relating to motions practice to establish the specific periods of allowable delay under subsection (F). *Ante*, at 328. I disagree, however, that Congress left this potentially unlimited period of time to be governed solely by such rules. Although Congress might have intended for the district courts and circuits to quantify the precise limits acceptable under this portion of the Act, Congress made sure that, even without the development of such standards, no more time than what is "reasonably necessary" for the prompt submission of the motion to the trial court for decision would be excluded from the running of the 70-day clock established by the Act.

Moreover, even if the majority is correct that "Congress clearly envisioned that any limitations should be imposed by circuit or district court

Adhering to both the plain language of the statute and its legislative history, the majority of courts considering this question have held that subsection (F) permits the exclusion of only a reasonable amount of time for the trial court to take a pretrial motion under advisement, and that any other result would defeat the purposes of the Act. See *United States* v. *Ray*, 768 F. 2d 991, 997–999 (CA8 1985); *United States* v. *Mitchell*, 723 F. 2d 1040, 1046–1047 (CA1 1983); *United States* v. *Janik*, 723 F. 2d 537, 543–544 (CA7 1983); *United States* v. *Novak*, 715 F. 2d 810, 819–820 (CA3 1983), cert. denied *sub nom. Ware* v. *United States*, 465 U. S. 1030 (1984); *United States* v. *Cobb*, 697 F. 2d 38, 43–45 (CA2 1982); *United States* v. *Smith*, 563 F. Supp. 217, 219–220 (Md. 1983), aff'd, 750 F. 2d 1233 (CA4 1984), cert. denied, 471 U. S. 1057 (1985); *United States* v. *Hawker*, 552 F. Supp. 117, 124–125 (Mass. 1982). Similarly, the Judicial Conference of the United States recognizes that "[i]n some circumstances, the duration of this exclusion may be subject to a reasonableness requirement." Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended (Dec. 1979 rev., with amendments through Oct. 1984), 106 F. R. D. 271, 289

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rules rather than by the statute itself," *ante*, at 328, the majority fails to consider the applicable local rules relevant to this case. These provide that "[a]ll pre-trial hearings shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the court's criminal docket." U. S. District Court, Northern District of California, Plan for Prompt Disposition of Criminal Cases, Sec. II(4)(F)(4) (revised, Apr. 7, 1980), California Rules of Court 822–824 (West 1986). Although this rule does not offer any specific guidance, it is sufficient to invoke the "reasonably necessary" standard intended by Congress.

Finally, the majority states that it is deferring to the Ninth Circuit's determination that the local rules were not violated in this case. *Ante*, at 328, n. 9. This finding is not supported by the record, for although the lower court cited to the local rules, 746 F. 2d 619, 623 (1984), there is no indication that the panel ever applied the rules to the facts of this case, let alone that it found that the rules had not been violated.

(1984). Finally, commentators have also noted the necessity for this construction, finding that without it, there would be no need for trial courts to process motions in a timely fashion, thus undermining the purposes of the Act. See Misner, The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process, 32 Hastings L. J. 635, 654–655 (1981); Note, Speedy Trial: A Constitutional Right in Search of Definition, 61 Geo. L. J. 657, 679, and n. 136 (1973), reprinted in Hearings on S. 754 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., 61, 83, and n. 136 (1973).

I agree with this wealth of statutory, judicial, and scholarly authority, and would hold that the Speedy Trial Act requires a trial court to take all pretrial motions under advisement in a prompt manner, and as a result, that only that period of delay found to be reasonably necessary to such a prompt handling of the motion is properly excludable under subsection (F). By holding that the entire period of delay from the filing of a pretrial motion until that motion is taken under advisement is excludable from the 70-day speedy trial computation, the majority allows this exception to swallow the rule and in so doing, undermines the entire Act. As Judge Ferguson concluded in his dissent below, "[w]hile I sympathize with the majority's search for a *per se* rule . . . I cannot agree that the desire for an 'easy' rule can justify the abrogation of the major purpose of the Speedy Trial Act—to insure the defendant a speedy trial." 746 F. 2d 619, 627 (1984). I would reverse the judgment of the Ninth Circuit, and remand for a determination of whether the delay in this case was reasonable.

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* OWENS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 84-1905. Argued February 26, 1986—Decided May 19, 1986

Certain provisions of the Social Security Act in effect between 1979 and 1983 authorized payment of survivor's benefits to a wage earner's widowed spouse who remarried after age 60 but not to a similarly situated divorced widowed spouse. After being administratively denied survivor's benefits under these provisions because she had remarried, appellee divorced widow filed a class action in Federal District Court, challenging the constitutionality of the provisions. The court upheld the challenge, reasoning that because Congress in 1977 had chosen to treat surviving divorced spouses and widowed spouses in the same manner upon the wage earner's death, there was no logical basis for distinguishing between the two classes of individuals upon their subsequent remarriage.

Held: The provisions in question did not violate the equal protection component of the Due Process Clause of the Fifth Amendment. Pp. 345-350.

(a) When Congress decided to create some exceptions to the rule under which widowed spouses would lose their entitlement to survivor's benefits upon remarriage, it was not required to take an all-or-nothing approach but instead had valid reasons for proceeding more cautiously. Faced with concerns about the increase in the benefits that would ensue if the remarriage rule were completely eliminated, Congress reasonably could decide to concentrate limited funds where the need was likely to be greatest. Pp. 346-348.

(b) Because divorced widowed spouses did not enter into remarriage with the same level of dependency on the wage earner's account as widows or widowers, it was rational for Congress to treat these groups differently after remarriage. Any inference that because both divorced widowed spouses and widowed spouses were entitled to survivor's benefits, Congress viewed the groups as equally dependent on the wage earner, is belied by the history and provisions of the Act. Pp. 348-350.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MAR-

SHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 350. BLACKMUN, J., filed a dissenting opinion, *post*, p. 354.

Deputy Solicitor General Kuhl argued the cause for appellant. With her on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, *Edwin S. Kneedler*, and *William Kanter*.

Gill Deford argued the cause for appellees. With him on the brief were *Neal S. Dudovitz*, *Peter Komlos-Hrobsky*, *Sally Hart Wilson*, and *Eileen P. Sweeney*.

JUSTICE POWELL delivered the opinion of the Court.

Certain provisions of the Social Security Act in effect between 1979 and 1983 authorized payment of survivor's benefits from a wage earner's account to a widowed spouse who remarried after age 60, but not to a similarly situated divorced widowed spouse. The question in this case is whether those provisions violated the equal protection component of the Due Process Clause of the Fifth Amendment.

I

The Social Security Act (Act) originally provided only primary benefits to qualified wage earners. Congress later provided secondary benefits to wives, widows, dependent children, and surviving parents of the wage earner. At that time, widows and other secondary beneficiaries would lose their entitlement to survivor's benefits upon a subsequent marriage. In 1950, Congress extended secondary benefits to dependent husbands and widowers, subject to the same restriction. In 1958, Congress created an exception to this remarriage rule so that if a widow or widower married an individual who received benefits under the Act, neither would forfeit survivor's benefits.

Until 1965, divorced wives, including those who had outlived their former spouse (divorced widows), were not eligible for the same benefits provided to wives and widows. In that year, Congress amended § 202(b) of the Act to extend

wife's benefits to a divorced wife and survivor's benefits to a divorced widow if the recipient had been married to her former husband for at least 20 years, and had received more than one-half of her support from him or an agreement or court order required him to make substantial contributions to her support. Pub. L. 89–97, § 308(a), 79 Stat. 375–376.[1] Divorced wives and divorced widows were also subject to the same remarriage rule that had been applied to widows and widowers. In these amendments, however, Congress changed the remarriage rule as it applied to widows and widowers. The new rule provided that if a widow or widower over age 60 married someone who was not entitled to receive certain benefits under the Act, she or he would not completely forfeit survivor's benefits. Instead, the benefits were reduced to half of the primary wage earner's benefits. §§ 333(a)(1) and (b)(1), 79 Stat. 403, 404.

In 1977, Congress again relaxed the remarriage provision for widows and widowers, allowing them to receive unreduced survivor's benefits if they remarried after age 60. The effective date of that amendment was 1979. Pub. L. 95–216, §§ 336(a)(3), (b)(3), (c)(1), 91 Stat. 1547.[2] But Congress retained until 1983 the provision that generally barred a divorced wife or divorced widow from receiving benefits upon remarriage. See §§ 202(b)(1)(C), (b)(3), §§ 202(e)(1)(A), (e)(1)(F). The present case involves this temporary disparity in benefits received upon remarriage.

As a result of a pair of District Court sex discrimination opinions that invalidated portions of the Act, *Ambrose* v. *Califano*, CCH Unempl. Ins. Rep. ¶ 17,702 (Ore. 1980); *Oli-*

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[1] In 1972, Congress eliminated the requirement that a divorced wife or divorced widow show a specified level of support from her former husband, but retained the 20-years-of-marriage requirement. Pub. L. 92–603, §§ 114(a), (b), 86 Stat. 1348.

[2] Congress also reduced the 20-years-of-marriage requirement for divorced wives and divorced widows to 10 years.

ver v. *Califano*, CCH Unempl. Ins. Rep. ¶15,244 (ND Cal. 1977), the Secretary of Health and Human Services (Secretary) promulgated regulations providing that divorced husbands and divorced widowers would receive husband's benefits and survivor's benefits to the same extent as divorced wives and divorced widows received wife's benefits and survivor's benefits. 44 Fed. Reg. 34480, 34483–34484 (1979); see 20 CFR §§404.331, 404.336 (1985). In 1983 Congress amended the Act to incorporate these regulatory changes. Pub. L. 98–21, §301(b)(1), 97 Stat. 111. In the same bill, Congress provided that divorced widowed spouses who remarry after age 60 are eligible to receive survivor's benefits in the same manner as widows and widowers.

II

Appellee Buenta Owens married Russell Judd in 1937 and was divorced from him in 1968. In 1978, when she was 61, she married appellee Kenneth Owens. Judd died on June 19, 1982. On July 30, 1982, Owens applied for widow's benefits on Judd's earnings account as a divorced widow. Her claim was denied on August 27, 1982, because she had remarried. She sought administrative reconsideration, contending that the statutory provision denying benefits because of her remarriage was unconstitutional. Her claim again was denied. Subsequently, Owens and the Secretary entered into an agreement stipulating that the only disputed issue was the constitutionality of the provisions of the Act that at that time denied widow's benefits to divorced widows who remarried. See 42 U. S. C. §§402(e)(1)(A), (e)(4). The parties also stipulated that, but for the relevant provisions, Owens' right to the benefits had been established. Based on that agreement, the parties waived any further administrative review. On April 19, 1983, Owens filed this action in the United States District Court for the Central District of California,

and sought to represent a nationwide class of divorced widowed spouses.[3]

On December 23, 1983, the District Court rejected Owens' constitutional challenge. Applying the rational-basis standard of review, the court reasoned that Congress was justified in taking one step at a time in extending benefits to spouses who had remarried. While Owens' motion to alter or amend the judgment under Federal Rule of Civil Procedure 59 was pending, the 1983 amendments to the Act went into effect, so that all otherwise eligible members of the class became entitled to receive monthly survivor's benefits beginning in January 1984. Subsequently, the court certified a nationwide plaintiffs' class, consisting of all divorced widowed spouses who remarried after age 60 and who were denied benefits between December 1978 and January 1984.[4]

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[3] Appellee Kenneth Owens had been married to Dorothy L. Owens for over 34 years when they were divorced in 1978. In that same year he married Buenta Owens. He was 60 years old. In 1982 he applied for survivor's benefits based on the earnings account of his former wife, who had died. His claim was denied at the initial stage and again in a reconsideration decision in 1983. He and the Secretary also reached an agreement to waive any further administrative review. Kenneth Owens filed suit in the United States District Court for the Central District of California, challenging the constitutionality of the statutory provisions with an argument virtually identical to his wife's. When he filed his lawsuit, the District Court already had ruled in favor of the Secretary in Buenta Owens' suit, and her motion for reconsideration was pending. The court consolidated Kenneth Owens' suit with that of his wife. Kenneth Owens died during the pendency of this suit before this Court. Buenta Owens moved to be substituted for him as an appellee in this case, a motion we granted on February 24, 1985. Because appellees raise identical arguments, the discussion of Kenneth Owens' case is subsumed in the discussion of Buenta Owens' case.

[4] The Secretary disputes the propriety of the class certification and in particular the District Court's conclusion that the waiver of further administrative review as to the named appellees had the effect of waiving exhaustion requirements as to all the members of the class. Because we reject the equal protection claim, we do not reach the class certification issue.

On October 5, 1984, the District Court reversed its prior ruling on the merits and held the challenged provisions unconstitutional. The court agreed with the Secretary that Congress rationally could assume that widowed spouses are generally more dependent on income from the deceased wage earner than are divorced widowed spouses. It reasoned, however, that because Congress in 1977 had chosen to treat surviving divorced spouses and widowed spouses in the same manner upon the death of the wage earner, there was no logical basis for distinguishing between the two classes of individuals upon their subsequent remarriage. The Secretary appealed directly to this Court pursuant to 28 U. S. C. § 1252. We noted probable jurisdiction, *Heckler* v. *Owens*, 474 U. S. 1046 (1985). We now reverse.

III

Congress faces an unusually difficult task in providing for the distribution of benefits under the Act. The program is a massive one, and requires Congress to make many distinctions among classes of beneficiaries while making allocations from a finite fund. In that context, our review is deferential. "Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.'" *Mathews* v. *De Castro*, 429 U. S. 181, 185 (1976), quoting *Helvering* v. *Davis*, 301 U. S. 619, 640 (1937). As this Court explained in *Flemming* v. *Nestor*, 363 U. S. 603, 611 (1960):

> "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

When the challenged classification in this case is examined in the light of these principles, it cannot be said that the distinctions Congress made were arbitrary or irrational.

A

We have previously noted that "[t]he entitlement of any secondary beneficiary is predicated on his or her relationship to a contributing wage earner." *Califano* v. *Jobst*, 434 U. S. 47, 52 (1977). In determining who is eligible for such benefits, the scope of the program does not allow for "individualized proof on a case-by-case basis." *Ibid.* Congress "has elected to use simple criteria, such as age and marital status, to determine probable dependency." *Ibid.* In particular, Congress has used marital status as a general guide to dependency on the wage earner: "The idea that marriage changes dependency is expressed throughout the Social Security Act." *Id.*, at 52, n. 8. One example of this assumption is Congress' original decision to terminate the benefits of all secondary beneficiaries, including widowed spouses, who remarried.[5] When Congress subsequently made divorced widowed spouses eligible for survivor's benefits, it also imposed on them the rule that remarriage terminated benefits. This remarriage rule was based on the assumption that remarriage altered the status of dependency on the wage earner. This Court upheld the validity of that general assumption in *Jobst*. *Id.*, at 53.

Congress was not constitutionally obligated to continue to extend benefits to any remarried secondary beneficiary. It nevertheless chose to do so, but in gradual steps. In 1965, Congress provided that if a widow or widower remarried after age 60, she or he would receive reduced benefits. In

[5] In 1958, Congress amended this strict remarriage rule to provide that benefits would not be terminated if a widow or widower married a person who was also entitled to benefits under the Act. Pub. L. 85-840, §§ 307(b), (c), 72 Stat. 1031.

1977, Congress provided that if a widow or widower remarried after age 60, she or he would continue to receive full survivor's benefits. Finally, in 1983, Congress amended the Act to provide that divorced widowed spouses who remarry after age 60 may receive survivor's benefits in the same manner as widows and widowers. Appellees complain that Congress' failure in 1977 to extend benefits to divorced widowed spouses who had remarried was irrational.

This Court consistently has recognized that in addressing complex problems a legislature "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955). That is precisely what Congress has done in this case. When Congress decided to create some exceptions to the remarriage rule, it was not required to take an all-or-nothing approach. Instead, it chose to proceed more cautiously. It had valid reasons for doing so.

The House version of the 1977 bill contained a complete elimination of the general rule terminating benefits upon a subsequent marriage. H. R. Rep. No. 95–702, pt. 1, pp. 47–48 (1977). The House version would have created in the first year of operation alone 670,000 more beneficiaries than under the pre-1977 system,[6] costing $1.3 billion in additional benefits each year. *Ibid.*[7] Faced with these

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[6] In addition to widowed spouses and divorced widowed spouses, the expanded class of beneficiaries would have included surviving parents and surviving children.

[7] The contemporaneous legislative history does not reveal what portion of that figure would have been attributable to divorced widowed spouses. A budgetary report on the 1983 amendments that eliminated the distinction between widowed spouses and divorced widowed spouses estimated the cost of that amendment as less than $50 million a year. Congress in 1977 was not required to separate out the $1.3 billion cost figure by subcategories. It was free to continue to extend benefits following marriage only to that group of secondary beneficiaries most closely tied to the wage

concerns, Congress reasonably could decide to "concentrate limited funds where the need [was] likely to be greatest." *Califano* v. *Boles*, 443 U. S. 282, 296 (1979). It chose only to create an exception for widows and widowers, who presumably were more likely to depend on their spouses for financial support than were divorced widows and widowers. While it may have been feasible to have extended benefits to divorced widowed spouses in 1979 rather than 1983, Congress was not constitutionally obligated to do so.

Congress' adjustments of this complex system of entitlements necessarily create distinctions among categories of beneficiaries, a result that could be avoided only by making sweeping changes in the Act instead of incremental ones. A constitutional rule that would invalidate Congress' attempts to proceed cautiously in awarding increased benefits might deter Congress from making any increases at all. The Due Process Clause does not impose any such "'constitutional straitjacket.'" *De Castro*, 429 U. S., at 185, quoting *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972). As we recognized in *Jobst:*

> "Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by the general marriage rule without accomplishing its entire objective in the same piece of legislation. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489. Even if it might have been wiser to take a larger step, the step Congress did take was in the right direction and had no adverse impact on persons like the Jobsts." 434 U. S., at 57–58.

Congress drew a reasonable line in a process that soon increased benefits to all relevant beneficiaries.

B

The District Court correctly reasoned that under *De Castro* and *Boles*, it was rational for Congress to assume that

earner, consistent with the general purposes of the Act. That $50 million annual cost is sufficient to justify fiscal concern.

divorced widowed spouses are generally less dependent upon the resources of their former spouses than are widows and widowers. It held, however, that because Congress had chosen to treat widowed spouses and divorced widowed spouses identically upon the death of the wage earner, there was no rational basis for distinguishing between them if they remarried. The logic of the District Court's position depends on a showing that Congress did not distinguish between divorced widowed spouses and widowed spouses prior to remarriage. Apparently the District Court inferred that because both divorced widowed spouses and widowed spouses were entitled to survivor's benefits, Congress viewed the groups as equally dependent on the wage earner. Such an inference is belied by the history and provisions of the Act.

When Congress first began to make divorced wives eligible for wives' benefits in 1965, it focused on that group of divorced wives whose marriages ended after many years, when they might be "too old to build up a substantial social security earnings record even if [they] can find a job." H. R. Rep. No. 213, 89th Cong., 1st Sess., 107–108 (1965). To that end, divorced wives were eligible for wife's benefits only if they had been married to the wage earner for 20 years and received substantial support from him. It was not until 1972 that Congress dropped the requirement of showing support from the wage earner. Even then, Congress retained the 20-year marriage requirement.

Congress has made the same distinctions in its treatment of divorced widowed spouses. When they first became eligible for survivor's benefits in 1965, it was under the same basic eligibility rules that applied to divorced spouses. During the relevant time of this lawsuit, divorced spouses and divorced widowed spouses had to have been married to the wage earner for at least 10 years to receive benefits. That precondition did not have to be met by spouses or widows.

These eligibility requirements demonstrate that Congress adhered to the general assumption, approved in *De Castro*, that divorce normally reduces dependency on the wage earner. The fact that Congress awards benefits to divorced widowed spouses once the eligibility requirements are met does not necessarily mean that their dependency is equivalent to that of widows or widowers. Congress may view the 10-year-marriage requirement as a lesser showing of dependency, but still sufficient to justify extension of benefits. Presumably Congress concluded that remarriage sufficiently reduced that lesser dependency to the point where it could conclude that benefits no longer were appropriate. These views would be consistent with the position Congress has taken throughout the history of the Act that divorced spouses are less dependent on the wage earner than spouses. Because divorced widowed spouses did not enter into marriage with the same level of dependency on the wage earner's account as widows or widowers, it was rational for Congress to treat these groups differently after remarriage.

IV

The judgment of the District Court is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The Court demonstrates an enviable ability to discern rationality where there is none. But the majority's efforts to imagine plausible legislative scenarios cannot obscure the simple truth: there is absolutely no evidence that Congress had any rational basis for deciding in 1977 that surviving divorced spouses who remarried could not receive the same survivor's benefits allowed to remarried widowed spouses. Because I believe that such a distinction between two groups treated similarly in other respects cannot survive the scru-

tiny required by the equal protection component of the Fifth Amendment's Due Process Clause, I dissent.

I

In 1977, a Report of the House Committee on Ways and Means noted one drawback of the benefits scheme then in force:

> "Present law provides, in general, that the marriage (or remarriage) of a worker's divorced or surviving spouse, parent, or child prevents or terminates entitlement to benefits based on the worker's social security earnings record. For example, a widow who remarries before age 60 cannot get benefits based on her first husband's earnings as long as she is married. If she remarries after age 60, the benefits based on the first husband's social security are reduced or terminated; the widow gets either a wife's benefit based on her first husband's earnings (which is less than the widow's benefit she was getting) or a wife's benefit based on her current husband's earnings (if he is a beneficiary), whichever is higher. Benefits are not payable to divorced spouses and young surviving spouses who are remarried.
>
> "Your committee is especially concerned about the effect of these provisions on older surviving spouses (and divorced spouses). Accordingly, your committee has recommended changes in the law which would eliminate marriage or remarriage as a factor affecting entitlement to benefits or benefit amounts. Specifically, under your committee's bill, marriage or remarriage would not bar or terminate entitlement to benefits as a divorced spouse, surviving spouse . . . , parent, or child, and remarriage would not cause any reduction in aged widow's or widower's insurance benefits." H. R. Rep. No. 95–702, pt. 1, pp. 47–48 (1977).

The Senate version of this bill, however, did not address any of the House Committee's concerns. And a subsequent

Report tersely records the result of discussions between conferees from both Houses on this issue:

> "The Senate recedes, with an amendment that would retain only that part of the House-passed provisions that would prevent reduction in benefits for widows and widowers who remarry after age 60." H. R. Conf. Rep. No. 95–837, p. 73 (1977).

The compromise thus produced the Social Security provisions in effect between 1979 and 1983 that are the subject of this suit. Those provisions authorized payment of survivor's benefits to widowed spouses who remarried after age 60, but not to similarly situated divorced widowed spouses.

II

As a historical matter, I suspect that the Court is right to characterize the distinction drawn by the 1977 Act between widowed spouses and surviving divorced spouses as the product of Congress' decision to "take one step at a time," *ante*, at 347, toward a program that would reflect "the needs of today's society," H. R. Rep. No. 95–702, pt. 1, *supra*, at 4. However, under the Due Process Clause, even legislative classifications that result from compromise must bear at least a rational relationship to a legitimate governmental purpose. Had Congress accommodated the House's reform goals with the Senate's more conservative outlook in this area by passing a law giving benefits to only those remarried widowed spouses who had been born on odd-numbered days of the calendar, we would surely have to strike the provision down as irrational. The question here is thus whether Congress had any rational basis for taking the particular step that it chose to take in 1977.

Recognizing that it is not enough to label the 1977 provisions a way station on the road to a sensible destination, the Court argues that the statutory distinction between surviving divorced spouses and widowed spouses was based upon a legislative judgment that widowed spouses were the more

dependent of the two groups. The problem with the majority's rationalization is that Congress never expressed it, or even hinted at it. The relevant legislative history contains absolutely no evidence to support the assumption that a divorced survivor is any less dependent than a widowed survivor, or to indicate that in 1977 Congress was at all motivated by that assumption.

The majority attempts to fill the gap by assuming that Congress must have perceived a distinction between divorced spouses and widowed spouses because it required that the former, but not the latter, be married to the wage earner for 10 years in order to receive benefits. That distinction can perhaps be taken as evidence that Congress believed that a divorced spouse who had been married to the wage earner for less than 10 years was not sufficiently dependent on the wage earner's income to justify the extension of benefits. Yet it can hardly be taken as an indication that surviving divorced spouses who *did* satisfy the 10-year requirement were thought any less dependent than widowed spouses. Divorced spouses meeting that requirement were not treated differently from widowed spouses for any purpose other than the remarriage provisions, and there is no indication in the statute or legislative history that Congress ever attempted to articulate a difference between the two groups justifying different treatment.

"When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence." *Schweiker* v. *Wilson*, 450 U. S. 221, 244 (1981) (POWELL, J., dissenting); see *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 184 (1980) (BRENNAN, J., dissenting). While the absence of a clear statement of purposes need not doom a statute under rationality review, our task must always be to determine whether a particular rational purpose *actually* motivated the Legislature. See *Fritz*, *supra*, at

188 (BRENNAN, J., dissenting). We have no indication in this case that Congress had any basis for drawing this line other than its desire to find a point of compromise between the two Houses. With the help of the Government's lawyers, the Court has tried hard to come up with a hypothetical justification for Congress' action. I do not think that is our job. I dissent.

JUSTICE BLACKMUN, dissenting.

I agree with JUSTICE MARSHALL that the Court has failed to identify a rational basis for Congress' decision to treat widowed spouses and surviving divorced spouses differently upon their remarriage. If anything, persons in these two categories are *more* similarly situated after remarriage than they were before, since they all then belong to family units unconnected to the primary wage earner whose earnings provide the basis for their secondary social security benefits. Cf. *Califano* v. *Jobst*, 434 U. S. 47, 53 (1977) ("marriage is an event which normally marks an important change in economic status" and "not only creates a new family . . . but also modifies . . . pre-existing relationships").

Reporter's Note

The next page is purposely numbered 1101. The numbers between 354 and 1101 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM MAY 5 THROUGH MAY 21, 1986

MAY 5, 1986

Appeals Dismissed

No. 85-1425. REPUBLICAN PARTY OF HAWAII ET AL. *v.* MINK ET AL. Appeal from Sup. Ct. Haw. dismissed for want of substantial federal question. Reported below: 68 Haw. ——, 711 P. 2d 723.

No. 85-6104. CORDOVA *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 698 S. W. 2d 107.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Certiorari Granted—Vacated and Remanded

No. 84-1783. JORDAN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Skipper* v. *South Carolina*, *ante*, p. 1. Reported below: 464 So. 2d 475.

No. 84-1942. NATIONWIDE MUTUAL INSURANCE CO. *v.* CLAY. Sup. Ct. Ala. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Aetna Life Insurance Co.* v. *Lavoie*, 475 U. S. 813 (1986). Reported below: 469 So. 2d 533.

No. 85-5087. ELMORE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Skipper* v. *South Carolina*, *ante*, p. 1. Reported below: 286 S. C. 70, 332 S. E. 2d 762.

No. 85-5339. JONES *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Skipper* v. *South Carolina*, *ante*, p. 1. Reported below: 288 S. C. 1, 340 S. E. 2d 782.

No. 85-5411. PLEMMONS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Skipper* v. *South Carolina*, *ante*, p. 1. Reported below: 286 S. C. 78, 332 S. E. 2d 765.

No. 85-6063. VALLE *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Skipper* v. *South Carolina*, *ante*, p. 1. Reported below: 474 So. 2d 796.

Miscellaneous Orders

No. — - ——. LESLIE *v.* UNITED STATES. Motion to direct the Clerk to file a petition for writ of certiorari which does not comply with the Rules of this Court denied.

No. A-760. SMITH *v.* UNITED STATES. Application for bail pending appeal, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A-804. SEABOARD SYSTEM RAILROAD, INC. *v.* PAGE. Sup. Ct. Ala. Application for stay pending appeal, presented to JUSTICE POWELL, and by him referred to the Court, denied. JUSTICE BLACKMUN would grant the application.

No. D-553. IN RE DISBARMENT OF VELASQUEZ. It is ordered that Ray Velasquez, of Marlow Heights, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-556. IN RE DISBARMENT OF SODOWICK. It is ordered that Michael Samuel Sodowick, of West Caldwell, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 81, Orig. KENTUCKY *v.* INDIANA ET AL. Accounting of the Special Master is received and ordered filed. The Special

Master appointed by the Court is discharged with the thanks of the Court. [For earlier decision herein, see, *e. g.*, 474 U. S. 1.]

No. 84-1947. CERBONE, JUSTICE OF THE VILLAGE COURT, VILLAGE OF MT. KISCO, NEW YORK, ET AL. *v.* CONWAY. C. A. 2d Cir. [Certiorari granted, 474 U. S. 1100.] Motion of petitioners for divided argument denied.

No. 85-488. OHIO CIVIL RIGHTS COMMISSION ET AL. *v.* DAYTON CHRISTIAN SCHOOLS, INC., ET AL. C. A. 6th Cir. [Probable jurisdiction postponed, 474 U. S. 978.] Motion of appellants for leave to file a supplemental brief after argument granted.

No. 85-1524. HUBBARD BROADCASTING, INC. *v.* SOUTHERN SATELLITE SYSTEMS, INC., ET AL. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 85-6562. BAXTER *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 27, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85-6628. IN RE BURNEY. Petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 85-1513. EDWARDS, GOVERNOR OF LOUISIANA, ET AL. *v.* AGUILLARD ET AL. Appeal from C. A. 5th Cir. Probable jurisdiction noted. Reported below: 765 F. 2d 1251.

Certiorari Granted

No. 85-1140. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* BUELL. C. A. 9th Cir. Certiorari granted. Reported below: 771 F. 2d 1320.

No. 85-1517 (A-619). COLORADO *v.* SPRING. Sup. Ct. Motion of respondent for leave to proceed *in forma pau* granted. Certiorari granted limited to Question 1 present the petition. Application for stay, presented to JUSTICE W and by him referred to the Court, is granted pending the iss of the mandate of this Court. Reported below: 713 P. 2d 8

Certiorari Denied. (See also No. 85-6104, *supra*.)

No. 85-550. UNION OIL COMPANY OF CALIFORNIA *v.* SP C. A. 10th Cir. Certiorari denied. Reported below: 762 865.

No. 85-695. ILLINOIS CENTRAL GULF RAILROAD CO. *v.* MAN. Sup. Ct. Ala. Certiorari denied. Reported below So. 2d 498.

No. 85-751. MOTION PICTURE LABORATORY TECHNICIA FILM TAPE EDITORS LOCAL 780 OF THE INTERNATIONAL ANCE OF THEATRICAL STAGE EMPLOYEES & MOVING PI MACHINE OPERATORS OF THE UNITED STATES AND CA AFL-CIO *v.* NATIONAL AERONAUTICS AND SPACE ADMINI TION ET AL. C. A. 7th Cir. Certiorari denied. Rep below: 774 F. 2d 1167.

No. 85-859. SULLIVAN *v.* TEXAS. Ct. App. Tex., 1st Jud. Dist. Certiorari denied. Reported below: 678 2d 162.

No. 85-946. KERR-MCGEE CORP. ET AL. *v.* SILKWOOD MINISTRATOR OF THE ESTATE OF SILKWOOD. C. A. 10 Certiorari denied. Reported below: 769 F. 2d 1451.

No. 85-1083. MOECKLY *v.* UNITED STATES; and
No. 85-6019. COULOMBE *v.* UNITED STATES. C. A. 8 Certiorari denied. Reported below: 769 F. 2d 453.

No. 85-1223. KIMMEL *v.* UNITED STATES. C. A. 5 Certiorari denied. Reported below: 777 F. 2d 290.

No. 85-1268. MASSMAN CONSTRUCTION CO. *v.* TENN VALLEY AUTHORITY. C. A. 6th Cir. Certiorari denied. ported below: 769 F. 2d 1114.

No. 85-1333. NIMROD MARKETING (OVERSEAS) LTD. ET TEXAS ENERGY INVESTMENT CORP. ET AL. C. A. 5 Certiorari denied. Reported below: 769 F. 2d 1076.

No. 85-1354. DiBERNARDO ET AL. v. UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 1470.

No. 85-1381. HELLER v. UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 776 F. 2d 92.

No. 85-1488. LIGNAROLO ET AL. v. UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 971.

No. 85-1506. QUANSAH v. CTS PRINTEX CORP. C. A. 9th Cir. Certiorari denied. Reported below: 779 F. 2d 56.

No. 85-1511. BETTS v. ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 109 Ill. 2d 154, 485 N. E. 2d 1081.

No. 85-1515. RUSSELL v. TEXAS. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 85-1521. SMITH v. OFFICE OF PERSONNEL MANAGEMENT. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 258.

No. 85-1522. MILLER v. CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 774 F. 2d 188.

No. 85-1526. GOPAL v. CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 171 Cal. App. 3d 524, 217 Cal. Rptr. 487.

No. 85-1536. ANGEL ET UX. v. MARTINSON, JUDGE, SUPERIOR COURT OF SAN DIEGO COUNTY (RENN, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-1539. SANDHU v. AAMCO TRANSMISSIONS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1043.

No. 85-1542. ORLEANS v. CITY OF WILDWOOD HOUSING AUTHORITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 1016.

No. 85-1603. STROZZI v. COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 712 P. 2d 1100.

No. 85-1619. REDMOND v. UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 319.

No. 85-1638. LAW MATHEMATICS & TECHNOLOGY, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 779 F. 2d 675.

No. 85-5965. CLARK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-6080. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 2d 809.

No. 85-6124. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 47.

No. 85-6256. GREEN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-6269. TAYLOR *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 85-6271. JONES *v.* CUYLER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 1015.

No. 85-6277. LAWRENCE *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 700 S. W. 2d 111.

No. 85-6346. BOGGS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 775 F. 2d 582.

No. 85-6369. KELLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1029.

No. 85-6373. HOWARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 47.

No. 85-6378. CLEMENTS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 135 Ill. App. 3d 1001, 482 N. E. 2d 675.

No. 85-6425. BURNETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 777 F. 2d 593.

No. 85-6458. COOK *v.* UNITED STATES. C. A. 9th Cir. Certiorari before judgment denied.

No. 85-6504. WOOD *v.* XEROX CORP. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1030.

No. 85-6508. FRAZAR *v.* LOWE. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 788.

No. 85-6515. KALEC *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 85-6516. SAVAGE *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 85-6524. WASHINGTON *v.* ANGELONE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-6526. COLE *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 701 S. W. 2d 489.

No. 85-6528. DAY *v.* POPE, FORMER CHIEF JUSTICE, SUPREME COURT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-6529. COULVERSON *v.* OHIO ADULT PAROLE AUTHORITY. C. A. 6th Cir. Certiorari denied. Reported below: 758 F. 2d 652.

No. 85-6530. YELLEN *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 85-6533. PICCIOTTI *v.* ROBERTS, NEW YORK STATE COMMISSIONER OF LABOR. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 85-6534. ORTH *v.* HOUSEWRIGHT, DIRECTOR, NEVADA DEPARTMENT OF PRISONS. Sup. Ct. Nev. Certiorari denied. Reported below: 101 Nev. 961.

No. 85-6544. KIMSEY *v.* CELESTE, GOVERNOR OF OHIO, ET AL. Sup. Ct. Colo. Certiorari denied.

No. 85-6548. RYAN *v.* STEPHEN. Sup. Ct. Tex. Certiorari denied.

No. 85-6560. WATSON *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 784 F. 2d 722.

No. 85-6589. BOLES *v.* DEPARTMENT OF TRANSPORTATION. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 92.

No. 85-6594. EUSCH *v.* SKOW ET AL. C. A. 7th Cir. Certiorari denied.

No. 85-6596. WALKER *v.* CITY OF BOWLING GREEN, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 311.

No. 85-6618. ANESI *v.* UNITED STATES DEPARTMENT OF AGRICULTURE. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1168.

No. 85-6652. GENNUSO *v.* EPPOLITO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 1.

No. 85-6656. WATKINS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 224.

No. 85-426. SAVE THE DUNES COUNCIL, INC. *v.* UNITED STATES ET AL. C. A. 7th Cir. Motion of Sierra Club for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 754 F. 2d 855.

No. 85-953. CAGLE *v.* CARLSON ET AL. Ct. App. Ariz. Certiorari denied. JUSTICE WHITE and JUSTICE POWELL would grant certiorari. Reported below: 146 Ariz. 292, 705 P. 2d 1343.

No. 85-1362. STERN ET AL. *v.* TARRANT COUNTY HOSPITAL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 778 F. 2d 1052.

No. 85-1518. VOLKSWAGEN OF AMERICA ET AL. *v.* ROSSELL, GUARDIAN AD LITEM OF KENNON, A MINOR. Sup. Ct. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 147 Ariz. 160, 709 P. 2d 517.

No. 85-1490. BASCH ET AL. *v.* WESTINGHOUSE CORP. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 777 F. 2d 165.

No. 85-1801. LARSON ET AL. *v.* FARGO WOMEN'S HEALTH ORGANIZATION, INC., ET AL. Appeal from Sup. Ct. N. D. Motion of appellants to treat the jurisdictional statement as a petition for writ of certiorari granted. Certiorari denied. Reported below: 381 N. W. 2d 176.

No. 85-5881. HARRIMAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 474 So. 2d 1304.

No. 85-6276. BUNDY *v.* FLORIDA. Sup. Ct. Fla.;
No. 85-6325. JOHNSON *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 85-6511. ADAMS *v.* AIKEN, WARDEN, ET AL. Ct. Common Pleas of York County, S. C.;
No. 85-6512. SPANN *v.* SOUTH CAROLINA. Ct. Common Pleas of York County, S. C.; and
No. 85-6554. YOUNG *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 85-6276, 455 So. 2d 330; No. 85-6325, 477 So. 2d 196; No. 85-6554, 701 S. W. 2d 429.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 85-1124. CHRISTENSEN *v.* UNITED STATES (two cases), 475 U. S. 1018;
No. 85-5634. BERNARD *v.* BERNARD ET AL., 474 U. S. 1103;
No. 85-5903. BERNARD *v.* WARDEN ET AL., 474 U. S. 1104;
No. 85-6284. NELSON *v.* VETERANS ADMINISTRATION, 475 U. S. 1087;
No. 85-6368. IN RE KIERSTEAD, 475 U. S. 1094; and
No. 85-6371. IN RE KARRIEM ET AL., 475 U. S. 1094. Petitions for rehearing denied.

No. 85-1212. OLEN *v.* PURDUE ET AL., 475 U. S. 1065. Petition for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

MAY 14, 1986

Miscellaneous Order

No. A-872. PINKERTON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied.

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JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the sentence in this case.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Applicant seeks a stay of execution, claiming that the Eighth and Fourteenth Amendments are offended by the State's attempt to execute him for a crime he committed while a juvenile. This Court has not yet considered whether imposition of the death penalty for a minor's crimes is so antagonistic to civilized notions of morality as to transgress the bounds imposed by the Constitution. I believe it is time for this Court to address this issue of profound significance. See *Roach* v. *Aiken*, 474 U. S. 1039 (1986) (BRENNAN, J., joined by MARSHALL, J., dissenting). Accordingly, I would grant the stay of execution in order to afford Pinkerton an opportunity to present his claim in a petition for certiorari.

MAY 19, 1986

Dismissal Under Rule 53

No. 85-777. NATIONAL FEDERATION OF FEDERAL EMPLOYEES *v.* DEFENSE LANGUAGE INSTITUTE. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 767 F. 2d 1398.

Appeals Dismissed

No. 85-1257. ROGERS ET AL. *v.* CHEYENNE AIRPORT BOARD ET AL. Appeal from Sup. Ct. Wyo. dismissed for want of substantial federal question. Reported below: 707 P. 2d 717.

No. 85-1537. MUKA *v.* CARTER, CHIEF DISCIPLINARY COUNSEL. Appeal from Sup. Ct. R. I. dismissed for want of substantial federal question. Reported below: 502 A. 2d 327.

No. 85-1584. NIEDZWIECKI *v.* CIRCUIT PROTECTIVE DEVICES, DIVISION OF WESTINGHOUSE ELECTRIC CORP. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the

papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 795 F. 2d 79.

No. 85-1606. WHALERS' VILLAGE CLUB *v.* CALIFORNIA COASTAL COMMISSION. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 173 Cal. App. 3d 240, 220 Cal. Rptr. 2.

No. 85-1612. DE NARDO *v.* MURPHY ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 781 F. 2d 1345.

No. 85-6573. HUNTER *v.* ELLINWOOD. Appeal from Sup. Ct. N. M. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-6674. IN RE DYSON. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-6688. BURY *v.* CITY OF LAKELAND, FLORIDA, ET AL. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 781 F. 2d 904.

No. 85-1596. STEIN DISTRIBUTING CO., INC. *v.* DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE WHITE and JUSTICE REHNQUIST would postpone jurisdiction to a hearing of the case on the merits. Reported below: 779 F. 2d 1407.

Certiorari Granted—Vacated and Remanded

No. 84-2026. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* PITTS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in

light of *Lockhart* v. *McCree, ante*, p. 162. Reported below: 753 F. 2d 689.

No. 84-2027. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* RUIZ ET AL. C. A. 8th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Lockhart* v. *McCree, ante*, p. 162. Reported below: 754 F. 2d 254.

No. 84-2028. SARGENT, WARDEN *v.* WOODARD. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lockhart* v. *McCree, ante*, p. 162. Reported below: 753 F. 2d 694.

No. 85-5768. GRIFFIN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cabana* v. *Bullock*, 474 U. S. 376 (1986). Reported below: 760 F. 2d 1505.

Miscellaneous Orders

No. A-800. KINNEY *v.* KINNY. App. Ct. Conn. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A-825. SHUMATE *v.* PATTERSON. C. A. 4th Cir. Application for stay of mandate, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A-853 (85-1609). HASTINGS, UNITED STATES DISTRICT JUDGE, ET AL. *v.* GODBOLD, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, ET AL. C. A. 11th Cir. Application of Investigating Committee for order vacating stay entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE POWELL, and by him referred to the Court, denied.

No. D-526. IN RE DISBARMENT OF DOBBS. Disbarment entered. [For earlier order herein, see 474 U. S. 917.]

No. D-545. IN RE DISBARMENT OF WILLIS. Disbarment entered. [For earlier order herein, see 475 U. S. 1003.]

No. D-547. IN RE DISBARMENT OF MAGRUDER. Disbarment entered. [For earlier order herein, see 475 U. S. 1063.]

No. 85-1027. ARIZONA *v.* HICKS. Ct. App. Ariz. [Certiorari granted, 475 U. S. 1107.] Motion for appointment of counsel granted, and it is ordered that John William Rood III, Esquire, of Phoenix, Ariz., be appointed to serve as counsel for respondent in this case.

No. 85-1792. BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES *v.* RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD CO. C. A. 4th Cir.; and

No. 85-1852. BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES *v.* BURLINGTON NORTHERN RAILROAD CO. ET AL. C. A. 7th Cir. Motion of petitioner to expedite consideration of the petitions for writs of certiorari before judgment denied.

No. 85-6702. IN RE MUELLER. Petition for writ of habeas corpus denied.

No. 85-6606. IN RE BASALYGA. Petition for writ of mandamus denied.

No. 85-6580. IN RE OSIPOVA. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 85-1244. CITY OF PLEASANT GROVE *v.* UNITED STATES. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 623 F. Supp. 782.

No. 85-1370. ARKANSAS WRITERS' PROJECT, INC. *v.* RAGLAND, COMMISSIONER OF REVENUE OF ARKANSAS. Appeal from Sup. Ct. Ark. Probable jurisdiction noted. Reported below: 287 Ark. 155, 697 S. W. 2d 94 and 698 S. W. 2d 802.

No. 85-1530. BROCK, SECRETARY OF LABOR, ET AL. *v.* ROADWAY EXPRESS, INC. Appeal from D. C. N. D. Ga. Probable jurisdiction noted. Reported below: 624 F. Supp. 197.

Certiorari Granted

No. 85-1360. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL. *v.* HECHLER. C. A. 11th Cir. Certiorari granted. Reported below: 772 F. 2d 788.

No. 85-899. CONNECTICUT *v.* BARRETT. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 197 Conn. 50, 495 A. 2d 1044.

No. 85-1409. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* YUCKERT. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 774 F. 2d 1365.

Certiorari Denied. (See also Nos. 85-1584, 85-1606, 85-1612, 85-6573, 85-6674, 85-6688, and 85-1596, *supra.*)

No. 85-860. BIASINI *v.* NEW YORK. County Court of Montgomery County, N. Y. Certiorari denied.

No. 85-1190. ASSOCIATED GAS DISTRIBUTORS ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 85-1207. TRANSCONTINENTAL GAS PIPE LINE CORP. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 769 F. 2d 1053.

No. 85-1210. SANTIESTEBAN *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 85-1219. TRANSWESTERN PIPELINE CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.;

No. 85-1236. ANR PIPELINE CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.;

No. 85-1237. TEXAS EASTERN TRANSMISSION CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.;

No. 85-1250. TRUNKLINE GAS CO. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 85-1252. ARKLA ENERGY RESOURCES, A DIVISION OF ARKLA, INC. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 248 U. S. App. D. C. 231, 770 F. 2d 1144.

No. 85-1231. PASSARO *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 774 F. 2d 456.

No. 85-1283. HAYSSEN ET AL. *v.* BOARD OF ZONING ADJUSTMENTS OF THE COUNTY OF SONOMA (BERRY, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 171 Cal. App. 3d 400, 217 Cal. Rptr. 464.

No. 85-1285. BAILEY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 341 Pa. Super. 611, 491 A. 2d 915.

No. 85-1289. VEILLETTE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 2d 899.

No. 85-1335. GILMERE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PATILLO *v.* CITY OF ATLANTA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1495.

No. 85-1357. BRAUER *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 85-1373. MASSMAN CONSTRUCTION CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1065.

No. 85-1387. CESARONI ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 1031.

No. 85-1389. LONE PINE STEERING COMMITTEE ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 3d Cir. Certiorari denied. Reported below: 777 F. 2d 882.

No. 85-1443. CORDIS CORP. *v.* MEDTRONIC, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 780 F. 2d 991.

No. 85-1466. JET INDUSTRIES, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 303.

No. 85-1471. BOREAL RIDGE CORP. *v.* SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE (TIETJEN, REAL PARTY IN INTEREST). Sup. Ct. Nev. Certiorari denied. Reported below: 101 Nev. 945.

No. 85-1501. CORTLANDT NURSING HOME ET AL. *v.* AXELROD, COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 169, 486 N. E. 2d 785.

No. 85-1504. MARITIME OVERSEAS CORP. ET AL. *v.* BRUNNER. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 296.

No. 85-1510. CHRISTY NEWSREEL SERVICES, INC. *v.* CITY OF ANN ARBOR. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1020.

No. 85-1533. DAVIS ET AL. *v.* CITY OF DALLAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 205.

No. 85-1543. FLINN *v.* GORDON. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 1551.

No. 85-1548. DILLON *v.* LUTTERMAN ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-1549. G. J. DEASY INVESTMENT, INC., DBA TEXAS VEHICLE MANAGEMENT *v.* MATTOX, ATTORNEY GENERAL OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 1091.

No. 85-1553. CHURCH OF SCIENTOLOGY FLAG SERVICE ORGANIZATION, INC. *v.* CITY OF CLEARWATER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 598.

No. 85-1554. SANTARELLI ET AL. *v.* ELLISON. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 306, 465 N. E. 2d 962.

No. 85-1556. STEINGRABER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 334 Pa. Super. 589, 483 A. 2d 895.

No. 85-1558. EMPIREGAS, INC. OF ARDMORE *v.* HARDY ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 487 So. 2d 244.

No. 85-1570. DRURY, ADMINISTRATOR OF THE ESTATE OF ABDALLAH *v.* ABDALLAH ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 2d 75.

No. 85-1572. LEE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 177 Ga. App. 8, 338 S. E. 2d 445.

No. 85-1573. BRADFIELD *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 341 Pa. Super. 611, 491 A. 2d 915.

No. 85-1574. BURLINGTON NORTHERN RAILROAD CO. *v.* ANDERSON. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 700 S. W. 2d 469.

No. 85-1575. RIVERA *v.* ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 913.

No. 85-1576. WRIGHT ET AL. *v.* KECH-TV ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 300 Ore. 139, 707 P. 2d 1232.

No. 85-1577. DINWIDDIE ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF LEA COUNTY ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 103 N. M. 442, 708 P. 2d 1043.

No. 85-1578. MINAYA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-1582. GROSS *v.* GROSS. Sup. Ct. Ohio. Certiorari denied.

No. 85-1586. CAMPS *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 476 So. 2d 864.

No. 85-1597. IVANCIC *v.* OLMSTEAD. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 349, 488 N. E. 2d 72.

No. 85-1598. A & A CONCRETE, INC., ET AL. *v.* WHITE MOUNTAIN APACHE TRIBE, DBA WHITE MOUNTAIN APACHE DEVELOPMENT ENTERPRISE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 781 F. 2d 1411.

No. 85-1607. GIBBS *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 1040.

No. 85-1615. BOOKER ET AL. *v.* THOMAS. C. A. 8th Cir. Certiorari denied. Reported below: 784 F. 2d 299.

No. 85-1627. MAYER *v.* DAVIS ET AL. Ct. App. Ohio, Summit County. Certiorari denied.

No. 85-1634. CONNER ET AL. *v.* SHELTER MUTUAL INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 335.

No. 85-1636. O'DONNELL *v.* PAINE, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 85-1647. RUBINSTEIN *v.* TEXAS. Ct. App. Tex., 10th Sup. Jud. Dist. Certiorari denied.

No. 85-1657. NELMS *v.* WEAVER ET UX. Sup. Ct. Tenn. Certiorari denied.

No. 85-1666. HOSFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 782 F. 2d 936.

No. 85-1675. KALISH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 780 F. 2d 506.

No. 85-1681. HECHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1032.

No. 85-1682. WARD *v.* UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1062.

No. 85-1703. STRANAHAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-1723. FESLER ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 781 F. 2d 384.

No. 85-5929. CASEY *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied.

No. 85-5951. OTERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 2.

No. 85-5983. CHURCHILL *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 136 Ill. App. 3d 123, 482 N. E. 2d 355.

No. 85-6033. SHAH *v.* KERN COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1175.

No. 85-6138. WILKINS *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 776 F. 2d 1047.

No. 85-6187. LEE *v.* MILLER, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 85-6209. BERTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-6252. BROWN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 64 Md. App. 708.

No. 85-6254. FIGUEROA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 44.

No. 85-6292. CLIFFORD *v.* DAUGHERTY ET AL. C. A. 3d Cir. Certiorari denied.

No. 85-6347. BIRDSELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 645.

No. 85-6348. SAM *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 473 So. 2d 908.

No. 85-6349. WHITE *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 1032.

No. 85-6357. HILL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 489 A. 2d 1078.

No. 85-6366. JOHNSON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 700 S. W. 2d 815.

No. 85-6381. WILSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-6383. BROOKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 777 F. 2d 1141.

No. 85-6422. SHOOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 53.

No. 85-6433. FORMAN *v.* BAER, CHAIRMAN, UNITED STATES PAROLE COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 776 F. 2d 1156.

No. 85-6435. CAMACHO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 227.

No. 85-6442. TAYLOR *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6471. KLIER *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 300 Ore. 477, 713 P. 2d 1058.

No. 85-6509. BRYSINSKI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 135 Ill. App. 3d 1160, 496 N. E. 2d 1274.

No. 85-6531. SPRAGGINS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 255 Ga. 195, 336 S. E. 2d 227.

No. 85-6542. FREEMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 2d 549 and 782 F. 2d 853.

No. 85-6555. WILLIFORD *v.* YOUNG, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 405.

No. 85-6559. GRIFFIN *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 780 F. 2d 1018.

No. 85-6561. STEWART *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1043.

No. 85-6563. BUFFALOE *v.* ANDERSON. Ct. Sp. App. Md. Certiorari denied. Reported below: 63 Md. App. 747.

No. 85-6565. GODBEE *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 2d 1237.

No. 85-6566. FRIEND *v.* REES, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 50.

No. 85-6568. SMITH *v.* SCHROEDER, CHIEF JUSTICE, KANSAS SUPREME COURT, ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-6570. DAY *v.* CONTINENTAL INSURANCE COS. C. A. 5th Cir. Certiorari denied.

No. 85-6571. FORD *v.* STEPHENSON, SUPERINTENDENT, CALEDONIA AND ODOM COMPLEX. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1034.

No. 85-6574. DAVIS *v.* BOSTON EDISON CO. ET AL. C. A. 1st Cir. Certiorari denied.

No. 85-6576. UNGER *v.* HOELEN. C. A. 4th Cir. Certiorari denied. Reported below: 785 F. 2d 306.

No. 85-6578. MORGAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 116 App. Div. 2d 919, 498 N. Y. S. 2d 510.

No. 85-6583. KIM ET AL. *v.* STROH, DIRECTOR OF ALCOHOLIC BEVERAGE CONTROL, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 85-6586. WILDER *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1029.

No. 85-6587. MCFALL *v.* REES, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1165.

No. 85-6588. KISER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 85-6590. HERNANDEZ *v.* CITY OF LOUISVILLE, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 1021.

No. 85-6591. LAGRANGE *v.* TEXAS DEPARTMENT OF PUBLIC SAFETY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 681.

No. 85-6592. HARRIS *v.* ABSHIRE, SUPERINTENDENT, RIVERSIDE CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 308.

No. 85-6605. JOHNSON *v.* WOMACK, CLERK, SUPREME COURT OF MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 786 F. 2d 1160.

No. 85-6607. BRYSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 711 P. 2d 932.

No. 85-6608. ROSBERG *v.* GOERES. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1050.

No. 85-6610. MYERS *v.* GUILLORY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 776 F. 2d 1046.

No. 85-6611. TINNEY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 712 P. 2d 65.

No. 85-6613. SELLERS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 176 Ga. App. 681, 337 S. E. 2d 373.

No. 85-6614. RANDALL *v.* SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY. Sup. Ct. Cal. Certiorari denied.

No. 85-6617. KUNKEL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 484 So. 2d 9.

No. 85-6619. HART *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 85-6621. HOLLINGSWORTH *v.* STEPHENSON, SUPERINTENDENT, CALEDONIA AND ODOM COMPLEX, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 46.

No. 85-6624. ALLEN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 85-6625. DAY *v.* CMC CORP. C. A. 5th Cir. Certiorari denied.

No. 85-6629. MORRIS *v.* JACKSON PARK HOSPITAL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 85-6632. SIMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 311.

No. 85-6651. LEE *v.* HARDAGE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1035.

No. 85-6657. SHUMATE *v.* PATTERSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1036.

No. 85-6666. DE VITO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1149.

No. 85-6685. MARKOUSKI *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 79.

No. 85-6686. MORGAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 47.

No. 85-6690. RICHARDSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1033.

No. 85-6691. MERCER *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1165.

No. 85-6694. BOONE *v.* CASHION, SUPERINTENDENT OF NORTH CAROLINA DIVISION OF PRISONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 785 F. 2d 304.

No. 85-6701. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 778 F. 2d 1017.

No. 85-6708. JEFFERS *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 782 F. 2d 1049.

No. 85-6711. KAYE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 779 F. 2d 1461.

No. 85-6719. NUNEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-6720. GLASCOE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-6722. SWANSON *v.* OFFICE OF PERSONNEL MANAGEMENT ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 322.

No. 85-6728. WOMBLE *v.* NORTON. Ct. App. D. C. Certiorari denied.

No. 85-6735. VANNERSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 221.

No. 85-6736. CREECH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1025.

No. 85-6740. JIMENEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 533.

No. 85-121. KEMP, WARDEN *v.* YOUNG. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 760 F. 2d 1097.

No. 85-801. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* GRIFFIN. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 760 F. 2d 1505.

No. 85-1337. NORTH CAROLINA *v.* HARBISON. Sup. Ct. N. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 315 N. C. 175, 337 S. E. 2d 504.

No. 85-1590. KIRK, SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES *v.* THOMAS S., BY HIS APPOINTED GUARDIAN AD LITEM, BROOKS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 781 F. 2d 367.

No. 85-541. BARCLAYSAMERICAN/CREDIT, INC. *v.* QUILLER ET UX.;

No. 85-584. GRANT ET AL. *v.* GENERAL ELECTRIC CREDIT CORP.; and

No. 85-717. QUILLER ET UX. *v.* BARCLAYSAMERICAN/CREDIT, INC. C. A. 11th Cir. Motion of American Financial Services Association et al. for leave to file a brief as *amici curiae* in No. 85-541 granted. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and these petitions. Reported below: Nos. 85-541 and 85-717, 727 F. 2d 1067 and 764 F. 2d 1400; No. 85-584, 764 F. 2d 1404.

No. 85-1186. SAMPSON *v.* GILMERE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PATILLO. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 2d 1495.

CHIEF JUSTICE BURGER, with whom JUSTICE O'CONNOR joins, dissenting.

On New Year's Day, 1980, Atlanta police responded to a report that Thomas Patillo had threatened the driver of a van with a gun after Patillo had nearly caused an accident with the van. Petitioner Sampson and a fellow police officer, Craig, responded to the call, and arrived at Patillo's residence. Patillo, who appeared to be inebriated, refused the officers' order to accompany them to the police car for questioning, and attempted to flee. The police officers then escorted Patillo from his residence by force. Some witnesses reported that at this point the officers began beating Patillo in the head but no evidence of head wounds was discovered. Patillo broke free of the officers' hold and reached for officer Craig's revolver. During the struggle that followed, Patillo lunged towards Officer Sampson. Sampson, believing that Patillo had the gun in his hand, shot Patillo twice at close range. Patillo died from these gunshot wounds.

Respondent is Patillo's sister, who filed this suit under 42 U. S. C. § 1983 on her own behalf and on behalf of Patillo's estate.

After a bench trial, the District Court concluded that Patillo's due process rights had been violated both by the alleged beating and by the shooting, and that Sampson's belief that his life was in danger was not objectively reasonable, and awarded damages against petitioner. A panel of the United States Court of Appeals for the Eleventh Circuit reversed the award of damages, reasoning that under *Parratt* v. *Taylor*, 451 U. S. 527 (1981), the availability of a state-law tort action against the police officers precluded relief under § 1983 for a due process violation. The panel decision was vacated and the case was listed before the Eleventh Circuit for en banc hearing. The en banc court affirmed the award of damages against the police officers. *Gilmere* v. *City of Atlanta*, 774 F. 2d 1495 (1985). Reasoning that *Parratt* barred only purely procedural due process claims for which state remedies are available, the Court of Appeals discerned two substantive constitutional bases for the imposition of § 1983 liability in this case. First, the court determined that Patillo's shooting deprived him of substantive due process by the excessive use of force. In reaching this conclusion, the Court of Appeals reasoned that any fear that Sampson had for his own life was legally insufficient to justify the use of deadly force because any fear on the officer's part was the fear of retaliation against his own unjustified physical abuse. Second, as an alternative holding, the Court of Appeals determined that Patillo's shooting was also an unconstitutional "seizure" in violation of this Court's holding in *Tennessee* v. *Garner*, 471 U. S. 1 (1985), that use of deadly force to arrest a nonviolent suspect violates the Fourth Amendment.

The Court of Appeals' holding that Patillo's shooting violates the Fourth Amendment despite Officer Sampson's fear for his life is plainly at odds with language in *Garner* emphasizing that the use of deadly force in effecting an arrest is constitutional when the officer has probable cause to believe that the suspect poses a threat to the officer. *Id.*, at 11–12. The Court of Appeals' holding conflicts with a holding of the Fifth Circuit that an officer's conduct which makes the need for deadly force more likely does not constitutionally disable the officer from later using deadly force to defend himself. *Young* v. *City of Killeen*, 775 F. 2d 1349 (1985).

Because the Court of Appeals' decision in this case misreads this Court's holding in *Garner*, and because the decision conflicts with

the decision of the Fifth Circuit in *Young*, I would grant certiorari.

No. 85–1246. RAYMARK INDUSTRIES, INC. *v.* BATH IRON WORKS CORP. ET AL.;

No. 85–1253. EAGLE-PICHER INDUSTRIES, INC. *v.* UNITED STATES; and

No. 85–1288. RAYMARK INDUSTRIES, INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: No. 85–1246, 772 F. 2d 1007; Nos. 85–1253 and 85–1288, 772 F. 2d 1023.

JUSTICE WHITE, dissenting.

In No. 85–1246, petitioner, an asbestos manufacturer, is the defendant in a products liability suit brought by the widow of a deceased employee of respondent Bath Iron Works' shipyard. Petitioner sought contribution from respondent on various theories, including a claim under § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 86 Stat. 1263, 33 U. S. C. § 905(b). The United States Court of Appeals for the First Circuit held that § 5(b) covers only those torts that are within the reach of admiralty jurisdiction as defined in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U. S. 249 (1972). *Drake* v. *Raymark Industries, Inc.*, 772 F. 2d 1007 (1985). The First Circuit concluded that ship construction does not satisfy the "maritime nexus" test of *Executive Jet*. As the First Circuit realized, its interpretation of the scope of § 5(b) conflicts with the decision in *Hall* v. *Hvide Hull No. 3*, 746 F. 2d 294 (CA5 1984), which holds that employees covered by the LHWCA who sue under § 5(b) need not satisfy the "maritime nexus" test of *Executive Jet* so long as the underlying event took place on a ship on navigable water.

In Nos. 85–1253 and 85–1288, which involve third-party claims by asbestos manufacturers against the United States as vessel owner and shipyard employer, the First Circuit followed its holding in *Drake, supra*, regarding the scope of § 5(b). *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F. 2d 1023 (1985).

I would grant certiorari to resolve the conflict presented in these cases.

No. 85–1359. NORVELL, SHERIFF, ST. LUCIE JAIL, ET AL. *v.* MILLER. C. A. 11th Cir. Motion of respondent for leave to

proceed *in forma pauperis* granted. Certiorari denied. Reported below: 775 F. 2d 1572.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

Miller was charged with "misapplication of funds" in connection with the 1978 construction of several homes. The Florida statute under which Miller was charged provides that one of the elements of the crime, the "intent to defraud," can be prima facie established by the "failure to pay for such labor, services or materials furnished for this specific improvement after receipt of such proceeds." Fla. Stat. § 713.34(3) (1985).

The state trial court instructed the jury that

> "[p]roof that the defendant failed to pay for such labor, services or materials for any specific improvement from the proceeds of any payment made to him for such specific improvements shall constitute prima facie evidence of intent to defraud. Prima facie evidence means evidence of such nature as is sufficient to establish a fact and which, if unrebutted, remains sufficient for that purpose."

Miller was found guilty and sentenced to 6 months in county jail and 14½ years' probation. After Miller's conviction was affirmed on direct appeal, he brought this federal habeas action. The District Court denied the application.

The Court of Appeals for the Eleventh Circuit reversed, 775 F. 2d 1572 (1985), holding that the jury instructions could have been interpreted as creating a "mandatory rebuttable presumption" in violation of *Francis* v. *Franklin*, 471 U. S. 307 (1985), and *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). Although this holding was sufficient to dispose of the application, the court went on to hold that the statute under which Miller was convicted was unconstitutional. Since the improper jury instructions were a "verbatim" rendition of the statute, the court reasoned, the statute, like the instructions, must fail.

Even if the jury instructions were impermissible under *Franklin* and *Sandstrom*, by striking down the underlying statute the Court of Appeals' decision flies in the face of *Ulster County Court* v. *Allen*, 442 U. S. 140 (1979), where we considered a facial attack upon a New York statute on the grounds that it impermissibly shifted the burden of proof. As the Court explained, a facial attack to a statute on these grounds will fail if the statute creates

only a "permissive inference," leaving the trier of fact free to credit or reject the inference. The application of the statute to a particular case, however, can be successfully challenged if there is no rational way the trier could make the connection permitted by the inference. On the other hand, a statute creating a "mandatory presumption" is "a far more troublesome evidentiary device" because it may "affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact." *Id.*, at 157. To the extent that the trier of fact is forced to abide by the presumption irrespective of particular facts presented by the case, the analysis of the mandatory presumption's constitutional validity "is logically divorced from those facts and based on the presumption's accuracy in the run of cases." *Id.*, at 159. Because the statute in *Ulster County* created only a permissive inference, the Court held that the Court of Appeals erred in passing on the constitutionality of the statute "on its face." *Id.*, at 163.

The Court of Appeals' decision in this case striking down the statute cannot be reconciled with *Ulster County*. According to the Florida Supreme Court, the statute creates only a "permissive inference." *State* v. *Ferrari*, 398 So. 2d 804 (1981). A state trial court could, consistently with the statute as interpreted by the Florida Supreme Court, instruct the jury that it is free to either accept or reject the inference; that is, from the evidence that a contractor received advance payment for a particular project and did not use the money for the project, the jury could *but need not* infer that the contractor intended to defraud the owner. As we held in *Ulster County*, whether this kind of permissive inference unconstitutionally relieves the State of its burden of proof is to be determined on the facts of each case. But, because such an inference can be applied in a manner not repugnant to the Constitution, the Court of Appeals had no warrant to hold the Florida statute unconstitutional.

The Court of Appeals suggested that, while the Florida Supreme Court said that the statute created only a permissive inference, as a matter of federal law it created a mandatory rebuttable presumption. The Florida Supreme Court, however, is the final expositor of Florida law, not the Eleventh Circuit. Whether the troublesome phrase in the statute—"shall constitute prima facie evidence"—places the burden upon the defendant to rebut

the State's showing is a question properly left to the Florida Supreme Court. Even if the Florida Supreme Court had not already declared that the statute created only a permissive inference, the Court of Appeals still should have allowed the Florida courts to interpret their statute to conform with federal constitutional requirements. And, even if the statute were incapable of such interpretation, the Florida courts should have been left free to make that determination in the first instance.

The holding of the Court of Appeals is not only incorrect but also completely gratuitous. After holding that the petition should be granted because of the flawed jury instruction, it had no reason to go on and take the drastic step of holding a state statute unconstitutional, thereby leaving the State with no means of retrying Miller. Accordingly, I would grant the petition and at least allow plenary consideration of the issue.

No. 85-1423. PRIVATE TRUCK COUNCIL OF AMERICA, INC., ET AL. *v.* QUINN, SECRETARY OF STATE OF MAINE, ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 503 A. 2d 214.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE O'CONNOR join, dissenting.

In this case, the Supreme Judicial Court of Maine held that an allegation that a State has violated the Commerce Clause is not cognizable in an action under 42 U. S. C. § 1983. 503 A. 2d 214 (1986). This decision, while supported by the weight of authority, see, *e. g.*, *Consolidated Freightways Corp.* v. *Kassel*, 730 F. 2d 1139 (CA8), cert. denied, 469 U. S. 834 (1984), conflicts with the holding in *Kennecott Corp.* v. *Smith*, 637 F. 2d 181, 186, n. 5 (CA3 1980). I would grant certiorari to resolve this conflict.

This case also presents the question whether persons subjected to an unconstitutional tax, the nonpayment of which is a crime, may bring a refund action under the Fourteenth Amendment if no state refund procedure is available. The Supreme Judicial Court recognized that the Fourteenth Amendment may require a refund of unconstitutional taxes paid under compulsion. See *Carpenter* v. *Shaw*, 280 U. S. 363, 369 (1930); *Ward* v. *Board of County Comm'rs*, 253 U. S. 17, 24 (1920). However, the court rejected the "implied duress" theory of *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280, 286 (1912), and held that petitioners have no right of recovery under the Fourteenth Amendment

because they failed to present evidence that the State actually threatened them with arrest or seizure of personal property if they failed to pay the tax in question. Because this holding calls into question the continuing vitality of *Atchison*, I would grant certiorari on this issue as well.

No. 85-1617. EMERSON ELECTRIC CO. *v.* SWENSON ET AL. Sup. Ct. Minn. Motion of Chamber of Commerce of the United States et al. for leave to file a brief as *amici curiae* granted. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 374 N. W. 2d 690.

No. 85-5273. DAVID *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 468 So. 2d 1126 and 1133.

No. 85-5793. SKAGGS *v.* KENTUCKY (two cases). Sup. Ct. Ky.;

No. 85-6525. JOHNSON *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 85-6630. ROGERS, AKA HEYDUK *v.* NEVADA. Sup. Ct. Nev.; and

No. 85-6631. FARMER *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: No. 85-5793 (first case), 694 S. W. 2d 672; No. 85-6525, 698 S. W. 2d 631; No. 85-6630, 101 Nev. 457, 705 P. 2d 664; No. 85-6631, 101 Nev. 419, 705 P. 2d 149.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85-6556. ANDERSON *v.* SPRING LAKE PARK PARTNERSHIP. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 782 F. 2d 1048.

No. 85-6930 (A-889). STRAIGHT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court,

denied. Certiorari denied. JUSTICE BLACKMUN would deny the state habeas petition without prejudice to the presentation of claims on federal habeas. Reported below: 488 So. 2d 530.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 85-24. MARYLAND *v.* ELFADL, 475 U. S. 1081;

No. 85-1096. VAN SANT *v.* UNITED STATES POSTAL SERVICE ET AL., 475 U. S. 1082;

No. 85-1272. MYER *v.* PACIFIC FEDERAL SAVINGS & LOAN ASSN., 475 U. S. 1084;

No. 85-1296. ROSENBAUM *v.* ROSENBAUM, 475 U. S. 1078;

No. 85-5375. BLANKS *v.* GEORGIA, 475 U. S. 1090;

No. 85-5729. HOWELL *v.* MARYLAND, 475 U. S. 1110;

No. 85-5890. BAIG *v.* UNITED STATES, 474 U. S. 1103;

No. 85-5920. POOL *v.* ARMONTROUT, WARDEN, 475 U. S. 1110;

No. 85-5978. CLARK *v.* STATE TREASURER'S OFFICE EMPLOYER ET AL., 475 U. S. 1024;

No. 85-6183. IN RE MAY, 475 U. S. 1044;

No. 85-6224. DRINKWINE *v.* FEDERATED PUBLICATIONS, INC., ET AL., 475 U. S. 1087;

No. 85-6229. COLLINS *v.* GEORGIA, 475 U. S. 1090;

No. 85-6260. LYNCH *v.* JOHNSON ET AL., 475 U. S. 1087;

No. 85-6310. GREGORY *v.* SOLEM, WARDEN, 475 U. S. 1088;

No. 85-6311. HOUGHTON *v.* CODER ET AL., 475 U. S. 1088;

No. 85-6367. CHOAT *v.* ROME INDUSTRIES, INC., ET AL., 475 U. S. 1097;

No. 85-6375. KNIES *v.* WISCONSIN, 475 U. S. 1110;

No. 85-6403. DYSON *v.* TEXAS A & M UNIVERSITY, 475 U. S. 1113; and

No. 85-6460. PURCELL ET UX. *v.* BOARD OF IMMIGRATION APPEALS, 475 U. S. 1098. Petitions for rehearing denied.

No. 84-773. BENDER ET AL. *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL., 475 U. S. 534. Motion of Bender et al. for leave to file petition for rehearing denied. Petition for rehearing denied.

MAY 20, 1986

Miscellaneous Orders

No. A-891. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* ZEIGLER. Application of the Attorney General of Florida for an order to dissolve a stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE POWELL, and by him referred to the Court, denied.

No. A-892 (85-6947). STRAIGHT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. The order heretofore entered staying the execution of the sentence of death until 5:00 p. m., May 20, 1986, is vacated. The application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, is denied. JUSTICE STEVENS would grant the application for stay of execution.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR, concurring in the denial of a stay.

In view of the discussion in the dissents, I write to summarize my reasons for voting to deny a stay in this case.

Ronald Straight is here on his second federal habeas corpus petition. In his first petition, Straight argued that he was handicapped by the reasonable belief of trial counsel and the trial judge that Florida law barred the introduction of nonstatutory mitigating evidence at capital sentencing proceedings. Cf. *Lockett* v. *Ohio*, 438 U. S. 586 (1978). The District Court denied relief on this claim, and on Straight's other claims as well, and the Court of Appeals for the Eleventh Circuit affirmed. *Straight* v. *Wainwright*, 772 F. 2d 674 (1985). Less than seven weeks ago, this Court denied Straight's petition for certiorari, a petition that again raised his *Lockett* argument. 475 U. S. 1099.

In his second habeas petition, filed late yesterday, Straight raises the same substantive legal claim, and adds various new

factual allegations in support. The District Court properly found that, to the extent Straight seeks to relitigate the same claims raised earlier, his petition should be dismissed under Habeas Corpus Rule 9(b) as a successive petition. The court also found that, to the extent that Straight sought to make new arguments that plainly could have been raised earlier, his petition was an abuse of the writ. See *Woodard* v. *Hutchins*, 464 U. S. 377, 378–380 (1984) (POWELL, J., joined by BURGER, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., concurring). The Court of Appeals found no error in the District Court's disposition, and denied a certificate of probable cause to appeal. The Court of Appeals granted a stay of execution until noon today to permit this Court to consider Straight's belated application for a stay and petition for certiorari.[1]

I find no basis for concluding that the District Court abused its discretion. Applicant has not offered any reason why he should be permitted to relitigate his *Lockett* claim, nor has he justified his previous failure to allege the supporting factual grounds on which he now relies. Thus, the District Court's decision to deny relief based on Rule 9 was plainly correct. That being the case, there is no ground for reaching the merits argument that the dissenting opinions now rely on.[2]

---

[1] Acting in my capacity as Circuit Justice, I extended the stay of petitioner's execution until 5 p. m. today to allow fuller consideration of his stay application.

[2] JUSTICE BRENNAN contends that, because four Justices have voted to "hold" this case pending disposition of *Darden* v. *Wainwright*, No. 85–5319, the Court is obliged to stay applicant's execution in order that the case not be mooted. JUSTICE BRENNAN correctly notes that, in the past, the Court has ordinarily stayed executions when four Members have voted to *grant* certiorari, and he maintains that "[a] 'hold' is analogous to a decision to grant a petition for certiorari." *Post*, at 1135 (dissenting). In my view, this last assertion is incorrect on several levels. First and foremost, the Court often "holds" cases for reasons that have nothing to do with the merits of the cases being held, as when we wish not to "tip our hand" in advance of an opinion's announcement. Second, when certiorari is granted, *by definition* the Court's resolution of the issues presented in that case might affect the judgment rendered below. That is not necessarily true of held cases. The judgment in a held case may rest on a number of grounds sufficient to sustain it. In this case, my vote to deny Straight's petition for certiorari—and therefore not to hold the petition for *Darden*, *supra*—reflects my view that *no matter how Darden* is resolved, the judgment of the District Court will be unaffected. The reason for that conclusion is obvious: the District Court found that the pe-

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE BLACKMUN joins all but the first paragraph, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would grant the stay application and the petition for certiorari and would vacate the sentence in this case.

But even if I did not hold this view, I would extend the stay of execution in this case until the Court acts on Straight's petition for certiorari in No. 85-6947. In that petition, Straight contends that the State of Florida's death penalty statute and the cases interpreting it prior to his trial resulted in the failure of the trial court to consider nonstatutory mitigating factors in violation of this Court's holding in *Lockett* v. *Ohio*, 438 U. S. 586 (1978). This issue is similar to one presented in *Darden* v. *Wainwright*, No. 85-5319, a case that has been argued but not yet decided by the Court, and other petitions that are before the Court that have not yet been acted upon.

It would be disturbing enough if the Court were to allow this execution to proceed without acting on the merits of Straight's petition for certiorari, since this would allow him to be executed despite the continuing possibility of relief from this Court. What the Court does here is far more alarming, however. For the fact is that in my view the Court *has* acted on the merits of Straight's petition. Four Justices have voted to "hold" Straight's petition because they believe that it presents an issue sufficiently similar to *Darden* to warrant delaying disposition of Straight's case until a decision is reached in that case. To deny a stay of execution in the face of this "hold" is, in my view, a wrong to which I may not be a silent witness.

A minority of the Justices has the power to grant a petition for certiorari over the objection of five Justices. The reason for this "antimajoritarianism" is evident: in the context of a preliminary 5-to-4 vote to deny, 5 give the 4 an opportunity to change at least one mind. Accordingly, when four vote to grant certiorari in a

---

tition must be dismissed under Habeas Corpus Rule 9, and therefore did not reach the merits of applicant's claim. *Darden*, of course, does not raise any issue concerning the applicability of Rule 9 in cases such as this one.

capital case, but there is not a fifth vote to stay the scheduled execution, one of the five Justices who does not believe the case worthy of granting certiorari will nonetheless vote to stay; this is so that the "Rule of Four" will not be rendered meaningless by an execution that occurs before the Court considers the case on the merits.

A "hold" is analogous to a decision to grant a petition for certiorari. The Court's "hold" policy represents the conviction that like cases must be treated alike. Like the "Rule of Four," it grants to a minority of the Court the power to prevent the majority from denying a petition for certiorari when the minority is persuaded that the issues or questions presented in the case to be held are similar to a case that the Court is to decide. The principle is apparent: whether an individual obtains relief should not turn on the fortuity of whether his papers were the first, the second, or the tenth to reach the Court. What counts is the merits. A vote to "hold" is a statement by a number of Justices that the disposition of the granted case may have an effect on the merits of the case which is to be held. The fact that a majority of the Justices disagree with the decision to "hold" does not warrant subversion of the "hold" rule any more than does disagreement by five with the decision to grant a petition for certiorari justify departure from the "Rule of Four." It is unthinkable to me that the practice that four votes to grant certiorari trigger an "automatic" fifth vote to stay an execution should not apply to a "hold" when a man's life is in the balance.

For the Court to deny a stay to a petitioner who is under sentence of death, and whose petition four Justices have determined to hold, is to give a new and gruesome meaning to the old notion of the "race to the courthouse." It is to distinguish as an initial matter between those who may live and those who will die by rewarding with a stay of execution that litigant whose lawyer files his papers first. It is to divide litigants arbitrarily into the condemned and the spared on the basis of what amounts to little more than a footrace. It is to reject those first principles of justice that ultimately define a system of law: the principles of uniform application of rules, of consistency, of evenhandedness, of fairness.

I dissent.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of application for stay of execution.

The State of Florida intends to execute applicant at 5:01 this afternoon. In the papers he has filed in this Court, applicant claims that the Florida death penalty statute and the cases interpreting it prior to his trial led all participants in his sentencing hearing, including the trial judge, to believe that nonstatutory mitigating circumstances could not be considered in the sentencing decision. He argues that the failure of the trial court to consider such nonstatutory factors violated the injunction of this Court in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), that a death penalty scheme must not prevent the sentencer from considering "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604; see *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982).

When presented with evidence that a sentencing judge had actually believed himself precluded from considering nonstatutory mitigating circumstances, both the Florida Supreme Court and the Court of Appeals for the Eleventh Circuit have held that a defendant is constitutionally entitled to a new sentencing proceeding. See, *e. g.*, *Harvard* v. *State*, 486 So. 2d 537 (Fla. 1986); *Songer* v. *Wainwright*, 769 F. 2d 1488 (CA11 1985). Unlike the defendants in *Harvard* and *Songer*, applicant never had the chance during postconviction proceedings to ascertain how his sentencing judge had interpreted Florida's statutory scheme. He now seeks an evidentiary hearing where he might make such an inquiry. I believe he should be given at least the chance to do so.*

I would grant the petition for certiorari and the application for a stay of execution.

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*With respect to JUSTICE POWELL's suggestion that the merits ought not to be reached here, I note only that there is no little confusion on the procedural aspects of this case. When, in his first habeas petition, applicant raised a variant of the *Lockett* claim he raises here, the Court of Appeals incorrectly found that claim procedurally barred even though, on state collateral review, the Florida Supreme Court had reached it on the merits, 422 So. 2d 827, 832 (1982). 772 F. 2d 674, 677–678 (1985). Had the Court of Appeals properly considered that claim, this second habeas petition might not have been necessary.

MAY 21, 1986

Dismissal Under Rule 53

No. 85-6770. ADAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 786 F. 2d 1157.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1137 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

CALIFORNIA *v.* HAMILTON

ON APPLICATION FOR STAY

No. A-805. Decided May 6, 1986

California's application to stay enforcement of the California Supreme Court's judgment invalidating respondent's death sentence is granted. The State Supreme Court's judgment was based on its holdings that the failure to properly instruct the jury at respondent's murder trial on the issue of intent to kill violated his right to due process under *Sandstrom* v. *Montana*, 442 U. S. 510, and that such error was not harmless. The State seeks the stay so that it can petition for certiorari to raise the question of the proper constitutional standard for determining prejudice with regard to *Sandstrom* errors. Since the outcome here may well be affected by the decision in another, pending case, it is likely that a majority of this Court would not want to dispose of the petition for certiorari in this case before a decision is rendered in such other case.

JUSTICE REHNQUIST, Circuit Justice.

Applicant, the State of California, asks that I stay pending disposition of its petition for certiorari the enforcement of the judgment of the California Supreme Court, which invalidated the death sentence imposed on respondent Hamilton for the 1979 murder of a woman near San Diego. 41 Cal. 3d 408, 710 P. 2d 981 (1985). The jury was not instructed that it was required, as a matter of state law under *Carlos* v. *Superior Court*, 35 Cal. 3d 131, 672 P. 2d 862 (1983), to find that Hamilton intended to kill his victim before it could impose the death penalty. The California Supreme Court held that this failure to properly instruct the jury on the issue of intent violated Hamilton's right to due process under this Court's decision in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). 41 Cal. 3d, at 431, 710 P. 2d, at 995. The court also held that such

Sandstrom error was not harmless under the four-part test for harmlessness set forth in *People* v. *Garcia*, 36 Cal. 3d 539, 554–557, 684 P. 2d 826, 835–837 (1984), cert. denied, 469 U. S. 1229 (1985). In particular, the court concluded that the fourth part of the *Garcia* test, under which a *Sandstrom* error may be found harmless if "the record not only establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration," *Garcia*, *supra*, at 556, 684 P. 2d, at 835, did not apply to the instant case. 41 Cal. 3d, at 432, 710 P. 2d, at 995–996.

The State requests a stay so that it can petition for certiorari, raising the following question: "What is the proper standard of prejudice under the United States Constitution for errors in jury instructions regarding intent to kill in capital cases?" The State argues that the California Supreme Court misconstrued this Court's decision in *Connecticut* v. *Johnson*, 460 U. S. 73 (1983), when it set up in *Garcia* its four-part harmlessness test for *Sandstrom* errors, and that under a proper test the *Sandstrom* error in the instant case would be found harmless. The State also points out that, under California law, it will be forced to begin a new trial on the issue of Hamilton's sentence by May 12, 1986, or be forever barred from seeking the death penalty. See Cal. Penal Code Ann. § 1382(2) (West 1982). On the other hand, since the California Supreme Court affirmed Hamilton's murder conviction, he will remain confined whether or not a stay is granted.

This Court currently has before it the case of *Rose* v. *Clark*, No. 84–1974, which involves the question whether a *Sandstrom* error may ever be found harmless and, if so, under what circumstances. Our decision in *Rose* v. *Clark* may well affect the outcome of the instant case. For this reason, I believe that a majority of this Court would not want to dispose of the petition for certiorari in this case before a decision is rendered in *Rose* v. *Clark*. I therefore stay the

enforcement of the judgment of the California Supreme Court pending further action by me or by the Court.

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OF

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SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

OFFICERS OF THE COURT

EDWIN MEESE III, Attorney General.
CHARLES FRIED, Solicitor General.
JOSEPH F. SPANIOL, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
STEPHEN G. MARGETON, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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Syllabus

LOUISIANA PUBLIC SERVICE COMMISSION v. FEDERAL COMMUNICATIONS COMMISSION ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-871. Argued January 13, 1986—Decided May 27, 1986*

The Communications Act of 1934 (Act) grants to the Federal Communications Commission (FCC) broad authority to develop and regulate "interstate and foreign commerce in wire and radio communication," 47 U. S. C. § 151, but also provides that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service," § 152(b). In 1980 and 1981, the FCC issued orders changing its prior rules concerning practices for depreciating telephone plant and equipment. Subsequently, upon the petition of private telephone companies, the FCC ruled that § 220 of the Act, which expressly directs the FCC to prescribe depreciation practices, operated to pre-empt inconsistent state depreciation regulations for intrastate ratemaking purposes, and that, as an alternative ground, federal displacement of state regulation was justified as being necessary to avoid frustration of validly adopted federal policies. The Court of Appeals affirmed.

Held: Section 152(b) bars federal pre-emption of state regulation over depreciation of dual jurisdiction property for intrastate ratemaking purposes. Pp. 368-379.

(a) Sections 151 and 152(b) are naturally reconciled to define a national goal of the creation of a rapid and efficient telephone service, and to enact a *dual* regulatory system to achieve that goal. P. 370.

(b) Neither the legislative history of § 152(b) nor the Act's structure supports the view that the words "charges," "classifications," and "practices," as used in § 152(b), were intended to refer only to "customer charges" for specific services and not to depreciation charges. Those words are terms of art that are to be interpreted by reference to the

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*Together with No. 84-889, *California et al.* v. *Federal Communications Commission et al.*; No. 84-1054, *Public Utilities Commission of Ohio et al.* v. *Federal Communications Commission et al.*; and No. 84-1069, *Florida Public Service Commission* v. *Federal Communications Commission et al.*, on certiorari to the same court.

trade to which they apply, and thus they embrace depreciation. Pp. 371–373.

(c) There is no merit to the argument that § 152(b) does not control because the plant involved is used interchangeably to provide both interstate and intrastate service, and that § 152(b)'s reservation of authority to state commissions should be confined to intrastate matters that do not substantially affect interstate communication. Although state regulation will generally be displaced to the extent that it stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. Here, § 152(b) constitutes a congressional *denial* of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes, and the FCC may not take "pre-emptive" action merely because it thinks such action will best effectuate federal policy. Moreover, the Act itself establishes a process designed to resolve "jurisdictional separations" matters, by which process it may be determined what portion of an asset is employed to produce or deliver interstate as opposed to intrastate service, 47 U. S. C. § 410(c). Thus it is possible to apply different rates and methods of depreciation to plant once the correct allocation between interstate and intrastate use has been made. Pp. 373–376.

(d) Nor is there merit to the argument that § 220, which directs the FCC to prescribe the classes of property for which depreciation charges may be included under operating expenses in fixing rates, and which prohibits carriers from departing from FCC-set regulations respecting depreciation, requires automatic pre-emption of all state regulation respecting depreciation. The meaning of § 220 is not so unambiguous or straightforward as to override § 152(b)'s command that "*nothing* in this chapter shall be construed to apply or to give the Commission jurisdiction" over intrastate service. Pp. 376–378.

737 F. 2d 388, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, REHNQUIST, and STEVENS, JJ., joined. BURGER, C. J., and BLACKMUN, J., dissented. POWELL and O'CONNOR, JJ., took no part in the consideration or decision of the cases.

Lawrence G. Malone argued the cause for appellant in No. 84–871 and petitioners in Nos. 84–889, 84–1054, and 84–1069. With him on the briefs for petitioners in No. 84–889 were *David E. Blabey, Margery F. Baker, Janice E. Kerr, J. Calvin Simpson, Gretchen Dumas, Jack*

Shreve, Steven W. Hamm, Raymon E. Lark, Jr., Christopher K. Sandberg, Philip Stoffregen, Patrick Nugent, Frank J. Kelley, Attorney General of Michigan, *Louis J. Caruso,* Solicitor General, *Don L. Keskey* and *Leo H. Friedman,* Assistant Attorneys General, *Lynda S. Mounts, Stuart J. Bassin, William Paul Rodgers, Jr., Joel B. Shifman, Kenneth O. Eikenberry,* Attorney General of Washington, *Larry V. Rogers,* Assistant Attorney General, *Irwin I. Kimmelman,* Attorney General of New Jersey, *Carla Vivian Bello,* Deputy Attorney General, *Joseph I. Lieberman,* Attorney General of Connecticut, *William B. Gundling, Peter J. Jenkelunas,* and *Phyllis E. Lemell,* Assistant Attorneys General, *Brian Moline, Howard C. Davenport, Lloyd N. Moore, Jr., Steven M. Schur,* and *Robert Waldrum. Michael R. Fontham, Marshall B. Brinkley, William S. Bilenky, Paul Sexton, Anthony J. Celebreeze, Jr.,* Attorney General of Ohio, *Robert S. Tongren* and *Mary R. Brandt,* Assistant Attorneys General, and *Richard P. Rosenberry* filed briefs for appellant in No. 84–871 and petitioners in Nos. 84–1054 and 84–1069.

Solicitor General Fried argued the cause for the federal parties. With him on the brief were *Deputy Solicitor General Wallace, Christopher J. Wright, Jack D. Smith, Daniel M. Armstrong,* and *Jane E. Mago.*

Michael Boudin argued the cause for respondents American Telephone and Telegraph Co. et al. With him on the brief for the American Telephone and Telegraph Co. et al. were *Donald Mcg. Rose, John Wohlstetter, W. Preston Granbery, Albert H. Kramer, Mark J. Mathis, D. Michael Stroud, Vincent L. Sgrosso, William O'Keefe, Carolyn C. Hill, Thomas J. Reiman, Alfred Winchell Whittaker,* and *John B. Messenger. William R. Malone, Richard McKenna,* and *Philip A. Lacovara* filed a brief for GTE Service Corp. et al.†

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†Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Charles A. Graddick,* Attorney General of Alabama, and

JUSTICE BRENNAN delivered the opinion of the Court.

In these consolidated cases, we are asked by 26 private telephone companies and the United States to sustain the holding of the Court of Appeals for the Fourth Circuit that orders of the Federal Communications Commission (FCC or Commission) respecting the depreciation of telephone plant and equipment pre-empt inconsistent state regulation. They are opposed by the Public Service Commissions of 23 States, backed by 30 *amici curiae*, who argue that the Communications Act of 1934 (Act), 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.*, expressly denied the FCC authority to establish depreciation practices and charges insofar as they relate to the setting of rates for intrastate telephone service.

Respondents suggest that the heart of the cases is whether the revolution in telecommunications occasioned by the federal policy of increasing competition in the industry will be thwarted by state regulators who have yet to recognize or

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Stephen L. Skipper, William James Samford, Jr., and *Susan Shirock DePaola;* for the State of Louisiana et al. by *William J. Guste, Jr.*, Attorney General of Louisiana, *Richard M. Troy* and *J. David McNeill III*, Assistant Attorneys General, *John L. Gubbins, Philip S. Shapiro, Barry Zitser, Corrine K. A. Watanabe*, Attorney General of Hawaii, *Ronald Shigekane*, Deputy Attorney General, and *Brian Burnett*, Assistant Attorney General of Utah; for the State of Maine et al. by *William E. Furber, James E. Tierney*, Attorney General of Maine, *Joseph G. Donahue, Mary L. Vanderpan*, Assistant Attorney General of South Dakota, *Michael J. Bowers*, Attorney General of Georgia, *James O. Llewellyn*, Senior Assistant Attorney General, *Michael J. Henry*, Assistant Attorney General, *Steven Clark*, Attorney General of Arkansas, *John Doehm*, Assistant Attorney General of Nebraska, *John E. Archibold*, Special Assistant Attorney General of Colorado, *Kirk J. Emge*, and *Ellyn Elise Crutcher;* for the National Conference of State Legislatures et al. by *Benna Ruth Solomon* and *Joyce Holmes Benjamin;* and for the Telephone Ratepayers Association for Cost-Based and Equitable Rates by *Jack L. Landau.*

Briefs of *amici curiae* urging affirmance were filed for MCI Telecommunications Corp. by *Laurence H. Silberman* and *Henry D. Levine;* and for the United States Telephone Association by *Jack E. Herington, Joseph R. Fogarty, H. Russell Frisby, Jr.*, and *Marcia Spielholz.*

accept this national policy and who thus refuse to permit telephone companies to employ accurate accounting methods designed to reflect, in part, the effects of competition. We are told that already there may be as much as $26 billion worth of "reserve deficiencies" on the books of the Nation's local telephone companies, a reserve which, it is insisted, represents inadequate depreciation of a magnitude that threatens the financial ability of the industry to achieve the technological progress and provide the quality of service that the Act was passed to promote. Petitioners answer that the Act clearly establishes a system of dual state and federal authority over telephone service. They contend that the Act vests in the States exclusive power over intrastate rate-making, which power, petitioners argue, includes final authority over how depreciation shall be calculated for the purpose of setting those intrastate rates. Petitioners note also that the Due Process Clause of the Fourteenth Amendment necessarily represents a check on the power of the States to set depreciation rates at what would amount to confiscatory levels, and that respondents therefore overstate the danger of the States crippling the financial vitality of phone companies.

In deciding these cases, it goes without saying that we do not assess the wisdom of the asserted federal policy of encouraging competition within the telecommunications industry. Nor do we consider whether the FCC should have the authority to enforce, as it sees fit, practices which it believes would best effectuate this purpose. Important as these issues may be, our task is simply to determine where Congress *has* placed the responsibility for prescribing depreciation methods to be used by state commissions in setting rates for intrastate telephone service. In our view, the language, structure, and legislative history of the Act best support petitioners' position that the Act denies the FCC the power to dictate to the States as it has in these cases, and accordingly, we reverse.

I

The Act establishes, among other things, a system of dual state and federal regulation over telephone service, and it is the nature of that division of authority that these cases are about. In broad terms, the Act grants to the FCC the authority to regulate "interstate and foreign commerce in wire and radio communication," 47 U. S. C. § 151, while expressly denying that agency "jurisdiction with respect to . . . intrastate communication service . . . ." 47 U. S. C. § 152(b). However, while the Act would seem to divide the world of domestic telephone service neatly into two hemispheres—one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction—in practice, the realities of technology and economics belie such a clean parceling of responsibility. This is so because virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service, and is thus conceivably within the jurisdiction of both state and federal authorities. Moreover, because the same carriers provide both interstate and intrastate service, actions taken by federal and state regulators within their respective domains necessarily affect the general financial health of those carriers, and hence their ability to provide service, in the other "hemisphere."

In 1980 and 1981, the FCC issued two orders that ultimately sparked this litigation. In the 1980 order the FCC changed two depreciation practices affecting telephone plant. *Property Depreciation*, 83 F. C. C. 2d 267, reconsideration denied, 87 F. C. C. 2d 916 (1981). First, the order altered how carriers could group property subject to depreciation. Because carriers employ so many individual items of equipment in providing service, it would be impossible to depreciate each item individually, and property is therefore classified and depreciated in groups. The order permitted companies the option of grouping plant for depreciation pur-

poses based on its estimated service life (the "equal life" approach). This replaced the FCC's prior practice of requiring companies to classify and depreciate property according to its year of installation (the "vintage year" method). This change was made to allow depreciation to be based on smaller and more homogeneous groupings, which, the FCC concluded, would result in more accurate matching of capital recovery with capital consumption.

The 1980 order further sought to promote improved accounting accuracy by replacing "whole life" depreciation with the "remaining life" method. Under remaining life, and unlike the treatment under a whole life regime, if estimates upon which depreciation schedules are premised prove erroneous, they may be corrected in midcourse in a way that assures that the full cost of the asset will ultimately be recovered.

The third FCC-mandated change in plant depreciation was announced in a 1981 order, and involved the cost of labor and material associated with the installation of wire inside the premises of a business or residence. The new rule provided that this so-called "inside wiring" no longer be treated as a capital investment to be depreciated over time, but rather as a cost to be "expensed" in the year incurred. *Uniform System of Accounts*, 85 F. C. C. 2d 818.

Later in 1981, the National Association of Regulatory Utility Commissioners (NARUC) petitioned the FCC for a "clarification" of its order respecting inside wiring. Specifically, NARUC sought a declaration that the FCC's order did not restrict the discretion of state commissions to follow different depreciation practices in computing revenue requirements and rates for intrastate services.

On April 27, 1982, the FCC issued a memorandum opinion and order in which it agreed with NARUC that its order respecting the depreciation of inside wiring did not preclude state regulators "from using their own accounting and depreciation procedures for intrastate ratemaking pur-

pose[s] . . . ." *Uniform System of Accounts*, 89 F. C. C. 2d 1094, 1095. In reaching this conclusion, the FCC declared that it had not intended the 1981 order to "have any preemptive effect that does not arise by operation of law," and added that "[n]o policy of this Commission would be furthered by requiring state commissions to adhere to the rules we have adopted for the purposes of computing the interstate revenue requirement." *Id.*, at 1097. The FCC then examined the language and legislative history of sections of the Act dealing with jurisdiction and depreciation and found that they did not support the position that unwilling state commissions either were required by operation of law or could be required in the discretion of the FCC to follow all accounting and depreciation methods prescribed by the Commission. Two commissioners issued a written dissent in which they argued that the FCC had, in its 1981 order, intended to pre-empt inconsistent state depreciation practices, and that deference to the States was especially inappropriate where an important federal policy—that of nuturing a "brave new world" of competition in the industry—was at stake.

Respondents petitioned for reconsideration of the order, and the FCC reversed itself and held that § 220 of the Act, which deals expressly with depreciation, does operate automatically to pre-empt inconsistent state action where the Commission has acted to prescribe depreciation rates for a carrier. *Amendment of Part 31*, 92 F. C. C. 2d 864 (1983). As an alternative ground in support of pre-emption, the FCC asserted that federal displacement of state regulation is justifiable under the Act when necessary "to avoid frustration of validly adopted federal policies." *Id.*, at 875. Applying this standard to the facts before it, the FCC then found preemption appropriate. It noted that "adequate capital recovery is important to 'make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, world-wide wire and radio communication service with

adequate facilities at reasonable charges . . .' 47 U. S. C. 151," and that "[s]tate depreciation rate prescriptions that do not adequately provide for capital recovery in the competitive environment, which constitutes this Commission's policy in those markets found capable of supporting competition, would frustrate the accomplishment of that policy and are preemptable by this Commission." 92 F. C. C. 2d, at 876.

The Fourth Circuit affirmed. *Virginia State Corporation Comm'n* v. *FCC*, 737 F. 2d 388 (1984).[1] It acknowledged that the Act "does reserve to the states the authority to prescribe rates for intrastate telephone service," but determined that "reservation [of authority] is not to be read as preserving the states' sphere of intrastate jurisdiction at the expense of an efficient, viable interstate telecommunications network." *Id.*, at 392. The court then noted that the FCC had intended to pre-empt state practices, held that the authority to do so was statutorily entrusted to the FCC, and found that the regulations at issue were reasonably designed to ensure that federal objectives would not be frustrated. The Court of Appeals did not reach the Commission's holding that § 220 of the Act automatically operates to pre-empt state-prescribed depreciation at odds with depreciation ordered by the FCC. We granted certiorari to review the decision of the Court of Appeals. 472 U. S. 1025 (1985).[2]

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[1] Exclusive jurisdiction over final FCC orders lies with the courts of appeals. 28 U. S. C. § 2342(1).

[2] We originally postponed jurisdiction in No. 84-871, which came to us by way of appeal, rather than certiorari. A potential jurisdictional issue in that case arose as a result of the contention of the Government and the telephone companies that an appeal did not lie under 28 U. S. C. § 1254(2) because the decision of the Court of Appeals did not expressly strike down any particular state ratemaking order.

We need not address or resolve whether an appeal is proper in No. 84-871. The Louisiana Public Service Commission has asked that its jurisdictional statement be treated as a petition for a writ of certiorari, and we clearly have certiorari jurisdiction under 28 U. S. C. § 1254(1) to decide the case. We have, moreover, granted the petitions for certiorari in

II

Both the petitioners and the respondents characterize this litigation as one in which two different persons seek to drive one car, a condition the parties agree is unsatisfactory.[3] Where the parties disagree is with respect to who ought to be displaced from the controls. In order to address the contentions, it is appropriate to consider not only the structure of the Act and how it divides authority, but also the nature and function of depreciation as a component of utility regulation.

Depreciation is defined as the loss in service value of a capital asset over time. In the context of public utility accounting and regulation, it is a process of charging the cost of depreciable property, adjusted for net salvage, to operating expense accounts over the useful life of the asset. Thus, accounting practices significantly affect, among other things, the rates that customers pay for service. This is so because a regulated carrier is entitled to recover its reasonable expenses and a fair return on its investment through the rates

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Nos. 84-889, 84-1054, and 84-1069, 472 U. S. 1025 (1985). In accordance with our customary practice, see, *e. g.*, *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 43-44, n. 1 (1986), we dismiss the appeal in No. 84-871 and, treating the papers as a petition for certiorari, grant the writ of certiorari.

[3] Petitioners suggest that overreaching by the FCC has resulted in a situation where one person has a foot on the accelerator of a car while another person is attempting to steer. Tr. of Oral Arg. 9, 21. Although it is not evident from the metaphor whether petitioners' position is that the hand or the foot belongs to the FCC—whether, in other words, the FCC has stepped on the States' authority, or, heavy-handedly grabbed the wheel—the notion is that it is the States' responsibility under the Act to value property and to ascertain a rate base, and that it is inconsistent to confer depreciation authority—which is, according to the States, integrally bound up with valuation considerations and the determination of the rate base—on the FCC.

The respondents assert that this is "the case of two hands on the steering wheel," *id.*, at 40, by which, presumably, they mean to suggest that the hands belong to two different entities. Their position is that it makes no sense to have both the FCC and the state regulators depreciating the same piece of plant in two different ways.

it charges its customers, and because depreciation practices contribute importantly to the calculation of both the carrier's investment and its expenses. See *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 13–14 (1909). See generally, 1 A. Priest, Principles of Public Utility Regulation (1969); P. Garfield & W. Lovejoy, Public Utility Economics (1964); 1 A. Kahn, Economics of Regulation (1970).

The total amount that a carrier is entitled to charge for services, its "revenue requirement," is the sum of its current operating expenses, including taxes and depreciation expenses, and a return on its investment "rate base." The original cost of a given item of equipment enters the rate base when that item enters service. As it depreciates over time—as a function of wear and tear or technological obsolescence—the rate base is reduced according to a depreciation schedule that is based on an estimate of the item's expected useful life. Each year the amount that is removed from the rate base is included as an operating expense. In the telephone industry, which is extremely capital intensive, depreciation charges constitute a significant portion of the annual revenue requirement recovered in rates; the parties agree that depreciation charges amount to somewhere between 10% to 15% of the intrastate revenue requirement.

In essence, petitioners' argument is that the plain and unambiguous language of § 152(b) denies the FCC power to compel the States to employ FCC-set depreciation practices and schedules in connection with the setting of intrastate rates. In part, that section provides:

> "[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."

Petitioners maintain that "charges," "classifications," and "practices" are "terms of art" which denote depreciation and accounting, and thus that the question presented by these

cases is expressly answered by the statute. They argue also that the legislative history shows on a more general level that § 152(b) was intended to reserve to the States exclusive regulatory jurisdiction over intrastate service, especially intrastate ratemaking, and that given the importance of depreciation to ratemaking, to require state regulators to follow FCC depreciation practices would frustrate the statutory design of preserving the States' ratemaking authority over intrastate service. Petitioners maintain that to confer this power on the FCC would be, in effect, to write the jurisdictional limitation of § 152(b) out of the Act.

Where petitioners focus on § 152(b), respondents' principal argument is that this litigation turns on § 220 of the Act, which they insist constitutes an unambiguous grant of power to the FCC exclusively to regulate depreciation. Their argument is that once the FCC has acted pursuant to that section, States are automatically precluded from prescribing different depreciation practices or rates. Section 220(b) states:

> "The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the [classes] of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its

operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses."

Respondents assert that their understanding of § 220(b) is bolstered by other substantive provisions of § 220. They note, for example, that under § 220(g), once the FCC has prescribed the "forms and manner of keeping accounts," it is "unlawful . . . to keep any other accounts . . . than those so prescribed . . . or to keep the accounts in any other manner than that prescribed or approved by the Commission," and that subsections (d) and (e) of § 220 provide for civil and criminal penalties for failing to keep accounts as determined by the Commission. Moreover, § 220(h) permits the FCC in its discretion, if it finds such action to be "consistent with the public interest," to "except the carriers of any particular class or classes in any State from any of the requirements" under the section "in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates." Respondents argue that this provision strongly suggests that unless the FCC affirmatively acts to waive or delegate its authority, *i. e.*, to "except" carriers from its regulation, then under § 220(h) the States impliedly cannot adopt inconsistent regulations. Respondents also assert that § 220(i) makes clear that the role of the States in depreciation is essentially advisory only. That section provides that the FCC, before exercising its authority, "shall notify" the state commissions and provide an opportunity to the States to "present [their] views" and also instructs the FCC to "consider such views and recommendations." According to respondents, "Congress gave the states an opportunity to present their views because it expected them to be bound by the resulting prescriptions." Joint Brief for Listed Private Respondents 14 (Joint Brief). In sum, the position of respondents is that "Congress clearly intended that there be one regime—rather than multiple regimes—of deprecia-

tion for each subject carrier. The FCC was given responsibility for establishing such a regime, and its depreciation decisions have to be respected unless and until it relinquishes authority to the states in individual instances. The states' interest is recognized but their role is confined to providing their 'views and recommendations.'" *Ibid.*

Although respondents rely primarily on § 220 to support pre-emption, they also urge as an alternative and independent ground the reasoning relied on by the Court of Appeals, namely that the FCC is entitled to pre-empt inconsistent state regulation which frustrates federal policy. It is in the context of this argument that respondents most forcefully contend that state regulators must not be permitted to jeopardize the continued viability of the telecommunications industry by refusing to permit carriers to depreciate plant in a way that allows for accurate and timely recapturing of capital. This argument, which is pressed especially by the Solicitor General, relies largely on § 151, which in broad terms directs the FCC to develop a rapid and efficient national telephone network.

III

The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones* v. *Rath Packing Co.*, 430 U. S. 519 (1977), when there is outright or actual conflict between federal and state law, *e. g.*, *Free* v. *Bland*, 369 U. S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice* v. *Sante Fe Elevator Corp.*, 331 U. S. 218 (1947), or where the state law stands as

an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines* v. *Davidowitz*, 312 U. S. 52 (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141 (1982), *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691 (1984).

In the present cases, two of these "varieties" of pre-emption are alleged. As noted above, respondents argue that § 220 by its terms confers exclusive regulatory power over depreciation on the FCC, thus raising a claim that Congress has expressly manifested a clear intent to displace state law. In addition, respondents maintain that the refusal of the States to accept the FCC-set depreciation schedules and rules will frustrate the federal policy of increasing competition in the industry, and thus that state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." In our view, the jurisdictional limitations placed on the FCC by § 152(b), coupled with the fact that the Act provides for a "separations" proceeding to determine the portions of a single asset that are used for interstate and intrastate service, 47 U. S. C. § 410(c), answer both pre-emption theories.

The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law. *Rice* v. *Sante Fe Elevator Corp.*, *supra*. The Act itself declares that its purpose is "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U. S. C. § 151. In order to accomplish this goal, Congress created the FCC to centralize and consolidate the regulatory responsibility that had previously been the province of the Interstate Commerce Commis-

sion and the Federal Radio Commission under predecessor statutes. See generally McKenna, Pre-Emption Under the Communications Act, 37 Fed. Comm. L. J. 1, 12–18 (1985). To this degree, § 151 may be read as lending some support to respondents' position that state regulation which frustrates the ability of the FCC to perform its statutory function of ensuring efficient, nationwide phone service may be impliedly barred by the Act.

We might be inclined to accept this broad reading of § 151 were it not for the express jurisdictional limitations on FCC power contained in § 152(b). Again, that section asserts that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . . ." By its terms, this provision fences off from FCC reach or regulation intrastate matters—indeed, including matters "in connection with" intrastate service. Moreover, the language with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC.

In interpreting §§ 151 and 152(b), we are guided by the familiar rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict. *Washington Market Co.* v. *Hoffman*, 101 U. S. 112 (1879). We agree with petitioners that the sections are naturally reconciled to define a national goal of the creation of a rapid and efficient phone service, and to enact a *dual* regulatory system to achieve that goal. Moreover, were we to find the sections to be in conflict, we would be disinclined to favor the provision declaring a general statutory purpose, as opposed to the provision which defines the jurisdictional reach of the agency formed to implement that purpose.

Respondents advance a number of arguments to counter the view that § 152(b) forbids the FCC to prescribe deprecia-

tion practices and charges in the context of ratemaking for intrastate service. We address each in turn.

A

Respondents assert that the legislative history of § 152(b), as well as the structure of the Act, shows that "charges" and "classifications" refer only to "customer charges," not depreciation charges, and thus that § 152(b) does not purport to limit the FCC power to regulate depreciation. They seek to support this narrow reading of § 152(b) by noting that the words "charges," "classifications," "practices," and "regulations" appear throughout the Act in contexts where it is clear that what is meant is charges which relate directly to carriers' rate and service relationships with their customers, rather than depreciation or accounting charges. See §§ 201–205. Reading the sections *in pari materia*, we are told, makes it apparent that Congress was concerned in § 152(b) with preserving state autonomy over the rates charged by carriers for specific services, not over depreciation. According to respondents, this reading is bolstered by the legislative history of the section, which reveals that the provision was proposed by state regulators in reaction to this Court's decision in the so-called *Shreveport Rate Case*, *Houston, E. & W. T. R. Co.* v. *United States*, 234 U. S. 342 (1914), which held, among other things, that the Interstate Commerce Commission had the power to order an increase in specific intrastate railroad rates charged to customers in order to avoid discrimination against interstate commerce. "In other words, Section 2(b)(1) was from the outset concerned with protection against federal preemption of the states' setting of individual customer charges for specific intrastate services." Joint Brief 34.

We reject this narrow reading of § 152(b). "Charges," "classifications," and "practices," are terms often used by accountants, regulators, courts, and commentators to denote depreciation treatment, see, *e. g.*, *United Railways & Elec-*

tric Co v. *West*, 280 U. S. 234, 262 (1930); *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 158 (1930); Wheat, The Regulation of Interstate Telephone Rates, 51 Harv. L. Rev. 846, 859 (1938); A. Kahn, Economics of Regulation (1970), and in accordance with the rule of construction that technical terms of art should be interpreted by reference to the trade or industry to which they apply, *Corning Glass Works* v. *Brennan*, 417 U. S. 188 (1974), we find that they do embrace depreciation. It is worth noting that the FCC itself, in the very orders underlying this litigation, used "charges" to mean "depreciation charges." *E. g.*, *Property Depreciation*, 83 F. C. C. 2d, at 275.

Nor does the *Shreveport Rate Case* carry the load that respondents ask of it. In that case, this Court interpreted the constitutional and statutory authority of the Interstate Commerce Commission to include the power to regulate, indeed, set, intrastate rates in order to prevent discrimination against interstate traffic. It is certainly true, as respondents assert, that when Congress was drafting the Communications Act, § 152(b) was proposed and supported by the state commissions in reaction to what they perceived to be the evil of excessive federal regulation of intrastate service such as was sanctioned by the *Shreveport Rate Case;* but we find no authority in the legislative history to support respondents' position that the sole concern of the state commissioners was with "protection against federal preemption of the states' setting of individual customer charges for specific intrastate services." Joint Brief 34. Rather, the legislative history reveals that representatives from the industry and the States were fully aware that what was at stake in the Act were broad powers to regulate, including, but not limited to, the setting of individual rates, and that "[t]he question of an appropriate division between federal and state regulatory power was a dominating controversy in 1934." McKenna, 37 Fed. Comm. L. J., at 2. In other words, while we agree that provisions in both the Senate and House bills were de-

signed to overrule the *Shreveport Rate Case*, we are not persuaded that it was anyone's understanding that this "overruling" could or should be accomplished by merely including in the Act one section which forbade the FCC to establish specific rates for certain intrastate services; had this been the intention, it would hardly have been necessary to deny the FCC the jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . . ." Presumably, it would have sufficed simply to deny the FCC jurisdiction over "rates." In sum, given the breadth of the language of § 152(b), and the fact that it contains not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction (". . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service . . ."), we decline to accept the narrow view urged by respondents, and hold instead that it denies the FCC the power to pre-empt state regulation of depreciation for intrastate ratemaking purposes.

B

Accordingly, we cannot accept respondents' argument that § 152(b) does not control because the plant involved in this case is used interchangeably to provide both interstate and intrastate service, and that even if § 152(b) does reserve to the state commissions some authority over "certain aspects" of intrastate communication, it should be "confined to intrastate matters which are 'separable from and do not substantially affect' interstate communication." Joint Brief 36. With respect to the present cases, respondents insist that the refusal of the States to employ accurate measures of depreciation will have a severe impact on the interstate communications network because investment in plant will be recovered too slowly or not at all, with the result that new investment will be discouraged to the detriment of the entire network. Numerous decisions of the Courts of Appeals are cited as au-

thority for the proposition that § 152(b) applies as a jurisdictional bar to FCC pre-emptive action only when two factors are present; first, when the matter to be regulated is purely local and second, when interstate communication is not affected by the state regulation which the FCC would seek to pre-empt. *E. g., North Carolina Utilities Comm'n* v. *FCC*, 537 F. 2d 787 (CA4), cert. denied, 429 U. S. 1027 (1976); *North Carolina Utilities Comm'n* v. *FCC*, 552 F. 2d 1036 (CA4), cert. denied, 434 U. S. 874 (1977); *Puerto Rico Telephone Co.* v. *FCC*, 553 F. 2d 694 (CA1 1977); *New York Telephone Co.* v. *FCC*, 631 F. 2d 1059 (CA2 1980).

The short answer to this argument is that it misrepresents the statutory scheme and the basis and test for pre-emption. While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hines*, 312 U. S., at 67, it is also true that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. Section 152(b) constitutes, as we have explained above, a congressional *denial* of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes. Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency

power to override Congress. This we are both unwilling and unable to do.

Moreover, we reject the intimation—the position is not strongly pressed—that the FCC cannot help but pre-empt state depreciation regulation of joint plant if it is to fulfill its statutory obligation and determine depreciation for plant used to provide interstate service, *i. e.*, that it makes no sense within the context of the Act to depreciate one piece of property two ways. The Communications Act not only establishes dual state and federal regulation of telephone service; it also recognizes that jurisdictional tensions may arise as a result of the fact that interstate and intrastate service are provided by a single integrated system. Thus, the Act itself establishes a process designed to resolve what is known as "jurisdictional separations" matters, by which process it may be determined what portion of an asset is employed to produce or deliver interstate as opposed to intrastate service. 47 U. S. C. §§ 221(c), 410(c). Because the separations process literally separates costs such as taxes and operating expenses between interstate and intrastate service, it facilitates the creation or recognition of distinct spheres of regulation. See *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133 (1930). As respondents concede, and as the Court of Appeals itself acknowledged, 737 F. 2d, at 396, it is certainly possible to apply different rates and methods of depreciation to plant once the correct allocation between interstate and intrastate use has been made,[4] Brief for Respondent

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[4] Thus, these cases are readily distinguishable from those in which FCC pre-emption of state regulation was upheld where it was *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation. See, *e. g.*, *North Carolina Utilities Comm'n* v. *FCC*, 537 F. 2d 787 (CA4), cert. denied, 429 U. S. 1027 (1976), and *North Carolina Utilities Comm'n* v. *FCC*, 552 F. 2d 1036 (CA4), cert. denied, 434 U. S. 874 (1977) (Where FCC acted within its authority to permit subscribers to provide their own telephones, pre-emption of inconsistent state regulation prohibiting subscribers from connecting their own phones unless used ex-

GTE 36, just as it is possible to determine that, for example, 75% of an employee's time is devoted to the production of intrastate service, and only one quarter to interstate service, and to allocate the cost of that employee accordingly. Respondents maintain that if the FCC and the States apply different depreciation practices to the same property, then the "whole purpose of depreciation, which is to match depreciation charges of the equipment with the revenues generated by its use," will be frustrated. *Ibid.* But this is true and a concern only to the degree that the principles, judgments, and considerations that underlie depreciation rules reflect only "real world" facts, rather than choices made by regulators partially on the basis of fact and partially on the basis of such factors as the perceived need to improve the industry's cash flow, spur investment, subsidize one class of customer, or any other policy factor. What is really troubling respondents, of course, is their sense that state regulators will not allow them sufficient revenues. While we do not deprecate this concern, § 152(b) precludes both the FCC and this Court from providing the relief sought. As we so often admonish, only Congress can rewrite this statute.

C

We also reject respondents' argument that § 220, which deals specifically[5] and expressly with depreciation, requires

clusively in interstate service upheld since state regulation would negate the federal tariff).

[5] Respondents maintain that since "[s]pecific terms prevail over the general," *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 228 (1957), and § 220 deals specifically with depreciation, the general language of § 152(b) should not be read to bar FCC regulation of depreciation. The rule of construction cited by respondents is simply inapplicable in the context of these cases. First, § 152(b) deals with jurisdiction, and thus addresses a different subject than § 220, which respondents correctly characterize as involving depreciation. Thus, while § 152(b) may be more "general" than § 220, the sections are not general or specific with respect to each other. Second, § 152(b) not only imposes jurisdictional limits on the power of a federal agency, but also, by stating that nothing in the Act shall

automatic pre-emption of all state regulation respecting depreciation. As noted above, § 220 directs the FCC to prescribe the classes of property for which depreciation charges may be included under operating expenses, and prohibits carriers from departing from FCC-set regulations respecting depreciation. While it is, no doubt, possible to find some support in the broad language of the section for respondents' position, we do not find the meaning of the section so unambiguous or straightforward as to override the command of § 152(b) that "*nothing* in this chapter shall be construed to apply or to give the Commission jurisdiction" over intrastate service. We note, for example, that a very strict reading of § 220—which is what respondents urge and upon which they ultimately rely—is simply untenable. There can be no dispute, for example, regarding the fact that taxing authorities of the Federal Government are entitled to require the carriers to employ, for tax purposes, depreciation practices and schedules different from those which might be ordered by the FCC for interstate ratemaking purposes. We are advised by petitioners that carriers do, as a routine matter, keep "separate" books in this connection. Were respondents' reading of § 220 correct, this practice would violate the Act, and taxing authorities would be compelled to compute taxation on the basis of depreciation schedules employed by the FCC for ratemaking purposes. Moreover, despite the sweeping language of § 220, nowhere does it even allude to, let alone expressly refer to, depreciation as a component of state ratemaking. Nor is the word "pre-emption" used.

It is thus at least possible, as some petitioners argue, that the section was intended to do no more than spell out the authority of the FCC over depreciation in the context of interstate regulation. It is similarly plausible, as other

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be construed to extend FCC jurisdiction to intrastate service, provides its own rule of statutory construction. In other words, the Act itself, in § 152(b) presents its own specific instructions regarding the correct approach to the statute which applies to how we should read § 220.

petitioners contend, that the section, which is captioned "Accounts, records, and memoranda," was addressed to the plenary authority of the FCC to dictate how the carriers' books would be kept for the purposes of financial reporting, in order to ensure that investors and regulators would be presented with an accurate picture of the financial health of the carriers. In any event, we need not, in order to decide these cases, define fully the scope of the section, and we hold only that § 220 does not operate to pre-empt state depreciation regulation for intrastate ratemaking purposes.[6]

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[6] Respondents insist that the legislative history of the section proves that it was intended to provide the FCC with power to pre-empt state regulation over depreciation practices. They rely in particular on the fact that Congress, in drafting § 220, reenacted, almost verbatim, § 20(5) of the Interstate Commerce Act, 49 U. S. C. App. § 20(5), which, respondents contend, had already been construed to require the ICC to prescribe depreciation for both telephone companies and railroads. *Telephone and Railroad Depreciation Charges*, 118 I. C. C. 295 (1926). Respondents note further that during hearings on an early version of the Act, state commissioners testifying before Congress argued that reenactment of § 20(5) and other provisions would permit the FCC to usurp "[a]ll matters of depreciation . . . without regard to the action upon the same subject by the State Commission." Hearings on S. 6 before the Senate Committee on Interstate Commerce, 71st Cong., 2d Sess., pt. 15, p. 2243 (1930) (resolution of Montana Commission). They also note that state regulators did manage—initially—to persuade the drafters of the Act to add a new § 220(j), which expressly permitted the States to prescribe their own depreciation practices for the purposes of determining intrastate rates. The fact that this section was rejected by the Conference Committee, despite the strong support of the States, we are told, is strong evidence that Congress intended to preserve in the FCC the broad power over depreciation that had been conferred on the ICC.

We are not persuaded. First, § 20(5) of the Interstate Commerce Act had never been interpreted to prohibit state commissioners from requiring carriers to keep additional records for the purposes of intrastate ratemaking. As the FCC itself noted in its 1982 order denying preemption, *Uniform System of Accounts*, 89 F. C. C. 2d 1094, 1101, it was only in dictum that the ICC suggested that it possessed authority under § 20(5) to prescribe depreciation for all property that might be used in interstate commerce, and that dictum did not even purport to address

Like many statutes, the Act contains some internal inconsistencies, vague language, and areas of uncertainty. It is not a perfect puzzle into which all the pieces fit. Thus, it is with the recognition that there are not crisp answers to all of the contentions of either party that we conclude that § 152(b) represents a bar to federal pre-emption of state regulation over depreciation of dual jurisdiction property for intrastate ratemaking purposes.

For the reasons stated above, the judgment of the Court of Appeals for the Fourth Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and JUSTICE BLACKMUN dissent.

JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of these cases.

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whether federal prescription of depreciation would pre-empt the States from prescribing additional depreciation practices for its regulatory purposes. Moreover, that is how this Court read the ICC order. *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 159 (1930). And in *Northwestern Bell Telephone Co.* v. *Nebraska State Railway Comm'n*, 297 U. S. 471, 478 (1936), we expressly left open whether an ICC prescription, if issued, would be pre-emptive of state regulation.

Moreover, while it is true that Congress rejected the state-proposed § 220(j), again, as the FCC noted in its order denying pre-emption, respondents make too much of too little. "The record of the Congressional hearings indicates little more than that the supporters of original section 220(j) believed that the provision was desirable to resolve a previous unsettled point of law under the predecessor provision of the Interstate Commerce Act. . . . At most, this legislative history indicates that the 1934 Congress was not sure whether reenactment of the Interstate Commerce Act language would or would not preempt state accounting and depreciation rules and did not choose to resolve the question at that time." 89 F. C. C. 2d, at 1103, 1106.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL–CIO *v.* DAVIS

APPEAL FROM THE SUPREME COURT OF ALABAMA

No. 85–217. Argued February 25, 1986—Decided May 27, 1986

Appellee was formerly employed as a ship superintendent for a stevedoring company. When he, with others, attempted to organize the company's ship superintendents and to affiliate with appellant Union, a union official allegedly assured them that the Union would get them their jobs back if they were discharged for participating in union-related activities. After he was discharged apparently because of such activities, appellee filed a suit against appellant in an Alabama Circuit Court, alleging fraud and misrepresentation under an Alabama statute. The case proceeded to trial, and a jury entered a verdict in appellee's favor. Throughout the trial, appellant defended the suit on the merits, and not until its motion for judgment notwithstanding the verdict did it claim that the Circuit Court lacked jurisdiction because the suit was pre-empted by the National Labor Relations Act (NLRA). The Circuit Court denied the motion and entered judgment on the verdict. The Alabama Supreme Court affirmed, holding that the pre-emption claim was a waivable defense that was required to be affirmatively pleaded under Alabama law, and that since it was not so pleaded, it was deemed waived.

Held:

1. The Alabama Supreme Court's holding that appellant had waived its pre-emption claim by noncompliance with state procedural rules governing affirmative defenses did not present an independent and adequate state ground supporting the court's judgment, and the court erred in declining to address that claim on the merits. Pp. 387–393.

2. The general standard for determining whether state proceedings are pre-empted by the NLRA, *i.e.*, whether the conduct at issue was arguably protected or prohibited by the NLRA, *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, is applicable to this case. Where state law is pre-empted by the NLRA under *Garmon* and its progeny, the state courts lack the power to adjudicate the claims that trigger pre-emption. Here, if appellee was arguably an employee, rather than a supervisor, the pre-emption issue should be initially decided by the National Labor Relations Board (NLRB), not the state courts. Because the pre-emption issue turns on appellee's status, the appellant's pre-emption claim must be supported by a showing sufficient to permit the NLRB to find that appellee was an employee. On the

record, appellant has made no such showing. The mere lack of a conclusive determination by the NLRB as to appellee's status does not make out an arguable case for pre-emption. Pp. 394–399.

470 So. 2d 1215, affirmed.

WHITE, J., delivered the opinion of the Court, in Part I of which all other Members joined, in Part II of which BURGER, C. J., and BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, and in Part III of which all other Members, except BLACKMUN, J., joined. REHNQUIST, J., filed an opinion concurring in part and concurring in the judgment, in which POWELL, STEVENS, and O'CONNOR, JJ., joined, *post*, p. 399. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 403.

Charles R. Goldburg argued the cause for appellant. With him on the briefs was *Thomas W. Gleason.*

Bayless E. Biles argued the cause and filed a brief for appellee.*

JUSTICE WHITE delivered the opinion of the Court.

The opinion in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), set forth a general standard for determining when state proceedings or regulations are pre-empted by the provisions of the National Labor Relations Act, see 29 U. S. C. § 151 *et seq.* (1982 ed. and Supp. II): Subject to exception only in limited circumstances, "[w]hen an activity is arguably subject to § 7 or § 8 of the Act [29 U. S. C. § 157 or § 158], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U. S., at 245. This general standard has been applied in a multitude of cases decided since *Garmon*, and it must be applied again today. Before addressing that question, however, we must consider the very nature of such pre-emption—whether *Garmon* pre-emption is in the nature of an affirmative de-

*Briefs of *amici curiae* urging affirmance were filed for the Council of State Governments et al. by *Benna Ruth Solomon, Beate Bloch, Zachary D. Fasman*, and *Clifton S. Elgarten;* and for the National Right to Work Legal Defense Foundation, Inc., by *Glenn M. Taubman.*

fense that must be asserted in the trial court or be considered forever waived or whether it is in the nature of a challenge to a court's power to adjudicate that may be raised at any time.

I

Appellee Larry Davis was formerly employed by Ryan-Walsh Stevedoring Co. in Mobile, Alabama. At the times relevant to the events that gave rise to this suit, he was a ship superintendent or trainee ship superintendent. The ship superintendents apparently served as the immediate superiors of the longshoremen employed by Ryan-Walsh. They were on salary, however, and their compensation was generally lower than that received by the longshoremen, who worked on an hourly basis.

In early 1981, Ben Trione, one of the ship superintendents who worked for Ryan-Walsh, contacted the appellant International Longshoremen's Association (ILA or Union), a union that represents longshoremen and other employees on the waterfront, to discuss the possibility of organizing the superintendents and affiliating with the Union. Although the parties here dispute the content of the conversations that occurred at this stage between Trione and the ILA representatives regarding the ship superintendents and their eligibility for union membership, it is undisputed that a meeting of the superintendents was organized by Trione and attended by Benny Holland, an ILA official from Houston, Texas.

At this meeting, several of the superintendents expressed a fear of being discharged for participating in union-related activities. According to Davis' witnesses, Holland's response to this was to reassure them that the Union would get them their jobs back with backpay if that happened. According to Holland, however, Holland's response was that they would be protected in that manner only if they were determined not to be supervisors under the Act and that he did

not know whether or not they would be considered supervisors.[1] Holland further testified that he had submitted this issue to the Union's lawyers and had not received a definitive opinion from them by the time of the meeting. The meeting, according to all witnesses, resulted in a number of the ship superintendents, including Davis, signing pledge cards and a Union charter application with the ILA.[2]

On the day following the organizational meeting, Ryan-Walsh fired Trione. Trione contacted the ILA, which supplied him with an attorney. The attorney filed an unfair labor practice charge against Ryan-Walsh with the National Labor Relations Board, alleging that Trione was an employee under the Act and that Ryan-Walsh had violated § 8(a)(1) and § 8(a)(3) of the Act by discharging him for participating in

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[1] Under § 2(11) of the Act, 61 Stat. 138, a supervisor is defined as follows:

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U. S. C. § 152(11).

Supervisors as defined in this section are expressly not considered to be employees as defined in § 2(3) of the Act. 29 U. S. C. § 152(3).

Only employees as defined in § 2(3), however, are given rights under § 7 of the Act, 61 Stat. 140, 29 U. S. C. § 157, which provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

[2] Apparently, however, an insufficient number of cards was obtained, see 29 U. S. C. § 159(a), and no representation petition was filed with the NLRB.

union activities. See 29 U. S. C. §§ 158(a)(1), (3).[3] The NLRB's Regional Director, however, determined that Trione was a supervisor under the Act and declined to issue a complaint.[4] Trione did not, as he had a right to do, appeal this determination to the NLRB General Counsel. See 29 CFR § 102.19 (1985). Shortly thereafter, Davis was also dis-

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[3] Section 8(a) of the Act, 49 Stat. 452, in turn, provides in relevant part: "It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

. . . . .

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." 29 U. S. C. §§ 158(a)(1), (3).

[4] Under the Act, an employer does not commit an unfair labor practice under § 8(a)(3) if it fires a supervisor for union-related reasons: An employer "is at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor union." *Florida Power & Light Co.* v. *Electrical Workers*, 417 U. S. 790, 812 (1974). See also *Operating Engineers* v. *Jones*, 460 U. S. 669, 671, n. 1 (1983); *Beasley* v. *Food Fair of North Carolina, Inc.*, 416 U. S. 653, 656–657 (1974). An employer may, however, *allow* its supervisory employees to join a union. See *Florida Power & Light, supra*, at 808, 813. Even though supervisors are not covered by the Act, a discharge may constitute a § 8(a)(1) unfair labor practice if it infringes on the § 7 rights of the employer's nonsupervisory employees. See, *e. g.*, *Parker-Robb Chevrolet, Inc.*, 262 N. L. R. B. 402 (1982), aff'd *Automobile Salesmen's Union Local 1095* v. *NLRB*, 229 U. S. App. D. C. 105, 711 F. 2d 383 (1983) (summarizing post-1982 standard for finding violations of the Act in disciplinary actions taken against supervisors).

In response to Trione's complaint, the Regional Director stated his conclusions as follows:

"As a result of the investigation, it appears that further proceedings on the charge [of a violation under Section 8 of the Act] are not warranted inasmuch as the evidence disclosed that Mr. Trione was employed as a supervisor within the meaning of Section 2(11) of the Act. For this reason, Section 8(a)(3) would not be applicable to his discharge inasmuch as 'supervisors' are specifically excluded from the definition of employee under the Act. Nor is there sufficient evidence to establish that Mr. Trione's discharge violated Section 8(a)(1) of the Act. I am, therefore, refusing to issue a complaint in this matter." App. 62a–63a.

charged by Ryan-Walsh, apparently for his continued efforts to organize the ship superintendents and to join the Union.

In response to his discharge, Davis filed this suit against the ILA in the Circuit Court of Mobile County, alleging fraud and misrepresentation under Ala. Code § 6–5–101 (1975).[5] The case proceeded to trial, and a jury entered a verdict in Davis' favor in the amount of $75,000. Throughout the trial, the Union defended the suit on the merits, raising no issue that the suit was pre-empted by the NLRA. In its motion for judgment notwithstanding the verdict, however, the ILA raised for the first time a claim that the state court lacked jurisdiction over the case because the field had "been pre-empted by federal law and federal jurisdiction." App. 96a. The Circuit Court denied the Union's motion without opinion and entered judgment on the jury's verdict.

On appeal to the Supreme Court of Alabama, the ILA argued that pre-emption was not a waivable defense and that the state fraud and misrepresentation action was pre-empted under *Garmon*. Although acknowledging that other state courts had adopted the ILA's position that NLRA pre-emption was nonwaivable,[6] the Alabama court held that "[i]t is not the circuit court's subject matter jurisdiction to adjudicate a damage claim for the tort of fraud—even if it arises in the context of a labor-related dispute—that is pre-empted. Rather, it is the state court's *exercise* of that power that is subject to preemption." 470 So. 2d 1215, 1216 (1985). The court's view was that as a state court of general jurisdiction the Circuit Court had had subject-matter jurisdiction over this ordinary tort claim for damages. As a waivable defense, the pre-emption claim was required under Alabama

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[5] That section provides: "Misrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud."

[6] See, *e. g.*, *Consolidated Theatres, Inc.* v. *Theatrical Stage Employees Union, Local 16*, 69 Cal. 2d 713, 447 P. 2d 325 (1968).

law to be affirmatively pleaded. Since it was not so pleaded, it was deemed waived.[7]

The Alabama Supreme Court, although holding that the ILA's pre-emption claim had been waived, stated in a footnote that if it had had occasion to reach the merits, it would have found no pre-emption:

> "The instant facts fall squarely within the 'peripheral concern' exception to federal preemption of state jurisdiction of labor-related disputes. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243–44 (1959). The National Labor Relations Board has already determined that an employer's supervisors are not protected by the Labor Management Relations Act. Thus, in this case, [Davis] has no remedy before the NLRB, and this dispute, although somewhat labor-related, is, at most, only of 'peripheral concern' to the NLRB. See, *e. g.*, *Linn* v. *United Plant Guard Workers Local 114*, 383 U. S. 53 (1966)." *Id.*, at 1216–1217, n. 2 (citations omitted).

The Alabama Supreme Court accordingly affirmed the judgment against the Union. The Union appealed to this Court; Davis moved to dismiss the appeal on the ground that the decision below rested on an adequate and independent state ground because the Alabama Supreme Court's decision was based on an application of a state procedural rule. The ILA's submission, however, raised a substantial question whether reliance on the procedural rule rested on an erroneous view of the scope of *Garmon* pre-emption, a matter of

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[7] In reaching this conclusion, the Alabama Supreme Court noted that Alabama Rule of Civil Procedure 8(c) requires that affirmative defenses be specifically asserted and concluded that although pre-emption was not specifically listed as an affirmative defense under Rule 8 "it quite obviously falls within the nature of those defenses specifically listed." 470 So. 2d, at 1216, n. 1. See also *Powell* v. *Phenix Federal Savings & Loan Assn.*, 434 So. 2d 247 (Ala. 1983) (holding claim of pre-emption of state-law affirmative defenses to be deemed waived if not affirmatively pleaded).

federal law, and hence whether the procedural ground relied on was adequate and independent. We noted probable jurisdiction, 474 U. S. 899 (1985).[8]

II

A

Given the reliance of the Alabama Supreme Court on its procedural rule governing the presentation of affirmative defenses, we first decide whether that rule in this case represents an independent and adequate state ground supporting the judgment below. If it does, our review is at an end, for we have no authority to review state determinations of purely state law. Nor do we review federal issues that can have no effect on the state court's judgment. See, *e. g.*, *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 566 (1977); *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945); *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935). The inquiry into the sufficiency of the asserted state ground, however, is one that we undertake ourselves. See *Michigan* v. *Long*, 463 U. S. 1032, 1038 (1983); *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773 (1931).

In concluding that the Union's pre-emption claim was procedurally barred, the Alabama Supreme Court first held that because the Mobile County Circuit Court, as a state court of general jurisdiction, had subject-matter jurisdiction over the simple tort claim of misrepresentation, there could be no pre-emption of that court's actual jurisdiction. Only the exercise of that jurisdiction could be pre-empted.

This explanation has a certain logic to it; but the point is not whether *state* law gives the state courts jurisdiction over particular controversies but whether jurisdiction provided by

[8] Assuming, as we decide below, that the judgment below did not rest on an independent and adequate state ground and that we therefore have jurisdiction over this case, this is a proper appeal under 28 U. S. C. § 1257(2), since the Alabama Supreme Court upheld a state statute, § 6–5–101, as applied, against a claim of federal pre-emption.

state law is itself pre-empted by *federal* law vesting exclusive jurisdiction over that controversy in another body. It is clearly within Congress' powers to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution. See, *e. g.*, *Kalb* v. *Feuerstein*, 308 U. S. 433 (1940). Whether it has done so in a specific case is the question that must be answered when a party claims that a state court's jurisdiction is pre-empted. Such a determination of congressional intent and of the boundaries and character of a pre-empting congressional enactment is one of federal law. Pre-emption, the practical manifestation of the Supremacy Clause, is always a federal question.

If the Alabama procedural ruling under state law implicates an underlying question of federal law, however, the state law is not an independent and adequate state ground supporting the judgment:

> "[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded. . . . In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory." *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985) (citing *Herb* v. *Pitcairn*, *supra*, at 126; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164 (1917)).

To determine the sufficiency of the state procedural ground relied upon by the Alabama Supreme Court we must ascertain whether that court correctly resolved the antecedent federal question regarding the nature of *Garmon* pre-emption under the NLRA. Specifically, the question is whether *Garmon* pre-emption is a waivable affirmative defense such that a state court may adjudicate an otherwise pre-empted claim if the *Garmon* defense is not timely raised

or whether *Garmon* pre-emption is a nonwaivable foreclosure of the state court's very jurisdiction to adjudicate.

B

The Court's opinion in *Garner* v. *Teamsters*, 346 U. S. 485, 490–491 (1953), articulated what has come to be the accepted basis for the broadly pre-emptive scope of the NLRA:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Building on this cornerstone, the *Garmon* Court went on to set out the now well-established scope of NLRA pre-emption. Given the NLRA's "complex and interrelated federal scheme of law, remedy, and administration," 359 U. S., at 243, the Court held that "due regard for the federal enactment requires that state jurisdiction must yield," *id.*, at 244, when the activities sought to be regulated by a State are clearly or may fairly be assumed to be within the purview of § 7 or § 8. The Court acknowledged that "[a]t times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections." *Ibid.* Even in such ambiguous

situations, however, the Court concluded that "courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." *Id.*, at 244–245. Thus, the Court held that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.*, at 245.

In *Construction Laborers* v. *Curry*, 371 U. S. 542 (1963), we considered the application of these principles to a situation in which the Georgia courts had awarded relief based on a complaint that contained allegations that made out "at least an arguable violation of § 8(b)." *Id.*, at 546. There, we reviewed a claim that "the subject matter of [the] suit was within the exclusive jurisdiction of the National Labor Relations Board," *id.*, at 543, and held that, even though the state court was authorized to adjudicate the claim as a matter of state law, the state court "clearly exceeded its power" in awarding relief on the complaint. *Id.*, at 548. Specifically, "the state court had no jurisdiction to issue an injunction or to adjudicate this controversy, which lay within the exclusive powers of the National Labor Relations Board." *Id.*, at 546–547.

That our conclusion was in fact jurisdictional was accentuated by our discussion of the procedural context in which the case arose. The state court had awarded a temporary injunction only, and a permanent order had not yet been issued. We rejected, however, the argument that the judgment was not yet final for purposes of our own jurisdiction:

> "[W]e believe our power to review this case rests upon solid ground. The federal question raised by petitioner in the Georgia court, and here, is whether the Georgia courts had power to proceed with and determine this controversy. The issue ripe for review is not whether a

> Georgia court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction nor is it the question of whether federal or state law governs a case properly before the Georgia courts. What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board." *Id.*, at 548 (citations omitted).

See also *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 497–498, n. 5 (1983). *Curry* made clear that when a state proceeding or regulation is claimed to be pre-empted by the NLRA under *Garmon*, the issue is a choice-of-forum rather than a choice-of-law question. As such, it is a question whether the State or the Board has jurisdiction over the dispute. If there is pre-emption under *Garmon*, then state jurisdiction is extinguished.[9]

Since *Garmon* and *Curry*, we have reiterated many times the general pre-emption standard set forth in *Garmon* and the jurisdictional nature of *Garmon* pre-emption; we have also reaffirmed that our decisions describing the nature of *Garmon* pre-emption and defining its boundaries have rested on a determination that in enacting the NLRA Congress intended for the Board generally to exercise exclusive jurisdiction in this area. See, *e. g.*, *Journeymen* v. *Borden*, 373 U. S. 690, 698 (1963); *Iron Workers* v. *Perko*, 373 U. S. 701, 708 (1963); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 309–310 (1964); *Linn* v. *Plant Guard Workers*, 383 U. S. 53, 60 (1966); *Vaca* v. *Sipes*, 386 U. S. 171, 179 (1967); *Motor Coach Em-*

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[9] We note that this conclusion derives from congressional intent as delineated in our prior decisions. Thus, our decision today does not apply to pre-emption claims generally but only to those pre-emption claims that go to the State's actual adjudicatory or regulatory power as opposed to the State's substantive laws. The nature of any specific pre-emption claim will depend on congressional intent in enacting the particular pre-empting statute.

ployees v. *Lockridge*, 403 U. S. 274, 285–291 (1971); *Farmer* v. *Carpenters*, 430 U. S. 290, 296–297, 305 (1977); *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180, 188–190 (1978); *Operating Engineers* v. *Jones*, 460 U. S. 669, 676 (1983); *Belknap, Inc.* v. *Hale*, *supra*, at 510–511; *Brown* v. *Hotel Employees*, 468 U. S. 491, 502–503 (1984); *Wisconsin Dept. of Industry, Labor and Human Relations* v. *Gould Inc.*, 475 U. S. 282, 286 (1986).

Davis does not seriously dispute this conclusion—at least as a general matter. He concedes, in fact, that "when a particular issue has been placed by Congress within the primary and exclusive jurisdiction of the NLRB, a state court will have no subject matter jurisdiction to adjudicate the issue. In such cases, any judgment issued by the state court will be *void ab initio* because subject matter jurisdiction is preempted." Brief for Appellee 13. Davis notes, however, that this Court has acknowledged that *Garmon* does not preempt "all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." *Lockridge*, *supra*, at 289. Specifically, Davis points to *Garmon*'s own recognition that some controversies that are arguably subject to § 7 or § 8 are not pre-empted:

> "[D]ue regard for the presuppositions of our embracing federal system . . . has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." 359 U. S., at 243–244 (citations omitted).

Both before and since *Garmon* we have identified claims that fall within one or both these articulated exceptions. See, *e. g.*, *Belknap, Inc.* v. *Hale*, *supra*; *Farmer* v. *Carpen-*

ters, supra; Linn v. *Plant Guard Workers, supra; Automobile Workers* v. *Russell*, 356 U. S. 634 (1958); *Machinists* v. *Gonzales*, 356 U. S. 617 (1958); *Youngdahl* v. *Rainfair, Inc.*, 355 U. S. 131 (1957); *Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656 (1954).[10] But these cases serve only as more precise demarcations of the *scope* of *Garmon* pre-emption. They have not redefined the *nature* of that pre-emption in any way. A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court. Consequently, the state procedural rule relied on by the Alabama Supreme Court to support the judgment below was not a sufficient state ground, and the Union was and is entitled to an adjudication of its pre-emption claim on the merits.[11]

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[10] We have also acknowledged an exception for conduct that is arguably protected under § 7 where the injured party has no means of bringing the dispute before the Board. See *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978). See also *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 325–332 (1971) (WHITE, J., dissenting); *Longshoremen* v. *Ariadne Shipping Co.*, 397 U. S. 195, 201–202 (1970) (WHITE, J., concurring).

[11] Our reasoning and decision here are supported by this Court's decision in *Kalb* v. *Feuerstein*, 308 U. S. 433 (1940). In that case, the Court faced an issue involving state jurisdiction in a bankruptcy case that was strikingly similar to the issue presented by this case. There, a state court had entered a judgment of foreclosure against the appellants. Although the appellants had a petition pending concurrently in the bankruptcy court, the state courts rejected their challenge that the foreclosure was invalid because of the pending bankruptcy proceedings on the basis of a procedural default. In the face of the appellees' assertion that the procedural default presented an adequate nonfederal ground for the State's judgment, however, this Court accepted the appellants' contention that federal law itself "oust[ed] the jurisdiction of the state court" during the pendency of the bankruptcy proceeding. The state judgment thus "was not merely erroneous but was beyond [the state court's] power, void, and subject to collateral attack." *Id.*, at 438. The Court based this holding on Congress' exclusive right to regulate bankruptcy, which gave it the power to vest jurisdiction over bankruptcy proceedings exclusively in one forum and to withdraw

III

As the *Garmon* line of cases directs, the pre-emption inquiry is whether the conduct at issue was arguably protected or prohibited by the NLRA. That much is clear. There is also no dispute that if Davis was a supervisor, he was legally fired,[12] the Union misspoke if it represented that there was legal redress for the discharge, and there is no pre-emption. But if Davis was an employee, his discharge for union activities was an unfair practice, the Union was protected in its attempt to interest him in the Union, and it did not err in representing that if he was discharged for joining the Union, there would be a remedy. We should inquire, then, whether Davis was arguably an employee, rather than a supervisor. If he was, the issue was to be initially decided by the NLRB, not the state courts.

The precondition for pre-emption, that the conduct be "arguably" protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of pre-emption and would therefore not be satisfied in this case by a claim,

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that jurisdiction from all other forums, and Congress' statutory exercise of that right.

Given our longstanding interpretation of congressional intent regarding NLRA pre-emption under *Garmon*, this case is in all relevant respects the same as *Kalb*. Based on its constitutional power to regulate interstate commerce, Congress has created by statute a uniform body of laws governing labor relations and has vested in the National Labor Relations Board the exclusive jurisdiction over administration of those laws. And, although the exclusive nature of this jurisdiction was not explicitly noted by Congress, this Court has held that such exclusivity was intended by Congress. Enactment of such exclusive jurisdiction must, by operation of the Supremacy Clause, pre-empt conflicting state-court jurisdiction. That the entity chosen to administer those laws is administrative rather than judicial, as in *Kalb*, does not alter the pre-emptive effect of the federal law. Consequently, a procedural default in state court does not protect a state-court judgment from pre-emption.

[12] There is no allegation or evidence here that Davis' discharge, assuming he was a supervisor, was aimed at Ryan-Walsh's nonsupervisory employees or that it interfered with those employees' § 7 rights. See n. 4, *supra*.

without more, that Davis was an employee rather than a supervisor. If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board. *Marine Engineers* v. *Interlake S.S. Co.*, 370 U. S. 173, 184 (1962). The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation. In this case, therefore, because the pre-emption issue turns on Davis' status, the Union's claim of pre-emption must be supported by a showing sufficient to permit the Board to find that Davis was an employee, not a supervisor. Our examination of the record leads us to conclude that the Union has not carried its burden in this case.

Expecting that the Union would put its best foot forward in this Court, we look first at its submission here that there is an arguable case for pre-emption. The Union's brief states that its conduct was protected by federal law if Davis was an employee, that in order to find the Union liable the jury must have found that Davis was a supervisor, and that "the state law controversy of whether the Union made a misrepresentation and the federal controversy of whether the superintendents were in fact supervisors are 'the same in a fundamental respect.'" Brief for Appellant 16 (quoting *Operating Engineers* v. *Jones*, 460 U. S. 669, 682 (1983)). So far, the argument proceeds in the right direction. As for the critical issue of whether Davis is an employee or a supervisor, the Union asserts only that "[a]bsent a clear determination by the NLRB that the ship superintendents are supervisors rather than employees, superintendents are arguably employees and the state is preempted from applying its law." Brief for Appellant 13. In making this contention, the ILA

relies on our cases indicating that pre-emption can be avoided if an individual's supervisory status has been determined "'with unclouded legal significance.'" *Hanna Mining Co.* v. *Marine Engineers*, 382 U. S. 181, 190 (1965) (quoting *Garmon*, 359 U. S., at 246). See also *Jones*, *supra*, at 680. It does not undertake any examination of Davis' duties as a ship superintendent. It makes no attempt to show that Davis was more like an employee than a supervisor as those terms are defined in §§ 2(1) and (11) of the Act, 29 U. S. C. §§ 152(1) and (11).[13] It points to no evidence in the record indicating that Davis was not a supervisor. It does not argue that Davis' job was different from Trione's or that the Regional Director was wrong in finding that Trione was a supervisor. Its sole submission is that Davis was arguably an employee because the Board has not decided that he was a supervisor.

We cannot agree that Davis' arguable status as a supervisor is made out by the mere fact that the Board has not finally determined his status. The lack of a Board decision in no way suggests how it would or could decide the case if it had the opportunity to do so. To accept the Union's submission would be essentially equivalent to allowing a conclusory claim of pre-emption and would effectively eliminate the necessity to make out an arguable case. The better view is that those claiming pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted.

Moreover, neither *Garmon* nor *Hanna Mining* supports the Union position. *Garmon* itself is the source of the arguably protected or prohibited standard for pre-emption. The Court stated, 359 U. S., at 244:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by

[13] Whether a particular employee is a supervisor under the Act depends on his or her actual duties, not on his or her title or job classification. See, *e. g.*, *Winco Petroleum Co.*, 241 N. L. R. B. 1118, 101 LRRM 1100 (1979).

> § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of the federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

Later the Court said: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence" of the Board. *Id.*, at 245. Of course, the Court explained, the Board might decide the case one way or other, but in the "absence of the Board's clear determination that an activity is neither protected or prohibited," *id.*, at 246, it is not for the courts to decide the case. It is apparent from these passages that a court first must decide whether there is an arguable case for pre-emption; if there is, it must defer to the Board, and only if the Board decides that the conduct is not protected or prohibited may the court entertain the litigation. Nothing in *Garmon* suggests that an arguable case for pre-emption is made out simply because the Board has not decided the general issue one way or the other.

Hanna Mining also does nothing for the Union's submission. The Court there, relying on *Garmon*, held that there was no pre-emption because the Board or its General Counsel had in fact adversely decided the issues on which the claim of pre-emption rested. Obviously, no inference may be drawn from that decision that a party makes out a case for pre-emption by merely asserting that the issue involved has not been decided by the Board. The Union's position is also negated by *Interlake S.S. Co.*, *supra*, where the Court found pre-emption only after examining the facts and deciding "whether the evidence in this case was sufficient to show that either of [the organizations] was arguably a 'labor organization' within the contemplation of § 8(b)." *Id.*, at 178. The Court went on to hold that while there was persuasive evi-

dence that the marine engineers were supervisors, the Board had nevertheless effectively decided that the union involved was a labor organization within the meaning of the Act. While agreeing with the principles announced by the Court, Justice Douglas dissented because he had a different view of the facts of the case. Consequently, a party asserting pre-emption must put forth enough evidence to enable a court to conclude that the activity is arguably subject to the Act.

Here, the Union points to no evidence in support of its assertion that Davis was arguably an employee. The Union's claim of pre-emption in the state courts was also devoid of any factual or legal showing that Davis was arguably not a supervisor but an employee. In this respect, its brief in the Alabama Supreme Court was similar to its brief here, and its post-trial motion for judgment in the trial court contained no more than a conclusory assertion that state jurisdiction was pre-empted. Until that motion, no claim of pre-emption had been made out, but whether Davis was a supervisor or an employee was a relevant inquiry in making out his case. He alleged in his complaint that he was a supervisor. The Union answered that it was without sufficient information to form a belief as to whether or not he was. Moreover, in moving for summary judgment or for directed verdict at the close of Davis' case and at the close of all the evidence the Union did not assert that Davis was an employee, not a supervisor, let alone point to any evidence to support such a claim.[14] In sum, the Union has not met its burden of showing that the conduct here was arguably subject to the Act.

IV

We hold that where state law is pre-empted by the NLRA under *Garmon* and our subsequent cases, the state courts lack the very power to adjudicate the claims that trigger pre-

[14] Although it is not our task *sua sponte* to search the record for evidence to support the Union's pre-emption claim, we find nothing in the record to make out even a colorable case for holding that Davis was not a supervisor.

emption. Thus, the Alabama Supreme Court's holding that the ILA had waived its pre-emption claim by noncompliance with state procedural rules governing affirmative defenses did not present an independent and adequate state ground supporting the judgment below, and that court erred in declining to address that claim on the merits. On the merits, we reject the ILA's characterization of our prior cases as holding that the mere lack of a conclusive determination by the Board that an activity is without the purview of the Act renders that activity arguably subject to the Act. Rather, we reaffirm our previously expressed view that the party asserting pre-emption must make an affirmative showing that the activity is arguably subject to the Act and we therefore affirm the judgment of the Alabama Supreme Court.

So ordered.

JUSTICE REHNQUIST, with whom JUSTICE POWELL, JUSTICE STEVENS, and JUSTICE O'CONNOR join, concurring in part and concurring in the judgment.

The Court holds that appellant Union's federal pre-emption claim must be considered on the merits by Alabama courts even though the Union never once raised the claim in the Alabama trial court until a post-trial motion following an adverse jury verdict. By allowing a defendant to save its pre-emption claim until after it sees the verdict, this ruling poses a sufficient threat to orderly judicial proceedings that it can be justified only if Congress has mandated such a result. Because Congress clearly has not mandated any such result, I disagree with Part II of the Court's opinion.

Appellee Davis sued the Union in the Circuit Court of Mobile County alleging fraud and misrepresentation. Davis had been first a trainee ship superintendent and then a ship superintendent in the employ of Ryan-Walsh Stevedoring Co. in Mobile. Although the ship superintendents were theoretically superior to the longshoremen, they were paid

salary and their compensation was generally lower than that of the longshoremen, who worked for hourly wages.

One of Davis' fellow ship superintendents contacted the Union to see about the possibility of organizing the superintendents and affiliating with the Union. At a meeting of the superintendents to discuss that possibility, several of them expressed a fear of being discharged for participating in union-related activities. Testimony at trial indicated that one Benny Holland, a Union representative, had assured the superintendents that the Union would get them their jobs back with backpay if they were discharged. As a result of the meeting, a number of the ship superintendents including Davis signed pledge cards and an application for a Union charter from the ILA.

Sure enough, first another superintendent and then Davis were discharged by Ryan-Walsh, and the Union did not succeed in getting them their jobs back, with or without backpay. Davis then filed this suit, which the Union defended on the merits throughout the trial; at the conclusion of the trial the jury returned a verdict in Davis' favor for $75,000. Only at this point, in a motion for judgment notwithstanding the verdict, did the Union first raise its pre-emption claim, a technique that the Court now sanctions.

The Supreme Court of Alabama refused to consider the claim, observing that Alabama Circuit Courts are courts of general jurisdiction having authority to try, *inter alia*, cases involving fraud and misrepresentation. That court held that the Union's pre-emption claim was an affirmative defense under the Alabama Rules of Civil Procedure, and had to be affirmatively pleaded in order to be considered. I agree with this Court that Congress could, if it wished, forbid Alabama to impose any such procedural rule, but I am convinced that Congress has done no such thing.

The Court relies on what it apparently considers to be the similar case of *Kalb* v. *Feuerstein*, 308 U. S. 433 (1940). There Congress *did* provide quite explicitly that state courts

should be deprived of jurisdiction in cases where mortgage foreclosure proceedings in those courts were also the subject of a petition in bankruptcy in federal court. Congress said:

> "'(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:
>
> . . . . .
>
> "'(2) proceedings for foreclosure of a mortgage on land . . . or for recovery of possession of land.'" *Id.*, at 440–441 (quoting Frazier-Lemke Act) (emphasis deleted).

In the present case, by contrast, Congress has never said a word about pre-emption of state-court jurisdiction. This Court, in a long line of cases beginning with *Garner* v. *Teamsters*, 346 U. S. 485 (1953), has enunciated a judicial doctrine of pre-emption in labor relations cases based on the implied intent of Congress. But as the Court noted in *Garner:*

> "The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Id.*, at 488 (footnote omitted).

Thus when the Court speaks of the pre-emption of "subject-matter jurisdiction" here, it must rely on a far more dimly refracted version of congressional intent than did the *Kalb* Court: not what Congress said, but what this Court thinks Congress might have said had it been confronted with

the situation. This is far too thin a reed to support the perverse application of the doctrine in the present case.

The Court also places undue reliance upon its opinion in *Construction Laborers* v. *Curry*, 371 U. S. 542 (1963). There the claim of federal pre-emption had been properly presented by the union at every stage of Georgia proceedings. This Court, on direct review of a judgment of the Supreme Court of Georgia, held that Congress had denied to the Georgia courts the authority to issue an injunction because the matter was "within the exclusive powers of the National Labor Relations Board." *Id.*, at 546–547. The Court's opinion in *Curry* refers to state-court "jurisdiction," but as Justice Frankfurter explained, "the term 'jurisdiction' . . . is a verbal coat of . . . many colors." *United States* v. *Tucker Truck Lines, Inc.*, 344 U. S. 33, 39 (1952) (dissenting opinion). The Court's opinion today implicitly suggests that the word "jurisdiction" is to lawyers what a term like *Bombycilla cedrorum* (cedar waxwing) is to ornithologists: a description of one and only one particular species recognized throughout the world. We all know that the term "jurisdiction" does not partake of that specialized a meaning.

Nothing in *Curry*, and certainly nothing in *Kalb*, foreordains the result in this case. State-court judges and trial courts of general jurisdiction in Alabama and in the other 49 States are experts primarily in state law, not federal law. Indeed, with the advancing march of federal legislation in areas heretofore left to state law, it would be an impossible task for any judge—federal or state—to keep abreast of the various areas in which there might be federal pre-emption. Here Alabama, by application of a neutral statute with a precise counterpart in the Federal Rules of Civil Procedure, has said that a defendant who wishes to claim federal pre-emption as a defense to state-court exercise of jurisdiction may not wait to raise that claim until after the case has gone to verdict. The Court, saying otherwise, allows a sophisticated defendant as in the present case to gamble on obtaining

a favorable verdict and raise a pre-emption defense only if it loses on the merits. To me this result defies common sense; if Congress had ordained it, I would reach it albeit with reluctance. But it is this Court, not Congress, that has ordained the result. I believe the Court is mistaken in doing so, and I therefore cannot join Part II of its opinion.

Having concluded that National Labor Relations Act pre-emption is "jurisdictional," and hence may be raised at any time, the Court goes on to decide that the Union has not carried its burden of showing that the conduct at issue here was "arguably" protected or prohibited by the Act. With this I agree. Accordingly, I join Parts I and III of the Court's opinion and concur in the judgment.

JUSTICE BLACKMUN, concurring in part and dissenting in part.

The Court today reaffirms that a pre-empted cause of action, as defined in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), is a claim that a state court is without power to adjudicate. *Ante*, at 393. I fully agree, and therefore join Parts I and II of the Court's opinion. But I believe that the standard enunciated in Part III to determine the pre-emption *vel non* of a particular cause of action is erroneous, as well as at odds with the principles and policies of *Garmon*. I therefore dissent from Part III of the Court's opinion and from its judgment.

In *Garmon*, this Court held that when an activity is protected or prohibited by the Act, or arguably protected or prohibited, courts must defer to the exclusive competence of the National Labor Relations Board. *Id.*, at 245. In the absence of the Board's clear determination that an activity is neither protected nor prohibited, nor arguably so, courts must stay their hand. "[W]hether federal law *does* apply is to be decided" by the Board. *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 223, 229 (1970) (separate memorandum of Harlan, J.) (emphasis added). The Court today purports to follow *Garmon*, but nonetheless requires that the party "claiming

pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted," *ante*, at 396, and proceeds to require here that the Union make a showing "sufficient to permit the Board to find that Davis was an employee, not a supervisor." *Ante*, at 395. In transforming the notion that some activities are *arguably* protected or prohibited into a requirement that a party claiming pre-emption make out an "arguable case," *ante*, at 396, it seems to me that the Court misses the point of its decision in *Garmon*. As a result of the decision today, a court, under the guise of weighing the sufficiency of the evidence, will be making precisely the determination that *Garmon* makes clear is for the Board, and only the Board, to make.

To understand how far the Court strays from the practical and congressionally mandated standard articulated in *Garmon*, it is sufficient to look to the basis of the broad pre-emption doctrine. Under the Act, some activities are protected and some are prohibited; other activities are subject to state regulation, while still others, not at issue in this case, are to be left unregulated by both federal and state authorities. Thus, the determination of whether an activity falls within the sphere of protected or prohibited is the crucial question under federal law, and one which this Court recognized is not always an easy determination to make. *Garmon*, 359 U. S., at 244. Accordingly, Congress deprived state courts of jurisdiction over actually or arguably protected or prohibited conduct and "confide[d] primary interpretation and application of its rules to a specific and specially constituted tribunal," thereby ensuring that the federal scheme would be administered uniformly with the wisdom and insight resulting from specialized expertise and experience. *Garner* v. *Teamsters*, 346 U. S. 485, 490 (1953), quoted in *Garmon*, 359 U. S., at 242.[1] Permitting courts to

[1] Justice Harlan, whose concurrence in *Garmon* indicated his initial hesitancy to accept its categorical treatment of particular claims, came to embrace its approach, recognizing that any other would require this Court, as

determine whether activity is protected or prohibited could result in a court's finding unlawful an activity that the Board might embrace as lawful.

In an attempt to garner support for its holding, the Court relies on *Marine Engineers* v. *Interlake S.S. Co.*, 370 U. S. 173, 184 (1962). Such reliance is misplaced. Indeed, in *Interlake* the Court reaffirmed *Garmon*, recognizing that the definition of "labor organization," like the definition of "supervisor," is "of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole." 370 U. S., at 180. In *Interlake*, this Court held that only the Board could determine whether the union met the statutory definition of a "labor organization."

The Court in *Interlake*, in dicta, then reviewed the evidence that was presented. Such evidence was certainly not intended to be held up as the benchmark of the showing required successfully to claim that an activity is *arguably* protected; the Court made clear that that evidence was sufficient to show that the conduct was *actually* protected:

> "This was a case, therefore, where a state court was shown not simply the arguable possibility of Labor Board jurisdiction over the controversy before it, but that *the Board had actually determined* the underlying issue upon which its jurisdiction depended" (emphasis added). *Id.*, at 184.[2]

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the final court of review, to monitor every case in which a pre-emption claim is raised:

"Nor can we proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy. This Court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard." *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 289–290 (1971).

[2] Similarly, the fact that the Board had asserted jurisdiction over the unions in *Interlake*, at the time the state-court case was pending, is not an indication of the standard of "arguably," because that evidence "was *more*

Thus, in *Interlake*, the Court was presented with actual determinations by the Board; under *Garmon* that is the only kind of showing sufficient to take the pre-emption decision out of the hands of the Board.

The present case underscores the signal merit of *Garmon*.[3] Davis was fired for union activities. According to Davis, he was assured by the Union that, if fired, he could obtain reinstatement. Davis' ability to obtain reinstatement turns on whether Davis is a supervisor. If Davis is a supervisor, the Act would not protect him against retaliatory actions by his

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than sufficient to create an arguable case" (emphasis supplied), 370 U. S., at 132, n. 16, even though the unions had consistently advanced the position before the Board that they were not organizations within the meaning of the Act.

[3] To be sure, the *Garmon* universe is not without imperfection. JUSTICE WHITE has long sought to eliminate the "arguably protected" coverage of *Garmon* pre-emption. See, *e. g.*, *Lockridge*, 403 U. S., at 325–332 (WHITE, J., dissenting); *Longshoremen* v. *Ariadne Shipping Co.*, 397 U. S. 195, 201 (1970) (WHITE, J., concurring). In *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978), the Court addressed what I believe was at the heart of JUSTICE WHITE's opposition to "arguably protected." There the Court acknowledged an exception to *Garmon* pre-emption for conduct that is arguably protected where the injured party has no means of bringing the dispute before the Board. The opinion today speaks of a broader opposition to "arguably protected," as its effect in this case is to expand the *Sears* exception to encompass a case where the injured party, here Davis, does have the means of bringing the dispute before the Board. Apparently seeking to eliminate "arguably protected," but unable to do so directly, JUSTICE WHITE establishes a standard that is nearly as effective. Justice Harlan, speaking for the Court in *Lockridge* and responding to those who sought to weaken *Garmon*, provides the answer to JUSTICE WHITE today:

"[A]lthough largely of judicial making, the labor relations pre-emption doctrine finds its basic justification in the presumed intent of Congress. While we do not assert that the *Garmon* doctrine is without imperfection, we do think that it is founded on reasoned principle and that until it is altered by congressional action or by judicial insights that are born of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set out again in quest of a system more nearly perfect." 403 U. S., at 302.

employer based on his union activities and Davis' suit would be cognizable in state court for the Union's alleged intentional misrepresentation. However, if Davis is not a supervisor, the employer would have committed an unfair labor practice in firing him, and Davis would be entitled to redress by the Board. Thus, the issue here falls within the rubric of "arguably"—the conduct at issue is arguably protected because Davis may be a statutory employee, not a supervisor.[4]

The crucial question then was whether Davis was a supervisor. The task of identifying supervisors is an "aging but nevertheless persistently vexing problem." *NLRB* v. *Security Guard Service, Inc.*, 384 F. 2d 143, 145 (CA5 1967). Supervisory status is an inherently fact-specific determination that turns on an individual's duties, not job title or classification. See, *e. g.*, *Winco Petroleum Co.*, 241 N. L. R. B. 1118 (1979) (giving an employee the title "supervisor" or even theoretical power to perform some supervisory functions does not convert a rank-and-file employee into a statutory supervisor); *Pattern Makers Assn.*, 199 N. L. R. B. 96 (1972) (shop foreman with supervisory authority who worked with tools 40% of his time was supervisor despite contract which defined supervisory employees as persons who did not work with tools of trade). It is precisely because of the difficulty in assessing the statutory supervisory status of an individual, and the need for uniformity in the interpretation of the federal labor laws, that this Court, in *Hanna Mining Co.* v. *Ma-*

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[4] In the ordinary case, since a determination of pre-emption poses a jurisdictional bar to a court's adjudication of the merits of a suit, a defendant claiming pre-emption will do so at the threshold, usually in a motion to dismiss. Thus, courts will be called upon to determine pre-emption before facts have been developed or discovery has occurred. This poses a difficult burden for a defendant required, under today's decision, to present a factual showing. If a fair reading of the complaint leads to a possibility that the activity complained of may be protected or prohibited, then the case falls squarely within the reach of "arguably protected," and the state court lacks jurisdiction over the dispute. See *Construction Laborers* v. *Curry*, 371 U. S. 542, 546 (1963).

rine Engineers, 382 U. S. 181 (1965), held that state law can be applied only if the supervisory status of the individuals in question "has been settled with unclouded legal significance."[5] *Id.*, at 190. The supervisory status of Davis has never been settled by the Board.

Thus, in asserting that Davis was arguably a supervisor, the Union "advance[d] an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." *Ante*, at 395, quoting *Interlake*, 370 U. S., at 184. That is the only kind of showing that is properly required under *Garmon*.[6]

I therefore dissent from Part III of the Court's opinion and from its judgment.

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[5] There is indeed a cloud over Davis' status. As a "ship superintendent," Davis performs the same functions as workers called "walking foremen" in Houston, Tex. We are advised that the Houston walking foremen formed a union and are covered by a collective-bargaining agreement. See Juris. Statement 4, n. 3.

[6] In establishing the new standard, JUSTICE WHITE is joined by the four Justices who dissent from the Court's holding that pre-emption goes to subject-matter jurisdiction. These four would hold that pre-emption is merely a defense. Because under Alabama law, a defense that is not raised during trial is deemed waived, see *ante*, at 386, n. 7, the view of these four Justices means that the decision of the Alabama Supreme Court rested on an independent and adequate state ground, see *ante*, at 388–389, ineluctably leading to the conclusion that this Court is without jurisdiction over this case. Rather than stating that they would dismiss for want of jurisdiction, however, those Members of the Court reach out to join Part III of JUSTICE WHITE's opinion.

SQUARE D CO. ET AL. *v.* NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85-21. Argued March 3, 1986—Decided May 27, 1986

Petitioner shippers brought class actions in Federal District Court against respondent motor carriers and respondent ratemaking bureau, alleging that during the years 1966 through 1981 respondents engaged in a conspiracy, in violation of the Sherman Act, to fix rates for transporting freight between the United States and Canada without complying with an agreement filed by the bureau with, and approved by, the Interstate Commerce Commission. Petitioners sought treble damages, measured by the difference between the allegedly higher rates they paid and the rates they would have paid in a freely competitive market, and also sought declaratory and injunctive relief. The District Court dismissed the complaints on the authority of *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, wherein it was held that a private shipper could not recover treble damages under § 7 of the Sherman Act in connection with ICC-filed tariffs. The Court of Appeals affirmed the dismissal as to the treble-damages claims.

Held: Petitioners are not entitled to bring a treble-damages antitrust action. *Keogh, supra.* Pp. 415–423.

(a) Nothing in the Reed-Bulwinkle Act or in its legislative history indicates that Congress intended to change or supplant the *Keogh* rule. Similarly, there is no evidence that Congress in enacting the Motor Carrier Act of 1980 intended to change the *Keogh* rule. And cases like *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213, emphasizing the necessity to strictly construe immunity of collective ratemaking activities from antitrust laws, do not render *Keogh* invalid. Pp. 417–422.

(b) The various developments that have occurred since *Keogh*—the development of class actions, the emergence of precedents permitting treble damages even when there is an available regulatory remedy, greater sophistication in evaluating damages, and the development of procedures in which judicial proceedings can be stayed pending regulatory proceedings—are insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute. P. 423.

760 F. 2d 1347, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 424.

Douglas V. Rigler argued the cause for petitioners. With him on the briefs were *Linda Heller Kamm, Michael Fischer, Joseph E. Zdarsky, H. Laddie Montague, Arnold Levin*, and *Howard Sedran*.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried, Assistant Attorney General Ginsburg, Deputy Assistant Attorney General Cannon, Jerrold J. Ganzfried, Robert B. Nicholson, Robert S. Burk, Henri F. Rush, Timm L. Abendroth*, and *Jim J. Marquez*.

Donald L. Flexner argued the cause for respondents. With him on the brief were *Clifton S. Elgarten, Peter A. Greene, Charles L. Freed, John W. Bryant, Bryce Rea, Jr., Donald E. Cross, Lester M. Bridgeman, Louis E. Emery*, and *Joel B. Harris*.*

JUSTICE STEVENS delivered the opinion for the Court.

Petitioners have alleged that rates filed with the Interstate Commerce Commission by respondent motor carriers during the years 1966 through 1981 were fixed pursuant to an agreement forbidden by the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §1 *et seq*. The question presented is whether the carriers are subject to treble-damages liability in a private antitrust action if the allegation is true.

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*Briefs of *amici curiae* urging affirmance were filed for the Association of American Railroads by *Richard T. Conway, Ralph J. Moore, Jr., John Townsend Rich, Stephen J. Hadley*, and *Kenneth P. Kolson;* and for the National Motor Freight Traffic Association, Inc., et al. by *Patrick McEligot, William W. Pugh*, and *Kevin M. Williams*.

Briefs of *amici curiae* were filed for American Information Technologies Corp. et al. by *J. Paul McGrath;* for C. D. Ambrosia Trucking Co., Inc., et al. by *Lawrence R. Velvel* and *Bruce J. Ennis, Jr.;* and for the Western Fuels Association, Inc., et al. by *Frederick L. Miller, Jr.*

The question requires us to give careful consideration to the way in which Congress has accommodated the sometimes conflicting policies of the antitrust laws and the Interstate Commerce Act, 49 U. S. C. § 10101 *et seq.* (1982 ed. and Supp. II). Our analysis of the question will include three components: (1) the sufficiency of the complaint allegations in light of the bare language of the relevant statutes; (2) the impact of the Court's decision of an analogous question in 1922 in *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156; and (3) the extent to which the rule of the *Keogh* case remains part of our law today.

I

Two class-action complaints making parallel allegations against the same six defendants were filed in the United States District Court for the District of Columbia and then transferred to Buffalo, New York, where a similar action brought by the United States was pending. The Government case was ultimately settled by the entry of a consent decree;[1] after the two private actions had been consolidated, the District Court granted a motion to dismiss the complaints. We therefore take the well-pleaded facts as true.[2]

Five of the respondents are Canadian motor carriers engaged in the transportation of freight between the United States and Canada. They are subject to regulation by the Ontario Highway Transport Board, and by the Interstate

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[1] The consent decree enjoins respondents from "harassing, discouraging, coercing, or threatening in any way any motor carrier to withdraw, forbear from filing, or modify in any way said carrier's planned or actual independent rates," and from discussing rates except "within an authorized ratemaking body of a rate bureau with a rate agreement." *United States* v. *Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cases ¶ 66,167, pp. 66,533–66,535 (WDNY 1984).

[2] See *Hishon* v. *King & Spalding*, 467 U. S. 69, 73 (1984); *McLain* v. *Real Estate Bd. of New Orleans*, 444 U. S. 232, 246 (1980); *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U. S. 738, 746 (1976); *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974); *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957).

Commerce Commission (ICC). They are all members of the Niagara Frontier Tariff Bureau, Inc. (NFTB), which is also a defendant. NFTB is a nonprofit corporation organized to engage in collective ratemaking activities pursuant to an agreement filed with and approved by the ICC.[3]

The petitioners are corporations that have utilized respondents' services to ship goods between the United States and Canada for many years. In their complaints, they allege that, at least as early as 1966 and continuing at least into 1981, the respondents engaged in a conspiracy "to fix, raise and maintain prices and to inhibit or eliminate competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada without complying with the terms of the NFTB agreement and by otherwise engaging in conduct that either was not or could not be approved by the ICC."[4]

The complaints allege five specific actions in furtherance of this conspiracy. First, senior management officials of the NFTB used a "Principals Committee," which was not authorized by the NFTB agreement, to set rates and to inhibit competition.[5] Second, respondents set and controlled NFTB rate levels without complying with the notice, publication, public hearing, and recordkeeping requirements of the NFTB agreement and ICC regulations.[6] Third, respondents planned threats, retaliation, and coercion against NFTB members to inhibit independent actions.[7] Fourth, respondents actually used pressures, threats, and retaliation to inter-

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[3] See *Niagara Frontier Tariff Bureau, Inc.—Agreement*, 297 I. C. C. 494 (1955).

[4] Square D complaint, ¶ 22, App. 11; Big D complaint, ¶ 19, App. 24.

[5] Square D complaint, ¶ 23(a), App. 12; Big D complaint, ¶ 20(a), App. 24.

[6] Square D complaint, ¶ 23(b), App. 12; Big D complaint, ¶ 20(b), App. 24.

[7] Square D complaint, ¶ 23(c), App. 12; Big D complaint, ¶ 20(c), App. 24.

fere with independent actions.[8] Finally, still in furtherance of the conspiracy, respondents filed tariffs with the ICC.[9]

Because of respondents' unlawful conduct, the complaints continue, the petitioners and the members of the large class of shippers that they represent have paid higher rates for motor carrier freight transport than they would have paid in a freely competitive market.[10] They seek treble damages measured by that difference, as well as declaratory and injunctive relief.

The legal theory of the complaints is that respondents' conspiracy is not exempted from a private antitrust, treble-damages action even though the rates that respondents charged were filed with the ICC, as required by law. The complaints note that the ICC requires motor carriers to file tariffs containing all their rates, to make the tariffs available for public inspection, and to give advance notice of any changes in the filed rates.[11] Although the ICC has the power to determine those rates, the rates are set by the carriers, not the ICC, in the first instance.[12] The Reed-Bulwinkle Act, enacted in 1948, expressly authorizes the ICC to grant approval to agreements establishing rate bureaus for the purpose of setting rates collectively.[13] The joint setting of rates pursuant to such agreements is exempted from the antitrust laws, but the statute strictly limits the exemption to actions that conform to the terms of the agreement approved by the

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[8] Square D complaint, ¶ 23(d), App. 12; Big D complaint, ¶ 20(d), App. 25.

[9] Square D complaint, ¶ 23(e), App. 12; Big D complaint, ¶ 20(e), App. 25.

[10] Square D complaint, ¶ 24(a)–(d), App. 12–13; Big D complaint, ¶ 21(a)–(c), App. 25.

[11] Square D complaint, ¶ 16, App. 9 (citing 49 U. S. C. § 10762); Big D complaint, ¶ 13, App. 22 (same).

[12] Square D complaint, ¶ 16, App. 9 (citing 49 U. S. C. § 10704); Big D complaint, ¶ 13, App. 22 (same).

[13] Square D complaint, ¶ 17, App. 10 (citing 49 U. S. C. § 5b, now codified at 49 U. S. C. § 10706(b)(2)); Big D complaint, ¶ 14, App. 22 (same).

ICC.[14] In this case, according to the theory of the complaints the activities of respondents were not authorized by the NFTB agreement; hence the alleged conspiracy was not exempt from the antitrust laws, and, indeed, blatantly violated those laws.

Under the plain language of the relevant statutes, it would appear that petitioners have alleged a valid antitrust action. The stated activities are clearly within the generally applicable language of the antitrust laws;[15] nothing in the language of the Interstate Commerce Act, moreover, necessarily precludes a private antitrust treble-damages remedy for actions that are not specifically immunized within the terms of the Reed-Bulwinkle Act.[16]

The District Court nevertheless dismissed the complaints on the authority of the *Keogh* case. 596 F. Supp. 153 (WDNY 1984). The Court of Appeals for the Second Circuit affirmed insofar as the District Court's judgment dismissed the claims for treble damages based on respondents' filed rates, but remanded for a further hearing to determine whether petitioners are entitled to injunctive relief and to give them an opportunity to amend their complaints to state possible claims for damages not arising from the filed tariffs. 760 F. 2d 1347 (1985). We granted certiorari to consider whether the rule of the *Keogh* case was correctly applied in barring a treble-damages action based on the filed tariffs, and

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[14] Under the Reed-Bulwinkle Act, as currently codified, "[i]f the [Interstate Commerce] Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U. S. C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement." 49 U. S. C. § 10706(b)(2).

[15] See, *e. g.*, 15 U. S. C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal").

[16] See n. 14, *supra*.

if so, whether that case should be overruled. 474 U. S. 815 (1985).

II

In *Keogh*, as in this case, a shipper's complaint alleged that rates filed with the ICC by the defendants had been fixed pursuant to an agreement prohibited by the Sherman Act. The rates had been set by an agreement among executives of railroad companies "which would otherwise be competing carriers," 260 U. S., at 160. They were "higher than the rates would have been if competition had not been thus eliminated." *Ibid.* The shipper claimed treble damages measured by the difference between the rates set pursuant to agreement and those that had previously been in effect.

In their special plea, defendants averred that every rate complained of had been filed with the ICC and that, after hearings in which Keogh had participated, the rates had been approved by the Commission. That approval established that the fixed rates were "reasonable and non-discriminatory," *id.*, at 161, but it did not foreclose the possibility that slightly lower rates would also have been within the zone of reasonableness that the Commission would also have found lawful under the Interstate Commerce Act. Nor did the ICC's approval require rejection of Keogh's contention that the combination among the railroads violated the Sherman Act.[17] The Court nevertheless held that Keogh, a private shipper, could not "recover damages under § 7 because he lost the ben-

[17] "All the rates fixed were reasonable and non-discriminatory. That was settled by the proceedings before the Commission. *Los Angeles Switching Case*, 234 U. S. 294. But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6. That was settled by *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *United States* v. *Joint Traffic Association*, 171 U. S. 505. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government." 260 U. S., at 161–162.

efit of rates still lower, which, but for the conspiracy, he would have enjoyed." *Id.*, at 162.

The Court reasoned that the ICC's approval had, in effect, established the lawfulness of the defendant's rates,[18] and that the legal right of the shippers against the carrier had to be measured by the published tariff. It therefore concluded that the shipper could not have been "injured in his business or property" within the meaning of § 7 of the Sherman Act by paying the carrier the rate that had been approved by the ICC. Justice Brandeis explained:

> "Section 7 of the Anti-Trust Act gives a right of action to one who has been 'injured in his business or property.' Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The

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[18] "A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce. Under § 8 of the latter act the exaction of any illegal rate makes the carrier liable to the 'person injured thereby for the full amount of damages sustained in consequence of any such violation' together with a reasonable attorney's fee. Sections 9 and 16 provide for the recovery of such damages either by complaint before the Commission or by an action in a federal court. If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. *Louisville & Nashville R. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288. Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act? See *Meeker* v. *Lehigh Valley R. R. Co.*, 162 Fed. 354. And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal, because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where, as here, the rates complained of have been found by the Commission to be legal and while in force had to be collected by the carrier?" *Id.*, at 162.

rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. *Texas & Pacific R. R. Co.* v. *Mugg*, 202 U. S. 242; *Louisville & Nashville R. R. Co.* v. *Maxwell*, 237 U. S. 94; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson*, 233 U. S. 173; *Dayton Iron Co.* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 239 U. S. 446; *Erie R. R. Co.* v. *Stone*, 244 U. S. 332. And they are not affected by the tort of a third party. Compare *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Fink*, 250 U. S. 577. This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated." *Id.*, at 163.

In this case, unlike *Keogh*, respondents' rates, established in the tariffs that had been filed with the ICC, were not challenged in a formal ICC hearing before they were allowed to go into effect. They were, however, duly submitted, lawful rates under the Interstate Commerce Act in the same sense that the rates filed in *Keogh* were lawful. Under the Court's holding in that case, it therefore follows that petitioners may not bring a treble-damages antitrust action.[19] The question, then, is whether we should continue to respect the rule of *Keogh*.

III

Petitioners, supported by the Solicitor General of the United States, ask us to overrule *Keogh*. They submit that

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[19] In their brief, petitioners argue that, even under *Keogh*, their treble-damages action should not have been dismissed because there was no ICC hearing in this case and because *Keogh* did not involve allegations of the type of covert legal violations at issue here. Brief for Petitioners 10–11. The Court of Appeals, however, properly concluded that *Keogh* was not susceptible to such a narrow reading: "Rather than limiting its holding to cases where, as in *Keogh*, rates had been investigated and approved by the ICC, the Court said broadly that shippers could not recover treble-damages for overcharges whenever tariffs have been filed." 760 F. 2d, at 1351.

Keogh was implicitly rejected in the Reed-Bulwinkle Act and in the Motor Carrier Act of 1980, Pub. L. 96–296, 94 Stat. 793; that *Keogh* in effect created an implied immunity from the antitrust laws and that its reasoning is thus inconsistent with later cases, particularly *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966); and that the rationales of the *Keogh* decision are no longer valid.

Petitioners argue that the Reed-Bulwinkle Act, by delineating an antitrust immunity for specific ratemaking activities,[20] repudiated *Keogh*'s holding that shippers may not bring treble-damages actions in connection with ICC-filed tariffs. In our view, however, it is not proper to read that statute as supplanting the *Keogh* rule with a narrow, express exemption from the antitrust laws.

The legislative history of Reed-Bulwinkle explains that it was enacted, at least in part, in response to this Court's decision in *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945).[21] In that case, after restating the holding in *Keogh*, the Court held that, although Georgia could not maintain a suit under the antitrust laws to obtain damages, it could obtain injunctive relief against the collective ratemaking procedures employed by the railroads.[22] The Reed-Bulwinkle Act

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[20] See ch. 491, 62 Stat. 472, now codified at 49 U. S. C. § 10706(b).

[21] See, *e. g.*, H. R. Rep. No. 1100, 80th Cong., 1st Sess., 4 (1947) (citing "[t]he Georgia suit" and other cases, and emphasizing "[t]hese developments have caused grave concern among all those having direct interest in transportation, who see in the situation a threat to long-standing practices in the transportation industry that were developed in cooperation with the shippers and have proved their worth"). See also 760 F. 2d, at 1356–1360 (reviewing legislative history of Reed-Bulwinkle Act).

[22] "We think it is clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist. That was a suit for damages under § 7 of the Sherman Act. 26 Stat. 210. The Court recognized that although the rates fixed had been found reasonable and non-discriminatory by the Commission, the United States was not barred from enforcing the remedies of the Sherman Act. 260 U. S. pp. 161–162. It held, however, that for purposes of a suit for damages a rate was not necessarily illegal because it was the result of a conspiracy in restraint of trade. The legal rights of a shipper against a carrier in re-

thus created an absolute immunity from the antitrust laws for approved collective ratemaking activities.

Nothing in the Act or in its legislative history, however, indicates that Congress intended to change or supplant the *Keogh* rule that other tariff-related claims, while subject to governmental and injunctive antitrust actions, did not give rise to treble-damages antitrust actions. On the contrary, the House Report expressly stated that, except for creating the new exemption, the bill left the antitrust laws applicable to carriers unchanged "so far as they are now applicable."[23] Particularly because the legislative history reveals clear congressional awareness of *Keogh*,[24] far from supporting petitioners' position, the fact that Congress specifically addressed this area and left *Keogh* undisturbed lends powerful support to *Keogh*'s continued viability.

Similarly, petitioners and the Solicitor General argue that private treble-damages actions would further the congressional policy of promoting competition in the transportation industry reflected in the Motor Carrier Act of 1980.[25] We

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spect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by the contract or tort of the carrier. . . . The reasoning and precedent of that case apply with full force here. But it does not dispose of the main prayer of the bill, stressed at the argument, which asks for relief by way of injunction." 324 U. S., at 453.

[23] "The bill here reported leaves the antitrust laws to apply with full force and effect to carriers, *so far as they are now applicable*, except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body upon a finding that, by reason of furtherance of the national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted." H. R. Rep. No. 1100, 80th Cong., 2d Sess., 5 (1947) (emphasis added).

[24] See 760 F. 2d, at 1359–1360 (reviewing attention to *Keogh* in the congressional consideration of the the Reed-Bulwinkle Act).

[25] As we recently pointed out, the "legislative history of the Act is clear that, beyond the bounds of immunity granted in § 10706(b)(3), Congress wanted the forces of competition to determine motor-carrier tariffs." *ICC v. American Trucking Assns., Inc.*, 467 U. S. 354, 367 (1984). See also

may assume that this is the case—indeed, we may assume that petitioners are correct in arguing that the *Keogh* decision was unwise as a matter of policy—but it nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme,[26] which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980. Petitioners have pointed to no specific statutory provision or legislative history indicating a specific congressional intention to overturn the longstanding *Keogh* construction;[27] harmony with the general legislative purpose is inadequate for that formidable task.

Petitioners' reliance on *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966), is also unavailing. In *Carnation*, a shipper of evaporated milk brought an antitrust treble-damages action against an association of shipping companies that had established higher rates for transportation between the west coast of the United States and the Philippine Islands. The defendants contended that the Shipping Act of 1916 had repealed all antitrust regulation of ratemaking activities in the shipping industry. Section 15 of the Shipping Act did create an express exemption for collective

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H. R. Rep. No. 96-1069, pp. 27-28 (1980); 126 Cong. Rec. 7777 (1980) (statement of Sen. Cannon).

[26] See *Cannon* v. *University of Chicago*, 441 U. S. 677, 696-697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law"). See also *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297, 319 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 379 (1982); *Albernaz* v. *United States*, 450 U. S. 333, 341 (1981).

[27] The Motor Carrier Act did change the terms of the Reed-Bulwinkle Act in significant respects, see *ICC* v. *American Trucking Assns., Inc.*, 467 U. S., at 356-357, but it did not address the *Keogh* rule. For the same reasons that the creation of the Reed-Bulwinkle exemption did not affect *Keogh*, the reworking of that exemption in the Motor Carrier Act also did not affect the rule of that case.

ratemaking pursuant to agreements that had been approved by the Federal Maritime Commission, but the defendants had not obtained any such approval. They nevertheless contended that the structure of the entire Shipping Act, read against its legislative history, demonstrated an intent to free the ratemaking activities of the shipping industry from the antitrust laws. The Court unanimously rejected the argument, explaining:

> "We recently said: 'Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.' *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350–351. We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision such as the exemption provisions of the Shipping and Agricultural Acts. See, *e. g.*, *United States* v. *Philadelphia National Bank, supra.*" *Id.*, at 217–218.

Petitioners correctly point out that cases like *Carnation* make it clear that collective ratemaking activities are not immunized from antitrust scrutiny simply because they occur in a regulated industry, and that exemptions from the antitrust laws are strictly construed and strongly disfavored. Nevertheless, even if we agreed that *Keogh* should be viewed as an "antitrust immunity" case, we would not conclude that later cases emphasizing the necessity to strictly construe such immunity rendered *Keogh* invalid. For *Keogh* repre-

sents a longstanding statutory construction that Congress has consistently refused to disturb, even when revisiting this specific area of law.

We disagree, however, with petitioners' view that the issue in *Keogh* and in this case is properly characterized as an "immunity" question. The alleged collective activities of the defendants in both cases were subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief. *Keogh* simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation. Such a holding is far different from the creation of an antitrust immunity,[28] and makes the challenge to *Keogh*'s role in the settled law of this area still more doubtful.[29]

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[28] In so characterizing the issue, we do not minimize the powerful role of the private treble-damages action in the structure of the Nation's antitrust laws. See, *e. g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 635 (1985) ("The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators"). Granting this role its due respect, however, a critical distinction remains between an absolute immunity from *all* antitrust scrutiny and a far more limited non-availability of the private treble-damages remedy. The consent decree in this case, n. 1, *supra*, as well as the unchallenged Court of Appeals decision to remand on the question of injunctive and declaratory relief for antitrust violations highlight this distinction: respondents' conduct has consistently been within the reach of the generally applicable antitrust laws.

[29] The specific *Keogh* holding, moreover, was not even implicated in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966), because the ratemaking agreements challenged in that case had not been approved by, or filed with, the Federal Maritime Commission. *Id.*, at 215. Indeed, the Shipping Act gives the Federal Maritime Commission far more limited authority over rates than the Interstate Commerce Act gives the ICC. See 760 F. 2d, at 1363 ("Although the [Federal Maritime Commission] can and does take effects on competition into account in approving conference agreements under 46 U. S. C. § 814, . . . the Shipping Act does not give the Commission any mandate to regulate *rate* competition and, indeed, the

Finally, petitioners point to various developments, discussed by the Court of Appeals, that seem to undermine some of the reasoning in Justice Brandeis' *Keogh* opinion—the development of class actions, which might alleviate the expressed concern about unfair rebates;[30] the emergence of precedents permitting treble-damages remedies even when there is a regulatory remedy available;[31] the greater sophistication in evaluating damages, which might mitigate the expressed fears about the speculative nature of such damages;[32] and the development of procedures in which judicial proceedings can be stayed pending regulatory proceedings.[33] Even if it is true that these developments cast Justice Brandeis' reasons in a different light, however, it is also true that the *Keogh* rule has been an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for some 6½ decades. The emergence of subsequent procedural and judicial developments does not minimize *Keogh*'s role as an essential element of the settled legal context in which Congress has repeatedly acted in this area.

IV

The Court of Appeals, in Judge Friendly's characteristically thoughtful and incisive opinion, suggested that, in view

statutory scheme was designed to minimize the role of the FMC in this regard").

[30] See *id.*, at 1352 (discussing development of class actions in view of the *Keogh* concern about antitrust litigation operating as a discriminatory rebate).

[31] See *id.*, at 1354 (noting that "[t]he Court has subsequently found that activity could be challenged under the antitrust laws despite the existence of an administrative agency with authority to regulate the activity").

[32] See *id.*, at 1353 ("The Supreme Court has . . . rejected the argument that a plaintiff cannot recover damages it was able to pass on to its customers in the antitrust context").

[33] See *ibid.* (referring to "the many later cases in which the Supreme Court has directed the suspension of judicial proceedings pending the referral of similar issues to the ICC" in view of the *Keogh* concern about the need for the ICC to determine the propriety of a lower rate).

of subsequent developments, this Court might be prepared to overrule *Keogh*. We conclude, however, that the developments in the six decades since *Keogh* was decided are insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute.[34] As Justice Brandeis himself observed, a decade after his *Keogh* decision, in commenting on the presumption of stability in statutory interpretation: "*Stare decisis* is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation."[35] We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention. If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE MARSHALL, dissenting.

In his opinion for the Court of Appeals, Judge Friendly cogently and comprehensively explained why the reasoning

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[34] See, *e. g.*, *NLRB* v. *Longshoremen*, 473 U. S. 61, 84 (1985) ("[W]e should follow the normal presumption of *stare decisis* in cases of statutory interpretation"); *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 736 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"). See also Levi, An Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501, 540 (1948) ("The doctrine of finality for prior decisions setting the course for the interpretation of a statute is not always followed. . . . Nevertheless, the doctrine remains as more than descriptive. More than any other doctrine in the field of precedent, it has served to limit the freedom of the court. It marks an essential difference between statutory interpretation on the one hand and case law and constitutional interpretation on the other").

[35] *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (dissenting).

of *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156 (1922), has been rendered obsolete by subsequent developments in the law. He demonstrated that *Keogh* should be overruled, and I am persuaded by his analysis. I therefore dissent.

FEDERAL DEPOSIT INSURANCE CORPORATION *v.* PHILADELPHIA GEAR CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 84-1972. Argued March 4, 1986—Decided May 27, 1986

On the application of a customer of respondent, a bank issued a standby letter of credit for respondent's benefit in the amount of $145,200. The letter of credit provided that a draft drawn upon it would be honored by the bank only if accompanied by respondent's signed statement that the customer had failed to make payment for invoiced goods. On the same day that the letter of credit was issued, the customer executed an unsecured promissory note in the bank's favor. The customer and the bank understood the liability on the note to be contingent on respondent's presenting drafts on the letter of credit after the customer's nonpayment. Subsequently, the bank was declared insolvent, and petitioner Federal Deposit Insurance Corporation (FDIC) was appointed its receiver. Respondent then presented to the FDIC drafts on the letter of credit for payment of over $700,000 worth of goods delivered to the customer before the bank became insolvent. When the drafts were returned unpaid, respondent sued the FDIC in Federal District Court, alleging that the letter of credit backed by a promissory note was an insured deposit under the definition of "deposit" in 12 U. S. C. § 1813(*l*)(1) as an unpaid balance of "money or its equivalent" received or held by a bank that, *inter alia*, is evidenced by a letter of credit, and that therefore respondent was entitled to $100,000 in deposit insurance, this being the maximum amount insured by the FDIC. The District Court agreed, and the Court of Appeals affirmed.

Held: A standby letter of credit backed by a contingent promissory note does not give rise to an insured deposit. This has been the FDIC's longstanding interpretation, and such interpretation is consistent with Congress' purpose in creating federal deposit insurance to protect the assets and "hard earnings" that businesses and individuals have entrusted to banks. This purpose would not be furthered by extending deposit insurance to cover a standby letter of credit backed by a contingent promissory note, which involves no such surrender of assets or hard earnings to the bank's custody. In this case, the bank was not in possession of

any of respondent's or the customer's assets when it went into receivership. Pp. 430–440.

751 F. 2d 1131, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, POWELL, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 440.

Charles A. Rothfeld argued the cause for petitioner. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Wallace,* and *John C. Murphy, Jr.*

Gerald F. Slattery, Jr., argued the cause and filed a brief for respondent.*

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari to consider whether a standby letter of credit backed by a contingent promissory note is insured as a "deposit" under the federal deposit insurance program. We hold that, in light of the longstanding interpretation of petitioner Federal Deposit Insurance Corporation (FDIC) that such a letter does not create a deposit and, in light of the fact that such a letter does not entrust any noncontingent assets to the bank, a standby letter of credit backed by a contingent promissory note does not give rise to an insured deposit.

I

Orion Manufacturing Corporation (Orion) was, at the time of the relevant transactions, a customer of respondent Phila-

*Briefs of *amici curiae* urging reversal were filed for the American Bankers Association et al. by *John L. Warden* and *Stanley F. Farrar;* for the Council on International Banking, Inc., by *Bud G. Holman;* for the National Association of Bond Lawyers by *Daniel O. Mahoney;* and for the U. S. Conference of Mayors et al. by *Benna Ruth Solomon* and *Joyce Holmes Benjamin.*

George W. Miller and *Dennis J. Lehr* filed a brief for William H. Allen et al. as *amici curiae* urging affirmance.

delphia Gear Corporation (Philadelphia Gear). On Orion's application, the Penn Square Bank, N. A. (Penn Square) issued a letter of credit for the benefit of Philadelphia Gear in the amount of $145,200. The letter of credit provided that a draft drawn upon the letter of credit would be honored by Penn Square only if accompanied by Philadelphia Gear's "signed statement that [it had] invoiced Orion Manufacturing Corporation and that said invoices have remained unpaid for at least fifteen (15) days." App. 25. Because the letter of credit was intended to provide payment to the seller only if the buyer of the invoiced goods failed to make payment, the letter of credit was what is commonly referred to as a "standby" or "guaranty" letter of credit. See, *e. g.*, 12 CFR § 337.2(a), and n. 1 (1985) (defining standby letters of credit and mentioning that they may "'guaranty' payment of a money obligation"). A conventional "commercial" letter of credit, in contrast, is one in which the seller obtains payment from the issuing bank without looking to the buyer for payment even in the first instance. See *ibid.* (distinguishing standby letters of credit from commercial letters of credit). See also Verkuil, Bank Solvency and Guaranty Letters of Credit, 25 Stan. L. Rev. 716, 717–724 (1973); Arnold & Bransilver, The Standby Letter of Credit—The Controversy Continues, 10 U. C. C. L. J. 272, 277–279 (Spring 1978).

On the same day that Penn Square issued the standby letter of credit, Orion executed an unsecured promissory note for $145,200 in favor of Penn Square. App. 27. The purpose of the note was listed as "Back up Letter of Credit." *Ibid.* Although the face of the note did not so indicate, both Orion and Penn Square understood that nothing would be considered due on the note, and no interest charged by Penn Square, unless Philadelphia Gear presented drafts on the standby letter of credit after nonpayment by Orion. 751 F. 2d 1131, 1134 (CA10 1984). See also Tr. of Oral Arg. 32.

On July 5, 1982, Penn Square was declared insolvent. Petitioner FDIC was appointed its receiver. Shortly there-

after, Philadelphia Gear presented drafts on the standby letter of credit for payment of over $700,000 for goods delivered before Penn Square's insolvency. The FDIC returned the drafts unpaid. 751 F. 2d., at 1133–1134.

Philadelphia Gear sued the FDIC in the Western District of Oklahoma. Philadelphia Gear alleged that the standby letter of credit was an insured deposit under the definition of "deposit" set forth at 12 U. S. C. § 1813(*l*)(1), and that Philadelphia Gear was therefore entitled to $100,000 in deposit insurance from the FDIC. See 12 U. S. C. § 1821(a)(1) (setting forth $100,000 as the maximum amount generally insured by the FDIC for any single depositor at a given bank). In apparent hopes of obtaining additional funds from the FDIC in the latter's capacity as receiver rather than as insurer, respondent also alleged that terms of the standby letter of credit allowing repeated reinstatements of the credit made the letter's total value more than $145,200.

The District Court held that the total value of the standby letter of credit was $145,200, App. B to Pet. for Cert. 20a, 28a-30a; that the letter was an insured deposit on which the FDIC was liable for $100,000 in deposit insurance, *id.*, at 37a-43a; and that Philadelphia Gear was entitled to prejudgment interest on that $100,000, *id.*, at 43a. The FDIC appealed from the District Court's ruling that the standby letter of credit backed by a contingent promissory note constituted a "deposit" for purposes of 12 U. S. C. § 1813(*l*)(1) and its ruling that Philadelphia Gear was entitled to an award of prejudgment interest. Philadelphia Gear cross-appealed from the District Court's ruling on the total value of the letter of credit.

The Court of Appeals for the Tenth Circuit reversed the District Court's award of prejudgment interest, 751 F. 2d, at 1138–1139, but otherwise affirmed the District Court's decision. As to the definition of "deposit," the Court of Appeals held that a standby letter of credit backed by a promissory note fell within the terms of 12 U. S. C. § 1813(*l*)(1)'s defini-

tion of "deposit," and was therefore insured. *Id.*, at 1134–1138. We granted the FDIC's petition for certiorari on this aspect of the Court of Appeals' ruling. 474 U. S. 918 (1985). We now reverse.

II

Title 12 U. S. C. § 1813(*l*)(1) provides:

> "The term 'deposit' means—
>
> "(1) the unpaid balance of money or its equivalent received or held by a bank in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial . . . account, or which is evidenced by . . . a letter of credit or a traveler's check on which the bank is primarily liable: *Provided*, That, without limiting the generality of the term 'money or its equivalent,' any such account or instrument must be regarded as evidencing the receipt of the equivalent of money when credited or issued in exchange for checks or drafts or for a promissory note upon which the person obtaining any such credit or instrument is primarily or secondarily liable . . . ."

Philadelphia Gear successfully argued before the Court of Appeals that the standby letter of credit backed by a contingent promissory note constituted a "deposit" under 12 U. S. C. § 1813(*l*)(1) because that letter was one on which the bank was primarily liable, and evidenced the receipt by the bank of "money or its equivalent" in the form of a promissory note upon which the person obtaining the credit was primarily or secondarily liable. The FDIC does not here dispute that the bank was primarily liable on the letter of credit. Brief for Petitioner 7, n. 7. Nor does the FDIC contest the fact that the backup note executed by Orion is, at least in some sense, a "promissory note." See Tr. of Oral Arg. 7 (remarks of Mr. Rothfeld, representing the FDIC) ("It was labeled a note. It can be termed a note"). The FDIC argues rather that it has consistently interpreted § 1813(*l*)(1) not to

include standby letters of credit backed only by a contingent promissory note because such a note represents no hard assets and thus does not constitute "money or its equivalent." Because the alleged "deposit" consists only of a *contingent* liability, asserts the FDIC, a standby letter of credit backed by a contingent promissory note does not give rise to a "deposit" that Congress intended the FDIC to insure. Under this theory, while the note here may have been labeled a promissory note on its face and may have been a promissory note under state law, it was not a promissory note for purposes of the federal law set forth in 12 U. S. C. § 1813(*l*)(1). See *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447, 456 (1942) (holding that liability on a promissory note acquired by the FDIC is a federal question); *First National Bank* v. *Dickinson*, 396 U. S. 122, 133–134 (1969) (holding that federal law governs the definition of branch banking under the McFadden Act).

The Court of Appeals quite properly looked first to the language of the statute. See *Florida Power & Light Co.* v. *Lorion*, 470 U. S. 729, 735 (1985); *United States* v. *Yermian*, 468 U. S. 63, 68 (1984). Finding the language of the proviso in § 1813(*l*)(1) sufficiently plain, the Court of Appeals looked no further. But as the FDIC points out, the terms "letter of credit" and "promissory note" as used in the statute have a federal definition, and the FDIC has developed and interpreted those definitions for many years within the framework of the complex statutory scheme that the FDIC administers. The FDIC's interpretation of whether a standby letter of credit backed by a contingent promissory note constitutes a "deposit" is consistent with Congress' desire to protect the hard earnings of individuals by providing for federal deposit insurance. Since the creation of the FDIC, Congress has expressed no dissatisfaction with the FDIC's interpretation of "deposit"; indeed, Congress in 1960 adopted the FDIC's regulatory definition as the statutory language. When we weigh all these factors together, we are

constrained to conclude that the term "deposit" does not include a standby letter of credit backed by a contingent promissory note.

A

Justice Holmes stated that, as to discerning the constitutionality of a federal estate tax, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). Although the genesis of the Federal Deposit Insurance Act may not be quite so powerful a substitute for legal analysis, that history is worthy of at least a page of recounting for the light it sheds on Congress' purpose in passing the Act. Cf. *Watt* v. *Alaska*, 451 U. S. 259, 266 (1981) ("The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect").

When Congress created the FDIC, the Nation was in the throes of an extraordinary financial crisis. See generally F. Allen, Since Yesterday: The Nineteen-Thirties in America 98–121 (1940); A. Schlesinger, The Crisis of the Old Order 474–482 (1957). More than one-third of the banks in the United States open in 1929 had shut their doors just four years later. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, pt. 2, pp. 1019, 1038 (1976). In response to this financial crisis, President Roosevelt declared a national banking holiday effective the first business day after he took office. 48 Stat. 1689. Congress in turn responded with extensive legislation on banking, including the laws that gave the FDIC its existence.

Congress' purpose in creating the FDIC was clear. Faced with virtual panic, Congress attempted to safeguard the hard earnings of individuals against the possibility that bank failures would deprive them of their savings. Congress passed the 1933 provisions "[i]n order to provide against a repetition of the present painful experience in which a vast sum of *assets and purchasing power* is 'tied up.'" S. Rep. No. 77, 73d Cong., 1st Sess., 12 (1933) (emphasis added). The

focus of Congress was therefore upon ensuring that a deposit of "hard earnings" entrusted by individuals to a bank would not lead to a tangible loss in the event of a bank failure. As the chairman of the relevant Committee in the House of Representatives explained on the floor:

> "[T]he purpose of this legislation is to protect the people of the United States in the right to have banks in which their deposits will be safe. They have a right to expect of Congress the establishment and maintenance of a system of banks in the United States where citizens may place their hard earnings with reasonable expectation of being able to get them out again upon demand. . . .
>
> . . . . .
>
> "[The purpose of the bill is to ensure that] the community is saved from the shock of a bank failure, and every citizen has been given an opportunity to withdraw his deposits. . . .
>
> . . . . .
>
> "The public . . . demand of you and me that we provide a banking system worthy of this great Nation and banks in which citizens may place the fruits of their toil and know that a deposit slip in return for their hard earnings will be as safe as a Government bond." 77 Cong. Rec. 3837, 3838, 3840 (1933) (remarks of Rep. Steagall).

See also *id.*, at 3913 (remarks of Rep. Keller) ("[We must make] it absolutely certain that . . . any and every man, woman, or child who puts a dollar in any bank can absolutely know that he will under no circumstances lose a single penny of it"); *id.*, at 3924 (remarks of Rep. Green) ("It is time that we pass a law so secure that when a man puts his money in a bank he will know for sure that when he comes back it will be there"). To prevent bank failure that resulted in the tangible loss of hard assets was therefore the focus of Congress' effort in creating deposit insurance.

Despite the fact Congress revisited the deposit insurance statute in 1935, 1950, and 1960, these comments remain the

best indication of Congress' underlying purpose in creating deposit insurance. The Reports on the 1935 amendments presented the definition of "deposit" without any specific comment. See H. R. Rep. No. 742, 74th Cong., 1st Sess., 2 (1935); S. Rep. No. 1007, 74th Cong., 1st Sess., 2–4 (1935); H. R. Conf. Rep. No. 1822, 74th Cong., 1st Sess., 44 (1935). The floor debates centered around changes in the Federal Reserve System made in the same bill, not on deposit insurance. See, *e. g.*, 79 Cong. Rec. 6568–6577, 6651–6660 (1935). Indeed, in light of the fact that instruments denominated "promissory notes" seem at the time to have been considered exclusively uncontingent, see, *e. g.*, 16 Fed. Res. Bull. 520 (1930) (Regulation A) (defining promissory note as an "*unconditional* promise . . . to pay [a sum certain in dollars] at a fixed or determinable future time") (emphasis added); *Gilman* v. *Commissioner*, 53 F. 2d 47, 50 (CA8 1931) ("The form of these [contingent] instruments referred to as 'promissory notes' is very unusual"), it is unlikely that Congress would have had occasion to refer expressly to contingent notes such as the one before us here even if Congress had turned its attention to the definition of "deposit" when it first enacted the provision treating "money or its equivalent."

The legislative history of the 1950 amendments is similarly unhelpful, as one would expect given that the relevant provisions were reenacted but unchanged. See S. Rep. No. 1269, 81st Cong., 2d Sess., 2–3 (1950); H. R. Rep. No. 2564, 81st Cong., 2d Sess., 5–6 (1950). The Committee Reports on the 1960 amendments likewise give no indication that the amendments' phrasing was meant to effect any fundamental changes in the definition of deposit; those Reports state only that the changes are intended to bring into harmony the definitions of "deposit" used for purposes of deposit insurance with those used in reports of condition, and that the FDIC's rules and regulations are to be incorporated into the new definition. See H. R. Rep. No. 1827, 86th Cong., 2d Sess., 3, 5 (1960); S. Rep. No. 1821, 86th Cong., 2d Sess., 7, 10 (1960).

See also 106 Cong. Rec. 14794 (1960) (discussing pre-1960 scheme).

Congress' focus in providing for a system of deposit insurance—a system that has been continued to the present without modification to the basic definition of deposits that are "money or its equivalent"—was clearly a focus upon safeguarding the assets and "hard earnings" that businesses and individuals have entrusted to banks. Congress wanted to ensure that someone who put tangible assets into a bank could always get those assets back. The purpose behind the insurance of deposits in general, and especially in the section defining deposits as "money or its equivalent," therefore, is the protection of assets and hard earnings entrusted to a bank.

This purpose is not furthered by extending deposit insurance to cover a standby letter of credit backed by a contingent promissory note, which involves no such surrender of assets or hard earnings to the custody of the bank. Philadelphia Gear, which now seeks to collect deposit insurance, surrendered absolutely nothing to the bank. The letter of credit is for Philadelphia Gear's benefit, but the bank relied upon Orion to meet the obligations of the letter of credit and made no demands upon Philadelphia Gear. Nor, more importantly, did Orion surrender any assets unconditionally to the bank. The bank did not credit any account of Orion's in exchange for the promissory note, and did not treat its own assets as increased by its acceptance of the note. The bank could not have collected on the note from Orion unless Philadelphia Gear presented the unpaid invoices and a draft on the letter of credit. In the absence of a presentation by Philadelphia Gear of the unpaid invoices, the promissory note was a wholly contingent promise, and when Penn Square went into receivership, neither Orion nor Philadelphia Gear had lost anything except the ability to use Penn Square to reduce Philadelphia Gear's risk that Philadelphia Gear would go unpaid for a delivery of goods to Orion.

B

Congress' actions with respect to the particular definition of "deposit" that it has chosen in order to effect its general purpose likewise lead us to believe that a standby letter of credit backed by a contingent promissory note is not an insurable "deposit." In 1933, Congress amended the Federal Reserve Act to authorize the creation of the FDIC and charged it "to insure . . . the deposits of all banks which are entitled to the benefits of [FDIC] insurance." § 8, Banking Act of 1933, ch. 89, 48 Stat. 168. Congress did not define the term "deposit," however, until the Banking Act of 1935, in which it stated:

> "The term 'deposit' means the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time or thrift account, or which is evidenced by its certificate of deposit, and trust funds held by such bank whether retained or deposited in any department of such bank or deposited in another bank, together with such other obligations of a bank as the board of directors [of the FDIC] shall find and shall prescribe by its regulations to be deposit liabilities by general usage . . . ." § 101, Banking Act of 1935, ch. 614, 49 Stat. 684, 685–686.

Less than two months after this statute was enacted, the FDIC promulgated a definition of "deposit," which provided in part that "letters of credit must be regarded as issued for the equivalent of money when issued in exchange for . . . promissory notes upon which the person procuring [such] instruments is primarily or secondarily liable." See 12 CFR § 301.1(d) (1939) (codifying Regulation I, rule 1, Oct. 1, 1935), revoked after incorporation into statutory law, 12 CFR 234 (Supp. 1962).

In 1950, Congress revisited the provisions specifically governing the FDIC in order to remove them from the Federal

Reserve Act and place them into a separate Act. See Act of Sept. 21, 1950, ch. 967, 64 Stat. 874. The new provisions did not modify the definition of "deposit." In 1960, Congress expanded the statutory definition of "deposit" in several categories, and also incorporated the regulatory definition that the FDIC had employed since 1935 into the statute that remains in force today. See *supra*, at 430 (quoting current version of statute).

At no point did Congress disown its initial, clear desire to protect the hard assets of depositors. See *supra*, at 432–435. At no point did Congress criticize the FDIC's longstanding interpretation, see *infra*, at 438, that a standby letter of credit backed by a contingent promissory note is not a "deposit." In fact, Congress had re-enacted the 1935 provisions in 1950 without changing the definition of "deposit" at all. Compare 49 Stat. 685–686 with 64 Stat. 874–875. When the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB* v. *Bell Aerospace*, 416 U. S. 267, 275 (1974). See *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 457 (1978). Indeed, the current statutory definition of "deposit," added by Congress in 1960, was expressly designed to incorporate the FDIC's rules and regulations on "deposits." As Committees of both Houses of Congress explained the amendments: "The amended definition would include the present statutory definition of deposits, *and the definition of deposits in the rules and regulations of the Federal Deposit Insurance Corporation*, [along] with . . . changes [in sections other than what is now § 1813(*l*)(1)]." H. R. Rep. No. 1827, 86th Cong., 2d Sess., 5 (1960) (emphasis added); S. Rep. No. 1821, 86th Cong., 2d Sess., 10 (1960) (same). Congress, therefore, has expressly incorporated into the statutory scheme the regulations that the FDIC devised to assist it in determining what constitutes a "deposit"

within the statutory scheme. Under these circumstances, we must obviously give a great deal of deference to the FDIC's interpretation of what these regulations do and do not include within their definition of "deposit."

C

Although the FDIC does not argue that it has an express regulation excluding a standby letter of credit backed by a contingent promissory note from the definition of "deposit" in 12 U. S. C. § 1813(*l*)(1), that exclusion by the FDIC is nonetheless longstanding and consistent. At a meeting of FDIC and bank officials shortly after the FDIC's creation, a bank official asked whether a letter of credit issued by a charge against a customer's account was a deposit. The FDIC official replied:

> "'If your letter of credit is issued by a charge against a depositor's account or for cash and the letter of credit is reflected on your books as a liability, you do have a deposit liability. If, on the other hand, you merely extend a line of credit to your customer, you will only show a contingent liability on your books. In that event no deposit liability has been created.'" Transcript as quoted in *FDIC* v. *Irving Trust Co.*, 137 F. Supp. 145, 161 (SDNY 1955).

Because Penn Square apparently never reflected the letter of credit here as a noncontingent liability, and because the interwoven financial instruments at issue here can be viewed most accurately as the extension of a line of credit by Penn Square to Orion, this transcript lends support to the FDIC's contention that its longstanding policy has been to exclude standby letters of credit backed by contingent promissory notes from 12 U. S. C. § 1813(*l*)(1)'s definition of "deposit."

The FDIC's contemporaneous understanding that standby letters of credit backed by contingent promissory notes do not generate a "deposit" for purposes of 12 U. S. C. § 1813(*l*)(1) has been fortified by its behavior over the follow-

ing decades. The FDIC has asserted repeatedly that it has never charged deposit insurance premiums on standby letters of credit backed by contingent promissory notes, and Philadelphia Gear does not contest that assertion. See Tr. of Oral Arg. 42. Congress requires the FDIC to assess contributions to its insurance fund at a fixed percentage of a bank's "deposits" under 12 U. S. C. § 1813(*l*)(1). See 12 U. S. C. §§ 1817(a)(4), (b)(1), (b)(4)(A). By the time that this suit—the first challenge to the FDIC's treatment of standby letters of credit backed by contingent promissory notes—was brought, almost $100 billion in standby letters of credit was outstanding. See Board of Governors of the Federal Reserve System, Annual Statistical Digest 71 (1983); FDIC, 1983 Statistics on Banking (Table 110F). The FDIC's failure to levy premiums on standby letters of credit backed by contingent promissory notes therefore clearly demonstrates that the FDIC has never considered such letters to reflect deposits.

Although the FDIC's interpretation of the relevant statute has not been reduced to a specific regulation, we conclude nevertheless that the FDIC's practice and belief that a standby letter of credit backed by a contingent promissory note does not create a "deposit" within the meaning of 12 U. S. C. § 1813(*l*)(1) are entitled in the circumstances of this case to the "considerable weight [that] should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984). As we have stated above, the FDIC's interpretation here of a statutory definition adopted wholesale from the FDIC's own regulation is consistent with congressional purpose, and may certainly stand.

III

Philadelphia Gear essentially seeks to have the FDIC guarantee the contingent credit extended to Orion, not assets en-

trusted to the bank by Philadelphia Gear or by Orion on Philadelphia Gear's behalf. With a standard "commercial" letter of credit, Orion would typically have unconditionally entrusted Penn Square with funds before Penn Square would have written the letter of credit, and thus Orion would have lost something if Penn Square became unable to honor its obligations. As the FDIC concedes, deposit insurance extends to such a letter of credit backed by an uncontingent promissory note. See Tr. of Oral Arg. 8 (statement of Mr. Rothfeld, representing the FDIC) ("If this note were a fully uncontingent negotiable note that were not limited by any side agreements, it would be a note backing a letter of credit within the meaning of the statute"). See also *id.*, at 17–18. But here, with a standby letter of credit backed by a contingent promissory note, Penn Square was not in possession of any of Orion's or Philadelphia Gear's assets when it went into receivership. Nothing was ventured, and therefore no insurable deposit was lost. We believe that, whatever the relevant State's definition of "letter of credit" or "promissory note," Congress did not by using those phrases in 12 U. S. C. § 1813(*l*)(1) intend to protect with deposit insurance a standby letter of credit backed only by a contingent promissory note. We thus hold that such an arrangement does not give rise to a "deposit" under 12 U. S. C. § 1813(*l*)(1).

Accordingly, the judgment of the court below is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

There is considerable common sense backing the Court's opinion. The standby letter of credit in this case differs considerably from the savings and checking accounts that come most readily to mind when one speaks of an insured deposit. Nevertheless, to reach this common-sense result, the Court must read qualifications into the statute that do not appear

there. We recently recognized that even when the ingenuity of businessmen creates transactions and corporate forms that were perhaps not contemplated by Congress, the courts must enforce the statutes that Congress has enacted. See *Board of Governors, FRS* v. *Dimension Financial Corp.*, 474 U. S. 361, 373–375 (1986). Congress unmistakably provided that letters of credit backed by promissory notes constitute "deposits" for purposes of the federal deposit insurance program, and the Court's attempt to draw distinctions between different types of letter of credit transactions forces it to ignore both the statute and some settled principles of commercial law. Here, as in *Dimension*, the inflexibility of the statute as applied to modern financial transactions is a matter for Congress, not the FDIC or this Court, to remedy.

It cannot be doubted that the standby letter of credit in this case meets the literal definition of a "deposit" contained in 12 U. S. C. § 1813(*l*)(1). It is "a letter of credit . . . on which the bank is primarily liable . . . issued in exchange for . . . a promissory note upon which [Orion] is primarily or secondarily liable." The Court, however, holds that the note in this case, whether or not it is a promissory note under the Uniform Commercial Code (UCC) and Oklahoma law, is not a promissory note for purposes of the Federal Deposit Insurance Act. We should assume, absent convincing evidence to the contrary, that Congress intended for the term "promissory note" to derive its meaning from the ordinary sources of commercial law. I believe that there is no such evidence in this case.

The Court justifies its restrictive reading of the term "promissory note" in large part by arguing that Congress would not have wanted to include in that term any obligation that was not the present equivalent of money. The keystone of the FDIC's arguments, and of the Court's decision, is that Orion did not entrust "money or its equivalent" to the bank. The note in this case, however, was the equivalent of money,

and the Court's reading of Congress' intent is therefore largely irrelevant.

FDIC concedes, as it must, that Congress has determined that a promissory note generally constitutes money or its equivalent. Moreover, that statutory definition comports with economic reality. Promissory notes typically are negotiable instruments and therefore readily convertible into cash. The FDIC argues, and the Court holds, that the promissory note in this case is "contingent" and therefore not the equivalent of money. However, while the FDIC argues strenuously that Orion's note is not a promissory note in the usual sense of the word, one could more plausibly state that it is not a "contingent" obligation in the usual sense of that word. On its face the note is an unconditional obligation of Orion to pay the holder $145,200 plus accrued interest on August 1, 1982. It sets out no conditions that would affect the negotiability of the note, and therefore is fully negotiable for purposes of the UCC, U.C.C. § 3–104(1) (1977); Okla. Stat., Tit. 12A, § 3–104(1) (1981).

The Court therefore misses the point when it states that at the time of the original banking Acts, the term "promissory note" was not understood to include a contingent obligation. *Ante*, at 434. The note at issue in this case is an unconditional promise to pay, and satisfies all the requisites of a negotiable promissory note, either under the UCC or the common law as it existed in the 1930's. The only contingencies attached to Orion's obligation arise out of a separate contract. As to such contingencies, the law was well settled long before 1930:

> "[I]n order to make a note invalid as a promissory note, the contingency to avoid it must be apparent, either upon the face of the note, or upon some contemporaneous written memorandum on the same paper; for, if the memorandum is not contemporaneous, or if it be merely verbal in each case, whatever may be its effect as a matter of defence between the original parties, it is not deemed to be a part of the instrument, and does not af-

fect, much less invalidate, its original character." J. Thorndike, Story on Promissory Notes 34 (7th ed. 1878) (footnotes omitted).[1]

It is far from a matter of semantics to state that while Orion and the bank may have an oral understanding concerning the bank's treatment of Orion's note, that note itself is unconditional, and equivalent to money. The Court correctly observes that the bank would have breached its oral contract had it attempted to sue on the note; nevertheless, Orion would have had separately to plead and prove a breach of contract in that case, because parol evidence that the contract between the parties differed from the written instrument would have been inadmissible in the bank's action to collect the debt. See *American Perforating Co.* v. *Oklahoma State Bank*, 463 P. 2d 958, 962–963 (Okla. 1970). Similarly, should the note have found its way into the hands of a third party, Orion would have had no choice but to honor it, again being left with only the right to sue the bank for breach of the oral contract. Orion's entrustment of the note to the bank was not, therefore, completely risk free.

The risk taken on by Orion may not differ substantially from the risk assumed by one who hands over money to the bank to guarantee repayment of funds paid out on a letter of credit. The bank typically undertakes to put such cash collateral into a special account, where it never enters into the general assets of the bank. See U.C.C. § 5–117, comment (1977). Should the bank cease operations, the customer will enjoy a preference in bankruptcy, entitling it to receive its money back before general unsecured creditors of the bank

[1] We would have a very different case if the conditions put upon Orion's obligation to the bank were reflected on the face of the note, as they were in *Allen* v. *FDIC*, 599 F. Supp. 104 (ED Tenn. 1984), appeal pending, No. 85–5003 (CA6), a case raising the same issue as the present one. Because such a note is not negotiable, it is much more plausible to argue that Congress would not have considered it "money or its equivalent." The note in this case, however, is in no sense a contingent note.

are paid. U.C.C. §5–117; Okla. Stat., Tit. 12A, §5–117 (1981). Like Orion, then, that hypothetical customer has little to fear absent misconduct by the bank or a third party. If the federal deposit insurance program should not protect Philadelphia Gear, therefore, it probably should not protect *any* holder of a letter of credit, whether commercial, standby, funded, or unfunded.[2] That, however, is clearly a matter for Congress to determine.

While the Court purports to examine what Congress meant when it said "promissory note," in fact the Court's opinion does not rest on any special attributes of Orion's note. Rather, the Court rules that when an individual entrusts a negotiable instrument to a bank, that instrument is not "money or its equivalent" for purposes of §1813(*l*)(1) so long as the bank promises not to negotiate it or collect on it until certain conditions are met. That is a proviso that Congress might have been well advised to include in the Act, but did not. I therefore dissent.

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[2] It seems odd that Philadelphia Gear's status as an insured depositor should depend on the terms of the repayment agreement between Orion and the bank. Ordinarily, Philadelphia Gear would be indifferent to the agreement between Orion and the bank, and might not even be aware of the terms of that agreement. The Court, therefore, is not necessarily bringing greater rationality to this area of the law by creating distinctions between types of letters of credit for purposes of federal deposit insurance coverage.

PUBLIC SERVICE COMMISSION OF MARYLAND *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF MARYLAND

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1362. Argued January 13, 1986—Decided May 27, 1986

748 F. 2d 879, vacated and remanded.

Kirk J. Emge argued the cause and filed briefs for petitioner.

Jack D. Smith argued the cause for the Federal Communications Commission as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Fried, Deputy Solicitor General Wallace, Christopher J. Wright, Daniel M. Armstrong,* and *Jane E. Mago.*

D. Michael Stroud argued the cause for respondent. With him on the brief were *J. William Sarver, Mark J. Mathis,* and *Daniel I. Prywes.**

PER CURIAM.

We vacate the judgment of the Court of Appeals for the Fourth Circuit and remand for further proceedings consist-

*A brief of *amici curiae* urging reversal was filed for the State of California et al. by *Janice E. Kerr, J. Calvin Simpson, Mark E. Fogelman, Ellen S. LeVine, Joseph I. Lieberman,* Attorney General of Connecticut, *William B. Gundling, Peter J. Jenkelunas, Phyllis E. Lemell,* Assistant Attorneys General, *Howard C. Davenport, Wiliam S. Bilenky, Philip Stoffregen, Patrick Nugent, William Paul Rodgers, Jr., Jack Shreve, Stephen L. Skipper, Robert Waldrum, Joseph G. Donahue, William E. Furber, John K. Keane, Jr., Frank J. Kelley,* Attorney General of Michigan, *Louis J. Caruso,* Solicitor General, *Don L. Keskey* and *Leo H. Friedman,* Assistant Attorneys General, *Lynda S. Mounts, Brian Moline, Ellyn Elise Crutcher, Michael R. Fontham,* and *Marshall B. Brinkley.*

A brief of *amici curiae* urging affirmance was filed for American Telephone and Telegraph Co. et al. by *Michael Boudin, Thomas J. Reiman, Vincent L. Sgrosso, W. Preston Granbery,* and *John B. Messenger.*

ent with the opinion in *Louisiana Public Service Comm'n* v. *FCC*, *ante*, p. 355.

It is so ordered.

JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this case.

FEDERAL TRADE COMMISSION v. INDIANA FEDERATION OF DENTISTS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-1809. Argued March 25, 1986—Decided June 2, 1986

Respondent organization of dentists in Indiana promulgated a policy requiring its members to withhold x rays from dental insurers in connection with evaluating patients' claims for benefits. The Federal Trade Commission (FTC) issued a cease-and-desist order, ruling that the policy constituted an unfair method of competition in violation of § 5 of the Federal Trade Commission Act, since it amounted to a conspiratorial restraint of trade in violation of § 1 of the Sherman Act. The Court of Appeals vacated the FTC's order on the ground that it was not supported by substantial evidence, holding that the FTC's findings that respondent's x-ray policy was anticompetitive were erroneous; that the findings were inadequate because of the FTC's failure to define the market in which respondent allegedly restrained competition and to establish that respondent had the power to restrain competition in that market; and that the FTC erred in not determining whether the alleged restraint on competition among dentists had actually resulted in higher dental costs to patients and insurers.

Held:

1. The FTC's factual findings regarding respondent's x-ray policy are supported by substantial evidence. There is no dispute that respondent's members conspired among themselves to withhold x rays, and the FTC's finding that competition among dentists with respect to cooperation with insurers' requests for x rays was diminished where respondent held sway also finds adequate support in the record. Pp. 455–457.

2. Evaluated under the Rule of Reason, the FTC's factual findings are sufficient as a matter of law to establish a violation of § 1 of the Sherman Act, *i.e.*, an unreasonable restraint of trade, and hence a violation of § 5 of the FTC Act. Respondent's x-ray policy takes the form of a horizontal agreement among its members to withhold from their customers a particular service that they desire. Absent some countervailing procompetitive virtue, such an agreement cannot be sustained under the Rule of Reason. This conclusion is not precluded by the absence of specific findings as to the market in which respondent allegedly restrained competition or as to the power of respondent's members in that market or by the FTC's failure to find that respondent's x-ray policy resulted in

more costly dental services than the patients and insurers would have chosen if they were able to evaluate x rays in conjunction with claim forms. Nor do alleged noncompetitive "quality of care" considerations justify respondent's x-ray policy. And whether or not respondent's policy is consistent with Indiana's supposed policy against submission of x rays to insurers, it is not immunized from antitrust scrutiny. Anticompetitive collusion among private actors, even when consistent with state policy, acquires antitrust immunity only when it is actually supervised by the State, and there is no suggestion of such supervision here. Pp. 457–465.

745 F. 2d 1124, reversed.

WHITE, J., delivered the opinion for a unanimous Court.

Marcy J. K. Tiffany argued the cause for petitioner. With her on the briefs were *Solicitor General Fried*, *Assistant Attorney General Ginsburg*, *Ernest J. Isenstadt*, *David C. Shonka*, and *L. Barry Costilo*.

Bruce W. Graham argued the cause for respondent. With him on the brief was *Ronald K. Fowler*.*

JUSTICE WHITE delivered the opinion of the Court.

This case concerns commercial relations among certain Indiana dentists, their patients, and the patients' dental health care insurers. The question presented is whether the Federal Trade Commission correctly concluded that a conspiracy among dentists to refuse to submit x rays to dental insurers for use in benefits determinations constituted an

*Briefs of *amici curiae* urging reversal were filed for the American Association of Retired Persons by *Alfred Miller* and *Steven S. Honigman;* for the Health Insurance Association of America by *Joe Sims* and *Edwin R. Soeffing;* and for the Washington Business Group on Health by *Stephan E. Lawton*.

Briefs of *amici curiae* urging affirmance were filed for the American College of Radiology by *Reuben L. Hedlund* and *James A. Cherney;* for the American Dental Association by *Peter M. Sfikas;* for the American Medical Association by *Benjamin W. Heineman, Jr.*, *Carter G. Phillips*, *Newton N. Minow*, and *Jack R. Bierig;* and for the Physicians and Surgeons Association of Massachusetts, Inc., by *Robert D. Paul* and *Donald B. Gould*.

"unfair method of competition" in violation of § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45 (1982 ed. and Supp. II).

I

Since the 1970's, dental health insurers, responding to the demands of their policyholders, have attempted to contain the cost of dental treatment by, among other devices, limiting payment of benefits to the cost of the "least expensive yet adequate treatment" suitable to the needs of individual patients. Implementation of such cost-containment measures, known as "alternative benefits" plans, requires evaluation by the insurer of the diagnosis and recommendation of the treating dentist, either in advance of or following the provision of care. In order to carry out such evaluation, insurers frequently request dentists to submit, along with insurance claim forms requesting payment of benefits, any dental x rays that have been used by the dentist in examining the patient as well as other information concerning their diagnoses and treatment recommendations. Typically, claim forms and accompanying x rays are reviewed by lay claims examiners, who either approve payment of claims or, if the materials submitted raise a question whether the recommended course of treatment is in fact necessary, refer claims to dental consultants, who are licensed dentists, for further review. On the basis of the materials available, supplemented where appropriate by further diagnostic aids, the dental consultant may recommend that the insurer approve a claim, deny it, or pay only for a less expensive course of treatment.

Such review of diagnostic and treatment decisions has been viewed by some dentists as a threat to their professional independence and economic well-being. In the early 1970's, the Indiana Dental Association, a professional organization comprising some 85% of practicing dentists in the State of Indiana, initiated an aggressive effort to hinder insurers'

efforts to implement alternative benefits plans by enlisting member dentists to pledge not to submit x rays in conjunction with claim forms.[1] The Association's efforts met considerable success: large numbers of dentists signed the pledge, and insurers operating in Indiana found it difficult to obtain compliance with their requests for x rays and accordingly had to choose either to employ more expensive means of making alternative benefits determinations (for example, visiting the office of the treating dentist or conducting an independent oral examination) or to abandon such efforts altogether.

By the mid-1970's, fears of possible antitrust liability had dampened the Association's enthusiasm for opposing the submission of x rays to insurers. In 1979, the Association and a number of its constituent societies consented to a Federal Trade Commission order requiring them to cease and desist from further efforts to prevent member dentists from sub-

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[1] A presentation made in 1974 by Dr. David McClure, an Association official and later one of the founders of respondent Indiana Federation of Dentists, is revealing as to the motives underlying the dentists' resistance to the provision of x rays for use by insurers in making alternative benefits determinations:

"The problems associated with third party programs are many, but I believe the 'Indiana Plan' [*i. e.*, the policy of refusing to submit x rays] to be sound and if we work together, we can win this battle. We are fighting an economic war where the very survival of our profession is at stake.

"How long can some of the leaders of dentistry in other states be so complacent and willing to fall into the trap that is being set for us. If only they would take the time, to see from whence come the arrows that are heading in our direction. The Delta Dental Plans have bedded down with the unions and have been a party to setting up the greatest controls that any profession has ever known in a free society. . . .

"The name of the game is money. The government and labor are determined to reduce the cost of the dental health dollar at the expense of the dentist. There is no way a dental service can be rendered cheaper when the third party has to have its share of the dollar.

"Already we are locked into a fee freeze that could completely control the quality of dental care, if left on long enough." FTC Complaint Counsel's Trial Exhibit CX 372A, F, App. 104.

mitting x rays. *In re Indiana Dental Assn.*, 93 F. T. C. 392 (1979). Not all Indiana dentists were content to leave the matter of submitting x rays to the individual dentist. In 1976, a group of such dentists formed the Indiana Federation of Dentists, respondent in this case, in order to continue to pursue the Association's policy of resisting insurers' requests for x rays. The Federation, which styled itself a "union" in the belief that this label would stave off antitrust liability,[2] immediately promulgated a "work rule" forbidding its members to submit x rays to dental insurers in conjunction with claim forms. Although the Federation's membership was small, numbering less than 100, its members were highly concentrated in and around three Indiana communities: Anderson, Lafayette, and Fort Wayne. The Federation succeeded in enlisting nearly 100% of the dental specialists in the Anderson area, and approximately 67% of the dentists in and around Lafayette. In the areas of its strength, the Federation was successful in continuing to enforce the Association's prior policy of refusal to submit x rays to dental insurers.

In 1978, the Federal Trade Commission issued a complaint against the Federation, alleging in substance that its efforts to prevent its members from complying with insurers' requests for x rays constituted an unfair method of competition in violation of § 5 of the Federal Trade Commission Act. Following lengthy proceedings including a full evidentiary hearing before an Administrative Law Judge, the Commission ruled that the Federation's policy constituted a violation of § 5 and issued an order requiring the Federation to cease and desist from further efforts to organize dentists to refuse to submit x rays to insurers. *In re Indiana Federation of Dentists*, 101 F. T. C. 57 (1983). The Commission based its ruling on the conclusion that the Federation's policy of requiring its members to withhold x rays amounted to a conspiracy in restraint of trade that was unreasonable and hence

[2] Respondent no longer makes any pretense of arguing that it is immune from antitrust liability as a labor organization.

unlawful under the standards for judging such restraints developed in this Court's precedents interpreting § 1 of the Sherman Act. *E. g., Chicago Board of Trade* v. *United States*, 246 U. S. 231 (1918); *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978). The Commission found that the Federation had conspired both with the Indiana Dental Association and with its own members to withhold cooperation with dental insurers' requests for x rays; that absent such a restraint, competition among dentists for patients would have tended to lead dentists to compete with respect to their policies in dealing with patients' insurers; and that in those areas where the Federation's membership was strong, the Federation's policy had had the actual effect of eliminating such competition among dentists and preventing insurers from obtaining access to x rays in the desired manner. These findings of anticompetitive effect, the Commission concluded, were sufficient to establish that the restraint was unreasonable even absent proof that the Federation's policy had resulted in higher costs to the insurers and patients than would have occurred had the x rays been provided. Further, the Commission rejected the Federation's argument that its policy of withholding x rays was reasonable because the provision of x rays might lead the insurers to make inaccurate determinations of the proper level of care and thus injure the health of the insured patients: the Commission found no evidence that use of x rays by insurance companies in evaluating claims would result in inadequate dental care. Finally, the Commission rejected the Federation's contention that its actions were exempt from antitrust scrutiny because the withholding of x rays was consistent with the law and policy of the State of Indiana against the use of x rays in benefit determination by insurance companies. The Commission concluded that no such policy existed, and that in any event the existence of such a policy would not have justified the dentists' private and unsupervised conspiracy in restraint of trade.

The Federation sought judicial review of the Commission's order in the United States Court of Appeals for the Seventh Circuit, which vacated the order on the ground that it was not supported by substantial evidence. 745 F. 2d 1124 (1984). Accepting the Federation's characterization of its rule against submission of x rays as merely an ethical and moral policy designed to enhance the welfare of dental patients, the majority concluded that the Commission's findings that the policy was anticompetitive were erroneous. According to the majority, the evidence did not support the finding that in the absence of restraint dentists would compete for patients by offering cooperation with the requests of the patients' insurers, nor, even accepting that finding, was there evidence that the Federation's efforts had prevented such competition. Further, the court held that the Commission's findings were inadequate because of its failure both to offer a precise definition of the market in which the Federation was alleged to have restrained competition and to establish that the Federation had the power to restrain competition in that market. Finally, the majority faulted the Commission for not finding that the alleged restraint on competition among dentists had actually resulted in higher dental costs to patients and insurers. The third member of the Court of Appeals panel concurred in the judgment solely on the ground that there was insufficient proof that cooperation with insurers was an element of dental services as to which dentists would tend to compete.

We granted certiorari, 474 U. S. 900 (1985), in order to consider the Commission's claim that in vacating the Commission's order the Court of Appeals misconstrued applicable principles of antitrust law and "'misapprehended or grossly misapplied' the substantial evidence test," *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U. S. 490, 523 (1981) (citation omitted). We now reverse.

II

The issue is whether the Commission erred in holding that the Federation's policy of refusal to submit x rays to dental insurers for use in benefits determinations constituted an "unfair method of competition," unlawful under § 5 of the Federal Trade Commission Act. The question involves review of both factual and legal determinations. As to the former, our review is governed by 15 U. S. C. § 45(c), which provides that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." The statute forbids a court to "make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences." *FTC* v. *Algoma Lumber Co.*, 291 U. S. 67, 73 (1934). Rather, as under the essentially identical "substantial evidence" standard for review of agency factfinding, the court must accept the Commission's findings of fact if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 477 (1951); see also *Beneficial Corp.* v. *FTC*, 542 F. 2d 611, 616 (CA3 1976), cert. denied, 430 U. S. 983 (1977).

The legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are, by contrast, for the courts to resolve, although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as "unfair." See *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233 (1972); *Atlantic Refining Co.* v. *FTC*, 381 U. S. 357, 367–368 (1965); *FTC* v. *Cement Institute*, 333 U. S. 683, 720 (1948). The standard of "unfairness" under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, see *FTC* v. *Cement Institute*, *supra*, at 689–695, but also practices that the Commission determines are against public policy for other reasons, see *FTC* v. *Sperry & Hutchinson Co.*, 405

U. S., at 244. Once the Commission has chosen a particular legal rationale for holding a practice to be unfair, however, familiar principles of administrative law dictate that its decision must stand or fall on that basis, and a reviewing court may not consider other reasons why the practice might be deemed unfair. See *id.*, at 245–250; cf. *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943). In the case now before us, the sole basis of the FTC's finding of an unfair method of competition was the Commission's conclusion that the Federation's collective decision to withhold x rays from insurers was an unreasonable and conspiratorial restraint of trade in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. Accordingly, the legal question before us is whether the Commission's factual findings, if supported by evidence, make out a violation of Sherman Act § 1.

III

The relevant factual findings are that the members of the Federation conspired among themselves to withhold x rays requested by dental insurers for use in evaluating claims for benefits, and that this conspiracy had the effect of suppressing competition among dentists with respect to cooperation with the requests of the insurance companies. As to the first of these findings there can be no serious dispute: abundant evidence in the record reveals that one of the primary reasons—if not *the* primary reason—for the Federation's existence was the promulgation and enforcement of the so-called "work rule" against submission of x rays in conjunction with insurance claim forms.

As for the second crucial finding—that competition was actually suppressed—the Seventh Circuit held it to be unsupported by the evidence, on two theories. First, the court stated that the evidence did not establish that cooperation with requests for information by patients' insurance companies was an aspect of the provision of dental services with respect to which dentists would, in the absence of some

restraint, compete. Second, the court found that even assuming that dentists would otherwise compete with respect to policies of cooperating or not cooperating with insurance companies, the Federation's policy did not impair that competition, for the member dentists continued to allow insurance companies to use other means of evaluating their diagnoses when reviewing claims for benefits: specifically, "the IFD member dentists allowed insurers to visit the dental office to review and examine the patient's x rays along with all of the other diagnostic and clinical aids used in formulating a proper course of dental treatment." 745 F. 2d, at 1143.

Neither of these criticisms of the Commission's findings is well founded. The Commission's finding that "[i]n the absence of . . . concerted behavior, individual dentists would have been subject to market forces of competition, creating incentives for them to . . . comply with the requests of patients' third-party insurers," 101 F. T. C., at 173, finds support not only in common sense and economic theory, upon both of which the FTC may reasonably rely, but also in record documents, including newsletters circulated among Indiana dentists, revealing that Indiana dentists themselves perceived that unrestrained competition tended to lead their colleagues to comply with insurers' requests for x rays. See App. to Pet. for Cert. 289a, 306a-308a. Moreover, there was evidence that outside of Indiana, in States where dentists had not collectively refused to submit x rays, insurance companies found little difficulty in obtaining compliance by dentists with their requests. 101 F. T. C., at 172. A "reasonable mind" could conclude on the basis of this evidence that competition for patients, who have obvious incentives for seeking dentists who will cooperate with their insurers, would tend to lead dentists in Indiana (and elsewhere) to cooperate with requests for information by their patients' insurers.

The Commission's finding that such competition was actually diminished where the Federation held sway also finds adequate support in the record. The Commission found that in the areas where Federation membership among dentists was most significant (that is, in the vicinity of Anderson and Lafayette) insurance companies were unable to obtain compliance with their requests for submission of x rays in conjunction with claim forms and were forced to resort to other, more costly, means of reviewing diagnoses for the purpose of benefit determination. Neither the opinion of the Court of Appeals nor the brief of respondent identifies any evidence suggesting that the Commission's finding that the Federation's policy had an actual impact on the ability of insurers to obtain the x rays they requested was incorrect. The lower court's conclusion that this evidence is to be discounted because Federation members continued to cooperate with insurers by allowing them to use more costly—indeed, prohibitively costly—methods of reviewing treatment decisions is unpersuasive. The fact remains that the dentists' customers (that is, the patients and their insurers) sought a particular service: cooperation with the insurers' pretreatment review through the forwarding of x rays in conjunction with claim forms. The Federation's collective activities resulted in the denial of the information the customers requested in the form that they requested it, and forced them to choose between acquiring that information in a more costly manner or forgoing it altogether. To this extent, at least, competition among dentists with respect to cooperation with the requests of insurers was restrained.

IV

The question remains whether these findings are legally sufficient to establish a violation of § 1 of the Sherman Act—that is, whether the Federation's collective refusal to cooperate with insurers' requests for x rays constitutes an "unreasonable" restraint of trade. Under our precedents, a

restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be "*per se*" unreasonable, or because it violates what has come to be known as the "Rule of Reason," under which the "test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade* v. *United States*, 246 U. S., at 238.

The policy of the Federation with respect to its members' dealings with third-party insurers resembles practices that have been labeled "group boycotts": the policy constitutes a concerted refusal to deal on particular terms with patients covered by group dental insurance. Cf. *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U. S. 531 (1978); *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930). Although this Court has in the past stated that group boycotts are unlawful *per se*, see *United States* v. *General Motors Corp.*, 384 U. S. 127 (1966); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.* 359 U. S. 207 (1959), we decline to resolve this case by forcing the Federation's policy into the "boycott" pigeonhole and invoking the *per se* rule. As we observed last Term in *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U. S. 284 (1985), the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor—a situation obviously not present here. Moreover, we have been slow to condemn rules adopted by professional associations as unreasonable *per se*, see *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978), and, in general, to extend *per se* analysis to restraints imposed in the context

of business relationships where the economic impact of certain practices is not immediately obvious, see *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1 (1979). Thus, as did the FTC, we evaluate the restraint at issue in this case under the Rule of Reason rather than a rule of *per se* illegality.

Application of the Rule of Reason to these facts is not a matter of any great difficulty. The Federation's policy takes the form of a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire—the forwarding of x rays to insurance companies along with claim forms. "While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *National Society of Professional Engineers, supra*, at 692. A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services, see *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc., supra; Chicago Board of Trade, supra;* cf. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85 (1984)—such an agreement limiting consumer choice by impeding the "ordinary give and take of the market place," *National Society of Professional Engineers, supra*, at 692, cannot be sustained under the Rule of Reason. No credible argument has been advanced for the proposition that making it more costly for the insurers and patients who are the dentists' customers to obtain information needed for evaluating the dentists' diagnoses has any such procompetitive effect.

The Federation advances three principal arguments for the proposition that, notwithstanding its lack of competitive virtue, the Federation's policy of withholding x rays should not be deemed an unreasonable restraint of trade. First, as did the Court of Appeals, the Federation suggests that in the absence of specific findings by the Commission concerning the definition of the market in which the Federation allegedly restrained trade and the power of the Federation's members in that market, the conclusion that the Federation unreasonably restrained trade is erroneous as a matter of law, regardless of whether the challenged practices might be impermissibly anticompetitive if engaged in by persons who together possessed power in a specifically defined market. This contention, however, runs counter to the Court's holding in *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, *supra*, that "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output," and that such a restriction "requires some competitive justification even in the absence of a detailed market analysis." *Id.*, at 109–110. Moreover, even if the restriction imposed by the Federation is not sufficiently "naked" to call this principle into play, the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason. The Commission found that in two localities in the State of Indiana (the Anderson and Lafayette areas), Federation dentists constituted heavy majorities of the practicing dentists and that as a result of the efforts of the Federation, insurers in those areas were, over a period of years, actually unable to obtain compliance with their requests for submission of x rays. Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can

obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." 7 P. Areeda, Antitrust Law ¶1511, p. 429 (1986). In this case, we conclude that the finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.[3]

Second, the Federation, again following the lead of the Court of Appeals, argues that a holding that its policy of withholding x rays constituted an unreasonable restraint of trade is precluded by the Commission's failure to make any finding that the policy resulted in the provision of dental services that were more costly than those that the patients and their insurers would have chosen were they able to evaluate x rays in conjunction with claim forms. This argument, too, is unpersuasive. Although it is true that the goal of the insurers in seeking submission of x rays for use in their review of benefits claims was to minimize costs by choosing the least expensive adequate course of dental treatment, a showing that this goal was actually achieved through the means chosen is not an essential step in establishing that the dentists' attempt to thwart its achievement by collectively refusing to supply the requested information was an unreasonable restraint of trade. A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost-justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the

[3] Because we find that the Commission's findings can be sustained on this basis, we do not address the Commission's contention that the Federation's activities can be condemned regardless of market power or actual effect merely because they constitute a continuation of the restraints formerly imposed by the Indiana Dental Association, which allegedly had market power throughout the State of Indiana.

market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence. *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978). Moreover, even if the desired information were in fact completely useless to the insurers and their patients in making an informed choice regarding the least costly adequate course of treatment—or, to put it another way, if the costs of evaluating the information were far greater than the cost savings resulting from its use—the Federation would still not be justified in deciding on behalf of its members' customers that they did not need the information: presumably, if that were the case, the discipline of the market would itself soon result in the insurers' abandoning their requests for x rays. The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.

Third, the Federation complains that the Commission erred in failing to consider, as relevant to its Rule of Reason analysis, noncompetitive "quality of care" justifications for the prohibition on provision of x rays to insurers in conjunction with claim forms. This claim reflects the Court of Appeals' repeated characterization of the Federation's policy as a "legal, moral, and ethical policy of quality dental care, requiring that insurers examine and review all diagnostic and clinical aids before formulating a proper course of dental treatment." 745 F. 2d, at 1144. The gist of the claim is that x rays, standing alone, are not adequate bases for diagnosis of dental problems or for the formulation of an acceptable course of treatment. Accordingly, if insurance companies are permitted to determine whether they will pay a claim for dental treatment on the basis of x rays as opposed to a full examination of all the diagnostic aids available to the examining dentist, there is a danger that they will erroneously decline to pay for treatment that is in fact in the interest of

the patient, and that the patient will as a result be deprived of fully adequate care.

The Federation's argument is flawed both legally and factually. The premise of the argument is that, far from having no effect on the cost of dental services chosen by patients and their insurers, the provision of x rays will have too great an impact: it will lead to the reduction of costs through the selection of inadequate treatment. Precisely such a justification for withholding information from customers was rejected as illegitimate in the *National Society of Professional Engineers* case. The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices. Such an argument amounts to "nothing less than a frontal assault on the basic policy of the Sherman Act." *National Society of Professional Engineers*, *supra*, at 695. Moreover, there is no particular reason to believe that the provision of information will be more harmful to consumers in the market for dental services than in other markets. Insurers deciding what level of care to pay for are not themselves the recipients of those services, but it is by no means clear that they lack incentives to consider the welfare of the patient as well as the minimization of costs. They are themselves in competition for the patronage of the patients—or, in most cases, the unions or businesses that contract on their behalf for group insurance coverage—and must satisfy their potential customers not only that they will provide coverage at a reasonable cost, but also that that coverage will be adequate to meet their customers' dental needs. There is thus no more reason to expect dental insurance companies to sacrifice quality in return for cost savings than to believe this of consumers in, say, the market for engineering services. Accordingly, if noncompetitive quality-of-service justifications are inadmissible to justify the denial of information to con-

sumers in the latter market, there is little reason to credit such justifications here.

In any event, the Commission did not, as the Federation suggests, refuse even to consider the quality of care justification for the withholding of x rays. Rather, the Commission held that the Federation had failed to introduce sufficient evidence to establish such a justification: "IFD has not pointed to any evidence—or even argued—that any consumers have in fact been harmed by alternative benefits determinations, or that actual determinations have been medically erroneous." 101 F. T. C., at 177. The evidence before the Administrative Law Judge on this issue appears to have consisted entirely of expert opinion testimony, with the Federation's experts arguing that x rays generally provide an insufficient basis, standing alone, for dental diagnosis, and the Commission's experts testifying that x rays may be useful in assessing diagnosis of and appropriate treatment for a variety of dental complaints. *Id.*, at 128–132. The Commission was amply justified in concluding on the basis of this conflicting evidence that even if concern for the quality of patient care could under some circumstances serve as a justification for a restraint of the sort imposed here, the evidence did not support a finding that the careful use of x rays as a basis for evaluating insurance claims is in fact destructive of proper standards of dental care.[4]

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[4] It is undisputed that lay claims examiners employed by insurance companies have no authority to deny claims on the basis of examination of x rays; rather, initial screening of x rays serves only as a means of identifying cases that merit further scrutiny by the licensed dentists serving as consultants to the insurers. Any recommendation that benefits be denied or a less expensive course of treatment be pursued is based on the professional judgment of a licensed dentist that the materials available to him—x rays, claim forms, and whatever further diagnostic aids he chooses to consult—are sufficient to indicate that the treating dentist's recommendation is not necessary to the health of the patient. There is little basis for concluding that, where such a divergence of professional judgment exists, the treatment recommendation made by the patient's dentist should be

In addition to arguing that its conspiracy did not effect an unreasonable restraint of trade, the Federation appears to renew its argument, pressed before both the Commission and the Court of Appeals, that the conspiracy to withhold x rays is immunized from antitrust scrutiny by virtue of a supposed policy of the State of Indiana against the evaluation of dental x rays by lay employees of insurance companies. See Brief for Respondent 25–26, and n. 10. Allegedly, such use of x rays by insurance companies—even where no claim was actually denied without examination of an x ray by a licensed dentist—would constitute unauthorized practice of dentistry by the insurance company and its employees. The Commission found that this claim had no basis in any authoritative source of Indiana law, see 101 F. T. C., at 181–183, and the Federation has not identified any adequate reason for rejecting the Commission's conclusion. Even if the Commission were incorrect in its reading of the law, however, the Federation's claim of immunity would fail. That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it. See *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U. S. 457, 468 (1941). Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the State. See *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U. S. 48, 57 (1985). There is no suggestion of any such active supervision here; accordingly, whether or not the policy the Federation has taken upon itself to advance is consistent with the policy of the State of Indiana, the Federation's activities are subject to Sherman Act condemnation.

V

The factual findings of the Commission regarding the effect of the Federation's policy of withholding x rays are sup-

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assumed to be the one that in fact represents the best interests of the patient.

ported by substantial evidence, and those findings are sufficient as a matter of law to establish a violation of § 1 of the Sherman Act, and, hence, § 5 of the Federal Trade Commission Act. Since there has been no suggestion that the cease-and-desist order entered by the Commission to remedy this violation is itself improper for any reason distinct from the claimed impropriety of the finding of a violation, the Commission's order must be sustained. The judgment of the Court of Appeals is accordingly

Reversed.

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. v. CITY OF NEW YORK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84-1923. Argued February 26, 1986—Decided June 2, 1986

The Social Security Act provides benefits to disabled persons under two programs administered by the Social Security Administration (SSA): the Social Security Disability Insurance Program (SSD) and the Supplemental Security Income Program (SSI). Regulations for both programs establish a five-step "sequential evaluation" process for determining eligibility for benefits. The initial determination of whether an individual is disabled is made by a state agency under the authority and control of the Secretary of Health and Human Services (Secretary). This determination is subject to review by the SSA. The disappointed claimant is then afforded a three-stage administrative review process. Proceeding through these three stages exhausts the claimant's administrative remedies. Thereafter, he may seek judicial review in Federal District Court, but must do so within 60 days of the Secretary's final decision as required by 42 U. S. C. § 405(g). Respondents brought a class action against the Secretary and the Commissioner of the SSA, seeking relief on behalf of all individuals residing in New York who had, within a specified time period, been denied disability benefits or whose benefits were terminated pursuant to an allegedly illegal internal policy of the Secretary. The District Court certified the class as including claimants who had not complied with the 60-day requirement for seeking judicial review and other claimants who had not exhausted their administrative remedies and obtained a final decision of the Secretary as required by § 405(g). Holding that the policy in question was illegal, the District Court ordered the Secretary to reopen the decisions denying or terminating benefits and to redetermine eligibility. The Court of Appeals affirmed.

Held:

1. The District Court properly included in the class claimants who had received a final decision from the Secretary but did not seek judicial review within the statutory 60-day period. The 60-day requirement is not jurisdictional but rather constitutes a statute of limitations. Equitable tolling of that requirement is consistent with Congress' intent in enacting § 405(g), and on the facts of this case the equities are in favor of tolling. Tolling serves the Act's purpose where the internal policy

prevented the claimants from knowing of a violation of their rights. Pp. 478–482.

2. The District Court also properly included in the class claimants who failed to exhaust their administrative remedies. The court did not err in waiving exhaustion not only as to those claimants whose time to pursue further administrative appeals had lapsed but also as to those who still had time to pursue administrative remedies at the time the suit was filed. For claimants whose time to pursue further remedies had lapsed, exhaustion is excused for the same reasons requiring tolling of the 60-day statute of limitations. Since the claimants could not attack a policy of which they were unaware, it would be unfair to penalize them for not exhausting under such circumstances. It was also proper to waive the exhaustion requirement with respect to those claimants who still had time to file suit. The claims in the suit are collateral to the claims for benefits that class members had presented administratively. The class members neither sought nor were awarded benefits in the District Court, but rather challenged the Secretary's failure to follow the regulations. Moreover, the claimants would be irreparably injured if the exhaustion requirement were now enforced against them. The relief afforded by the District Court was fully consistent with the policies underlying exhaustion. Pp. 482–486.

742 F. 2d 729 and 755 F. 2d 31, affirmed.

POWELL, J., delivered the opinion for a unanimous Court.

Edwin S. Kneedler argued the cause for petitioners. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, *William Kanter*, and *Howard S. Scher*.

Frederick A. O. Schwarz, Jr., argued the cause for respondents. With him on the brief were *Frederick P. Schaffer*, *Michael D. Young*, *Robert Abrams*, Attorney General of New York, and *Robert Hermann*, Solicitor General, *Paul M. Glickman*, and *Andrea Green*, Assistant Attorneys General, *Leonard S. Rubenstein*, *Ambrose Doskow*, and *Richard L. Claman*.*

*Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Neil F. Hartigan*, Attorney General of Illinois, and *Roma J. Stewart*, Solicitor General, *Charles A. Graddick*, Attorney General of Alabama, *Steve Clark*, Attorney General of Arkansas, *Jim Smith*, Attorney General of Florida, *Corinne K. A. Watanabe*, Attorney General

JUSTICE POWELL delivered the opinion of the Court.

This class action was brought pursuant to 42 U. S. C. § 405(g) challenging an internal policy of the Secretary of Health and Human Services that had the effect of denying disability benefits to numerous claimants who may have been entitled to them. The issues presented are whether the District Court correctly included within the class (i) claimants who had received a final decision on their individual claims for benefits more than 60 days prior to the filing of this action, and (ii) other claimants who had not exhausted their administrative remedies.

I

The Federal Government provides benefits to disabled persons under two distinct programs administered by the Social Security Administration (SSA). The Social Security

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Disability Insurance Program (SSD) established by Title II of the Social Security Act, 49 Stat. 622, as amended, 42 U. S. C. § 401 *et seq.*, pays benefits to disabled persons who have contributed to the program and who suffer from a mental or physical disability. The Supplemental Security Income Program (SSI) established by Title XVI of the Act, 86 Stat. 1465, as amended, 42 U. S. C. § 1381, provides benefits to indigent disabled persons. Both statutes define "disability" as the "inability to engage in any substantial gainful activity. . . ." §§ 423(d)(1)(A), 1382c(a)(3)(A). An individual is found to be under a disability only if "his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." §§ 423(d)(2)(A), 1382c(a)(3)(B).

Pursuant to statutory authority, the Secretary of Health and Human Services (Secretary) has adopted complex regulations governing eligibility for SSD and SSI payments. 20 CFR pt. 404, subpart P (1985) (SSD); 20 CFR pt. 404, pt. 416, subpart I (1985) (SSI). The regulations for both programs are essentially the same and establish a five-step "sequential evaluation" process. The first step determines whether the claimant is engaged in "substantial gainful activity." If he is, benefits are denied. 20 CFR §§ 404.-1520(a),(b), 416.920(a),(b) (1985). If he is not engaged in such activity, the process moves to the second step, which decides whether the claimant's condition or impairment is "severe,"—*i. e.*, one that significantly limits his physical or mental ability to do basic work activities. If the impairment is not severe, benefits are denied. §§ 404.1520(c), 416.920(c). If the impairment is severe, the third step determines whether the claimant's impairments meet or equal those set forth in the "Listing of Impairments" (listings) contained in subpart P, appendix 1, of the regulations, 20 CFR §§ 404.1520(d), 416.920(d). The listings consist of specified

impairments acknowledged by the Secretary to be of sufficient severity to preclude gainful employment. If a claimant's condition meets or equals the listed impairments, he is conclusively presumed to be disabled and entitled to benefits. If the claimant's impairments are not listed, the process moves to the fourth step, which assesses the individual's "residual functional capacity" (RFC); this assessment measures the claimant's capacity to engage in basic work activities. If the claimant's RFC permits him to perform his prior work, benefits are denied. §§ 404.1520(e), 416.920(e).[1] If the claimant is not capable of doing his past work, a decision is made under the fifth and final step whether, in light of his RFC, age, education, and work experience, he has the capacity to perform other work. §§ 404.1520(f), 416.920(f). If he does not, benefits are awarded.

The determination whether an individual is disabled is made initially by a state agency acting under the authority and control of the Secretary. 42 U. S. C. §§ 421(a), 1383b(a); 20 CFR §§ 404.1503, 416.903 (1985); see *Heckler* v. *Day*, 467 U. S. 104, 106, and n. 4 (1984). All decisions by the state agency are subject to Quality Assurance Reviews by the Regional Office and by the Central Baltimore Offices of SSA. If the responsible SSA officials determine during either review that a state agency erred, the case is "returned" to the State for correction.

The disappointed claimant is afforded a three-stage administrative review process beginning with *de novo* reconsideration by the State of the initial determination. 20 CFR

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[1] The RFC assessment is made by a review physician employed by the state agency under contract with SSA. His written conclusion becomes part of the administrative record of the claim. See, *e. g.*, Plaintiffs' Ex. 50, p. 10; App. 148, 158; Record Doc. No. 73; Tr. 27. The District Court found that this assessment is generally given great weight by the administrative law judge on later review. *City of New York* v. *Heckler*, 578 F. Supp. 1109, 1125 (EDNY 1984).

§§ 404.909(a)(1), 416.1409(a) (1985). If a claimant is dissatisfied with the state agency's decision on reconsideration, he is entitled to a hearing by an administrative law judge (ALJ) within SSA's Office of Hearings and Appeals. 42 U. S. C. § 405(b)(1) (1982 ed., Supp. II), 42 U. S. C. § 1383(c)(1); 20 CFR §§ 404.929, 416.1429, 422.201 *et seq.* (1985).[2]

If the ALJ's decision is adverse to the claimant, the claimant may then seek review by the Appeals Council. 20 CFR §§ 404.967–404.983, 416.1467–416.1483 (1985). Proceeding through these three stages exhausts the claimant's administrative remedies. Following the determination at each stage, a disappointed claimant is notified that he must proceed to the next stage within 60 days of notice of the action taken or the decision will be considered binding. *E. g.*, 20 CFR §§ 404.905, 404.909(a)(1), 416.1405, 416.1409(a), 404.955(a), 404.968(a)(1), 416.1455(a), 416.1468(a) (1985). Thereafter, he may seek judicial review in federal district court, pursuant to 42 U. S. C. § 405(g). See 42 U. S. C. §§ 421(d), 1383(c)(3); 20 CFR §§ 404.900(a)(5), 404.981, 416.1400(a)(5), 416.1481, 422.210 (1985).[3]

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[2] The Secretary has not provided for a separate reconsideration stage in disability cessation cases under Title XVI. An SSI recipient whose benefits are terminated, therefore, is entitled to proceed directly to an ALJ hearing if he requests one within 60 days of the initial determination. 20 CFR §§ 416.1407, 416.1415 (1985).

[3] Title 42 U. S. C. § 405(g), provides in part:

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the

II

On February 8, 1983, respondents the City of New York, the New York City Health and Hospitals Corporation, and two state officials, suing on their own behalf and as *parens patriae*, together with eight named individuals, brought this class action against the Secretary and the Commissioner of SSA. They sought relief on behalf of all individuals residing in the State who had applied for or received SSD or SSI benefits on or after April 1, 1980, who had been found by petitioners to have a severe mental impairment, and whose applications for benefits either had been or were to be denied, or whose benefits had been or were to be terminated, based on petitioners' determination that the claimants were capable of substantial gainful employment.

The gravamen of respondents' complaint was that petitioners had adopted an unlawful, unpublished policy under which countless deserving claimants were denied benefits. They contended that the policy mandated a presumption—applicable at the level of the initial state psychiatric assessment—that a failure to meet or equal the listings was tantamount to a finding of ability to do at least unskilled work; that the presumption led to routine denials of benefits to eligible claimants; and that such a presumption was arbitrary, capricious, and violative of the Constitution, the Social Security Act, and the applicable regulations. Respondents claimed that this internal policy had the effect of eliminating steps four and five from the sequential evaluation process, and thus ignored the requirement for an individualized RFC assessment to determine whether a claimant with a severe condition is nonetheless able to work. They alleged that the policy was never published in the Federal Register as required by the Administrative Procedure Act, but was nonetheless imple-

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pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . ."

mented through various internal memoranda and the "returns" process by which SSA sends cases back to the States for correction. Respondents contended that failure to make the policy known to claimants denied the individual plaintiffs and class members due process of law.

A

Following a 7-day trial, the District Court held that from 1978 until at least the early months of 1983,[4] SSA followed the covert policy alleged by respondents and that the policy was illegal. *City of New York* v. *Heckler*, 578 F. Supp. 1109, 1115 (EDNY 1984). The court noted that the "Act and its regulations require the Secretary to make a realistic, individual assessment of each claimant's ability to engage in substantial gainful activity. See *Heckler v. Campbell*, [461 U. S. 458] (1983). The class plaintiffs did not receive that assessment." *Id.*, at 1124.[5] Rather, as respondents al-

[4] The District Court noted that in 1983 SSA "yielded to pressure to allow medical vocational allowances for those with mental disabilities. The change was precipitated only after the filing of this lawsuit and after a preliminary injunction was issued on December 22, 1982, in the case of *Mental Health Association of Minnesota v. Schweiker*, 554 F. Supp. 157 (D. Minn. 1982), *aff'd*, 720 F. 2d 965 (8th Cir. 1983)." 578 F. Supp., at 1115.

[5] The District Court added:

"On the contrary, SSA relied on bureaucratic instructions rather than individual assessments and overruled the medical opinions of its own consulting physicians that many of those whose claims they were instructed to deny could not, in fact, work. Physicians were pressured to reach 'conclusions' contrary to their own professional beliefs in cases where they felt, at the very least, that additional evidence needed to be gathered in the form of a realistic work assessment. The resulting supremacy of bureaucracy over professional medical judgments and the flaunting of published, objective standards is contrary to the spirit and letter of the Social Security Act.

"The Secretary's practices have violated the requirements of her own regulations. Defendants have ignored the five step sequential evaluation process by presuming that the failure to meet listings at step three or four of the process automatically translates into a residual functional capacity to do unskilled work at steps four and five. The bureaucratic assessment of

leged, SSA had consistently "followed a policy which presumes that mentally disabled claimants who do not meet or equal the listings necessarily retain sufficient residual functional capacity to do at least 'unskilled work.'" *Id.*, at 1115. The District Court further found that these tainted RFC assessments by state review physicians were subsequently given "great weight" by ALJ's in the administrative appeal process. *Id.*, at 1125. Moreover, "[t]he means of enforcement of the policy, through internal memoranda, returns, and reviews, has meant that the affected SSD or SSI applicant as well as counsel, social workers and advisers for a long time were unaware of its existence." *Id.*, at 1115. The court stated that evidence of the "fixed clandestine policy against those with mental illness" was overwhelming. *Ibid.*

The District Court certified a class,[6] and decided that the class properly included claimants who had not exhausted administrative remedies. Relying on *Mathews* v. *Eldridge*,

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residual functional capacity if it was done at all was reduced to a paper charade where the SSA physician completed a cursory report or checked off a form knowing the conclusion had to be that the claimant had the capacity for unskilled work. Medical experts demonstrated to the court that the symptoms and restrictions of the listings of impairments do not measure an individual's capacity for work or his or her ability to withstand the stress of even the least demanding work." *Id.*, at 1124.

[6] The class was ultimately defined by the District Court after trial as consisting of:

"All individuals residing in the State of New York who have applied for or received Title II and/or Title XVI benefits and who, between April 1, 1980 and May 15, 1983, were found by the New York Office of Disability Determinations to have a functional psychotic or functional nonpsychotic mental impairment which is severe (i. e., determined under 20 CFR § 404.1520(c) or § 416.930(c) to require evaluation under Appendix I of that Regulation), and whose applications for benefits have been denied or whose benefits have been or will be terminated, on the basis of defendants' determination that such persons are capable of substantial gainful activity." App. to Pet. for Cert. 65a.

The class is estimated to include more than 50,000 New York residents. *City of New York* v. *Heckler*, 742 F. 2d 729, 731 (CA2 1984).

424 U. S. 319 (1976), the court concluded that this was an appropriate case in which to waive the statutory exhaustion requirement. In the court's view, both parts of the *Eldridge* test were satisfied here: the claims were collateral to any claim for benefits, and the harm imposed by exhaustion would be irreparable.

Similarly, the District Court decided that the class properly included those who had not complied with the requirement that a claimant seek judicial review within 60 days of the Secretary's final decision or "within such further time as the Secretary may allow." 42 U. S. C. § 405(g). The court noted that the 60-day requirement is not jurisdictional, but rather is a statute of limitations waivable by the parties. *Mathews* v. *Eldridge*, *supra*, at 328, n. 9; *Weinberger* v. *Salfi*, 422 U. S. 749, 763–764 (1975). Observing that petitioners had made no argument concerning this requirement until their post-trial brief, the court found that "the same reasons which justify implying waiver of the exhaustion requirement are stronger for the sixty day requirement because the statute of limitations is not, as is the exhaustion requirement, 'central to the requisite grant of subject-matter jurisdiction.' *Weinberger* v. *Salfi*, 422 U. S. 749, 764 . . . (1975)." 578 F. Supp., at 1124.

As a remedy, the District Court ordered the Secretary to reopen the decisions denying or terminating benefits, and to redetermine eligibility. As interim relief, the court directed the Secretary to reinstate benefits of all class members who had previously been entitled to benefits but who were subsequently terminated, until the claimant's eligibility was properly determined.[7]

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[7] The District Court also ordered SSA to notify class members that their claims had been reopened, and to inform class members with an appeal pending before an ALJ that such claimants had the option of proceeding with their appeals upon the existing record rather than with the administrative reopening of their case. App. to Pet. for Cert. 65a–66a.

B

The Court of Appeals for the Second Circuit affirmed. *City of New York* v. *Heckler*, 742 F. 2d 729 (1984). On appeal petitioners did not challenge the District Court's findings of fact or ruling on the merits, but only raised contentions respecting the District Court's definition of the appropriate class, and the interim relief awarded.[8] With respect to the composition of the class, petitioners asserted that the District Court lacked jurisdiction under § 405(g) over most class members, including (i) claimants who failed to exhaust administrative remedies, and (ii) claimants whose right to pursue administrative or judicial review had lapsed by the time this action was commenced. *Id.*, at 734.

The Court of Appeals rejected petitioners' argument that the District Court lacked jurisdiction over the claims of class members who had failed to exhaust their administrative remedies. It upheld the District Court's finding that the harm caused by the wrongful denials was irreparable. While the court did not believe that the claims were "wholly" collateral to claims for benefits, it was satisfied that the class was complaining "fundamentally of a procedural irregularity and not of the Secretary's substantive standards of eligibility." *Id.*, at 737. Moreover, the Court of Appeals believed it was significant that the District Court was not asked to and did not rule on the merits of the underlying benefit claims.

The court then rejected petitioners' contention that the District Court should not have included within the class those claimants who failed to seek judicial review within 60 days of an adverse decision by the Secretary. The court agreed with the District Court that the 60-day limitation is not a jurisdictional requirement, but rather is a statute of limitations. *Id.*, at 738, citing *Eldridge*, *supra*, at 328, n. 9; *Salfi*, *supra*, at 763–764. The Secretary's secretive conduct justi-

[8] The Court of Appeals affirmed the District Court's award of interim relief, and petitioners have raised in this Court no issue respecting that portion of the Court of Appeals' decision.

fied tolling the period "during the time that SSA's policy of applying the challenged presumption concerning residual functional capacity remained operative but undisclosed." 742 F. 2d, at 738.[9]

On petition for rehearing, the same panel of the Court of Appeals, per Judge Newman, denied rehearing and in so doing rejected petitioners' argument that passage of the Social Security Disability Benefits Reform Act of 1984, Pub. L. 98–460, 98 Stat. 1794, required the court to alter its holding with respect to the effect of class members' failure to comply with § 405(g). *City of New York* v. *Heckler*, 755 F. 2d 31 (1985). The Secretary sought a writ of certiorari from this Court. We granted certiorari, 474 U. S. 815 (1985), and now affirm.

III

Petitioners renew here arguments rejected by the Court of Appeals. They challenge on jurisdictional grounds inclusion in the class of two groups of claimants: those who failed to bring a court action within 60 days of a final decision of the Secretary, and those who failed to exhaust administrative remedies. We first consider the requirement embodied in § 405(g) that claims must be presented in the District Court within 60 days of a final decision of the Secretary. Petitioners contend that the provision sets the bounds of the District Court's jurisdiction. This argument is foreclosed by two of our prior decisions that have declared that the 60-day requirement is not jurisdictional, but rather constitutes a period of limitations. *Eldridge*, *supra*, at 328, n. 9; *Salfi*, *supra*, at 764.[10]

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[9] As an alternative basis for jurisdiction, the Court of Appeals relied on 28 U. S. C. § 1361 "in the event that, upon further review, it is determined that section 405(g) jurisdiction is unavailable to some of the class members." 742 F. 2d, at 739. Because we conclude that jurisdiction under § 405(g) is available, we do not reach the issue whether mandamus jurisdiction would have been proper in this context.

[10] We reject petitioners' contention that *Salfi* and *Eldridge* do not stand for the proposition that the 60-day requirement is not jurisdictional. In both cases, jurisdiction was premised on § 405(g), and we noted that we did

Petitioners next contend that if the 60-day limit is a statute of limitations, it is a condition on the waiver of sovereign immunity and thus must be strictly construed. We have no difficulty agreeing with that statement. See *Block* v. *North Dakota*, 461 U. S. 273, 287 (1983). Accepting this proposition, however, does not answer the question whether equitable tolling can be applied to this statute of limitations, for in construing the statute we must be careful not to "assume the authority to narrow the waiver that Congress intended," *United States* v. *Kubrick*, 444 U. S. 111, 118 (1979), or construe the waiver "unduly restrictively." *Block*, *supra*, at 287. In *Honda* v. *Clark*, 386 U. S. 484 (1967), the Court held that where consistent with congressional intent, and called for by the facts of the case, it would "apply a traditional equitable tolling principle . . . ." *Id.*, at 501.[11] Petitioners argue that *Honda* stands for the proposition that equitable tolling is permissible only in cases in which the public treasury is not directly affected. We decline to hold that the doctrine of equitable tolling is so limited. When application of the doctrine is consistent with Congress' intent in enacting a particular statutory scheme, there is no justification for limiting the doctrine to cases that do not involve monetary relief.

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not have to consider whether the 60-day requirement had been satisfied because the issue had not been timely raised below. *Eldridge*, 424 U. S., at 328, n. 9; *Salfi*, 422 U. S., at 764. Were the requirement jurisdictional, of course, the Court could not have declined to consider whether it had been satisfied in those cases.

[11] In *Honda* v. *Clark*, United States citizens or residents of Japanese descent sought to recover funds vested under the Trading with the Enemy Act, 40 Stat. 411, 50 U. S. C. App. § 1 *et seq.* Under that Act the United States seized the American assets of businesses owned by Japanese nationals. After the war a mechanism was established to return the assets to their rightful owners or the owners' creditors. The central problem in that case revolved around the fact that the petitioners failed to file a lawsuit challenging a schedule of payments within the applicable 60-day time period. This Court allowed the limitations period to be tolled during the pendency of related litigation because it was consistent with the statutory scheme and equitable principles to do so. 386 U. S., at 501.

We must determine, therefore, whether equitable tolling is consistent with Congress' intent in enacting § 405(g), and whether tolling is appropriate on these facts. The statute of limitations we construe in this case is contained in a statute that Congress designed to be "unusually protective" of claimants. *Heckler* v. *Day*, 467 U. S., at 106. Moreover, Congress has authorized the Secretary to toll the 60-day limit,[12] thus expressing its clear intention to allow tolling in some cases. While in most cases the Secretary will make the determination whether it is proper to extend the period within which review must be sought, cases may arise where the equities in favor of tolling the limitations period are "so great that deference to the agency's judgment is inappropriate." *Eldridge*, 424 U. S., at 330. As in *Honda* v. *Clark*, we conclude that application of a "traditional equitable tolling principle" to the 60-day requirement of § 405(g) is fully "consistent with the overall congressional purpose" and is "nowhere eschewed by Congress." 386 U. S., at 501.

We conclude, moreover, that on these facts the equities in favor of tolling are compelling. As the Court of Appeals explained:

> "All of the class members who permitted their administrative or judicial remedies to expire were entitled to believe that their Government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States. Though they knew of the denial or loss of benefits, they did not and could not know that those adverse decisions had

[12] SSA's regulations governing extensions of time for filing are based on considerations of fairness to claimants. Thus, the Secretary may grant an extension where a suit was not timely filed because of illness, accident, destruction of records, or mistake. Similarly, an extension may be granted where the claimant misunderstands the appeal process or is unable timely to collect necessary information, or where the Secretary undertook action that "misled" the claimant concerning his right to review. 20 CFR §§ 404.911, 416.1411 (1985). The fairness concerns underlying the regulations support our application of equitable tolling in this case.

been made on the basis of a systematic procedural irregularity that rendered them subject to court challenge. Where the Government's secretive conduct prevents plaintiffs from knowing of a violation of rights, statutes of limitations have been tolled until such time as plaintiffs had a reasonable opportunity to learn the facts concerning the cause of action. Since in this case the full extent of the Government's clandestine policy was uncovered only in the course of this litigation, all class members may pursue this action notwithstanding the 60-day requirement." 742 F. 2d, at 738 (citations omitted).

In addition to serving its customary purpose,[13] the statute of limitations embodied in § 405(g) is a mechanism by which Congress was able to move cases to speedy resolution in a bureaucracy that processes millions of claims annually. Thus, the limitation serves both the interest of the claimant and the interest of the Government. Tolling, in the rare case such as this, does not undermine the purpose of the 60-day limitations period when viewed in connection with the underlying statute. Rather, it serves the purpose of the Act where, as the Court of Appeals stated, "the Government's secretive conduct prevents plaintiffs from knowing of a violation of rights . . . ." *Ibid.* See also *Heckler* v. *Day*, *supra*, at 106. Tolling of the 60-day limitations period was appropriate in this case, and the District Court properly included in the

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[13] As we explained in *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 554 (1974), statutory limitation periods are

"'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them'" (quoting *Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348–349 (1944)).

class claimants who had received a final decision from the Secretary, but who did not seek judicial review within the statutory 60-day time period.

IV

Petitioners also contend that the District Court erred in including in the class those members who failed to obtain a "final decision" from the Secretary as required by § 405(g). To obtain a final decision from the Secretary a claimant is required to exhaust his administrative remedies by proceeding through all three stages of the administrative appeals process. Only a claimant who proceeds through all three stages receives a final decision from the Secretary. At the outset, we note that by the time this lawsuit was filed, it was too late for a large number of class members to exhaust their claims, since expiration of the 60-day time limits for administrative appeals barred further access to the administrative appeals process. See 20 CFR §§ 404.905, 404.909(a)(1), 416.1405, 416.1409(a), 404.955(a), 404.968(a)(1), 416.1455(a), 416.1468(a) (1985). For these claimants, we conclude that exhaustion is excused for the same reasons requiring tolling of the statute of limitations. Since "[m]embers of the class could not attack a policy they could not be aware existed," 578 F. Supp., at 1118; see Part III, *supra*, it would be unfair to penalize these claimants for not exhausting under these circumstances.

At the time the suit was filed, however, some claimants may still have had time to exhaust their administrative remedies. The question remains whether it was permissible to include these claimants in the class. Resolution of this question is aided by cases in which we have been called upon to consider issues of exhaustion under § 405(g). See *Weinberger* v. *Salfi*, 422 U. S. 749 (1975); *Mathews* v. *Eldridge*, 424 U. S. 319 (1976); *Heckler* v. *Ringer*, 466 U. S. 602 (1984). Our decisions teach that the "final decision" requirement embodied in that section

> "consists of two elements, only one of which is purely 'jurisdictional' in the sense that it cannot be waived by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary." *Mathews* v. *Eldridge*, *supra*, at 328.

Ordinarily, the Secretary has discretion to decide when to waive the exhaustion requirement. But as we held in *Eldridge*, "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." 424 U. S., at 330.

Two factors influenced the Court's judgment that *Eldridge* was a case in which deference to the agency's determination of finality was not necessary. First, the constitutional challenge brought there was "entirely collateral to [a] substantive claim of entitlement." *Ibid.* Second, the claim rested "on the proposition that full relief cannot be obtained at a postdeprivation hearing." *Id.*, at 331. The petitioner had raised "at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments." *Ibid.*

The claims in this lawsuit are collateral to the claims for benefits that class members had presented administratively. The class members neither sought nor were awarded benefits in the District Court, but rather challenged the Secretary's failure to follow the applicable regulations.

Moreover, as in *Eldridge*, the claimants in this case would be irreparably injured were the exhaustion requirement now enforced against them. The District Court found that class members not only were denied the benefits they were seeking, but "[t]he ordeal of having to go through the administrative appeal process may trigger a severe medical setback.

Many persons have been hospitalized due to the trauma of having disability benefits cut off. Interim benefits will not adequately protect plaintiffs from this harm. Nor will ultimate success if they manage to pursue their appeals." 578 F. Supp., at 1118. Petitioners do not challenge this finding here, and therefore, like the Court of Appeals, "[w]e have no reason to disturb Chief Judge Weinstein's conclusion that the harm caused by wrongful denials was irreparable." 742 F. 2d, at 736. We should be especially sensitive to this kind of harm where the Government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place.

Finally, application of the exhaustion doctrine is "intensely practical." *Eldridge*, *supra*, at 331, n. 11. In *Salfi*, we explained:

> "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." 422 U. S., at 765.

The ultimate decision of whether to waive exhaustion should not be made solely by mechanical application of the *Eldridge* factors, but should also be guided by the policies underlying the exhaustion requirement. The purposes of exhaustion would not be served by requiring these class members to exhaust administrative remedies. This case is materially distinguishable from one in which a claimant sues in district court, alleging mere deviation from the applicable regulations in his particular administrative proceeding. In the normal course, such individual errors are fully correctable upon subsequent administrative review since the claimant on appeal

will alert the agency to the alleged deviation. Because of the agency's expertise in administering its own regulations, the agency ordinarily should be given the opportunity to review application of those regulations to a particular factual context. Thus, our holding today does not suggest that exhaustion is to be excused whenever a claimant alleges an irregularity in the agency proceedings.

These claimants stand on a different footing from one arguing merely that an agency incorrectly applied its regulation. Rather, the District Court found a systemwide, unrevealed policy that was inconsistent in critically important ways with established regulations. Nor did this policy depend on the particular facts of the case before it; rather, the policy was illegal precisely because it ignored those facts. The District Court found that the policy was being adhered to by state agencies due to pressure from SSA, and that therefore exhaustion would have been futile. Under these unique circumstances, there was nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise. Cf. *McKart* v. *United States*, 395 U. S. 185, 200 (1969).

In addition, the relief afforded by the District Court is fully consistent with the policies underlying exhaustion. The court did not order that class members be paid benefits. Nor does its decision in any way interfere with the agency's role as the ultimate determiner of eligibility under the relevant statutes and regulations. Indeed, by ordering simply that the claims be reopened at the administrative level, the District Court showed proper respect for the administrative process. It did no more than the agency would have been called upon to do had it, instead of the District Court, been alerted to the charge that an undisclosed procedure was illegal and had improperly resolved innumerable claims.

Petitioners correctly assert that, had class members exhausted administrative remedies, some might have received benefits despite the illegal policy. It also is likely that many

may have been disqualified for reasons having nothing to do with the illegal policy. Such observations, however, merely serve to remind us why exhaustion is the rule in the vast majority of cases; they do not aid the Court in deciding when exhaustion should be excused.[14] We hold that the District Court did not err in waiving exhaustion in this case either with respect to those claimants whose time to pursue further administrative appeals had lapsed, or with respect to those claimants who still had time to pursue administrative remedies.

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[14] Petitioners argue that when Congress in 1984 made comprehensive revisions in the disability program in the Social Security Disability Benefits Reform Act of 1984, Pub. L. 98–460, 98 Stat. 1794, it reaffirmed the finality requirement of § 405(g). In § 2(d) of the 1984 Act (98 Stat. 1797), Congress provided for remand to the Secretary, for redetermination under the new statutory medical improvement standard, of the claims of any individuals who were included in a class that had been certified in a case involving medical improvement, whether or not each individual class member had personally satisfied the jurisdictional requirements of § 405(g).

Congress took a different approach in cases involving individuals who have mental impairments. In § 5(a) of the 1984 Act, 98 Stat. 1801, Congress directed the Secretary to develop new standards for the evaluation of mental impairments. It then provided in § 5(c) (98 Stat. 1802) that any person who had sought benefits based on a mental impairment and who was found to be not disabled on or after March 1, 1981, could reapply to the Secretary and be reevaluated under these new standards.

Thus, petitioners argue that these provisions demonstrate that Congress knew how to grant relief to disability claimants who have not satisfied the exhaustion requirement. We agree with the Court of Appeals' observation in its decision denying the petition for rehearing:

"The Reform Act is remedial legislation, enacted principally to be of assistance to large numbers of persons whose disability benefits have been terminated. It would be a perverse view of Congressional intent if we were to infer from this beneficial legislation a determination on the part of Congress to deny other disability claimants the fruits of a judgment entered in their favor after a ruling that their claims had been unlawfully processed by the Secretary. What the Secretary is urging us to hold is that the Reform Act renders the finality and exhaustion requirements of section 405(g) more stringent than they were before the passage of the Act." *City of New York* v. *Heckler*, 755 F. 2d 31, 33 (1985).

V

Government agencies administering complex programs that bridge both state and federal bureaucracies necessarily will take certain actions pursuant to policies unknown to the public. We do not suggest that every internal policy that is found to be inconsistent with legal requirements, and arguably touches upon the outcome of a class of cases, will justify tolling the statute of limitations or excusing exhaustion. But, whatever the outer bounds of our holding today, this case falls well within them. While "hard" cases may arise, this is not one of them.

Moreover, we are aware that administrative inconvenience may result from our decision today. But the Secretary had the capability and the duty to prevent the illegal policy found to exist by the District Court. The claimants here were denied the fair and neutral procedure required by the statute and regulations, and they are now entitled to pursue that procedure. The judgment of the Court of Appeals is affirmed.

It is so ordered.

CITY OF LOS ANGELES ET AL. *v.* PREFERRED COMMUNICATIONS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-390. Argued April 29, 1986—Decided June 2, 1986

Respondent sued petitioners, the city of Los Angeles and its Department of Water and Power (DWP), in Federal District Court, alleging, *inter alia*, a violation of its rights under the First Amendment by reason of (1) the city's refusal to grant respondent a cable television franchise on the ground that respondent had failed to participate in an auction for a single franchise in the area and (2) DWP's refusal to grant access to poles or underground conduits used for power lines. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. The Court of Appeals reversed and remanded for further proceedings.

Held: The complaint should not have been dismissed. The activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests. Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats. But where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests. Thus, where the city has made factual assertions to justify restrictions on cable television franchising and these assertions are disputed by respondent, there must be a fuller development of the disputed factual issues before this Court will decide the legal issues. Accordingly, the case will be remanded to the District Court so that petitioners may file an answer and the material factual disputes may be resolved. Pp. 493-496.

754 F. 2d 1396, affirmed and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court. BLACKMUN, J., filed a concurring opinion, in which MARSHALL and O'CONNOR, JJ., joined, *post*, p. 496.

Edward J. Perez argued the cause for petitioners. With him on the briefs were *Thomas Bonaventura*, *John Haggerty*, *John H. Garvey*, and *Nicholas P. Miller*.

Harold R. Farrow argued the cause for respondent. With him on the brief were *Sol Schildhause* and *Siegfried Hesse.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Connecticut by *Joseph I. Lieberman*, Attorney General, *Clarine N. Riddle*, Deputy Attorney General, and *William B. Gundling*, Assistant Attorney General; for the City of Brookfield, Wisconsin, by *Harold H. Fuhrman;* for the City of New York by *Paul S. Ryerson*, *Patrick J. Grant*, and *Hadley W. Gold;* for the City of Palo Alto, California, et al. by *Michael A. Small*, *Jerome B. Falk, Jr.*, *Steven L. Mayer*, *Steven F. Nord*, *Donald S. Greenberg*, *Mary Jo Levinger*, *John Sanford Todd*, *P. Lawrence Klose*, *Carter J. Stroud*, *John W. Witt*, *R. R. Campagna*, *Jack White*, *R. K. Fox*, *Gordon Phillips*, *Victor Kaleta*, *Edward J. Cooper*, *George Agnost*, *Richard Terzian*, *J. Robert Flandrick*, *Roger Picquet*, *Stanley E. Remelmeyer*, *James Jackson*, and *Robin Faisant;* for Mountain States Telephone and Telegraph Co. et al. by *Debra T. Yarbrough*, *Robert W. Barker*, and *L. Andrew Tollin;* for the National Association of Broadcasters by *Michael S. Horne* and *Michael D. Berg;* for the National Federation of Local Cable Programmers et al. by *James N. Horwood*, *Alan J. Roth*, *Joseph Van Eaton*, and *Donald Weightman;* for the National Institute of Municipal Law Officers by *Roy D. Bates*, *William I. Thornton, Jr.*, *John W. Witt*, *Roger F. Cutler*, *George Agnost*, *J. Lamar Shelley*, *Robert J. Alfton*, *James K. Baker*, *Frank B. Gummey III*, *James D. Montgomery*, *Clifford D. Pierce, Jr.*, *William H. Taube*, and *Charles S. Rhyne;* for the National League of Cities et al. by *Benna Ruth Solomon* and *Jeffrey H. Howard;* for the Office of Communication of United Church of Christ et al. by *Henry Geller* and *Andrew J. Schwartzman;* and for Wisconsin Bell, Inc. by *Robert A. Christensen*, *Joan F. Kessler*, and *Floyd S. Keene*.

Briefs of *amici curiae* urging affirmance were filed for the United States et al. by *Solicitor General Fried*, *Assistant Attorney General Ginsburg*, and *Jack D. Smith;* for the American Cable Publishers Institute, Inc., by *Peter C. Smoot;* for Guam Cable TV by *Richard L. Brown;* for the Mid-America Legal Foundation by *John M. Cannon*, *Susan W. Wanat*, and *Ann Plunkett Sheldon;* for the Motion Picture Association of America, Inc., by *Richard M. Cooper* and *Walter J. Josiah, Jr.;* for the National Cable Television Association, Inc., by *Brenda L. Fox*, *Michael S. Schooler*, and *H. Bartow Farr III;* for the National Satellite Cable Association by *Mark J. Tauber* and *Deborah C. Costlow;* for Nor-West Cable Communications Partnership et al. by *David Rosenweig* and *Jerome D. Krings;* for Space, the Satellite Television Industry Association, Inc., by

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Preferred Communications, Inc., sued petitioners City of Los Angeles (City) and the Department of Water and Power (DWP) in the United States District Court for the Central District of California. The complaint alleged a violation of respondent's rights under the First and Fourteenth Amendments, and under §§ 1 and 2 of the Sherman Act, by reason of the City's refusal to grant respondent a cable television franchise and of DWP's refusal to grant access to DWP's poles or underground conduits used for power lines. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. See Fed. Rule Civ. Proc. 12(b)(6). The Court of Appeals for the Ninth Circuit affirmed with respect to the Sherman Act, but reversed as to the First Amendment claim. 754 F. 2d 1396 (1985). We granted certiorari with respect to the latter issue, 474 U. S. 979 (1985).

Respondent's complaint against the City and DWP alleged, *inter alia*, the following facts: Respondent asked Pacific Telephone and Telegraph (PT&T) and DWP for permission to lease space on their utility poles in order to provide cable television service in the south central area of Los Angeles. App. 6a. These utilities responded that they would not lease the space unless respondent first obtained a cable television franchise from the City. *Ibid.* Respondent asked the City for a franchise, but the City refused to grant it one, stating that respondent had failed to participate in an auction that was to award a single franchise in the area. *Id.*, at 6a–7a.[1]

Richard L. Brown; and for Tele-Communications, Inc., et al. by *Stuart W. Gold, Robert D. Joffe,* and *Henry J. Gerken.*

Briefs of *amici curiae* were filed for the American Civil Liberties Union et al. by *Charles S. Sims, Burt Neuborne,* and *Paul Hoffman;* for Best View Cablevision, Inc., by *Laurence S. Bader, Paul R. Grand,* and *Diana Parker;* for UNDA-USA et al. by *Robert L. Stern* and *Patrick F. Geary;* and for Nicholas W. Carlin, *pro se.*

[1] California authorizes municipalities to limit the number of cable television operators in an area by means of a "franchise or license" system, and

The complaint further alleged that cable operators are First Amendment speakers, *id.*, at 3a, that there is sufficient excess physical capacity and economic demand in the south central area of Los Angeles to accommodate more than one cable company, *id.*, at 4a, and that the City's auction process allowed it to discriminate among franchise applicants based on which one it deemed to be the "best." *Id.*, at 6a. Based on these and other factual allegations, the complaint alleged that the City and DWP had violated the Free Speech Clause of the First Amendment, as made applicable to the States by the Fourteenth Amendment, §§ 1 and 2 of the Sherman Act,

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to prescribe "rules and regulations" to protect customers of such operators. See Cal. Gov't Code Ann. § 53066 (West Supp. 1986). Congress has recently endorsed such franchise systems. See Cable Communications Policy Act of 1984, Pub. L. 98–549, 98 Stat. 2779. Pursuant to the authority granted by the State, the City has adopted a provision forbidding the construction or operation of a cable television system within city limits unless a franchise is first obtained. See Los Angeles, Cal., Admin. Code, Art. 13, § 13.62(a) (1979). A city ordinance provides that franchises are to be allotted by auction to the bidder offering "the highest percentage of gross annual receipts" derived from the franchise and "such other compensation or consideration . . . as may be prescribed by the Council in the advertisement for bids and notice of sale." See Los Angeles Ordinance 58,200, § 5.2 (1927).

In October 1982, the City published an advertisement soliciting bids for a cable television franchise in the south central area of Los Angeles. The advertisement indicated that only one franchise would be awarded, and it established a deadline for the submission of bids. App. 91a. It also set forth certain nonfinancial criteria to be considered in the selection process, including the degree of local participation in management or ownership reflecting the ethnic and economic diversity of the franchise area, the capacity to provide 52 channels and 2-way communication, the willingness to set aside channels for various public purposes and to provide public access facilities, the willingness to develop other services in the public interest, the criminal and civil enforcement record of the company and its principals, the degree of business experience in cable television or other activities, and the willingness to engage in creative and aggressive affirmative action. *Id.*, at 98a, 101a–102a, 105a, 108a–109a. Respondent did not submit a bid in response to this solicitation, and the franchise was eventually awarded to another cable operator.

the California Constitution, and certain provisions of state law. *Id.*, at 11a–19a.

The City did not deny that there was excess physical capacity to accommodate more than one cable television system. But it argued that the physical scarcity of available space on public utility structures, the limits of economic demand for the cable medium, and the practical and esthetic disruptive effect that installing and maintaining a cable system has on the public right-of-way justified its decision to restrict access to its facilities to a single cable television company. 754 F. 2d, at 1401.

The District Court dismissed the free speech claim without leave to amend for failure to state a claim upon which relief could be granted. See Fed. Rule Civ. Proc. 12(b)(6). It also dismissed the antitrust claims, reasoning that petitioners were immune from antitrust liability under the state-action doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1963). Finally, it declined to exercise pendent jurisdiction over the remaining state claims.

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. 754 F. 2d 1396 (1985). It upheld the conclusion that petitioners were immune from liability under the federal antitrust laws. *Id.*, at 1411–1415. But it reversed the District Court's dismissal of the First Amendment claim, and remanded for further proceedings. *Id.*, at 1401–1411. It held that, taking the allegations in the complaint as true, *id.*, at 1399, the City violated the First Amendment by refusing to issue a franchise to more than one cable television company when there was sufficient excess physical and economic capacity to accommodate more than one. *Id.*, at 1401–1405, 1411. The Court of Appeals expressed the view that the facts alleged in the complaint brought respondent into the ambit of cases such as *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), rather than of cases such as *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969),

and *Members of City Council* v. *Taxpayers for Vincent*, 466 U. S. 789 (1984). 754 F. 2d, at 1403–1411.

We agree with the Court of Appeals that respondent's complaint should not have been dismissed, and we therefore affirm the judgment of that court; but we do so on a narrower ground than the one taken by it. The well-pleaded facts in the complaint include allegations of sufficient excess physical capacity and economic demand for cable television operators in the area which respondent sought to serve.[2] The City, while admitting the existence of excess physical capacity on the utility poles, the rights-of-way, and the like, justifies the limit on franchises in terms of minimizing the demand that cable systems make for the use of public property. The City characterizes these uses as the stringing of "nearly 700 miles of hanging and buried wire and other appliances necessary for the operation of its system." Brief for Petitioners 12. The City also characterizes them as "a permanent visual blight," *ibid.*, and adds that the process of installation and repair of such a system in effect subjects City facilities designed for other purposes to a servitude which will cause traffic delays and hazards and esthetic unsightliness. Respondent in its turn replies that the City does not "provide anything more than speculations and assumptions," and that the City's "legitimate concerns are easily satisfied without the need to limit the right to speak to a single speaker." Brief for Respondent 9.

We of course take the well-pleaded allegations of the complaint as true for the purpose of a motion to dismiss, see, *e. g.*, *Kugler* v. *Helfant*, 421 U. S. 117, 125–126, n. 5 (1975). Ordinarily such a motion frames a legal issue such as the one which the Court of Appeals undertook to decide in this case.

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[2] They also include allegations that the City imposes numerous other conditions upon a successful applicant for a franchise. It is claimed that, entirely apart from the limitation of franchises to one in each area, these conditions violate respondent's First Amendment rights. The Court of Appeals did not reach these contentions, and neither do we.

But this case is different from a case between private litigants for two reasons: first, it is an action of a municipal corporation taken pursuant to a city ordinance that is challenged here, and, second, the ordinance is challenged on colorable First Amendment grounds. The City has adduced essentially factual arguments to justify the restrictions on cable franchising imposed by its ordinance, but the factual assertions of the City are disputed at least in part by the respondent. We are unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings in which the parties have an opportunity to prove those disputed factual assertions upon which they rely.

We do think that the activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests. Respondent alleges:

> "The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communications of others, while at the same time providing some original content." App. 3a.

Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently noted that cable operators exercise "a significant amount of editorial discretion regarding what their programming will include." *FCC* v. *Midwest Video Corp.*, 440 U. S. 689, 707 (1979). Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers. Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found

to fall within the ambit of the First Amendment in *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 386, even though the free speech aspects of the wireless broadcasters' claim were found to be outweighed by the Government interests in regulating by reason of the scarcity of available frequencies.

Of course, the conclusion that respondent's factual allegations implicate protected speech does not end the inquiry. "Even protected speech is not equally permissible in all places and at all times." *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U. S. 788, 799 (1985). Moreover, where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests. See, *e. g.*, *Members of City Council* v. *Taxpayers for Vincent*, *supra*, at 805–807; *United States* v. *O'Brien*, 391 U. S. 367, 376–377 (1968). We do not think, however, that it is desirable to express any more detailed views on the proper resolution of the First Amendment question raised by respondent's complaint and the City's responses to it without a fuller development of the disputed issues in the case. We think that we may know more than we know now about how the constitutional issues should be resolved when we know more about the present uses of the public utility poles and rights-of-way and how respondent proposes to install and maintain its facilities on them.

The City claims that no such trial of the issues is required, because the City need not "generate a legislative record" in enacting ordinances which would grant one franchise for each area of the City. Brief for Petitioners 44. "Whether a limitation on the number of franchises . . . is 'reasonable,'" the City continues, "thus cannot turn on a review of historical facts." *Id.*, at 45. The City supports its contention in this regard by citation to cases such as *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 179 (1980), and *Schweiker* v. *Wilson*, 450 U. S. 221, 236–237 (1981). Brief for Petitioners 45, n. 52.

The flaw in the City's argument is that both *Fritz* and *Wilson* involved Fifth Amendment equal protection challenges to legislation, rather than challenges under the First Amendment. Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force. But cf. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 459 (1978). This Court "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity." *Taxpayers for Vincent*, 466 U. S., at 803, n. 22; *Landmark Communications, Inc* v. *Virginia*, 435 U. S. 829, 843–844 (1978).

We affirm the judgment of the Court of Appeals reversing the dismissal of respondent's complaint by the District Court, and remand the case to the District Court so that petitioners may file an answer and the material factual disputes between the parties may be resolved.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE O'CONNOR join, concurring.

I join the Court's opinion on the understanding that it leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities. Different communications media are treated differently for First Amendment purposes. Compare, *e. g.*, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), with *FCC* v. *League of Women Voters of California*, 468 U. S. 364, 380 (1984). In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis. As this case arises out of a motion to dismiss, we lack factual information about the nature of cable television. Recognizing these consider-

ations, *ante*, at 493–494, the Court does not attempt to choose or justify any particular standard. It simply concludes that, in challenging Los Angeles' policy of exclusivity in cable franchising, respondent alleges a cognizable First Amendment claim.

SOUTH CAROLINA ET AL. *v.* CATAWBA INDIAN TRIBE, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-782. Argued December 12, 1985—Decided June 2, 1986

In 1760 and 1763, respondent Indian Tribe surrendered to Great Britain its aboriginal territory in return for the right to settle permanently on a 225-square-mile tract of land now located in South Carolina. In 1840, the Tribe conveyed the tract to South Carolina in return for the State's establishing a new reservation for the Tribe. In 1959, Congress, pursuant to its changed policies concerning Indian affairs, enacted the Catawba Indian Tribe Division of Assets Act (Catawba Act) authorizing a division of Catawba tribal assets. Section 5 of that Act provided for revocation of the Tribe's constitution, rendered inapplicable to the Tribe and its members special federal statutory protections for Indians, and made state laws applicable to the Tribe and its members in the same way that they apply to all "other persons or citizens." In 1980, the Tribe brought an action in Federal District Court against petitioners (South Carolina and other claimants to the 225-square-mile tract), seeking possession of the tract and trespass damages for the period of its dispossession on the ground that the 1840 conveyance to South Carolina was null and void because the United States never consented to it as required by the Nonintercourse Act to make it effective. The District Court granted summary judgment for petitioners, in part on the ground that the Tribe's claim was barred by the South Carolina statute of limitations. The Court of Appeals reversed, holding that, under its interpretation of the Catawba Act, the state statute of limitations did not apply.

Held: The explicit redefinition of the relationship between the Federal Government and respondent Tribe reflected in the Catawba Act's clear language requires the application of the state statute of limitations to the Tribe's claim. But whether that statute bars the claim should be determined by the Court of Appeals on remand. Pp. 506–511.

740 F. 2d 305, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL and O'CONNOR, JJ., joined, *post*, p. 511.

James D. St. Clair argued the cause for petitioners. With him on the briefs were *James L. Quarles III*, *William F. Lee*, *T. Travis Medlock*, Attorney General of South Carolina, *Kenneth P. Woodington*, Assistant Attorney General, *John C. Christie, Jr.*, *J. William Hayton*, *Stephen J. Landes*, *Lucinda O. McConathy*, *J. D. Todd, Jr.*, *Michael J. Giese*, *Dan M. Byrd, Jr.*, and *Mitchell K. Byrd*.

Don B. Miller argued the cause for respondent. With him on the brief were *Jean H. Toal* and *Robert M. Jones*.*

JUSTICE STEVENS delivered the opinion of the Court.

At issue in this litigation is the right to possession of a "Tract of Land of Fifteen Miles square" described in a 1763 treaty between the King of England and the Catawba Head Men and Warriors.[1] The tract, comprising 144,000 acres and 225 square miles, is located near the northern border of South Carolina; some 27,000 persons now claim title to different parcels within the tract. The specific question presented to us is whether the State's statute of limitations applies to the Tribe's claim. The answer depends on an interpretation of a statute enacted by Congress in 1959 to authorize a division of Catawba tribal assets. See 25 U. S. C. §§ 931–938.

**Solicitor General Lee, Assistant Attorney General Habicht, Edwin S. Kneedler, Jacques B. Gelin*, and *Arthur E. Gowran* filed a brief for the United States as *amicus curiae*.

[1] The 1763 Treaty of Fort Augusta was entered into by the Catawbas and British and colonial officials, and provides, in relevant part:

"And We the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendant on their Parts promise and engage that the aforesaid survey shall be compleated and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere." XI Colonial Records of North Carolina 201–202 (1763), reprinted in App. 35.

We hold that the State's statute applies, but we do not reach the question whether it bars the Tribe's claim.

Simply stated, the Tribe[2] claims that it had undisputed ownership and possession of the land before the first Nonintercourse Act was passed by Congress in 1790;[3] that the Nonintercourse Act prohibited any conveyance of tribal land without the consent of the United States; and that the United States never gave its consent to a conveyance of this land. Accordingly, the Tribe's purported conveyance to South Carolina in 1840 is null and void. Among the defenses asserted by petitioners[4] is the contention that, even if the Tribe's claim was valid before passage and enactment of the Catawba Division of Assets Act, § 5 of the Act made the state statute of limitations applicable to the claim. Because that is the only contention that we review, it is not necessary to describe much of the historical material in the record.

I

In 1760 and 1763, the Tribe surrendered to Great Britain its aboriginal territory in what is now North and South Carolina in return for the right to settle permanently on the "Tract of Land of Fifteen Miles square" that is now at issue.

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[2] The respondent, Catawba Indian Tribe, Inc., is a nonprofit corporation organized under the laws of South Carolina in 1975. Like the District Court and the Court of Appeals, we assume that the respondent is the successor in interest of the Catawba Indian Tribe of South Carolina. For convenience, we refer to the respondent as the "Tribe" throughout this opinion.

[3] See Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138. The Act, now codified at 25 U. S. C. § 177, states in relevant part:

"No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

[4] The petitioners include the State of South Carolina and approximately 76 other parties who are named as defendants in the complaint; they were sued as representatives of a class that was alleged to consist of the approximately 27,000 persons who claim an interest in the disputed land.

For purposes of this summary judgment motion, it is not disputed that the Tribe retained title to the land when the Nonintercourse Acts were passed.

By 1840, the Tribe had leased most, if not all, of the land described in the 1763 treaty to white settlers. In 1840, the Tribe conveyed its interest in the "Tract of Land of Fifteen Miles square" to the State of South Carolina by entering into the "Treaty of Nation Ford." In that treaty, the State agreed, in return for the "Tract," to spend $5,000 to acquire a new reservation, to pay the Tribe $2,500 in advance, and to make nine annual payments of $1,500 in the ensuing years. In 1842, the State purchased a 630-acre tract as a new reservation for the Tribe, which then apparently had a membership of about 450 persons.[5] This land is still held in trust for the Tribe by South Carolina.

The Tribe contends that the State did not perform its obligations under the treaty—it delayed the purchase of the new reservation for over 2½ years; it then spent only $2,000 instead of $5,000 to purchase the new land; and it was not actually "new" land because it was located within the original 144,000-acre tract. Still more importantly, as noted, the Tribe maintains that this entire transaction was void because the United States did not consent to the conveyance as required by the Nonintercourse Act.

At various times during the period between 1900 and 1943, leaders of the Tribe applied to the State for citizenship and for a "final settlement of all their claims against the State."[6] Petitioners argue that these claims merely sought full performance of the State's obligations under the 1840 treaty, but, for purposes of our decision, we accept the Tribe's position that it was then asserting a claim under the Nonintercourse Acts and thus challenging the treaty itself. In any

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[5] An 1825 War Department chart indicated that the Catawbas totaled 450 persons. 2 American State Papers 545 (1925).

[6] See 1920 S. C. Acts 1700, Joint Res. No. 904, § 1.

event, both state officials and representatives of the Federal Government took an interest in the plight of the Tribe.[7]

In response to this concern, on December 14, 1943, the Tribe, the State, and the Office of Indian Affairs of the Department of the Interior entered into a Memorandum of Understanding which was intended to provide relief for the Tribe, but which did not require the Tribe to release its claims against the State.[8] Pursuant to that agreement, the State purchased 3,434 acres of land at a cost of $70,000 and conveyed it to the United States to be held in trust for the Tribe.[9] The Federal Government agreed to make annual contributions of available sums for the welfare of the Tribe and to assist the Tribe with education, medical benefits, and economic development. For its part, the Tribe agreed to conduct its affairs on the basis of the Federal Government's recommendations; it thereafter adopted a Constitution ap-

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[7] In 1930, a Subcommittee of the Senate Committee on Indian Affairs held hearings in Rock Hill, South Carolina, which is located in the 144,000-acre tract. Senator Thomas of Oklahoma wrote that the "subcommittee . . . found some hundred and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death." Division of Tribal Assets of Catawba Indian Tribe, Hearings on H. R. 6128, before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 86th Cong., 1st Sess. (unpublished), Insert 5, at 3 (Minutes of State and Federal Conference, Oct. 21, 1958) (6 Record Ex. 56), quoting Feb. 10, 1932, letter, Senator Thomas to Commissioner Rhoads.

[8] Preliminary drafts of the Memorandum of Understanding contained a provision extinguishing the Tribe's reservation claim (6 Record Ex. 49), but that provision was deleted. The Solicitor of the Department of the Interior emphasized that the agreement should not use "a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts." United States Department of the Interior, Office of the Solicitor, Memorandum for the Commissioner of Indian Affairs. *Id.*, Ex. 50, p. 3.

[9] The State also agreed to appropriate at least $9,500 annually for three years for the benefit of the Tribe and to extend to Catawbas the rights and privileges of all citizens, including admission to public schools. *Ibid.*

proved by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 U. S. C. § 476.

In 1953, Congress decided to make a basic change in its policies concerning Indian affairs. The passage of House Concurrent Resolution 108 on August 1, 1953,[10] marked the beginning of the "termination era"—a period that continued into the mid-1960s, in which the Federal Government endeavored to terminate its supervisory responsibilities for Indian tribes.[11] Pursuant to that policy, the Federal Government identified the Catawba Tribe as a likely candidate for the withdrawal of federal services.[12] Moreover, members of

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[10] That Resolution declared: "[I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship." H. R. Con. Res. 108, 83d Cong., 1st Sess. (1953), 67 Stat. B132.

[11] According to one compilation, between 1954 and 1962, Congress passed 12 separate "Termination Acts," the 11th of which was the Catawba Act. See F. Prucha, The Great Father 1048 (1984). The termination policy has been criticized by various commentators. See, *e. g.*, Cornell, The New Indian Politics, 10 Wilson Q. 113, 121 (1986); F. Prucha, *supra*, at 1046–1059; Wilkinson & Biggs, The Evolution of the Termination Policy, 5 American Indian L. Rev. 139 (1977); Preloznik & Felsenthal, The Menominee Struggle to Maintain Their Tribal Assets and Protect Their Treaty Rights Following Termination, 51 N. D. L. Rev. 53 (1975). The ultimate legislative wisdom of the termination policy is, of course, not before the Court.

[12] In September 1954, a House Study Subcommittee on Indian Affairs reported that the Catawba Tribe was one of the groups able to take responsibility for their affairs and therefore was ready for termination of federal services. H. R. Rep. No. 2680, 83d Cong., 2d Sess., 2–3 (1954). In contrast to the report made by Senator Thomas in 1930, n. 7, *supra*, the Reports accompanying the Act concluded that the Catawbas had been able to merge into the general community and had been able to attain an economic position comparable to that of non-Indians. See S. Rep. No. 863, 86th Cong., 1st Sess., 3 (1959) ("The Catawba Indians have advanced economically . . . during the past 14 years, and have now reached a position that is comparable to their non-Indian neighbors"); H. R. Rep. No. 910, 86th Cong., 1st Sess., 2 (1959) (same). Most adult male Catawbas were

the Tribe desired an end to federal restrictions on alienation of their lands in order to facilitate financing for homes and farm operations.[13] Accordingly, after discussions with representatives of the Bureau of Indian Affairs in which leaders of the Tribe were assured that any claim they had against the State would not be jeopardized by legislation terminating federal services, the Tribe adopted a resolution supporting such legislation and authorizing a distribution of tribal assets to the members of the Tribe.[14] After receiving advice that the Tribe supported legislation authorizing the disposal of the tribal assets and terminating federal responsibility for the Tribe and its individual members, Congress enacted the Catawba Indian Tribe Division of Assets Act, 73 Stat. 592, 25 U. S. C. §§ 931–938. The Act provides for the preparation of a tribal membership roll, § 931; the tribal council's designation of sites for church, park, playground, and cemetery purposes, § 933(b); and the division of remaining assets among the enrolled members of the Tribe, § 933(f). The Act also provides for the revocation of the Tribe's Constitution and the termination of federal services for the Tribe, § 935. It explicitly states that state laws shall apply to members of the Tribe in the same manner that they apply to non-Indians. *Ibid.* Pursuant to that Act, the 3,434-acre reservation that had been acquired as a result of the 1943 Memorandum of Understanding was distributed to the members of the Tribe; the Secretary of the Interior revoked the Tribe's Constitution, effective July 1, 1962.

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employed at the time: 47% were in industry, 20% in skilled labor, 7% in the Armed Services, 15% in odd jobs, 5% retired, and 6% on the welfare rolls. S. Rep., at 4; H. R. Rep., at 5.

[13] See 105 Cong. Rec. 5462 (1959) (statement of Rep. Hemphill); App. 102.

[14] The resolution adopted at the meeting of the Tribe on January 3, 1959, expressly noted that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." *Id.*, at 103.

In 1980, the Tribe commenced this action seeking possession of the 225-square-mile tract and trespass damages for the period of its dispossession. All of the District Judges for the District of South Carolina recused themselves, and Judge Willson of the Western District of Pennsylvania was designated to try the case. After the development of a substantial record of uncontested facts, Judge Willson granted the petitioners' motion for summary judgment. His order of dismissal was initially reversed by a panel of the Court of Appeals for the Fourth Circuit, 718 F. 2d 1291 (1983); sitting en banc, the full Court of Appeals adopted the panel's opinion. 740 F. 2d 305 (1984). Because of the importance of the case, we requested the views of the Solicitor General of the United States and granted certiorari, 471 U. S. 1134 (1985). We now reverse.

II

Section 5 of the Catawba Act is central to this dispute. As currently codified, it provides:

> "The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States." 25 U. S. C. § 935.

This provision establishes two principles in unmistakably clear language. First, the special federal services and statutory protections for Indians are no longer applicable to the

Catawba Tribe and its members. Second, state laws apply to the Catawba Tribe and its members in precisely the same fashion that they apply to others.

The Court of Appeals disagreed with this reading of the Act. For it concluded that the word "them" in the second sentence of § 5 could refer to the individual Indians who are members of the Tribe and not encompass the Tribe itself. Relying on the canon that doubtful expressions of legislative intent must be resolved in favor of the Indians,[15] it thus held that the language in § 5 about the inapplicability of federal Indian statutes and the applicability of state laws did not reach the Tribe itself.

The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.[16] It seems clear to us that the antecedent of the words "them" and "their" in the second sentence of § 5 is the compound subject of the first clause in the sentence, namely, "the tribe and its members." To read the provision otherwise is to give it a contorted construction that abruptly divorces the first clause from the second and the third, and that conflicts with the central purpose

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[15] *DeCoteau* v. *District County Court*, 420 U. S. 425, 444 (1975); *Antoine* v. *Washington*, 420 U. S. 194, 199–200 (1975); *Mattz* v. *Arnett*, 412 U. S. 481, 504–505 (1973).

[16] See *Oregon Dept. of Fish and Wildlife* v. *Klamath Indian Tribe*, 473 U. S. 753, 774 (1985) ("[E]ven though 'legal ambiguities are resolved to the benefit of the Indians,' *DeCoteau* v. *District County Court*, 420 U. S. 425, 447 (1975), courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. [658, 673 (1979)], clearly runs counter to a tribe's later claims"); *Rice* v. *Rehner*, 463 U. S. 713, 732 (1983) (canon of construction regarding certain Indian claims should not be applied "when application would be tantamount to a formalistic disregard of congressional intent"); *Andrus* v. *Glover Construction Co.*, 446 U. S. 608, 618–619 (1980); *DeCoteau* v. *District County Court*, 420 U. S., at 447 ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent").

and philosophy of the Termination Act. According the statutory language its ordinary meaning, moreover, is reinforced by the fact that the first sentence in the section provides for a revocation of the Tribe's Constitution. It would be most incongruous to preserve special protections for a tribe whose constitution has been revoked while withdrawing protection for individual members of that tribe.[17]

Without special federal protection for the Tribe, the state statute of limitations should apply to its claim in this case. For it is well established that federal claims are subject to state statutes of limitations unless there is a federal statute of limitations or a conflict with federal policy.[18] Although federal policy may preclude the ordinary applicability of a state statute of limitations for this type of action in the absence of a specific congressional enactment to the contrary, *County of Oneida* v. *Oneida Indian Nation*, 470 U. S. 226 (1985), the Catawba Act clearly suffices to reestablish the usual principle regarding the applicability of the state statute of limitations. In striking contrast to the situation in

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[17] Respondent argues that the scope of the Act was merely to terminate the specific federal services arising from the 1943 Memorandum of Understanding. Such a limited interpretation cannot be reconciled with the broader language of the Act ("The tribe and its members shall not be entitled to *any* of the special services performed by the United States for Indians because of their status as Indians"; "*all* statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them"; "the laws of the several states shall apply to them *in the same manner* they apply to other persons or citizens within their jurisdiction") (emphasis added).

[18] See, *e. g.*, *Wilson* v. *Garcia*, 471 U. S. 261, 266–267 (1985); *Board of Regents* v. *Tomanio*, 446 U. S. 478, 483–484 (1980); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 462 (1975); *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 703–704 (1966); *Cope* v. *Anderson*, 331 U. S. 461, 463 (1947); *Rawlings* v. *Ray*, 312 U. S. 96, 97 (1941); *O'Sullivan* v. *Felix*, 233 U. S. 318, 322–323 (1914); *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 397–398 (1906); *McClaine* v. *Rankin*, 197 U. S. 154, 158 (1905); *Campbell* v. *Haverhill*, 155 U. S. 610, 617 (1895); *M'Cluny* v. *Silliman*, 3 Pet. U. S. 270, 277 (1830).

County of Oneida, the Catawba Act represents an explicit redefinition of the relationship between the Federal Government and the Catawbas; an intentional termination of the special federal protection for the Tribe and its members; and a plain statement that state law applies to the Catawbas as to all "other persons or citizens."

That the state statute of limitations applies as a consequence of terminating special federal protections is also supported by the significance we have accorded congressional action redefining the federal relationship with particular Indians. We have long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims.[19] Similarly, we have emphasized that Termination Acts subject members of the terminated tribe to "the full sweep of state laws and state

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[19] See, *e. g.*, *Larkin* v. *Paugh*, 276 U. S. 431, 439 (1928) ("With the issue of the patent, the title not only passed from the United States but the prior trust and the incidental restrictions against alienation were terminated. This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction—so that thereafter all questions pertaining to the title were subject to examination and determination by the courts, appropriately those in Nebraska, the land being there"); *Dickson* v. *Luck Land Co.*, 242 U. S. 371, 375 (1917) ("With those restrictions [of Congress] entirely removed and the fee simple issued it would seem that the situation was one in which all questions pertaining to the disposal of the lands naturally would fall within the scope and operation of the laws of the State"); *United States* v. *Waller*, 243 U. S. 452, 461–462 (1917) ("We cannot escape the conviction that the plain language of this act evidences the intent and purpose of Congress to make such lands allotted to mixed-blood Indians subject to alienation with all the incidents and rights which inhere in full ownership in persons of full capacity"); *Schrimpscher* v. *Stockton*, 183 U. S. 290, 296 (1902) (after a treaty removed restraints from alienation of land by certain Wyandotte Indians, state statute of limitations ran against Indians, even though Indians later asserted claim of a prior federal treaty violation; after removal of restraints on alienation, the Indian's heirs "were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands").

taxation."[20] These principles reflect an understanding that congressional action to remove restraints on alienation and other federal protections represents a fundamental change in federal policy with respect to the Indians who are the subject of the particular legislation.

The Court of Appeals found support for its conclusion about the nonapplicability of the state statute of limitations in § 6 of the Catawba Act, which provides that nothing in the statute affects the rights of the Tribe under the laws of South Carolina.[21] The thrust of the Court of Appeals' reasoning was that, if a state law was inapplicable to the Tribe or its members before the effective date of the Act, its application after the effective date necessarily violates § 6. But such a reading contradicts the plain meaning of § 5's reference to the applicability of state laws. In our view § 6 was merely intended to remove federal obstacles to the ordinary application of state law. Section 6 cannot be read to preserve, of its

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[20] *Bryan* v. *Itasca County*, 426 U. S. 373, 389 (1976). See also *United States* v. *Antelope*, 430 U. S. 641, 647, n. 7 (1977) ("[M]embers of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act"); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972) (terminated members of Tribe must bring action to invalidate allegedly fraudulent conveyance under same laws as other citizens).

As the Court of Appeals noted, in *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968), the Court concluded that the Menominee Termination Act did not terminate the Tribe's hunting and fishing rights. The Court emphasized that the Termination Act must be read *in pari materia* with an Act passed in the same Congress that preserved hunting and fishing rights. *Id.*, at 411. In this case, of course, there is no similar contemporaneous statute. Moreover, in *Menominee*, the Court was concerned about a "backhanded" abrogation of treaty rights, *id.*, at 412; no comparable abrogation is at issue here.

[21] As currently codified, § 6 provides:

"Nothing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina." 25 U. S. C. § 936.

own force, a federal tribal immunity from otherwise applicable state law without defeating a basic purpose of the Act and negating explicit language in § 5.[22] Most fundamentally, § 6 simply does not speak to the explicit redefinition of the federal relationship with the Catawbas that is the basis for the applicability of the state statute of limitations.

Finally, the Court of Appeals relied heavily on the assurance to the Tribe that the status of any claim against South Carolina would not be affected by the legislation.[23] Even assuming that the legislative provisions are sufficiently ambiguous to warrant reliance on the legislative history, we believe that the Court of Appeals misconceived the import of this assurance. We do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute became effective. Rather, we assume that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction. As a result, unlike the Court of Appeals, we perceive no contradiction between the applicability of the state statute of limitations and the assurance that the status of any state claims would not be affected by the Act.

We thus conclude that the explicit redefinition of the federal relationship reflected in the clear language of the Ca-

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[22] It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U. S. 379, 392 (1979). See also *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U. S. 237, 249 (1985); *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' *Montclair* v. *Ramsdell*, 107 U. S. 147, 152, rather than to emasculate an entire section").

[23] See 718 F. 2d 1291, 1296 (1983) (quoting Bureau of Indian Affairs official's assurance that "'any claim the Catawbas had against the State would not be jeopardized by carrying out a program with the Federal Government'").

tawba Act requires the application of the state statute of limitations to the Tribe's claim.

III

The District Court held that respondent's claim is barred by the South Carolina statute of limitations. The Court of Appeals' construction of the 1959 federal statute made it unnecessary for that court to review the District Court's interpretation of state law. Because the Court of Appeals is in a better position to evaluate such an issue of state law than we are,[24] we remand the case to that court for consideration of this issue.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE O'CONNOR join, dissenting.

The Catawba Indian Tribe Division of Assets Act, 73 Stat. 592, 25 U. S. C. § 931 *et seq.*, was passed by Congress in 1959 to divide up the Tribe's federally supervised reservation so that individual Catawbas could sell or mortgage their allotments. The Court today concludes that the Act also had the incidental effect of applying a South Carolina statute of limitations to the Catawbas' pre-existing and longstanding claim to lands the State purported to purchase from the Tribe in 1840. I feel this interpretation cannot be reconciled with the language of the Act under this Court's traditional approach to statutes regulating Indian affairs. I therefore dissent.

I

Too often we neglect the past. Even more than other domains of law, "the intricacies and peculiarities of Indian law deman[d] an appreciation of history." Frankfurter,

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[24] See *Pembaur* v. *Cincinnati*, 475 U. S. 469, 484–485, n. 13 (1986); *Regents of University of Michigan* v. *Ewing*, 474 U. S. 214, 224, n. 10 (1985); *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976); *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949).

Foreword to A Jurisprudential Symposium in Memory of Felix S. Cohen, 9 Rutgers L. Rev. 355, 356 (1954).

Before the arrival of white settlers, the Catawba Indians occupied much of what is now North and South Carolina. In the 1760 Treaty of Pine Tree Hill, the Catawbas relinquished the bulk of their aboriginal territory to Great Britain in exchange for assurances that they would be allowed to live in peace on a small portion of that territory, a square of land 15 miles on each side (144,000 acres), which today surrounds and includes Rock Hill, S. C. Three years later, in the Treaty of Augusta, the Tribe again agreed to "remain satisfied with the Tract of Land of Fifteen Miles square," and the British once more promised that "the Catawba shall not in any respect be molested by any of the King's subjects within the said Lines." App. 35. It is the 144,000 acres reserved for the Catawbas in 1760 and again in 1763—"a mere token of the[ir] once large domain"—that give rise to this litigation. See J. Brown, The Catawba Indians 8 (1966) (Brown).

The historical record suggests that the Catawbas were driven to the agreements of 1760 and 1763 in large part by the colonists' repeated and continuing encroachments on tribal lands.[1] Some of the land was acquired by purchase, see, *e. g.*, *id.*, at 165, but in South Carolina, as elsewhere, "[f]rom the very beginning abuses marred the transfer of land titles from the Indians to individuals among the English

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[1] In letters written in 1754 to the Catawbas and to the President of the Council of North Carolina, Governor Glen of South Carolina noted that the Catawbas repeatedly had complained about whites' settling too close to them. 6 Record, Exs. 1 and 2. In response to these complaints, Governor Glen forbade whites to settle within 30 miles of Catawba towns, *ibid.*, but that prohibition was frequently ignored. See C. Hudson, The Catawba Nation 49 (1970). For general discussions of early colonial encroachments on Catawba land, see Brown, at 163–166; P. Dammann, D. Miller, & D. Israel, A History of the Catawba Tribe and its Reservation Lands, reprinted in Settlement of the Catawba Indian Land Claims, Hearing before the House Committee on Interior and Insular Affairs on H. R. 3274, 96th Cong., 1st Sess., 135, 151–153 (1979) (Hearing).

colonists." F. Prucha, American Indian Policy in the Formative Years 6 (1962). Indeed, the South Carolina Provincial Council took legislative notice in a 1739 statute that lands purchased from Indians were "generally obtained . . . by unfair representations, fraud and circumvention, or by making them gifts or presents of little value, by which practices, great resentments and animosities have been created amongst the Indians toward the inhabitants of this Province." An Act to restrain and prevent the purchasing Lands from Indians, 1 The First Laws of the State of South Carolina 160–161 (J. Cushing ed. 1981). The 1739 statute therefore barred the private acquisition of Indian lands without a grant or license from the Crown or the Governor, but such steps apparently did little to stop white encroachments on Indian territory. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 U. Maine L. Rev. 17, 21 (1979). Recognizing that "great frauds and abuses have been committed in the purchasing lands of the Indians," the Crown in October 1763—shortly before the signing of the Treaty of Augusta—flatly forbade any further private purchases of land reserved for Indian tribes. Proclamation of 1763, reprinted in 3 W. Washburn, The American Indian and the United States 2135, 2138 (1973).

The United States from an early date followed a similar policy. Since 1790, the Nonintercourse Act, now codified as reenacted and amended at 25 U. S. C. § 177, has broadly prohibited the sale of Indian land without the consent of the Federal Government. Despite this prohibition—which in 1793 was extended to include not only outright purchases but also acquisitions of any "claim" to protected lands, see Act of Mar. 1, 1793, § 8, 1 Stat. 330—mounting pressures from settlers in the early 19th century led the State of South Carolina to enact a series of statutes purporting to authorize the leasing

of Catawba lands to non-Indians. Initially, the leases signed under these statutes seem to have posed little threat to the Tribe. According to B. S. Massey, who knew the Catawbas during this time and later served as South Carolina's agent to the Tribe, "[t]hey were then strong and felt themselves in their own greatness, governed by their own laws, working the best spots of their lands and leasing out the poorer portions to the white men." Report to The Governor of South Carolina on the Catawba Indians 4 (1854), reprinted in 6 Record, Ex. 11.

By the 1830's, however, nearly all of the 144,000 acres reserved for the Tribe in the Treaty of Augusta had been leased to non-Indians. This situation proved disastrous, because rents were "generally paid in old horses, old cows or bed quilts and clothes, at prices that the whites set on the articles taken." *Ibid.* The Catawbas soon were reduced to "a state of starvation and distress," *ibid.*, and they ultimately gave in to repeated efforts by the State to purchase their land. In 1840, representatives of the Tribe and the State signed the Treaty of Nation Ford. Under this "treaty"—which the United States never joined or approved—the Catawbas relinquished all their land in exchange for two promises. First, the State promised the sum of $16,000 in a series of resettlement payments. Second, the State pledged that it would purchase a new reservation "of the value of five thousand dollars," including 300 acres of "good arable lands fit for cultivation" in a thinly populated area of North or South Carolina satisfactory to the Indians. App. 38–39.[2]

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[2] According to Massey, the Indians "were driven to" this agreement "by being surrounded by white men, [who] cheat[ed] them out of their rights, and [by] partaking of the vices of the whites and but few of their virtues." Report to The Governor of South Carolina on the Catawba Indians 5 (1854), reprinted in 6 Record, Ex. 11. The "vices" to which Massey referred may have included the consumption of alcohol; the Catawbas later charged that state representatives negotiated the treaty by setting out a whiskey barrel and tin cups and inviting the Indians to help themselves. This charge was reported to the Department of the Interior in a 1908

The South Carolina Legislature promptly provided for the transfer of title from the State to the lessees of the 144,000 acres, requiring only that the lessees reimburse the State proportionately for its advances to the Tribe. Act of Dec. 18, 1840, § 3, 7 S. C. Stats. 103 (1840). Unfortunately, the State showed less enthusiasm in fulfilling its contractual obligations to the Indians. After allowing the Catawbas to wander homeless and uncompensated for 2½ years, the State reportedly spent $2,000 to buy back 630 agriculturally undesirable acres of the Catawbas' original 18th-century treaty lands as a "new" reservation for the Tribe.[3] The State continues to hold these 630 acres for the Catawbas. It is unclear from the record before us whether the Tribe ever received the resettlement payments promised by the State.

In the 146 years that have passed since the Nation Ford agreement, the Catawbas repeatedly have pressed their claim to the 144,000 acres, which they feel were taken from them illegally. In the early 1900's, the Tribe petitioned both the Federal Government and the State of South Carolina for relief, arguing that the 1840 transfer was void because the United States had not approved it. The Commissioner of Indian Affairs advised the Catawbas in 1906 and again in 1909 that the Department of the Interior would not seek relief on their behalf. He explained that the Catawbas were "state Indians" for whom the United States had no responsibility, and, consequently, that the absence of federal participation in

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memorandum by Catawba tribal attorney Chester Howe. See Plaintiffs' Response to Defendants' Motion to Dismiss in No. 80-2050-6 (CA4) p. 23, n. 30, citing Record Group 75, National Archives Central Files 1907-1939, BIA File No. 1753-1906.

[3] See Brown, at 317, 320-322. Assuming this account is correct, the new reservation was less than one-half of one percent of the Tribe's 1763 treaty lands. The price paid by the State for the new reservation—which works out to roughly $3.17 per acre—contrasts strikingly with the price paid for the same land when purchased from the Indians 2½ years earlier—the approximate equivalent of 15 cents per acre payable in installments over 10 years.

the Treaty of Nation Ford did not void the transaction.[4] In 1908, the South Carolina Attorney General reached the same conclusion, and advised the state legislature that the Tribe had no outstanding claim to any of the 144,000 acres. 1908 Op. S. C. Atty. Gen. 17, 18, 29–32. The Tribe nonetheless continued to press its claim to the land. A federal Indian agent visiting the Catawbas in December 1910, for example, was asked about the Tribe's prospects for recovering "their old reservation of 15 miles square"; he told them the Department of the Interior would not take their case into court. 6 Record, Ex. 21, pp. 11–12 (letter from C. Davis to Comm'r of Indian Affairs, Jan. 5, 1911).

The seeds of the legislation found dispositive by the Court today were planted in 1943, when the Tribe, the State of South Carolina, and the Department of the Interior concluded a Memorandum of Understanding providing for a new reservation for the Catawbas, and placing the Tribe and the new reservation under federal supervision. Evidently concerned about the Tribe's continued grievances concerning the 1840 agreement, South Carolina sought, unsuccessfully, to include in the Memorandum a waiver of any outstanding claims the Catawbas had against the State. *Id.*, Ex. 48 (letter from Ass't Comm'r of Indian Affairs to S. C. State Auditor, Aug. 28, 1941). Preliminary drafts of the Memorandum included such a waiver, see *id.*, Ex. 49, p. 5, but federal officials ultimately dropped the provision because they doubted the legality of using the agreement to deprive the Indians of claims that otherwise might be enforceable in court, see App.

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[4] 6 Record, Exs. 18, 20. But see *United States* v. *Candelaria*, 271 U. S. 432, 442 (1926) (construing the term "Indian Tribe" in the Nonintercourse Act to refer to any "'body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory,'" quoting *Montoya* v. *United States*, 180 U. S. 261, 266 (1901); *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 528 F. 2d 370, 376–378 (CA1 1975) (applying Nonintercourse Act to Tribe lacking federal recognition).

43–44 (memorandum from Interior Dept. Solicitor to Comm'r of Indian Affairs, Jan. 13, 1942).

In 1958, after representatives from the Bureau of Indian Affairs suggested to the Catawbas that their financial difficulties could be alleviated by distributing the Tribe's federally supervised assets and ending federal restrictions on alienation, the Indians expressed concern about their claims against the State, but they were assured that the proposal would not jeopardize those claims. 6 Record, Ex. 53, pp. 7–8 (memorandum from program officer to Tribal Programs Branch Chief, Jan. 30, 1959) (quoted by the Court, *ante*, at 510, n. 23). The Tribe then adopted a resolution calling on its Congressman, Robert Hemphill, to introduce and secure passage of legislation to remove restraints on alienation and to distribute tribal assets; the resolution specifically requested, however, that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." App. 103.

Representative Hemphill asked the Bureau of Indian Affairs to draft legislation "to accomplish the desires set forth in the Resolution." *Id.*, at 50. He then presented the draft bill to the Catawbas and told them that it had been "drawn up to carry out the intent of the resolution." *Id.*, at 111. After a majority of the Tribe expressed approval, Representative Hemphill introduced the bill in Congress, explaining that the Tribe had given its consent. See 105 Cong. Rec. 5462 (1959). The result was the 1959 Division of Assets Act, which the Court today concludes may bar the Tribe from pursuing its claim to the lands reserved for it in 1760 and 1763.

In the 1970's, spurred by favorable legal rulings elsewhere in the country, Catawba leaders renewed their request to the Department of the Interior to seek relief for the Tribe. In 1977, the Solicitor of the Department concluded that the rebuffs given the Catawbas in 1906 and 1909 had been legally unjustified, and that the Tribe could establish a prima facie claim to the 144,000 acres. He further concluded that the

Division of Assets Act operated prospectively only, and did not affect pre-existing rights. Accordingly, the Solicitor formally requested the Department of Justice to institute legal action on behalf of the Catawbas and to support the settlement discussions that the Tribe already had initiated with South Carolina officials. See App. to Brief in Opposition 3a. The litigation request was later withdrawn in an effort to emphasize that the Interior Department favored a negotiated settlement if at all possible, and settlement legislation backed by the Tribe was introduced in Congress. See Hearing, at 15–17 (statement of Leo M. Krulitz, Solicitor of the Department of the Interior). The legislative efforts apparently proved fruitless, and in October 1980 the Tribe filed this suit.

II

The Tribe's complaint asserts a right to possession of the reserved portion of its aboriginal territory under the Nonintercourse Act, the Federal Constitution, and the treaties of 1760 and 1763.[5] These are federal claims, see *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 666–678 (1974) *(Oneida I)*, and the statute of limitations is thus a matter of federal law, see *County of Oneida* v. *Oneida Indian Nation*, 470 U. S. 226, 240–244 (1985) *(Oneida II)*. Where, as here, Congress has not specified a statute of limitations, federal courts generally borrow the most closely analogous limitations period under state law, but *only* if application of the state limitations period would not frustrate federal policy. See, *e. g.*, *Wilson* v. *Garcia*, 471 U. S. 261, 266–267 (1985); *DelCostello* v. *Teamsters*, 462 U. S. 151, 158–163

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[5] Although the complaint asks in part that the Tribe "be restored to immediate possession" of virtually the entire 144,000 acres, App. 25, the available remedies, even if the Tribe prevailed, well might be limited by equitable considerations. See *Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, 357 (1926). The question currently before the Court, of course, is not whether part or all of the land claimed by the Catawbas should be given back to them, but whether the Tribe's ability to seek any judicial relief at all is governed by South Carolina's statute of limitations.

(1983); *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 367 (1977).

In *Oneida II*, the Court recognized that application of state statutes of limitations to Indian land claims generally *would* violate federal policy. The Court noted that a 1950 federal statute giving New York courts jurisdiction over most civil disputes involving Indians had been carefully crafted to exempt pre-existing land claims from the operation of a New York statute of limitations. See Act of Sept. 13, 1950, 64 Stat. 845, 25 U. S. C. § 233. Furthermore, in a later series of more general enactments imposing a federal statute of limitations on certain tort and contract actions brought anywhere in the United States by Indians or by the United States on behalf of Indians, Congress specifically excluded from the limitations period all actions "to establish the title to, or right of possession of, real or personal property." 28 U. S. C. § 2415(c).[6] The Court in *Oneida II* concluded that

[6] The federal statute of limitations for certain tort and contract actions brought by the United States on behalf of Indian Tribes was first adopted in 1966; the limitations period was not applied to suits brought by Indians themselves until 1982. "In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of the Indians." *Oneida II*, 470 U. S., at 242. The debates over these amendments to § 2415 indicate that Congress extended the filing deadline in part to allow additional time for preparation and negotiation of tort claims for trespass damages arising from allegedly illegal expropriations of tribal lands—including the 144,000 acres claimed by the Catawbas. See, *e. g.*, 123 Cong. Rec. 22166–22167 (1977) (Rep. Cohen, discussing Catawba claim and others); *id.*, at 22168 (Rep. Walsh); *id.*, at 22170 (Rep. Hanley); 126 Cong. Rec. 5748–5749 (1980) (Rep. Holland, discussing Catawba claim); *id.*, at 5750 (Rep. Udall). Members of Congress emphasized repeatedly that Indian land claims were difficult to research, that Indians historically had lacked adequate legal assistance and administrative resources, and that the United States had not played its proper role in bringing suits on the Indians' behalf. See, *e. g.*, 123 Cong. Rec. 22170 (1977) (Rep. Collins); *id.*, at 22171 (Rep. Johnson); 126 Cong. Rec. 3289 (1980) (Sen. Cranston); *id.*, at 5745–5746 (Rep. Clausen); *id.*, at 5747 (Rep. Danielson); *id.*, at 5750 (Rep. Swift). See also 123 Cong. Rec. 22171 (1977) (Rep. Weiss) ("[A]s a

the text and legislative history of these statutes evinced a congressional belief that actions brought to enforce Indian property rights were not, and should not be, subject to filing deadlines other than those provided by federal statute. Borrowing a state statute of limitations in such a case "would be a violation of Congress' will." 470 U. S., at 244.

In determining whether the 1959 Division of Assets Act exempts the Catawbas' claim from this general principle, analysis must begin with the firmly established rule—which the Court today implicitly reaffirms, see *ante*, at 506—that ambiguities in statutes regulating Indian affairs are to be construed in the Indians' favor. See, *e. g.*, *Oneida II*, 470 U. S., at 247–248; *Bryan* v. *Itasca County*, 426 U. S. 373, 392 (1976); *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U. S. 649, 655, n. 7 (1976); *DeCoteau* v. *District County Court*, 420 U. S. 425, 444 (1975); *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 353–354 (1941); *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918); *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912); see generally F. Cohen, Handbook of Federal Indian Law 221–225 (1982). This rule is not simply a method of breaking ties; it reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people whom our Nation long ago reduced to a state of dependency. The rule is particularly appropriate when the statute in question was passed primarily for the benefit of the Indians, as was the 1959 Division of Assets Act. Absent "clear and plain" language to the contrary, *Santa Fe Pacific*, 314 U. S., at 353, it must be assumed that Congress did not intend to belie its

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result of the numerous injustices suffered by American Indians during the last 150 years—many at the hands of the American Government—it is incumbent on the United States to give these people—our country's first inhabitants—a full chance to redress their grievances"); 126 Cong. Rec. 3287 (1980) (Sen. Melcher) (failure to extend statute of limitations could lead to "mass injustices"). Similar considerations presumably motivated Congress' decision to exempt entirely all claims for title or possession from the limitations period prescribed in § 2415.

"avowed solicitude" for the Indians, *id.*, at 354, with a "backhanded" abrogation or limitation of their rights, *Menominee Tribe* v. *United States*, 391 U. S. 404, 412 (1968).

The Court today evidently finds in § 5 of the Division of Assets Act "the clearly expressed intent of Congress," *ante*, at 506, that the Catawbas' tribal land claim was to be subject to South Carolina's statute of limitations. The Court relies largely on two provisions of § 5. The first renders inapplicable to the Catawbas all "special services performed by the United States for Indians because of their status as Indians," and "all statutes of the United States that affect Indians because of their status as Indians." The second provides that state laws shall "apply to [the Catawbas] in the same manner they apply to other persons or citizens." 25 U. S. C. § 935. Neither of these provisions, in my view, is able to bear the weight the Court places upon it.

A

The first provision merely renders federal Indian "services" and "statutes" inapplicable to the Catawbas. I agree with the Court that this provision makes the Nonintercourse Act, along with other Indian statutes, inapplicable both to individual Catawbas and to the Tribe. See *ante*, at 505–509. But that simply means that after the Division of Assets Act went into effect, the Tribe no longer was statutorily barred from selling or leasing its land. The services-and-statutes clause of the Act does not expressly abrogate or place procedural conditions on any *pre-existing* claims the Catawbas may have had, and the broad federal policy against application of state statutes of limitations to Indian land claims is neither a "service" nor a "statute."

The majority nonetheless asserts that this Court has "long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims." *Ante*, at 508. The cases it cites for that proposition all were decided well before the emergence during the

past 35 years of a clear congressional policy against the application of state statutes of limitations to Indian land claims. See *Oneida II*, 470 U. S., at 240–244. More importantly, all the cases cited by the majority involve lands for which patents had been issued to individual Indians, not lands alleged to remain tribal property. This Court made clear in *Oneida I* that claims arising under such patents are not federal claims at all, because, "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts." 414 U. S., at 676. In this case, however, as in *Oneida I*, "the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the substantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Id.*, at 677. Here, as in *Oneida I*, the complaint thus "asserts a present right to possession under federal law." *Id.*, at 675.

I do not see how a statute removing restraints on alienation can fairly be said to signal unambiguously a congressional intent to subject pre-existing tribal land claims arising under federal law to state statutes of limitations. But even if I agreed with the majority that the removal of restraints on alienation should trigger the application of state limitations periods, the 1959 Act lifted only *statutory* restrictions on the alienation of Catawba land, and the requirement that the Federal Government approve any transfer of the property at issue in this case did not, and does not, stem solely from any federal statute. The land set aside for the Catawbas in 1760 and 1763 was within the Tribe's aboriginal territory,[7] and

[7] John Stuart, the King's Superintendent of Indian Affairs, who had negotiated the Treaty of Augusta, noted in a 1772 letter to the South Carolina Governor that the 144,000 acres reserved for the Catawbas in that treaty

their claim to the land thus derives from original title[8] as well as from the 18th-century treaties.[9] With respect to original title, at least, the Nonintercourse Act merely "'put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States.'" *Oneida II*, 470 U. S., at 240, quoting *Oneida I*, 414 U. S., at 678.[10]

There is nothing in the 1959 legislation that indicates that Congress intended to exempt the Catawbas from this

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were, "as well as a very considerable Extent of Country besides[,] possessed by them when the Subjects of England first Settled in this part of the World." 6 Record, Ex. 7, p. 1.

[8] See generally F. Cohen, Handbook of Federal Indian Law 486–493 (1982); Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947); Note, Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial, 75 Colum. L. Rev. 655 (1975).

[9] This Court long has respected grants of land to Indian tribes by prior governments. See, *e. g.*, *United States* v. *Title Insurance & Trust Co.*, 265 U. S. 472, 484 (1924), quoting *Barker* v. *Harvey*, 181 U. S. 481, 491–492 (1901) ("'There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its powers of disposal'"); *Mitchel* v. *United States*, 9 Pet. 711 (1835).

[10] The federal common-law rule against alienation of aboriginal title without the consent of the sovereign was recognized as early as 1823 in Chief Justice Marshall's opinion for the Court in *Johnson* v. *McIntosh*, 8 Wheat. 543, 573–574 (1823), and it is reflected in the Constitution's Indian Commerce Clause, Art. I, § 8, cl. 3, which made "Indian relations . . . the exclusive province of federal law," *Oneida II*, 470 U. S., at 234, and n. 4. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 U. Maine L. Rev. 17, 28–29 (1979). In *Oneida II*, the Court rejected a suggestion that Indian common-law rights to tribal lands were somehow swallowed up or pre-empted by the Nonintercourse Act; it made clear that the common law still furnishes an independent basis for legal relief. See 470 U. S., at 236–240.

common-law protection of undistributed tribal property as well as from its statutory codification. Nor is there anything to indicate that Congress meant to abrogate the protection promised to the Tribe under the treaties of 1760 and 1763, which the Tribe claims provide an independent source of continuing federal protection. Indeed, in rejecting an argument that a similar provision of the Menominee Termination Act destroyed treaty rights to hunt and fish, this Court noted: "The use of the word 'statutes' is potent evidence that no *treaty* was in mind." *Menominee Tribe*, 391 U. S., at 412 (emphasis in original). In the same way, Congress' use in 1959 of the terms "services" and "statutes" suggests, if anything, that the Division of Assets Act was not intended to remove other sources of protection. Surely the selection of these terms provides no support for the view that Congress meant to impose new procedural requirements on preexisting tribal land claims based not only on statutory provisions, but also on treaty rights and federal common law.[11]

[11] The Tribe's complaint requests relief under the treaties of 1760 and 1763, the Nonintercourse Act, the Indian Commerce Clause, Art. I, § 8, cl. 3, and the constitutional prohibition against state treaties, Art. I, § 10, cl. 1. App. 24. Reading the complaint liberally "so . . . as to do substantial justice," Fed. Rule Civ. Proc. 8(f), I would conclude that the constitutional references suffice to invoke the rule that original Indian title may not be alienated without federal approval. Cf. Brief for United States as *Amicus Curiae* in *Connecticut* v. *Mohegan Tribe*, O. T. 1980, No. 80–1365, p. 7 (describing the rule as "constitutionally based"). A narrower construction of the complaint would be especially inappropriate because the Tribe adopted the United States' brief in *Mohegan Tribe* as part of its response in the District Court to the defendants' motion to dismiss, making clear that the constitutional claims raised in the complaint were to be read to embrace the common-law rule. See Plaintiff's Memorandum in Support of Motion for Leave to File Supplemental Memorandum and Supplemental Memorandum, 1 Record, Ex. 15.

Because, under my view, the Tribe's treaty claims add nothing material for present purposes to its common-law claim, I would not decide at this time whether the 1760 and 1763 treaties independently required the United States, as successor to Great Britain, to approve any sale or lease of the 144,000 acres. Why the majority finds no need to discuss this ques-

B

The second provision of the 1959 Act relied on by the Court directs that "the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." I agree with the Court that the word "them" must be understood to refer not only to individual Catawbas, but also to the Tribe. See *ante*, at 506–507. Clearly, however, "them" does not refer to *claims* brought by the Catawbas; the term encompasses the plaintiff in this case, but not the cause of action.

This distinction is critical. The "laws of the several States" provision of the Division of Assets Act placed the Catawbas on the same footing as non-Indians with regard to the application of state law. Just as a non-Indian's action based on South Carolina law must be brought within the time specified by the State, so a state-law action brought by a Catawba—or by the Catawba Tribe—must meet the same requirement. If a non-Indian in South Carolina brings a *federal* claim, however, the limitations period is determined by federal law. The same must hold for the federal claims raised by the Catawbas in this litigation.

Of course, the real question in this case is not whether federal law governs the limitations question, but whether federal law should borrow South Carolina's period of limitations, notwithstanding the general federal policy against such borrowing in the context of Indian land claims. My point here is that this question is not answered by the statutory instruction to apply state law to the Catawbas "in the same manner" as it is applied to non-Indians. Subjecting a group of Indians to state law to the same extent as other citizens is far different from subjecting their unique federal claims to a state statute of limitations. For non-Indians as well as Indians,

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tion, or the issue of common-law restraints on alienation, is harder to understand.

the decision whether to apply a state limitations period to a federal claim depends on whether such application is deemed contrary to federal policy. And nothing in § 5 of the Division of Assets Act unambiguously directs that, as a matter of federal policy, the Catawbas' unsettled tribal claims should be treated any differently for statute-of-limitations purposes from other tribal land claims. Indeed, there is no indication that Congress thought about such claims at all.[12]

C

The Court does not rely exclusively on the terms of the two provisions discussed above; it also emphasizes that the Division of Assets Act as a whole represented an "explicit redefinition of the relationship between the Federal Government and the Catawbas," terminating "special federal protection" for the Tribe and its members. *Ante*, at 508; see also *ante*, at 510.[13] But if we take seriously the "eminently sound and vital canon" that all ambiguities in statutes passed for the benefit of Indians are to be construed in the Indians' favor, *Northern Cheyenne Tribe*, 425 U. S., at 655, n. 7, then surely the effect of such an "explicit redefinition" must be limited to its explicit terms. The Court recognized as much in *Menominee Tribe, supra*, when it refused to read into the Menominee Termination Act an abr gation of the Menomi-

[12] The Senate and House Reports both explained that the purpose of the 1959 legislation was "to distribute the bulk of the [Catawbas'] tribal assets" among the members of the Tribe. S. Rep. No. 863, 86th Cong., 1st Sess., 1 (1959); H. R. Rep. No. 910, 86th Cong., 1st Sess., 2 (1959). Each Report contained a list of the Tribe's assets; the list made no mention of the Catawbas' claim to their 18th-century treaty lands. See S. Rep. No. 863, at 3; H. R. Rep. No. 910, at 4.

[13] The majority rightly places little weight on the fact that § 5 of the 1959 Act revoked the Tribe's Constitution. The Catawbas had no tribal constitution until 1944, when they adopted one pursuant to the 1943 Memorandum of Understanding. See, *e. g.*, H. R. Rep. No. 910, 86th Cong., 1st Sess., 5 (1959). Revocation of the Constitution therefore can hardly be understood as a statement that the Tribe should cease existence or lose any pre-existing claims.

nees' treaty rights to hunt and fish. Regardless of the general thinking behind the termination policy of the 1950's, we are faced here with a particular statute, and we should not "'strain to implement [an assimilationist] policy Congress has now rejected.'" *Bryan* v. *Itasca County*, 426 U. S., at 389, n. 14, quoting *Santa Rosa Band of Indians* v. *Kings County*, 532 F. 2d 655, 663 (CA9 1975).

Such straining is particularly inappropriate in this case, where the statute in question was passed at the Indians' behest, was apparently intended to carry out the Indians' wishes, and received the Indians' support based on federal assurances that it would not "affect the status" of their claim against the State. One, of course, can distinguish formally, as the majority does, see *ante*, at 510, between preserving the "status" of the claim and preserving the claim's immunity from the state statute of limitations. But the distinction smacks of the kind of semantic trap that this Court consistently has attempted to avoid when construing governmental agreements with Indians and statutes ostensibly passed for the benefit of Indians. In cases involving Indian treaties, for example, it has long been the rule not only that doubtful expressions must be construed in the Indians' favor, but also that the entire treaty must be interpreted as the Indians would have understood it. See, *e. g.*, *Choctaw Nation* v. *Oklahoma*, 397 U. S. 620, 631 (1970); *Jones* v. *Meehan*, 175 U. S. 1, 11 (1899); *Worcester* v. *Georgia*, 6 Pet. 515, 582 (1832).

The Catawbas were assured in unqualified terms that the 1959 legislation would not jeopardize their century-old grievance against the State of South Carolina. The Act itself said nothing about the claim, and nothing about statutes of limitations. No one told the Indians or the voting Members of Congress that the statute might someday prevent the Tribe from pursuing its claim in court. The Court nevertheless concludes today that the 1959 Act bars the Catawbas' claim if the limitations period under South Carolina law expired be-

tween the passage of the Act and the initiation of this lawsuit in 1980, and that this interpretation of the statute comports with the promises made to the Catawbas in the 1950's. I cannot agree with either conclusion. In my view, this decision breaks faith once again with the Tribe, and it does so in a way the statute does not require. Nothing in the text or legislative history of the Act evinces a congressional desire to mislead the Indians, or an understanding that the Act sometime might be construed as it is by the Court today.

III

Apparently, there no longer are any full-blood Catawbas, and no one now speaks the Catawba language. See Charlotte Observer, Mar. 6, 1977, p. 1C, reprinted in Hearing, at 420. Of the 1,200 or so persons currently on the tribal roll, only about 5 or 10 percent live on the 630-acre reservation still held for the Tribe by the State of South Carolina.[14] The reservation itself does not differ conspicuously from other rural neighborhoods in South Carolina. Indeed, "[a]n unobservant tourist may well drive through the reservation unawares, and many do." C. Hudson, The Catawba Nation 3 (1970). For the most part, modern-day Catawbas "think and live like ordinary Americans of the Southeast." *Ibid.*

When an Indian Tribe has been assimilated and dispersed to this extent—and when, as the majority points out, thousands of people now claim interests in the Tribe's ancestral homeland, see *ante*, at 499–500, and n. 4—the Tribe's claim to that land may seem ethereal, and the manner of the Tribe's dispossession may seem of no more than historical interest. But the demands of justice do not cease simply because a wronged people grow less distinctive, or because the rights of innocent third parties must be taken into account in fash-

[14] See, *e. g.*, Hearing, at 20 (statement of Leo M. Krulitz, Interior Department Solicitor); *id.*, at 39 (statement of Claude Ayres, Member, Catawba Indian Nation Land Claim Committee); Proposed Catawba Indian Reservation Land Use Analysis 4 (1977), reprinted in Hearing, at 251, 258.

ioning a remedy. Today's decision seriously handicaps the Catawbas' effort to obtain even partial redress for the illegal expropriation of lands twice pledged to them, and it does so by attributing to Congress, in effect, an unarticulated intent to trick the Indians a century after the property changed hands. From any perspective, there is little to be proud of here.

Because I do not believe that Congress in 1959 expressed an unambiguous desire to encumber the Catawbas' claim to their 18th-century treaty lands, and because I agree with Justice Black that "[g]reat nations, like great men, should keep their word," *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99, 142 (1960) (dissenting opinion), I do not join the judgment of the Court.

LEE *v.* ILLINOIS

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

No. 84-6807. Argued December 9, 1985—Decided June 3, 1986

Petitioner and a codefendant, charged with committing a double murder, were tried jointly in an Illinois court in a bench trial at which neither defendant testified. In finding petitioner guilty of both murders, the judge expressly relied on portions of the codefendant's confession, particularly with respect to the judge's rejection of petitioner's assertions that she had not participated in the murder of one of the victims and that she had acted either in self-defense or under intense and sudden passion in killing the other victim. The Illinois Appellate Court affirmed petitioner's convictions, rejecting her contention that her rights under the Confrontation Clause were violated by the trial judge's consideration of the codefendant's confession against her.

Held: The trial court's reliance upon the codefendant's confession as substantive evidence against petitioner violated her rights under the Confrontation Clause of the Sixth Amendment. Pp. 539–547.

(a) The right of cross-examination is included in an accused's right to confront the witnesses against him; the right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials. This truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a defendant without the benefit of cross-examination, since such a confession is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally, and since the accomplice may have a strong motivation to implicate the defendant and to exonerate himself. Thus, accomplices' confessions that incriminate defendants are presumptively unreliable. Pp. 539–543.

(b) On the record here, the codefendant's confession did not bear sufficient independent "indicia of reliability," *Ohio* v. *Roberts*, 448 U. S. 56, 66, to rebut the presumption of unreliability. The circumstances surrounding the confession did not rebut the presumption that the codefendant's statement could not be trusted as regards petitioner's participation in the murders. Nor is there any merit to Illinois' assertion that reliability was established because petitioner's confession and the codefendant's confession "interlocked" on some points. A codefendant's confession is not rendered reliable simply because some of the facts it contains "interlock" with the facts of the defendant's statement.

Although the confessions here overlapped in their factual recitations to a great extent, they clearly diverged with respect to petitioner's participation in the planning of one victim's death, her facilitation of the murder of the other victim, and factual circumstances relevant to the couple's premeditation. Thus, the subjects upon which the two confessions did not "interlock" cannot be characterized as irrelevant or trivial. The determination, in the first instance, of whether the error as to the trial judge's consideration of the codefendant's confession was harmless, is for the state courts. Pp. 543–547.

129 Ill. App. 3d 1167, 491 N. E. 2d 1391, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 547.

Dan W. Evers argued the cause for petitioner. With him on the briefs was *Randy E. Blue*.

Jill Wine-Banks, First Assistant Attorney General of Illinois, argued the cause for respondent. With her on the brief were *Neil F. Hartigan*, Attorney General, and *Mark L. Rotert*.

JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner and a codefendant, charged with committing a double murder, were tried jointly in a bench trial. Neither defendant testified at trial. In finding petitioner guilty as charged, the trial judge expressly relied on portions of the codefendant's confession, obtained by police at the time of arrest, as substantive evidence against petitioner. The question for decision is whether such reliance by the judge upon the codefendant's confession violated petitioner's rights as secured by the Confrontation Clause of the Sixth Amendment,[1] as applied to the States through the Fourteenth Amendment.

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[1] The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

I

In February 1982, police officers of East St. Louis asked petitioner Millie Lee to come to the police station to help identify a badly burned body that the police had discovered in an apartment in the housing complex in which Lee lived. While Lee was examining photographs of the body, a detective noticed that she began to cry. The detective advised Lee of her *Miranda* rights, and began to question her about the whereabouts of her aunt, Mattie Darden,[2] with whom Lee shared an apartment. After giving a number of confused and conflicting accounts concerning when she had last seen or talked to her aunt, Lee finally admitted that she and her boyfriend, Edwin Thomas, had been involved in the stabbing of both Aunt Beedie and her friend, Odessa Harris, and that the body was her Aunt Beedie's. At that point, the officers questioning Lee again read her her *Miranda* rights, placed her under arrest, and continued to question her. After concluding their interview with Lee, the police presented her with a typewritten account of her statement, which included at the top of the first page a recitation and waiver of her *Miranda* rights. Lee read and signed each page of the confession.

Petitioner's codefendant, Edwin Thomas, arrived at the police station, ostensibly for "questioning" about the homicides, while police officers were still in the process of interviewing Lee; nonetheless, the police apparently were sufficiently informed of Thomas' involvement such that upon his arrival, he was read his rights and confronted by an officer with his alleged participation in the murders. Thomas indicated at that point that he "wanted to think about" whether to talk to the police.

During her questioning by the police, Millie Lee had asked to see Edwin Thomas; after being advised of his rights, Thomas asked if he could see Lee. After they obtained Lee's confession, the police allowed the two to meet. Lee

[2] Mattie Darden was known also as "Aunt Beety" or "Aunt Beedie."

and Thomas were permitted to kiss and to hug, and one of the officers then asked Lee, in the presence of Thomas, "what was the statement you had just given us implicating Edwin?" Lee said to Thomas: "They know about the whole thing, don't you love me Edwin, didn't you in fact say . . . that we wouldn't let one or the other take the rap alone." Brief for Respondent 6. At that point, Thomas gave a statement to the police, which was later typed and then presented to Thomas for his review and signature.

According to Lee's statement, on the evening of February 11, 1982, she and Thomas were at home in the apartment that Lee shared with Aunt Beedie when the aunt and her friend Odessa Harris arrived at approximately 8:30 or 9 p. m. Aunt Beedie and Odessa went into the bedroom, while Lee did the dishes in the kitchen. Thomas, who had been watching television, joined Lee in the kitchen, and the two apparently had "two or three words not really an argument." Odessa then came out of the bedroom to the kitchen and asked "what the hell was going on." As related in Lee's confession, Odessa "said we ought to be ashamed of ourselves arguing and making all that noise. I told her it was none of her business that she didn't live here." Odessa returned to the bedroom. *Id.*, at 6.

As Lee's account further related, after Odessa returned to the bedroom Lee called her back into the kitchen in order to confirm whether Aunt Beedie had "really" paid the rent. Odessa assured Lee that the rent had indeed been paid, and then complained once more about the fact that Lee and Thomas had been arguing. As Odessa left the kitchen to return to the bedroom, she passed Thomas and gave him "dirty looks." When Odessa turned her head Thomas got up from his chair and stabbed Odessa in the back with a 24-inch-long knife. Odessa fell on the floor, and called out to Aunt Beedie. Lee explained that she then

> "ran, well I don't know if I ran or walked into the bedroom. Edwin was standing over by the kitchen cabinet with the knife in his hand with blood on it. Odessa was

laying there moaning. When I went into the bedroom my aunt Beety was sitting on the bed and then she got up and had a knife in her hand. I don't know where the knife came from, my aunt usually kept her gun by her bed. I don't know what kind of gun it is. When my aunt got up off the bed she told me to get out of her way or she would kill me and then she swung at me with the knife. I ran into the kitchen and got a butcher knife that was sitting on the kitchen table and then I went back into the bedroom where my aunt was and then I stabbed her. I kept stabbing her. The first time I stabbed her, I hit her in the chest, I kept stabbing her and I really don't know where else I stabbed her, I had my eyes closed some of the time." *Id.*, at 7.

Lee's statement also included an account of some of the circumstances leading up to the killing:

> "Me, and Edwin had talked about stop[p]ing aunt Mattie from harassing me before. She would come in drunk or would get on the phone and tell people that I never did anything for her that I wouldn't give her anything to eat, or anything since I had a boyfriend. . . . Edwin used to get mad when my aunt would talk about me and that he couldn't take much more of what my auntie was doing, that when he began talking about doing something to aunt Beetty *[sic]* but he never said what. Odessa was always jumping up in my face and one time about a month ago me and Odessa got into an argument about my dress that I let Odessa use and Edwin seen her get in my face that time. He, Edwin just couldn't stand to see my auntie or Odessa harass me anymore. Things just kept adding up and adding up and the night that we killed Odessa and my aunt Beetty *[sic]* Edwin just couldn't take anymore." *Id.*, at 12.

Thomas' confession paralleled Lee's in several respects. It described the argument between himself and Lee, the con-

frontation with Odessa in the kitchen, and the stabbings of Odessa and then Aunt Beedie. However, Thomas' statement provided an altogether different version of how he and Lee came to commit the murders. Most significantly, Thomas stated that he and Lee had previously discussed killing Aunt Beedie, and referred to conversations immediately prior to the murders that suggested a premeditated plan to kill. According to Thomas, after Odessa scolded Lee for arguing with Thomas:

> "This is when I asked [Lee] 'did she still want to go through with it?' I was referring to what we had plained *[sic]* before about killing Aunt Beedie. We had talked about doing something to Aunt Beedie, but we had not figure out just what we would do. We had never before discussed doing anything to Odessa just Aunt Beedie, because we were tired of Aunt Beedie getting drunk, and coming home and 'going off' on [Lee]. . . . After asking [Lee], 'did she still want to do it?' [Lee] first gave me a funny look, as though she was not going to do it, she stared into space for awhile, then she looked at me and said, 'yes.'
>
> "We decided that if we did som[e]thing to Aunt Beedie, we had to do something with Odessa. We wanted Odessa to leave, but she stayed there. We had plained *[sic]* that [Lee] was supposed to get Odessa to stand, with her back toward the front room, looking into the kitchen, while I would grab her from the back, using the big knife." *Id.*, at 17–18.

Lee's statement, by contrast, suggested that it was Thomas who had been provoked by Aunt Beedie's behavior and Thomas who had snapped the night of the murders. Her statement made no mention of an alleged decision by herself and Thomas to "go through with it," nor, of course, did it indicate that the two had formulated a plan to induce Odessa to return to the kitchen where Thomas would kill her. On

the contrary, Lee asserted that on the night of the killings "Edwin just couldn't take anymore."

Lee and Thomas were charged in a two-count indictment with murder. Count one charged them with the murder of Aunt Beedie, and count two with the murder of Odessa. They were appointed separate counsel for trial.

On the day of trial, counsel for the two defendants withdrew motions for severance and for trial by jury. In withdrawing the motion for separate trials, counsel for Thomas explained that "[s]ince we are having a Bench Trial, the Court would only consider the evidence proper to each defendant, we feel that there is no longer any need for that motion." The court then asked petitioner's lawyer whether that was her understanding as well. She replied: "Yes, your Honor. I have conferred with Miss Lee. We would ask the Court to consider the evidence separately for each defendant." The judge replied: "It will be done that way." Tr. 3.

Neither defendant testified at trial, except on behalf of their respective motions to suppress their statements on the ground that they were given involuntarily, motions that were denied by the trial judge.

At trial both the prosecution and the defendants relied heavily on the confessions. In closing, counsel for petitioner called the court's attention to Lee's confession, and argued that it showed that Lee was "not responsible for the death of Odessa Harris. . . . As I read her statement, she was not personally involved in the stabbing of Odessa Harris. Mr. Thomas was." *Id.*, at 232–233. Counsel maintained that under Illinois law, in order to be guilty of murder a person must be involved before or during the commission of the offense, and that Lee's confession simply could not fairly be read to support such a finding. With respect to Aunt Beedie's killing, counsel urged the court to consider the lesser charge of voluntary manslaughter. According to counsel, Lee's statement indicated that Aunt Beedie had had

a knife, that Lee and Aunt Beedie had struggled and that the stabbing occurred as a result of that struggle. Counsel suggested that Lee had acted either upon the "unreasonable belief that her act of stabbing Mattie Darden constituted self-defense" or, in the alternative, that the killing "was the result of a sudden and intense passion resulting from serious provocation." Brief for Petitioner 5.

In rebuttal, the prosecutor described Lee's arguments in support of lesser offenses as "interesting." He answered the suggestion that the evidence showed insufficient intent to support murder by asserting that "once you read the confession of Millie Lee, you will note that she indicates in her statement that before anything begins, . . . that she and Edwin spoke together . . . at which time Edwin asked her, 'Are you ready?' And she, after thinking awhile, said, 'Yes.'" The prosecutor maintained that this exchange, which he incorrectly attributed to Lee's statement, and which had in fact appeared only in Thomas' confession, demonstrated a willingness on the part of Lee to "go through with whatever plan" the two had formulated with respect to the victims, and thus that there had been an agreement to kill. The State also argued in closing—again erroneously drawing from Thomas', not Lee's, confession—that Lee "did in fact aid and assist and encourage this whole operation, by drawing Odessa out of the bedroom"; the prosecutor argued that this was evident from Thomas' statement that it was necessary to kill Odessa in order to go ahead with the plan to kill Aunt Beedie. To prove Lee's intent to kill and to rebut her theories of self-defense and sudden and intense passion, the State pointed to Thomas' assertion that he had asked Lee if she was willing to go through with what they had talked about, and her reply "I'm scared, but I will go through with it."[3] Tr. 236.

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[3] It is evident that the prosecutor, in arguing Lee's guilt, invited the court to consider Thomas' confession, an invitation that the court accepted and which generated the error that we address in this opinion. However, there has been no claim made regarding the significance, if any, of prosecu-

In finding Lee guilty of the murders of Aunt Beedie and Odessa, and explaining why he rejected Lee's assertions that she had not participated in the killing of Odessa and that she acted either in self-defense or under intense and sudden passion with respect to the stabbing of Aunt Beedie, the trial judge expressly relied on Thomas' confession and his version of the killings, particularly with respect to the decision to kill Aunt Beedie allegedly made earlier by Lee and Thomas. Lee's contentions, the judge declared, were

> "disputed by the statement of her co-defendant, who stated that he asked Miss Lee do you want to go through with it. A previously conceived plan to dispose of Miss Darden. And after some thinking . . . she responded that she did. There is no showing that they acted under a sudden and intense passion, in fact prior to the stabbing, according to his own confession, the defendant took a knife . . . and awaited the arrival of Miss Harris into the kitchen, in fact had his co-defendant call her so she could come out. Now that isn't a sudden and intense passion." App. 25.

Lee was sentenced to a term of 40 years' incarceration for the murder of Odessa, and life imprisonment for the murder of Aunt Beedie.

On appeal, Lee contended, among other things, that her Confrontation Clause rights were violated by the trial court's consideration of Thomas' confession against her. The state appeals court conceded that the trial court considered Thomas' confession in finding Lee guilty, but held that since the defendants' confessions were "interlocking," they did not fall within the rule of *Bruton* v. *United States*, 391 U. S. 123 (1968), which, the court stated, was that the "admission of a codefendant's extrajudicial statement that inculpates the

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torial misconduct or mistake that results in inadmissible hearsay evidence being brought to the attention of the factfinder, and we thus do not address the question.

other defendant violates the defendant's Sixth Amendment right to confront witnesses against him." 129 Ill. App. 3d 1197, 491 N. E. 2d 1391 (1984). The court did not explain what it meant by saying that the confessions were "interlocking," how the confessions interlocked, or how or why the *Bruton* analysis would be altered when confessions did interlock. The Illinois Supreme Court denied leave to appeal. We granted certiorari. 473 U. S. 904 (1985).

II

The State of Illinois concedes that this case involves the use of a codefendant's confession as substantive evidence against petitioner. Brief for Respondent 9. Illinois also correctly recognizes that the admissibility of the evidence as a matter of state law is not the issue in this case; rather, it properly identifies the question presented to be "whether that substantive use of the hearsay confession denied Petitioner rights guaranteed her under the Confrontation Clause. . . ." *Id.*, at 11. It contends, in essence, that Lee's Sixth Amendment rights were not violated because Thomas was unavailable and his statement was "reliable" enough to warrant its untested admission into evidence against Lee. See *Ohio* v. *Roberts*, 448 U. S. 56 (1980). We need not address the question of Thomas' availability, for we hold that Thomas' statement, as the confession of an accomplice, was presumptively unreliable and that it did not bear sufficient independent "indicia of reliability" to overcome that presumption.

A

In *Pointer* v. *Texas*, 380 U. S. 400 (1965), this Court unanimously held that the Confrontation Clause was applicable to the States, and in doing so, remarked that it "cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." *Id.*, at 404. Citing and quoting from such cases as *Kirby* v. *United States*,

174 U. S. 47 (1899), *Alford* v. *United States*, 282 U. S. 687 (1931), *Greene* v. *McElroy*, 360 U. S. 474 (1959), *In re Oliver*, 333 U. S. 257 (1948), and *Turner* v. *Louisiana*, 379 U. S. 466 (1965), we observed that "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer*, *supra*, at 405.

On one level, the right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial. The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals.

But the confrontation guarantee serves not only symbolic goals. The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials. In *California* v. *Green*, 399 U. S. 149, 158 (1970), we identified how the mechanisms of confrontation and cross-examination advance the pursuit of truth in criminal trials. Confrontation, we noted,

> "(1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility" (footnote omitted). *Ibid.*

Our cases recognize that this truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. As has been noted, such a confession "is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . . More than this, however, the arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Bruton* v. *United States*, *supra*, at 141 (WHITE, J., dissenting) (citations omitted).

Thus, in *Douglas* v. *Alabama*, 380 U. S. 415 (1965), we reversed a conviction because a confession purportedly made by the defendant's accomplice was read to the jury by the prosecutor. Because the accomplice in that case, while called to the witness stand, invoked his privilege against self-incrimination and refused to answer questions put to him, we held that the defendant's "inability to cross-examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Id.*, at 419. This holding, on which the Court was unanimously agreed, was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.

Over the years since *Douglas*, the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants. Even Justice Harlan, who was generally averse to what he regarded as an expansive reading of the confrontation right, stated that he "would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of

an accused, absent some circumstance indicating authorization or adoption." *Dutton* v. *Evans*, 400 U. S. 74, 98 (1970) (concurring in judgment).

Our ruling in *Bruton* illustrates the extent of the Court's concern that the admission of this type of evidence will distort the truthfinding process. In *Bruton*, we held that the Confrontation Clause rights of the petitioner were violated when his codefendant's confession was admitted at their joint trial, despite the fact that the judge in that case had carefully instructed the jury that the confession was admissible only against the codefendant. We based our decision in *Bruton* on the fact that a confession that incriminates an accomplice is so "inevitably suspect" and "devastating" that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions could not be applied. *Bruton*, 391 U. S., at 136.

Although in the present case the state court apparently relied on *Bruton* in reaching its decision, this is not strictly speaking a *Bruton* case because we are not here concerned with the effectiveness of limiting instructions in preventing spill-over prejudice to a defendant when his codefendant's confession is admitted against the codefendant at a joint trial. Rather, this case is strikingly similar to *Douglas*. Here, as in *Douglas*, the State sought to use hearsay evidence as substantive evidence against the accused. In both cases, the hearsay in question was a confession made by an alleged accomplice, and in neither case was the defendant able to confront and cross-examine the declarant. Whatever differences there are between the cases show clearly that in the present case the Confrontation Clause concerns are of even greater consequence than in *Douglas*. In *Douglas*, the accomplice's confession was read by the prosecutor to the uncooperative declarant in order to "refresh [his] recollection," 380 U. S., at 316, and was thus technically not evidence that was admitted against the accused; in the present case, Thomas' statement was, of course, admitted into evidence by

the judge following a suppression hearing. Moreover, here, unlike *Douglas*, it is not necessary to speculate as to whether the factfinder would consider the uncross-examined hearsay; the judge expressly so relied. In this case the Court does not address a hypothetical. The danger against which the Confrontation Clause was erected—the conviction of a defendant based, at least in part, on presumptively unreliable evidence—actually occurred.

B

Illinois contends that Thomas' statement bears sufficient "indicia of reliability" to rebut the presumption of unreliability that attaches to codefendants' confessions, citing as support our decision in *Ohio* v. *Roberts*, 448 U. S., at 66 (citations omitted). While we agree that the presumption may be rebutted, we are not persuaded that it has been in this case.

In *Roberts*, we recognized that even if certain hearsay[4] evidence does not fall within "a firmly rooted hearsay exception" and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a "showing of particularized guarantees of trustworthiness." *Ibid.* However, we also emphasized that "[r]eflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'"

[4] We have previously turned to McCormick's definition of hearsay as "testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." E. Cleary, McCormick on Evidence § 246, p. 584 (2d ed. 1972). We have also quoted approvingly McCormick's caveat that "[s]implification has a measure of falsification." *Ibid.* (quoted in *Ohio* v. *Roberts*, 448 U. S., at 62, n. 4).

Id., at 65, quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 107 (1934). Illinois' asserted grounds for holding Thomas' statement to be reliable with respect to Lee's culpability simply do not meet this standard.[5]

First, contrary to Illinois' contention, the circumstances surrounding the confession do not rebut the presumption that Thomas' statement could not be trusted as regards Lee's participation in the murders. When Thomas was taken in for questioning and read his rights he refused to talk to the police. The confession was elicited only after Thomas was told that Lee had already implicated him and only after he was implored by Lee to share "the rap" with her. The unsworn statement was given in response to the questions of police, who, having already interrogated Lee, no doubt knew what they were looking for, and the statement was not tested in any manner by contemporaneous cross-examination by counsel, or its equivalent. Although, as the State points out, the confession was found to be voluntary for Fifth Amendment purposes, such a finding does not bear on the question of whether the confession was also free from any desire, motive, or impulse Thomas may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate Lee's involvement in retaliation for her having implicated him in the murders. It is worth noting that the record indicates that Thomas not only had a theoretical motive to distort the facts to Lee's detriment, but that he also was actively considering the possibility of becoming her adversary: prior to trial, Thomas contemplated becoming a witness for the State against Lee. This record evidence documents a reality of the criminal process, namely, that once partners in a crime recognize that the "jig is up," they tend to

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[5] We reject respondent's categorization of the hearsay involved in this case as a simple "declaration against penal interest." That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant.

lose any identity of interest and immediately become antagonists, rather than accomplices.

We also reject Illinois' second basis for establishing reliability, namely, that because Lee's and Thomas' confessions "interlock" on some points, Thomas' confession should be deemed trustworthy in its entirety. Obviously, when codefendants' confessions are identical in all material respects, the likelihood that they are accurate is significantly increased. But a confession is not necessarily rendered reliable simply because some of the facts it contains "interlock" with the facts in the defendant's statement. See *Parker* v. *Randolph*, 442 U. S. 62, 79 (1979) (BLACKMUN, J., concurring in part and concurring in judgment). The true danger inherent in this type of hearsay is, in fact, its selective reliability. As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another. If those portions of the codefendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted.

In this case, the confessions overlap in their factual recitations to a great extent. However, they clearly diverge with respect to Lee's participation in the planning of her aunt's death, Lee's facilitation of the murder of Odessa, and certain factual circumstances relevant to the couple's premeditation. For example, Lee's confession states that Thomas was "talking about doing something to aunt Beetty but he never said what," App. 12, and does not refer at all to the joint plan to

do "something to Aunt Beedie *[sic]*" which Thomas repeatedly mentions in his confession. *Id.*, at 17. Nor does Lee's confession give any indication that Lee and Thomas colluded to "do somthing *[sic]* with Odessa," *id.*, at 18, as does Thomas' statement. Lee states that she called Odessa into the kitchen only to discuss the rent and that Thomas assaulted Odessa after Odessa had left the kitchen, given Thomas a "dirty loo[k]," and was walking toward the bedroom. *Id.*, at 6. By contrast, Thomas indicates that "[Lee] was suppose *[sic]* to get Odessa to stand, with her back toward the front room, looking into the kitchen" so that Thomas could stab her from the back, *id.*, at 18, and that he actually attacked Odessa while she was in the kitchen at Lee's beckoning. *Id.*, at 19. Finally, there are certain factual discrepancies in the two statements which bear on Lee's alleged pre-existing intent to kill the two women. For example, Thomas states that the couple had thought to put on gloves before the killings, *id.*, at 20, while Lee states that they put on gloves only to dispose of the bodies. *Id.*, at 10.

The subjects upon which these two confessions do not "interlock" cannot in any way be characterized as irrelevant or trivial. The discrepancies between the two go to the very issues in dispute at trial: the roles played by the two defendants in the killing of Odessa, and the question of premeditation in the killing of Aunt Beedie.

In sum, we are not convinced that there exist sufficient "indicia of reliability," flowing from either the circumstances surrounding the confession or the "interlocking" character of the confessions, to overcome the weighty presumption against the admission of such uncross-examined evidence. We therefore hold that on the record before us, there is no occasion to depart from the time-honored teaching that a codefendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation.[6]

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[6] Illinois makes the somewhat surprising argument—an argument, incidentally, that was not made before the state court—that this case does not

By holding that the consideration of Thomas' untested confession against Lee violated Lee's Confrontation Clause rights, we do not foreclose the possibility that this error was harmless when assessed in the context of the entire case against Lee. See *Schneble* v. *Florida*, 405 U. S. 427 (1972). However, because the Illinois courts are in a better position to assess the remaining evidence in light of the substantive state law of murder, we leave this determination in the first instance to the state courts. Accordingly, the judgment of the Appellate Court of Illinois, Fifth Judicial District, is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

I yield to no one in my respect for the Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth. And I do not denigrate the lofty precepts that have been developed to strengthen its enforcement. I feel, however, that at times this Court tends to be

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present any Confrontation Clause issue since Lee was afforded an opportunity to cross-examine Thomas during the suppression hearing. We disagree.

The function of a suppression hearing is to determine the voluntariness, and hence the admissibility for Fifth Amendment purposes, of a confession. The truth or falsity of the statement is not relevant to the voluntariness inquiry, and no such testimony was given by Thomas. Counsel for both Lee and Thomas specifically stated that their clients were testifying "for purposes of the motion to suppress the confession only." Tr. 205, 219. Before either defendant took the stand, the court announced: "Let the record show the testimony of this defendant will be used solely for the purpose of sustaining the motion to suppress previously made." *Id.*, at 205.

Thus, there was no opportunity to cross-examine Thomas with respect to the reliability of the statement, especially as it may have related to Lee, and thus no opportunity for cross-examination sufficient to satisfy the demands of the Confrontation Clause. Cf. *Jackson* v. *Denno*, 378 U. S. 368, 376–377 (1964) (A defendant's constitutional right to a hearing to object to the use of a confession involves a determination of voluntariness, "a determination uninfluenced by the truth or falsity of the confession").

overly concerned with theory and pronounced principles for their own sake, and to disregard the significant realities that so often characterize a criminal case. There is a real world as well as a theoretical one.

This case, centering on two senseless and reprehensible East Saint Louis murders, is illustrative. Petitioner Millie R. Lee and her friend and codefendant, Edwin R. Thomas, each confessed to extensive and cooperative involvement in the crimes. Their corroborated and mutually reinforcing statements stand in vivid contrast to the blame-it-on-the-other-person and buck-passing posturing that usually develops when criminal accomplices are apprehended and each endeavors to rescue himself or herself at the expense of the other. We have nothing of that kind here.

I agree with the Court that this case is governed by *Ohio* v. *Roberts*, 448 U. S. 56 (1980). Under the principles enunciated in that case, Thomas' confession was constitutionally admissible against petitioner *only* if Thomas was "unavailable" as a witness *and* the confession bore sufficient "indicia of reliability." *Id.*, at 65–66. These two requirements serve to ensure that an out-of-court statement is admitted only when it does not threaten the central mission of the Confrontation Clause, which is "to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton* v. *Evans*, 400 U. S. 74, 89 (1970) (plurality opinion), quoting *California* v. *Green*, 399 U. S. 149, 161 (1970). Because I believe that each of the *Roberts* requirements was satisfied in this case, I conclude that the trial court's use of the accomplice's confession as evidence against petitioner was constitutionally permissible.[1]

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[1] As the Court points out, *ante*, at 539, the admissibility of Thomas' confession under Illinois law is not the issue in this case and does not control the question of constitutional admissibility.

I

Recognizing "the Framers' preference for face-to-face accusation," this Court has construed the Confrontation Clause to embody in general "a rule of necessity." *Ohio* v. *Roberts*, 448 U. S., at 65. When a witness is available to testify in court, his prior statement, even if reliable, generally will be inadmissible to prove the truth of what it asserts unless the witness is produced for cross-examination. See *California* v. *Green*, 399 U. S., at 158; *Barber* v. *Page*, 390 U. S. 719 (1968). "In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Roberts*, 448 U. S., at 65.[2]

For all practical purposes, Thomas was unavailable as a prosecution witness. Although physically present in the courtroom, he clearly would have invoked his privilege against self-incrimination if called to the stand to describe the murders he had committed with petitioner.[3] Indeed, it is

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[2] As this Court recently explained in *United States* v. *Inadi*, 475 U. S. 387 (1986), a specific showing of unavailability is not always required. I nonetheless assume, for purposes of discussion, that in relevant respects Thomas' custodial confession is more like the prior judicial testimony at issue in *Roberts* than like the contemporaneous co-conspirator statements involved in *Inadi*, and thus that both *Roberts* requirements had to be satisfied.

[3] Because the State did not call Thomas to testify, he did not expressly invoke his Fifth Amendment privilege. In the circumstances of this case, however, the absence of this formality is not decisive. Cf. *United States* v. *Thomas*, 571 F. 2d 285, 288 (CA5 1978). Not only would such an effort by the State have been futile, but also Thomas' presence in the courtroom made him as available to petitioner as to the prosecution. Thus, in the exceedingly unlikely event that Thomas would have testified if called, there was no significant denial of petitioner's right to confrontation, because petitioner herself could have called Thomas and questioned him, if necessary, as an adverse witness. The Confrontation Clause does not require that cross-examination actually occur; it requires only that a defendant be given the opportunity for cross-examination or its functional equivalent. See *Ohio* v. *Roberts*, 448 U. S. 56, 70–71 (1980).

precisely Thomas' Fifth Amendment privilege that brought the Confrontation Clause into this case in the first place: although the State "produced" Thomas in court, his right not to testify against himself made him effectively unavailable for cross-examination by petitioner. See *Douglas* v. *Alabama*, 380 U. S. 415, 419 (1965). In much the same way, Thomas' testimony was unavailable to the State. See *Phillips* v. *Wyrick*, 558 F. 2d 489, 494 (CA8 1977), cert. denied, 434 U. S. 1088 (1978).

Illinois, of course, had weapons that petitioner lacked. For example, the State could have offered Thomas a favorable sentencing recommendation, or the opportunity to plead guilty to a lesser offense, in exchange for his testimony against petitioner. Alternatively, the State could have tried Thomas separately and granted him immunity from the use of his inculpatory testimony against petitioner. See *Kastigar* v. *United States*, 406 U. S. 441 (1972). Measures of this kind, however, entail significant costs. A plea agreement necessarily compromises the community's legitimate correctional interests, and a grant of immunity places a heavy evidentiary burden on any future prosecution of the witness. See *id.*, at 460–461. I cannot conclude that the possibility of such an arrangement with petitioner's codefendant rendered him an available witness for purposes of the Confrontation Clause.

My unwillingness reflects in part a respect for established principles of the law of evidence. Although the Confrontation Clause differs in significant ways from the common-law rule against the introduction of hearsay, the two "stem from the same roots," *Dutton* v. *Evans*, 400 U. S., at 86 (plurality opinion), and "protect similar values," *California* v. *Green*, 399 U. S., at 155. As a consequence, analysis under the Confrontation Clause properly is informed, although not constrained, by hearsay principles developed over time by courts and legislatures. See, *e. g.*, *Roberts*, 448 U. S., at 66. Among those principles is the generally accepted notion that

witnesses who successfully invoke the privilege against self-incrimination are "unavailable" for purposes of determining whether their prior statements are admissible under an exception to the hearsay rule. See *California* v. *Green*, 399 U. S., at 168, n. 17; Fed. Rule Evid. 804(a)(1); E. Cleary, McCormick on Evidence § 253 (3d ed. 1984). The judgment embodied in that notion—that a witness who validly invokes the privilege is unavailable as a practical matter to testify—seems to me to be sound, and I see no reason to take a different approach under the Confrontation Clause. I therefore conclude that Thomas was unavailable as a witness.

II

I also conclude, in the circumstances of this case—and the Court should be realistic about these issues—that the confession of petitioner's codefendant bore adequate "indicia of reliability" to allow its admission into evidence against petitioner. Chief among these indicia is the fact that Thomas' statements were thoroughly and unambiguously adverse to his penal interest. See *United States* v. *White*, 553 F. 2d 310, 314 (CA2), cert. denied, 431 U. S. 972 (1977). The hearsay exception for declarations against interest is firmly established; it rests upon "the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect." 5 J. Wigmore, Evidence § 1457, p. 329 (J. Chadbourn rev. 1974).[4] Again, I recognize that the requirements of the

[4] The old view that the interest must be proprietary or pecuniary, not penal, by now has been fully discredited. The refusal of the common law to exempt statements against penal interest from the hearsay rule usually is traced to the decision of the House of Lords in the *Sussex Peerage Case*, 11 Cl. & F. 85, 8 Eng. Rep. 1034 (1844), a case Wigmore describes as "not strongly argued and not considered by the judges in the light of the precedents," 5 J. Wigmore, Evidence § 1476, p. 351 (J. Chadbourn rev. 1974). The doctrine announced there has been termed "barbarous," *id.*, § 1477, p. 360, and "indefensible in logic," Advisory Committee's Notes on Fed. Rule Evid. 804(b)(3), 28 U. S. C. App., p. 733. The rationale for allowing admission of declarations against interest applies no less forcefully when

Confrontation Clause and the hearsay rule often diverge. But statements squarely within established hearsay exceptions possess "the imprimatur of judicial and legislative experience," G. Lilly, An Introduction to the Law of Evidence § 78, pp. 277–278 (1978), and that fact must weigh heavily in our assessment of their reliability for constitutional purposes. See *Roberts*, 448 U. S., at 66.

The majority points out correctly, *ante*, at 541–542, that the Court customarily has treated the confessions of codefendants with suspicion. Never, however, has the Court held such confessions *per se* inadmissible under the Confrontation Clause,[5] and the suspicion the Court has shown in no way contradicts the general reliability of statements against penal interest. Indeed, accomplice confessions ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interest of the declarant. It is of course against one's penal interest to confess to criminal complicity, but often that interest can be advanced greatly by ascribing the bulk of the blame to one's confederates. It is in circum-

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the de arant concedes criminal instead of civil liability; indeed, "no other statement is so much against interest as a confession of murder." *Donnelly* v. *United States*, 228 U. S. 243, 278 (1913) (Holmes, J., dissenting). Accordingly, most jurisdictions now allow the introduction, in appropriate circumstances, of out-of-court declarations against penal interest. See E. Cleary, McCormick on Evidence § 278 (3d ed. 1984); Fed. Rule Evid. 804(b)(3).

[5] In *Bruton* v. *United States*, 391 U. S. 123 (1968), the inadmissibility of the codefendant's out-of-court statements against the defendant was not contested; the question was whether limiting instructions were constitutionally adequate to ensure that the jury considered the codefendant's statements only against the codefendant and not against the defendant. See *id.*, at 128, n. 3 ("There is not before us . . . any recognized exception to the hearsay rule . . . and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause"); see also *Dutton* v. *Evans*, 400 U. S. 74, 86 (1970) (plurality opinion). The *Bruton* rule thus necessarily applies only to situations in which the out-of-court statements are constitutionally inadmissible against the defendant. See *United States* v. *Kelley*, 526 F. 2d 615, 620 (CA8 1975), cert. denied, 424 U. S. 971 (1976).

stances raising the latter possibility—circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interest—that we have viewed the accomplice's statements as "inevitably suspect." *Bruton* v. *United States*, 391 U. S. 123, 136 (1968); see also *id.*, at 141–142 (WHITE, J., dissenting) ("Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence").

Such circumstances were presented starkly in *Douglas* v. *Alabama*, 380 U. S. 415 (1965). The accomplice's confession in that case was "of crucial importance" because it identified the defendant as the triggerman. *Id.*, at 417, and n. 3. Only one shot had been fired, and it obviously was in the accomplice's penal interest to convince the authorities that he was not the one who fired it. By "fingering" the defendant, he minimized his own criminal culpability.

In the present case, however, there is little reason to fear that Thomas' statements to the police may have been motivated by a desire to shift blame to petitioner. Thomas' confession was less favorable in all respects to his own interests than petitioner's confession, and there is no claim by either side that Thomas actually was more culpable than either he or petitioner admitted. Also, Thomas' description of petitioner's involvement in the murders in no way diminished his own complicity. This is particularly so with respect to the matter for which the trial judge relied on Thomas' confession, namely, the joint planning of the murders. Far from minimizing Thomas' own liability, the claim that the two defendants consulted about the crimes immediately before carrying them out damaged Thomas' defense just as much as petitioner's, and subjected both defendants to possible charges of criminal conspiracy.[6]

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[6] Thomas' statement to the police therefore differs significantly from the typical confession implicating an accomplice. In most cases, the inculpation of the accomplice is "collateral" to the confession, in that the allega-

Not only was Thomas' confession unambiguously adverse to his own penal interest, but it was also extensively corroborated by other evidence introduced at trial. Perhaps the strongest corroboration was provided by petitioner's own confession, which mirrors Thomas' statement in striking detail. Both defendants independently told the police that the murders took place after Odessa Harris came into the kitchen to complain about their arguing. App. 6 (petitioner's confession) ("Odessa . . . asked what the hell was going on"); *id.*, at 17 (Thomas' confession) ("Odessa . . . asked, what's the hell going on"). Both defendants explained that Harris then returned to the bedroom, and that petitioner called her back to the kitchen, at which time Thomas rose from a recliner and stabbed her in the back with a long-blade knife. *Id.*, at 6–7, 18–19. According to both confessions, Odessa Harris fell to the floor and began to call for petitioner's aunt, Mattie Darden, whom petitioner then intercepted in the bedroom with a knife. *Id.*, at 7, 19. Both defendants agreed that while petitioner was in the bedroom she asked Thomas for the hammer, that Thomas could not find it, that petitioner asked Thomas to bring a skillet from the kitchen, that

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tions implicating the accomplice are not found in portions of the statement directly adverse to the declarant's penal interest. Comment, Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest, 66 Calif. L. Rev. 1189, 1190, n. 7 (1978).

Moreover, because Thomas' inculpation of petitioner was inseverable from those portions of the confession strongly adverse to his own penal interests, this case presents no special reason to fear that Thomas implicated petitioner in an effort to curry favor with the police. In theory, of course, the entire confession could have been a misguided effort to please the interrogating officers, see, *e. g.*, *Parker* v. *Randolph*, 442 U. S. 62, 86, and n. 6 (1979) (STEVENS, J., dissenting), but this possibility is present whenever a suspect confesses while in custody, and it renders the confession no less reliable as evidence against a codefendant than as evidence against the confessing suspect. In this case, moreover, the possibility of a false confession is rendered remote by the circumstances of Thomas' confession, and by the extensive corroboration provided by petitioner's own confession and by the physical evidence. See *infra*.

Thomas did so, and that the skillet fractured after petitioner struck Darden on the head with it once or twice. *Id.*, at 7, 20. They agreed that Thomas then brought another skillet from the kitchen, that petitioner hit her aunt once more on the head, spraying grease about the room, and that Thomas took over after telling petitioner she was not hitting hard enough. *Id.*, at 8, 20. Both defendants said they had spoken in the past about doing something to stop Darden from harassing petitioner. *Id.*, at 12, 17.[7]

The two confessions, of course, were not identical as to every detail. One could not expect them to be. In particular, the discussion just before the killings, on which the trial judge relied in rejecting petitioner's defense of "sudden and intense passion," was described only in Thomas' statement. For at least two reasons, however, this divergence does not significantly undermine the corroboration provided by petitioner's confession. First, although petitioner did not mention the discussion described by Thomas, the story she told was in no way inconsistent with the occurrence of such a discussion. Nothing she said suggested that joint planning of the kind described by Thomas had *not* taken place. Second, as noted above, Thomas' assertion that he and petitioner consulted immediately before the murders cannot be understood as an attempt to shift blame from Thomas to petitioner. Far from diminishing Thomas' cul-

[7] The confessions further agree on the details of the defendants' activities following the murders, the broad outlines of which were as follows: Petitioner and Thomas put Harris' body inside a trunk they found in Darden's bedroom and left the trunk outside by the trash. Petitioner went to a local store to buy lighter fluid, with which she and Thomas set the trunk on fire. Using clothes line and a long aluminum lawn chair, they carried Darden to a vacant apartment. They cleaned the floors of Darden's apartment. The following day, they transferred Harris' remains to a cardboard stereo box, leaving the box with the garbage. Thomas later returned to the vacant apartment and set fire to Darden's body. App. 8–11, 20–24.

pability, that assertion increased his potential liability just as much as it did petitioner's.[8]

In addition to the corroboration provided by petitioner's own confession, the statements given by petitioner and Thomas were fully consistent with the physical evidence. The knives used in the attacks were found where petitioner said they were hidden. See Tr. 183–184. The police also found, among other evidence, the can of lighter fluid used to ignite the bodies of both victims, see *id.*, at 21–22, the broken skillet, see *id.*, at 41–42, and both victims' remains, see *id.*, at 17–18, 67–71, 78–82, 155–157. The wounds found on Darden's body were fully in accord with the story told by both defendants. See *id.*, at 77–78.

Finally, the record amply supports the trial court's determination that the confessions were voluntary. Although petitioner and Thomas were in custody when they gave their statements, each was fully notified of his or her rights, and there is no indication of any police pressure. The interrogating officers testified at trial that the defendants appeared alert and sober during questioning, and that they were not

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[8] The Court in the past has divided on the significance of "interlocking" confessions for the rule announced in *Bruton* v. *United States*, 391 U. S. 123 (1968). Compare *Parker* v. *Randolph*, 442 U. S., at 74–75 (plurality opinion) (*Bruton* rule is inapplicable to cases involving interlocking confessions), with 442 U. S., at 77–81 (opinion concurring in part and concurring in judgment) (interlocking confessions may make *Bruton* error harmless but do not render the rule inapplicable), and *id.*, at 81–83 (STEVENS, J., dissenting) (same). Since *Bruton* applies only in cases where the codefendant's out-of-court statements are inadmissible against the defendant, see n. 5, *supra*, the views I expressed in *Randolph* necessarily imply, as the Court suggests, that interlocking confessions are not automatically admissible against both defendants. See *ante*, at 545. I adhere to that position. It hardly follows, however, that the corroboration provided by a defendant's own confession is *irrelevant* to a determination whether a codefendant's out-of-court statements are sufficiently reliable to be admissible against the defendant under the Confrontation Clause. Any categorical approach of that kind seems to me to be profoundly unwise.

threatened or cajoled by the police in any way. See *id.*, at 30–31, 37–38, 94–96, 104–106.

It is the unusual conjunction of these indicia of reliability—thorough and unambiguous adversity to Thomas' penal interest, extensive and convincing corroboration by petitioner's own confession, further corroboration provided by the physical evidence, and reliable evidence of voluntariness—that persuades me in this case that the *de facto* admission of the confession of an unavailable witness as substantive evidence against petitioner did not violate the Confrontation Clause. Were any of these elements missing, the result might be different and I might well agree with the Court. Together, however, they kept this trial within constitutional bounds.

III

The Court's cases have construed the Confrontation Clause in a pragmatic fashion, requiring "substantial compliance" with its purposes, see *Ohio* v. *Roberts*, 448 U. S., at 69; *California* v. *Green*, 399 U. S., at 166, but acknowledging the need to balance the interests of the accused against the public's "strong interest in effective law enforcement," *Roberts*, 448 U. S., at 64; see also *Mattox* v. *United States*, 156 U. S. 237, 243 (1895). I share the Court's general concern regarding the use of an accomplice's confession as evidence against an accused, but I believe that in this case the practical unavailability of petitioner's codefendant as a witness for the State, together with the unusually strong and convincing indications that his statements to the police were reliable, rendered the confession constitutionally admissible against petitioner.

I respectfully dissent.

UNITED STATES ET AL. *v.* HEMME ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 84-1944. Argued March 5, 1986—Decided June 3, 1986

Prior to 1977, the Internal Revenue Code's gift tax permitted the taxpayer a lifetime exemption of $30,000 to be deducted from amounts otherwise taxable, which exemption could be claimed, in whole or in part, at any time during the taxpayer's lifetime. 26 U. S. C. § 2521 (1970 ed.). The estate tax afforded the estate a specific exemption of $60,000 in determining the amount subject to tax. § 2052 (1970 ed.). The Tax Reform Act of 1976 (new Act), which was enacted on October 4, 1976, and which became effective on January 1, 1977, created the so-called "unified credit" (deductible directly from the amount of the tax) that a taxpayer could apply either toward gift tax during life or toward estate tax after death. §§ 2010(a), 2505(a). The $30,000 exemption for gifts and the $60,000 exemption for estates were eliminated, beginning with estates of taxpayers dying after December 31, 1976, and gifts given after that date, and a phase-in schedule was established for the amount of the new unified credit. The new Act also contained a transitional rule (applicable to taxpayers who, before 1977, had used up some or all of their $30,000 gift tax exemption) providing that the amount of the unified credit "shall be reduced by an amount equal to 20% of the aggregate amount allowed as a specific exemption under section 2521 [prior to its repeal] with respect to gifts made by the decedent after September 8, 1976." § 2010(c). On September 28, 1976, a taxpayer made certain gifts, and he later filed a federal gift tax return which declared that no tax was due and in which he claimed his entire $30,000 lifetime exemption under § 2521 (1970 ed.). However, the taxpayer died just over two years later, and his estate was required by law to include in the estate all gifts made "in contemplation of death," which presumptively included all gifts made within three years of the decedent's death. § 2035 (1970 ed.). After including the 1976 gifts in the estate, the estate then claimed the unified credit of $34,000 under the new Act. However, the Internal Revenue Service (IRS) ruled that under the new Act's transitional rule in § 2010(c) the credit must be reduced by 20% of the specific gift-tax exemption claimed during the decedent's lifetime, or $6,000. The estate paid the assessed deficiency of $6,000 and ultimately a refund suit was filed by appellees (the trustee of the decedent's "revocable living trust" and the trans-

ferees of his property). The District Court held that the application of § 2010(c) to the decedent's gifts, which were made before the new Act's enactment, was so arbitrary and capricious as to violate the Due Process Clause of the Fifth Amendment.

Held:

1. There is no merit to appellees' argument, focused on the word "allowed" in § 2010(c), that Congress did not intend the transitional rule to be applied as the IRS applied it here, because when the 1976 gifts were required to be included in the estate as having been made in contemplation of death the $30,000 specific gift-tax exemption decedent had claimed became "disallowed"—a claim to a specific exemption not being "allowed" unless the taxpayer ultimately *benefited* from that exemption by paying less tax than he otherwise would have payed. Longstanding interpretation of the tax laws does not support such argument. Nor was the mere inclusion of the gifts in the gross estate tantamount to disallowance of the $30,000 exemption. Moreover, decedent did receive a benefit for his specific exemption, since he avoided any gift taxes. The application of § 2010(c) here is consistent with the statute's language and purpose. Pp. 564–567.

2. The District Court erred in finding that § 2010(c), as applied here, transgressed the Due Process Clause of the Fifth Amendment as being arbitrary and capricious because it retroactively affected the final disposition of a gift made before the statute's enactment. *Untermyer* v. *Anderson*, 276 U. S. 440, distinguished. The nature of a tax and the circumstances in which it is laid must be considered before it can be said that its retroactive application is so oppressive as to transgress the constitutional limitation. Here, in view of the applicable statutory provisions prior to the new Act, particularly the requirement of § 2035 (1970 ed.) as to inclusion in an estate of gifts made in contemplation of death, appellees were no worse off than they would have been without the enactment of the new Act. Moreover, even assuming that, as appellees asserted, the confluence of §§ 2010(c) and 2035 required them to pay tax on the same transaction twice, the Constitution was not offended since Congress clearly expressed its intention to occasion that result. Pp. 567–572.

Reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Albert G. Lauber, Jr., argued the cause for appellants. With him on the briefs for the United States were *Solicitor*

General Fried, Assistant Attorney General Archer, Michael L. Paup, and *Ernest J. Brown.*

Edward F. Sutkowski argued the cause for appellees. With him on the brief were *Dean B. Rhoads* and *Donald C. Rikli.**

JUSTICE MARSHALL delivered the opinion of the Court.

Appellees, identified as the trustee of the "revocable living trust" of Charles W. Hirschi and transferees of Hirschi's property, seek a refund of $6,000 in estate taxes, on the ground that the Government's interpretation of a statutory transitional rule, enacted to bridge the old and new regimes for the federal taxation of gifts and estates, violates both the statute and the Constitution.

I

Prior to 1977, the gift tax and the estate tax were imposed, calculated, and collected separately. The gift tax, imposed on donors of certain gifts, permitted each taxpayer a lifetime exemption of $30,000 to be deducted from amounts otherwise taxable. 26 U. S. C. § 2521 (1970 ed.). This so-called "specific exemption" could be claimed, in whole or in part, at any time during the taxpayer's lifetime. *Ibid.* The estate tax, too, provided certain relief for modest estates. In determining the amount subject to estate tax, the estate was entitled to deduct a "specific exemption" of $60,000. § 2052 (1970 ed.).

In considering tax reform in 1976, Congress determined that several changes were necessary to ease the burden of estate and gift taxes on taxpayers of modest means. See H. R. Rep. No. 94-1380, p. 11 (1976). One such change was to transform what had been tax deductions into tax credits so that taxpayers in the lower brackets would benefit as much

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**David W. Carpenter, James J. Carroll,* and *Edward C. Rustigan* filed a brief for Margaret A. Paluch as *amicus curiae* urging affirmance.

as those in higher brackets.[1] *Id.*, at 15. In addition, Congress decided to merge the two separate specific exemptions for gifts and estates into a single credit, believing that the prior system had favored those who could afford to make substantial lifetime transfers, while disadvantaging those who needed to maintain access to their assets until death. *Id.*, at 16. Accordingly, the Tax Reform Act of 1976 (Act) erased many of the distinctions in treatment between transfers during life and those after death, in effect treating inheritance as the final taxable gift. It created the so-called "unified credit," which a taxpayer could apply either toward gift tax during life or toward estate tax after death. 26 U. S. C. §§ 2010(a), 2505(a). The $30,000 specific exemption for gifts and $60,000 specific exemption for estates were eliminated, beginning with estates of taxpayers dying after December 31, 1976, and gifts given after that date. A phase-in schedule was established for the amount of the new unified credit, providing a credit of $30,000 for taxpayers dying in 1977, $34,000 for those dying in 1978, and culminating in $47,000 for decedents dying in 1981 and thereafter. 26 U. S. C. §§ 2010(b), 2505(b) (1976 ed.).

The transformation from exemptions to credit left unresolved the treatment of taxpayers who, before 1977, had used up some or all of their $30,000 specific exemption to escape taxation of gifts. Without further action by Congress, those taxpayers would have gained that benefit of the old regime and theoretically would still be entitled to the entire unified credit provided by the new scheme, even though the latter credit was intended to be a substitute for the entire $90,000 worth of specific exemptions. Moreover, taxpayers with notice of the new scheme would have a great incentive to make

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[1] A credit has greater value to the taxpayer than a deduction or exemption. A credit directly reduces the amount of tax that must be paid, dollar for dollar, whereas a deduction reduces tax liability only indirectly by reducing the taxable estate. See R. Stephens, G. Maxfield, & S. Lind, Federal Estate and Gift Taxation ¶ 3.01 (4th ed. 1978).

gifts quickly and claim their specific exemptions before the unified credit was to go into effect, deliberately seeking the windfall of double exemption. See *Estate of Gawne* v. *Commissioner*, 80 T. C. 478, 483 (1983). Recognizing these possibilities, the House Ways and Means Committee reported out a bill which provided that if any portion of the $30,000 specific exemption for gifts had been claimed by a taxpayer since 1932, the unified credit otherwise available to the taxpayer would be reduced by 20% of the amount of the specific exemption already claimed. H. R. 14844, 94th Cong., 2d Sess., §§ 2010(c), 2505(c) (1976), reprinted in H. R. Rep. No. 94–1380, pp. 94, 131 (1976). While the legislative history does not explain the derivation of the 20% figure, the Committee apparently believed it to represent roughly the proportion of equivalence between the values of the specific exemption and the credit, taking into account average effective tax rates.

This proposed transitional rule was amended by the Conference Committee. The conferees limited the class of covered taxpayers to those who had made gifts after September 8, 1976, the date the Conference Committee approved the measure, but before January 1, 1977, the effective date of the Act. See H. R. Conf. Rep. No. 94–1515, pp. 607–608 (1976). The Conference Committee evidently was less concerned with the possibility of double tax benefits in general than it was with preventing the intentional accretion of such benefits. See R. Stephens, G. Maxfield, & S. Lind, Federal Estate and Gift Taxation ¶3.02, pp. 3–4, n. 9 (4th ed. 1978); J. McCord, 1976 Estate and Gift Tax Reform: Analysis, Explanation and Commentary § 2.13, p. 26 (1977). The Act containing this transitional rule passed both Houses of Congress on September 16, 1976, and the President signed it on October 4, 1976. It is the application of the transitional rule that is at issue in the case before us.

II

The parties have stipulated to the facts. On September 28, 1976, during the period designated as the transitional period, Charles Hirschi made gifts totaling $45,000 to five persons. Two days later, Hirschi filed a federal gift tax return declaring that no tax was due. The first $15,000 consisted of five gifts of $3,000 each, and was exempt from taxation by virtue of a statutory annual exclusion from gift tax of $3,000 per donee. See 26 U. S. C. § 2503(b) (1970 ed.). To render the remaining $30,000 also exempt from tax, Hirschi elected to claim his entire, lifetime specific exemption. By thus claiming the maximum exemptions to which the old law entitled him, Hirschi evidently hoped to reap the benefits of that law before its repeal. Had he lived three years longer, he might have come closer to realizing his hopes.

But, in poignant confirmation of Benjamin Franklin's adage, Hirschi escaped neither death nor taxes. Just over two years later, Hirschi died, and his estate was required by law to include in the gross estate all gifts made "in contemplation of death," which presumptively included all gifts made within three years of the decedent's demise. See 26 U. S. C. § 2035 (1970 ed.). After including in the estate the full $45,000 worth of gifts given on September 28, 1976, the estate then claimed its entire unified credit provided by the new Act for decedents dying in 1978, in the amount of $34,000. The Internal Revenue Service (IRS), however, concluded that, under the transitional rule, the $34,000 unified credit must be reduced by 20% of the amount of the specific exemption claimed during the decedent's lifetime, or $6,000. The IRS made an assessment of $6,000, and the estate paid the deficiency. The estate then filed an unsuccessful administrative claim for a refund, and this lawsuit followed.

The District Court for the Southern District of Illinois held that § 2010(c), as applied to Hirschi's gift, violates the Due Process Clause of the Fifth Amendment. Because the tran-

sitional rule has an effect on gifts made before its enactment, the court reasoned that the case is controlled by *Untermyer* v. *Anderson*, 276 U. S. 440 (1928), in which this Court held that the Nation's first gift tax could not be applied to gifts made before its enactment without violating due process. *Id.*, at 445. The District Court found that the application of § 2010(c) to this transaction was "so arbitrary and capricious as to render it unconstitutional." App. to Juris. Statement 6a. This Court noted probable jurisdiction of the Government's appeal, 474 U. S. 814 (1985), and we now reverse the judgment of the District Court.

III

Appellees proffer two principal arguments in support of the judgment below. First, they maintain that Congress did not intend the transitional rule to be applied as the IRS applied it in their case. Second, they contend that the employment of the transitional rule in their case offends due process. Although the District Court embarked immediately upon the constitutional claim, we shall undertake the statutory analysis first.

The transitional rule provides as follows:

> "The amount of the credit allowable under subsection (a) [the unified credit] shall be reduced by an amount equal to 20 percent of the aggregate amount allowed as a specific exemption under section 2521 (as in effect before its repeal by the Tax Reform Act of 1976) with respect to gifts made by the decedent after September 8, 1976." 26 U. S. C. § 2010(c).

Appellees focus on the word "allowed." They contend that, when the $30,000 gift was included in the Hirschi estate by reason of his death within three years of making the gift, the $30,000 specific exemption he had claimed became "disallowed"; it was improper, they argue, for the unified credit

to have been diminished as if Hirschi had been "allowed" his specific exemption. Under appellees' view, a claim to a specific exemption is not "allowed" unless the taxpayer ultimately *benefits* from that exemption by paying less tax than he otherwise would have paid.

Longstanding interpretation of the tax laws provides appellees little in the way of support. This Court had occasion, in 1943, to consider an argument very similar to that propounded by appellees in this case. In *Virginian Hotel Corp.* v. *Helvering*, 319 U. S. 523 (1943), the taxpayer claimed "that 'allowed,' unlike 'allowable,' connotes the receipt of a tax benefit." *Id.*, at 526. The provision at issue there required the reduction of the basis of property by the amount of prior depreciation deductions "to the extent allowed." The taxpayer had claimed depreciation deductions in prior years, but, because other deductions for the years in question had been sufficient to produce overall losses, the deductions for depreciation had not reduced the amount of tax owed in those years. Consequently, the taxpayer argued that those deductions, although claimed, had not been "allowed," because they had not resulted in a tax benefit. The Court disagreed:

> "[W]e find no suggestion that 'allowed,' as distinguished from 'allowable,' depreciation is confined to those deductions which result in tax benefits. 'Allowed' connotes a grant. Under our federal tax system there is no machinery for formal allowances of deductions from gross income. Deductions stand if the Commissioner takes no steps to challenge them." *Id.*, at 526–527.

In this case, too, we find no suggestion that only those uses of the specific exemption that afford an ultimate tax advantage to the taxpayer are to be considered "allowed" within the meaning of § 2010(c). For the gift-tax scheme has no more machinery for formal allowance of deductions than does the income-tax scheme discussed in *Virginian Hotel*. While it is true that "the record does not reflect that the specific exemption was allowed," Brief for Appellees 17, inaction

by the IRS under these circumstances suggests allowance, rather than disallowance, of the claim. See *Kilgroe* v. *United States*, 664 F. 2d 1168, 1170 (CA10 1981); *Blackhawk-Perry Corp.* v. *Commissioner*, 182 F. 2d 319, 321 (CA8 1950); *P. Dougherty Co.* v. *Commissioner*, 159 F. 2d 269, 271 (CA4 1946); *Repplier Coal Co.* v. *Commissioner*, 140 F. 2d 554, 558 (CA3 1944).

Nor is the mere inclusion of the gift in the gross estate tantamount to disallowance of the $30,000 exemption. Under § 2035, the $30,000 would have been included in the estate even if Hirschi had paid gift tax on the gift instead of claiming his specific exemption. The operation of § 2035 makes no comment upon the propriety of the claim of exemption. Thus, we cannot conclude that Congress intended inclusion of a gift made in contemplation of death in the gross estate of the donor to render the specific exemption not "allowed" within the meaning of § 2010(c).

The term "allowed" is a familiar denizen of the Tax Code. See, *e. g.*, §§ 1016(a)(20), (25). In some sections it appears unqualified, while in others, Congress has clearly embellished the term with the "tax benefit" qualification that appellees urge here. For example, in certain situations a taxpayer's "basis" in property is to be reduced "for amounts allowed as deductions . . . and resulting in a reduction of the taxpayer's taxes." §§ 1016(a)(9), (14), (16). Congress failed to so qualify the term "allowed" in § 2010(c), and we will not presume to impart to Congress an unstated intention to do so.

More importantly, Hirschi did receive a benefit for his specific exemption. He was permitted the option of deciding, in 1976, whether he would prefer to pay gift tax at that time or to claim his lifetime specific exemption and avoid paying taxes on the gift. He was granted the opportunity, knowing of the disadvantageous laws relating to gifts made in contemplation of death, to calculate the probability that he would live for three more years and escape tax on the $30,000 alto-

gether. During his lifetime he paid no tax on the $30,000 gift, consistent with his election to use the specific exemption. The eventual effect of his decisions upon his estate cannot be said to have deprived him of the benefit Congress intended to bestow upon those in Hirschi's position. The application of § 2010(c) to reduce the unified credit of Hirschi's estate by 20% of the amount claimed as a specific exemption, therefore, is consistent with the language and purpose of the statute.

IV

We must now address the argument that led the District Court to find unconstitutional the Government's application of the transitional rule to appellees. Appellees contend that the rule "effectively imposes a retroactive penalty tax upon Mr. Hirschi's claim to the specific exemption," Brief for Appellees 33, and that it is "unreasonably harsh and oppressive," in violation of the Due Process Clause. *Id.*, at 31. In addition, appellees suggest that they have been subjected to double taxation, also without due process, see *id.*, at 32.

The District Court found that § 2010(c) transgresses the Due Process Clause because its application to appellees is arbitrary and capricious. Relying heavily on *Untermyer* v. *Anderson*, 276 U. S. 440 (1928), the court concluded that the "retroactive" operation of the legislation, insofar as it affects the final disposition of a gift made before the enactment of the statute, is unreasonable. In *Untermyer*, this Court construed the Revenue Act of 1924, which was signed on June 2 of that year and imposed a gift tax on gifts made during the entire calendar year 1924. The Court concluded that, "so far as applicable to bona fide gifts not made in anticipation of death and fully consummated prior to June 2, 1924, those provisions are arbitrary and invalid under the due process clause of the Fifth Amendment." *Id.*, at 445. The principal objection to the statute was the absence of notice; the Court endorsed the conclusion, *ibid.*, reached in *Blodgett* v. *Holden*, 275 U. S. 142, 147 (1927), where a plurality had found it

"wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing."

In *Untermyer*, *supra*, at 445, the Court explicitly recognized a distinction between retroactive taxation of genuine gifts and that of gifts made in contemplation of death; the case, therefore, is not controlling here. Moreover, *Untermyer* involved the levy of the first gift tax; its authority is of limited value in assessing the constitutionality of subsequent amendments that bring about certain changes in operation of the tax laws, rather than the creation of a wholly new tax. See *United States* v. *Darusmont*, 449 U. S. 292, 299 (1981) *(per curiam)*. Indeed, this Court has since made clear that some retrospective effect is not necessarily fatal to a revenue law. In *Milliken* v. *United States*, 283 U. S. 15 (1931), for example, the Court upheld the application of an early "gift in contemplation of death" statute, enacted in 1918, to draw into the estate of a decedent who died in 1920 a gift given in 1916, before enactment of the statute. In that case the equities were especially favorable to the taxpayer, because the gift in question was stock that had appreciated substantially following the gift, and inclusion in the estate occasioned taxation of the higher amount. Nevertheless, this Court reasoned that the validity of the tax depended, not upon its retroactive feature, but upon its nature and that of the gift. The Court upheld the levy of estate tax upon the gift on the ground that the notion of taxing gifts made in contemplation of death as part of the estate was not new, and that the donor should have known that there was a chance of increased tax burden if he chose to make what amounted to a testamentary gift during his lifetime. *Id.*, at 24.

Following the approach taken in our prior cases, we must "consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the con-

stitutional limitation." *Welch* v. *Henry*, 305 U. S. 134, 147 (1938). One of the relevant circumstances is whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute. Our first task, accordingly, is to determine whether Hirschi's conduct was granted a different and more oppressive legal effect as a result of the Act. The key to resolution of this question is § 2035, which has reached back for years to affect the taxation of gifts made in contemplation of death.

Section 2035, as it applied to gifts made before 1977, provided that gifts made within three years of the donor's death would be deemed to have been made in contemplation of death, unless the estate could establish otherwise. 26 U. S. C. § 2035(b) (1970 ed.). Congress required that gifts made in contemplation of death be included in the amount of the gross estate in order to forestall any temptation on the part of taxpayers to make deathbed transfers for the purpose of evading estate taxes. See *Milliken* v. *United States*, *supra*. Even if the Act had never been passed, Hirschi's gift would have been subject to the requirements of § 2035. Our inquiry, therefore, must focus upon the operation of that provision both with and without the intervening passage of § 2010(c).

Had Congress not enacted § 2010(c), Hirschi would have claimed his $30,000 specific exemption; he would have paid no tax on that gift. When he died within three years, his estate would have been required, under § 2035, to include the gift in the estate and pay estate taxes on that $30,000. His estate would have been permitted to claim its specific exemption of $60,000 against the estate tax owed. With the enactment of § 2010(c), Hirschi claimed his $30,000 specific exemption; he paid no tax on that gift. When he died within three years, his estate was required, under § 2035, to include the gift in the estate and pay estate taxes on that $30,000. His estate was permitted to claim its entire unified credit of $34,000, *minus $6,000*, against the estate tax owed.

The operative comparison, then, is between a specific exemption of $60,000, available to the estate under the old law, and a unified credit from which $6,000 has been subtracted, available to appellees under the new Act. As discussed above, Congress reasonably determined that the entire unified credit would provide a substitute for *both* the $30,000 specific exemption for lifetime gifts *and* the $60,000 specific exemption for estates.[2] Mindful that, under the old law, the estate would have been entitled to claim $60,000—only two-thirds of the taxpayer's entire $90,000 exemption—we cannot be surprised to discover that, under the new Act, too, the estate is entitled to something less than the full unified credit otherwise available. Here, Congress quite fairly decided that the credit should be reduced by 20% of the specific exemption previously taken, a favorable exchange for the taxpayer.[3] Taking into account Congress' equation, then, we cannot but deduce that appellees are no worse off than they would have been without the enactment of the Act. Appellees reach a different conclusion only by comparing Hirschi's position, not to that of another taxpayer subject to § 2035, but to that of a person who did not die within three years of

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[2] This determination was entirely reasonable from the standpoint of the taxpayer, as the unified credit resulted in an overall increase in tax savings over that provided by the specific exemptions. For example, Hirschi's estate was subject to a 34% marginal rate of tax, and consequently the estate's $60,000 specific exemption would have yielded a tax reduction of $20,400. Using the unified credit of the new Act, however, the estate enjoyed a tax reduction of $28,000.

[3] Of course, a numerical comparison between the exemptions and the credit is not entirely fruitful because Congress intended in the Act to increase the overall amount of gifts and estates exempted from tax. See H. R. Rep. No. 94-1380, p. 11 (1976). Nevertheless, simple mathematics suggests that, if a unified credit of $47,000 were to be deemed comparable in some sense to $90,000 in exemptions, then one would expect the credit to be reduced by as much as 52% of the exemption claimed, instead of 20%. Taking account of varying tax rates, Congress clearly acted fairly when it settled on the 20% figure.

making the gift, a person not similarly situated with respect to the relevant legal criteria.

Other circumstances of Hirschi's transaction confirm our conclusion that appellees have not suffered different and oppressive treatment as a result of the Act. First, § 2035 had long been in effect at the time Hirschi made his gift, and it is § 2035 that contains the principal retroactive feature involved in this case, requiring the estate to reach back and embrace a gift made over two years previously. Moreover, Hirschi had no expectation at the time of the gift that he would be entitled to any particular amount of a unified credit, that credit not yet having been created. Especially if the amount of the credit that his estate was ultimately allotted resulted in no greater a tax than the estate would have owed under the old law, the retroactive aspect of the law could not be said to be oppressive or inequitable. Appellees concede that, even taking into account the operation of § 2010(c), they still have paid estate taxes of $655.16 *less* than they would have paid had the 1976 Act never been passed. While the amount of tax is not dispositive, it is one circumstance of the transaction to be considered under *Milliken*. Under these circumstances, we have no difficulty concluding that, even if § 2010(c) can be considered to be retroactive taxation, a question that we do not answer, the provision represents a fair judgment by Congress that does not deprive appellees of anything to which they can assert a constitutional right.

Appellees also protest that the confluence of §§ 2010(c) and 2035 has required them to pay tax on the same transaction twice. By reducing the unified credit by $6,000, they argue, the IRS has effectively made the estate liable for gift tax on the $30,000, while also assessing estate tax on the same $30,000. Yet we have concluded above that appellees have not been taxed more oppressively than have any taxpayers unfortunate enough to be subject to § 2035. "There is no doubt of the power of Congress to provide for including in the gross estate of a decedent, for purposes of the death tax, the

value of gifts made in contemplation of death." *Heiner* v. *Donnan*, 285 U. S. 312, 324 (1932). We need not decide here whether that inclusion results in double taxation, for even if it did, the Constitution would not be offended as long as Congress had clearly expressed its intention to occasion the result. *Patton* v. *Brady*, 184 U. S. 608, 621 (1902). Congress clearly intended, in § 2035, to gather Hirschi's $30,000 gift into the estate; equally clear is the legislative purpose to reduce the unified credit whenever the specific exemption for lifetime gifts was used during the transitional period. There being no ambiguity in the statute, even if one could construe the treatment of Hirschi as double taxation, the Constitution would not stand in its way. *Hellmich* v. *Hellman*, 276 U. S. 233, 238 (1928).

V

The application of § 2010(c) to reduce the credit available to the Hirschi estate by $6,000 is not inconsistent with the statute or the Due Process Clause of the Constitution. Accordingly, the judgment of the District Court is

Reversed.

BROWN-FORMAN DISTILLERS CORP. v. NEW YORK STATE LIQUOR AUTHORITY

APPEAL FROM COURT OF APPEALS OF NEW YORK

No. 84-2030. Argued March 3, 1986—Decided June 3, 1986

New York's Alcoholic Beverage Control Law (ABC Law) provides that a distiller, licensed to do business in the State, may not sell its products to wholesalers within the State except in accordance with a monthly price schedule previously filed with appellee State Liquor Authority, and requires that the distiller include with the schedule an affirmation that the prices in the schedule are no higher than the lowest prices that the distiller will charge wholesalers anywhere else in the United States during the month. Appellee determined that the ABC Law prohibited appellant distiller, which sells its liquor in New York and in other States, from offering certain promotional allowances (based on past purchases and projections of future purchases) to wholesalers in the State, and that the payment of the allowances to wholesalers in other States lowered the "effective price" of appellant's products to those wholesalers, thus violating the affirmation provision of the ABC Law. After license revocation proceedings were instituted against appellant, it sought review of appellee's ruling in the Appellate Division of the New York Supreme Court, which held, *inter alia*, that the affirmation provision did not on its face directly regulate interstate commerce in violation of the Commerce Clause of the Federal Constitution. The New York Court of Appeals affirmed.

Held:

1. The affirmation provision of New York's ABC Law, on its face, violates the Commerce Clause. Pp. 578–585.

(a) In analyzing state economic regulation under the Commerce Clause, the critical consideration is the overall effect of the state law on both local and interstate activity. Pp. 578–579.

(b) While a State, as here, may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511. Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States. The mere fact that the effects of New York's ABC Law are triggered only by sales of liquor within New York therefore does not val-

idate the law if it regulates the out-of-state transactions of distillers who sell in New York. Pp. 579–580.

(c) A "prospective" statute such as the affirmation provision of the ABC Law—requiring that prices in the State in the current month not be higher than those that will be charged in any other State during the same (as opposed to the *previous*) month—directly regulates out-of-state transactions in violation of the Commerce Clause. Once a distiller's posted price is in effect in New York, it must seek appellee's approval before it may lower its prices for the same item in other States. By defining the "effective price" of liquor (in view of appellant's promotional allowance program) differently from other States, New York can effectively force appellant to abandon its allowance program in States in which that program is legal, or force those other States to alter their own regulatory schemes in order to permit appellant to lower its New York prices without violating the affirmation laws of those States. Pp. 582–584.

2. The Twenty-first Amendment does not save the ABC Law's affirmative provision from invalidation under the Commerce Clause. That Amendment gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States. The Commerce Clause operates with full force whenever one State attempts to regulate the sale of alcoholic beverages in another State. Moreover, New York's affirmation provision may interfere with the ability of other States to exercise their own authority under the Twenty-first Amendment. Pp. 584–585.

64 N. Y. 2d 479, 479 N. E. 2d 764, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL and O'CONNOR, JJ., joined, and in all but n. 6 of which BLACKMUN, J., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 586. STEVENS, J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 586. BRENNAN, J., took no part in the consideration or decision of the case.

Macdonald Flinn argued the cause and filed briefs for appellant.

Lloyd Constantine, Assistant Attorney General of New York, argued the cause for appellee. With him on the brief were *Robert Abrams*, Attorney General, *Robert Hermann*, Solicitor General, and *August L. Fietkau*, *Richard G.*

Liskov, and *Christopher Keith Hall*, Assistant Attorneys General.*

JUSTICE MARSHALL delivered the opinion of the Court.

The State of New York requires every liquor distiller or producer that sells liquor to wholesalers within the State to sell at a price that is no higher than the lowest price the distiller charges wholesalers anywhere else in the United States. The issue in this case is whether that requirement violates the Commerce Clause of the Constitution.

I

New York extensively regulates the sale and distribution of alcoholic beverages within its borders. The State's Alcoholic Beverage Control Law (ABC Law) prohibits the manufacture and sale of alcoholic beverages within the State without the appropriate licenses, ABC Law § 100(1) (McKinney 1970), and regulates the terms of all sales, §§ 101-a to 101-bbb (McKinney 1970 and Supp. 1986). Distillers and their agents may not sell to wholesalers in New York except in accordance with a price schedule filed with the State Liquor Authority. § 101-b(3)(a). The distiller or agent must file the price schedule before the 25th day of each month, and the prices therein become effective on the first day of the second following month. The schedule must contain a precise description of each item the distiller intends to sell, and a per-bottle and per-case price. All sales to any wholesaler in

*Briefs of *amici curiae* urging reversal were filed for the Distilled Spirits Council of the United States, Inc., by *David W. Ichel* and *Russell W. Shannon;* for the Distillers Somerset Group Inc., by *Bartlett H. McGuire* and *James D. Liss;* for the United States Brewers Association, Inc., et al. by *Jeffrey Ives Glekel, Timothy G. Reynolds, Lawrence J. Block, Jerome I. Chapman,* and *William H. Allen;* and for the Wine Institute by *Arnold M. Lerman, Daniel Marcus,* and *Roy T. Englert, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the National Conference of State Legislatures et al. by *Benna Ruth Solomon;* and for Wine and Spirits Wholesalers of America, Inc., by *Michael Whiteman, Douglas W. Metz,* and *Abraham Tunick.*

New York during the month for which the schedule is in effect must be at those prices.

This litigation concerns § 101–b(3)(d) of the ABC Law, which requires any distiller or agent that files a schedule of prices to include an affirmation that "the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor will be sold by such [distiller] to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores" during the month covered by the schedule. Violation of the statute may lead to revocation of a distiller's license and the forfeiture of bond posted by the distiller in connection with the license, § 101–b(6). Twenty other States have similar affirmation laws.[1]

Appellant Brown-Forman Distillers Corp. (Brown-Forman) is a distiller that owns several brands of liquor that it sells in New York and in other States. Beginning in 1978, appellant has offered its wholesalers cash payments, or "promotional allowances," which are credited against any amounts due appellant.[2] Appellant intends for wholesalers

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[1] These States differ in the time reference for the affirmation price. Some require the distiller to set a price that is no higher than the lowest price charged *previously* anywhere in the United States, see, *e. g.*, Ariz. Rev. Stat. Ann. § 4–253(A) (Supp. 1985). Others, like New York, require the affirmed price to be no higher than the lowest price that will be charged during the *current* month. See ABC Law § 101–b(3)(d).

There are 18 States, known as "control" States, that purchase all liquor that will be distributed and consumed within their borders. The control States use a standard sales contract that requires the distiller to warrant that the price the distiller charges to the State is no higher than the lowest price offered anywhere else in the United States. See Brief for Appellant 5, n. 4.

[2] The Federal Bureau of Alcohol, Tobacco and Firearms (BATF), upon appellant's request, ruled that appellant's promotional allowance does not violate the Federal Alcohol Administration Act, 27 U. S. C. §§ 201–211. See § 205(b) (prohibiting "paying or crediting [any] retailer [of alcoholic beverages] for any advertising" if done to induce the retailer to purchase

to use these allowances for advertising; however, the amount of the allowance a wholesaler receives is not tied to the quantity either of the wholesaler's advertising or of its purchases of appellant's products. The amount of a particular wholesaler's allowance does depend on its past purchases and projections of future purchases, but accepting the allowance does not constitute an agreement to purchase any particular quantity of Brown-Forman products. The allowances, therefore, are unconditional, lump-sum payments to all wholesalers, in every State except New York, that purchase Brown-Forman brands.

Appellant offered the promotional allowance to its New York wholesalers, but the Liquor Authority determined that the ABC Law prohibited such payments.[3] The Authority also determined, however, that the payment of promotional allowances to wholesalers in other States lowered the effective price of Brown-Forman brands to those wholesalers, and thus violated § 101–b(3)(d) of the ABC Law.[4] The Liquor Authority accordingly instituted license revocation proceedings against appellant.

Appellant sought review of the Liquor Authority's ruling in the state courts, asserting that it was both arbitrary and unconstitutional. Appellant contended that it could not possibly file a schedule of prices that reflected precisely the "effective price" charged to wholesalers in other States, because there was no one "effective price." Each participating

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alcohol from the person providing such payment or credit to the exclusion in whole or in part of other distillers or producers). Some of the features of appellant's promotional allowance program described herein were required by BATF in order to ensure that the program would not violate the Act. See Juris. Statement 4.

[3] See § 101–b(2)(b) (prohibiting "any discount, rebate, free goods, allowance or other inducement of any kind whatsoever" except for quantity and prompt-payment discounts of specified amounts).

[4] See § 101–b(3)(g) (in determining lowest price, "appropriate reductions shall be made to reflect all discounts . . . and all rebates, free goods, allowances and other inducements").

wholesaler could pay a different effective price in a given month depending on the amount of Brown-Forman product it had purchased during that month. Moreover, appellant argued, other States did not treat the promotional allowances as discounts. Were New York to force appellant to reduce its prices in that State, appellant would be charging a lower price to New York wholesalers than the price recognized by other States, thereby forcing appellant to violate the affirmation laws of those States. Appellant contended that the only way to avoid this dilemma was to stop offering promotional allowances, unless other States chose to alter their affirmation laws. By effectively forcing appellant to discontinue a promotional program in other States where that program was legal, appellant argued, New York's regulation violated the Commerce Clause. Appellant also argued that the affirmation law on its face directly regulated interstate commerce in violation of the Commerce Clause.

The Appellate Division of the New York Supreme Court rejected these arguments, 100 App. Div. 2d 55, 473 N. Y. S. 2d 420 (1984), as did the New York Court of Appeals, 64 N. Y. 2d 479, 479 N. E. 2d 764 (1985). The Court of Appeals concluded, first, that the Liquor Authority's decision to consider the promotional allowances as a discount was supported by substantial evidence. Second, the court held that the ABC Law as applied does not violate the Commerce Clause, rejecting as speculative appellant's contention that it cannot comply simultaneously with the affirmation laws of New York and of other States. Finally, the court held that the affirmation law, on its face, does not violate the Commerce Clause. We noted probable jurisdiction limited to the question whether the ABC Law, on its face, violates the Commerce Clause, 474 U. S. 814 (1985). We now reverse.

II

This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the

Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. See, *e. g.*, *Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978); *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189 (1925); *Edgar* v. *MITE Corp.*, 457 U. S. 624, 640–643 (1982) (plurality opinion). When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike* v. *Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. See *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429, 440–441 (1978).

A

Appellant does not dispute that New York's affirmation law regulates all distillers of intoxicating liquors evenhandedly, or that the State's asserted interest—to assure the lowest possible prices for its residents—is legitimate. Appellant contends that these factors are irrelevant, however, because the lowest-price affirmation provision of the ABC Law falls within that category of direct regulations of interstate commerce that the Commerce Clause wholly forbids. This is so, appellant contends, because the ABC Law effectively regulates the price at which liquor is sold in other States. By requiring distillers to affirm that they will make no sales anywhere in the United States at a price lower than the posted price in New York, appellant argues, New York makes it illegal for a distiller to reduce its price in other States during the period that the posted New York price is in

effect. Appellant contends that this constitutes direct regulation of interstate commerce. The law also disadvantages consumers in other States, according to appellant, and is therefore the sort of "simple economic protectionism" that this Court has routinely forbidden. *Philadelphia* v. *New Jersey*, *supra*, at 624.

If appellant has correctly characterized the effect of the New York lowest-price affirmation law, that law violates the Commerce Clause. While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 528 (1935); *Schwegmann Brothers Giant Super Markets* v. *Louisiana Milk Comm'n*, 365 F. Supp. 1144 (MD La. 1973), aff'd, 416 U. S. 922 (1974). Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States. See, *e. g.*, *New England Power Co.* v. *New Hampshire*, 455 U. S. 331, 338 (1982) (State may not require "that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders"). In *Seelig*, *supra*, this Court struck down New York's Milk Control Act. The Act set minimum prices for milk purchased from producers in New York and in other States, and banned the resale within New York of milk that had been purchased for a lower price. Justice Cardozo's opinion for the Court recognized that a State may not "establish a wage scale or a scale of prices for use in other states, and . . . bar the sale of the products . . . unless the scale has been observed." *Id.*, at 528. The mere fact that the effects of New York's ABC Law are triggered only by sales of liquor within the State of New York therefore does not validate the law if it regulates the out-of-state transactions of distillers who sell in-state. Our inquiry, then, must center on whether New York's affirmation law regulates commerce in other States.

B

This Court has once before examined the extraterritorial effects of a New York affirmation statute. In *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35 (1966), the Court considered the constitutionality, under the Commerce and Supremacy Clauses, of the predecessor to New York's current affirmation law. That law differed from the present version in that it required the distiller to affirm that its prices during a given month in New York would be no higher than the lowest price at which the item had been sold elsewhere during the *previous* month. The Court recognized in that case, as we have here, that the most important issue was whether the statute regulated out-of-state transactions. *Id.*, at 42–43. It concluded, however, that "[t]he mere fact that [the statute] is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute." The Court distinguished *Seelig, supra*, by concluding that any effects of New York's ABC Law on a distiller's pricing policies in other States were "largely matters of conjecture," 384 U. S., at 42–43.

Appellant relies on *United States Brewers Assn.* v. *Healy*, 692 F. 2d 275 (CA2 1982), summarily aff'd, 464 U. S. 909 (1983), in seeking to distinguish the present case from *Seagram*. In *Healy*, the Court of Appeals for the Second Circuit considered a Connecticut price-affirmation statute for beer sales that is not materially different from the current New York ABC Law. The Connecticut statute, like the ABC Law, required sellers to post prices at the beginning of a month, and proscribed deviation from the posted prices during that month. The statute also required brewers to affirm that their prices in Connecticut were as low as the price at which they would sell beer in any bordering State during the effective month of the posted prices. The Court of Appeals distinguished *Seagram* based on the "prospective" nature of this affirmation requirement. It concluded that the Connecticut statute made it impossible for a brewer to lower

its price in a bordering State in response to market conditions so long as it had a higher posted price in effect in Connecticut. By so doing, the statute "regulate[d] conduct occurring wholly outside the state," 692 F. 2d, at 279, and thereby violated the Commerce Clause. We affirmed summarily.

C

We agree with appellant and with the *Healy* court that a "prospective" statute such as Connecticut's beer affirmation statute, or New York's liquor affirmation statute, regulates out-of-state transactions in violation of the Commerce Clause. Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month.[5] Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce. *Edgar* v. *MITE Corp.*, 457 U. S., at 642 (plurality opinion); see also *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S., at 522 (regulation tending to "mitigate the consequences of competition between the states" constitutes direct regulation). While New York may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not

[5] The Liquor Authority may "for good cause shown" permit a distiller to change its prices during a particular month, ABC Law § 101–b(3)(a), and New York speculates that the Authority would permit a distiller to lower its prices in other States in a given month so long as the distiller also lowers them in New York. However, whether to permit such a deviation from the statutory scheme is a matter left by the statute to the discretion of the Liquor Authority.

We would not solve the constitutional problems inherent in New York's statute by indulging the dissent's assumption that the Authority will be sensitive to Commerce Clause concerns. Certainly New York could not require an out-of-state company to receive a license from New York to do business in other States, even if we were quite sure that such licenses would be granted as a matter of course. Similarly, New York simply may not force appellant to seek regulatory approval from New York before it can reduce its prices in another State. The protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency.

"project its legislation into [other States] by regulating the price to be paid" for liquor in those States. *Id.*, at 521.

That the ABC Law is addressed only to sales of liquor in New York is irrelevant if the "practical effect" of the law is to control liquor prices in other States. *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 775 (1945). We cannot agree with New York that the practical effects of the affirmation law are speculative. It is undisputed that once a distiller's posted price is in effect in New York, it must seek the approval of the New York State Liquor Authority before it may lower its price for the same item in other States. It is not at all counter-intuitive, as the dissent maintains, *post*, at 588, to assume that the Liquor Authority would not permit appellant to reduce its New York price after the posted price has taken effect. The stated purpose of the prohibition on price changes during a given month is to prevent price discrimination among retailers, see ABC Law §§ 101-b(1), (2)(a). That goal is in direct conflict with the dissent's view of the "whole purpose" of the ABC law, and we have no means of predicting how the Authority would resolve that conflict. We do know, however, that the Liquor Authority forbade appellant to reduce its New York prices by offering promotional allowances to New York retailers, precisely because the Authority believed that program would violate the price-discrimination provisions. App. to Juris. Statement 50a. The dissent would require us to assume that other States will adopt a flexible approach to appellant's promotional allowance program, *post*, at 589, despite New York's refusal to do so.

Moreover, the proliferation of state affirmation laws following this Court's decision in *Seagram* has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different States. The ease with which New York's lowest-price regulation can interfere with a distiller's operations in other States is aptly demonstrated by the controversy that gave rise to this lawsuit. By defining the "effective price" of liquor differently from other States,

New York can effectively force appellant to abandon its promotional allowance program in States in which that program is legal, or force those other States to alter their own regulatory schemes in order to permit appellant to lower its New York prices without violating the affirmation laws of those States. Thus New York has "project[ed] its legislation" into other States, and directly regulated commerce therein, in violation of *Seelig*, *supra*.[6]

III

New York finally contends that the Twenty-first Amendment, which bans the importation or possession of intoxicating liquors into a State "in violation of the laws thereof," saves the ABC Law from invalidation under the Commerce Clause. That Amendment gives the States wide latitude to regulate the importation and distribution of liquor within their territories, *California Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 107 (1980). Therefore, New York argues, its ABC Law, which regulates the sale of alcoholic beverages within the State, is a valid exercise of the State's authority.

It is well settled that the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause. See *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984). Rather, the Twenty-first Amendment and the Commerce Clause "each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 332 (1964). Our task, then,

[6] While we hold that New York's prospective price affirmation statute violates the Commerce Clause, we do not necessarily attach constitutional significance to the difference between a prospective statute and the retrospective statute at issue in *Seagram*. Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case. If there is a conflict between today's decision and the *Seagram* decision, however, there will be time enough to address that conflict should a case arise involving a retrospective statute. Because no such statute is before us now, we need not consider the continuing validity of *Seagram*.

is to reconcile the interests protected by the two constitutional provisions.

New York has a valid constitutional interest in regulating sales of liquor within the territory of New York. Section 2 of the Twenty-first Amendment, however, speaks only to state regulation of the "transportation or importation into any State . . . for delivery or use therein" of alcoholic beverages. That Amendment, therefore, gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States. The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country, *Idlewild Bon Voyage Liquor Corp.*, *supra*, or another State. Our conclusion that New York has attempted to regulate sales in other States of liquor that will be consumed in other States therefore disposes of the Twenty-first Amendment issue.

Moreover, New York's affirmation law may interfere with the ability of other States to exercise their own authority under the Twenty-first Amendment. Once a distiller has posted prices in New York, it is not free to lower them in another State, even in response to a regulatory directive by that State, without risking forfeiture of its license in New York. New York law, therefore, may force other States either to abandon regulatory goals or to deprive their citizens of the opportunity to purchase brands of liquor that are sold in New York. New York's reliance on the Twenty-first Amendment is therefore misplaced. Having found that the ABC Law on its face violates the Commerce Clause, and is not a valid exercise of New York's powers under the Twenty-first Amendment, we reverse the judgment of the New York Court of Appeals.

It is so ordered.

JUSTICE BRENNAN took no part in the consideration or decision of this case.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion (except for its footnote 6), but I would go further and overrule *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35 (1966). *Seagram* is now a relic of the past. It was decided when affirmation statutes were comparatively new and long before the proliferation of overlapping and potentially conflicting affirmation statutes that has taken place in the last two decades. I see no principled distinction that can be drawn for constitutional analysis between New York's current prospective statute and the same State's retroactive statute upheld in *Seagram*, and I doubt very much whether any Member of this Court would be able to perceive one. Either type, despite one's best efforts at fine-tuning, operates to affect out-of-state transactions and violates the Commerce Clause. Our failure to overrule *Seagram* now merely preserves uncertainty and will breed or necessitate further litigation. We should face reality and overrule *Seagram*.

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

Speculation about hypothetical cases illuminates the discussion in a classroom, but it is evidence and historical fact that provide the most illumination in a courtroom. Forgoing the support of a record developed at trial, appellant Brown-Forman Distillers Corporation (Brown-Forman) contends that New York's Alcoholic Beverage Control (ABC) Law § 100 *et seq.* (McKinney 1970 and Supp. 1986) is an unconstitutional burden on interstate commerce "on its face." Over 20 years ago this Court unanimously refused to invalidate the predecessor of New York's present statute on precisely the same ground. As Justice Stewart then explained:

> "The mere fact that § 9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the

> statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. The serious discriminatory effects of § 9 alleged by appellants on their business outside New York are largely matters of conjecture. It is by no means clear, for instance, that § 9 must inevitably produce higher prices in other States, as claimed by appellants, rather than the lower prices sought for New York. It will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly presents them." *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 43 (1966).

Two decades have elapsed since those sentences were written. In the interim, Brown-Forman has been selling its products in more than 30 States, including New York. Yet at no time did it introduce any evidence tending to prove that New York's ABC Law affected the price of its products in any other State.[1]

In lieu of evidence about the actual impact of the New York statute, the Court speculates that the ABC Law prevents price competition in transactions involving Brown-Forman's products in other States. See *ante*, at 579–580, 582. This result is not a necessary consequence of the operation of the New York law. To begin with, so far as New York is concerned Brown-Forman may maintain its selling price in other States or may increase it—either is consistent with Brown-Forman's promise to give New York wholesalers its "lowest price." § 101-b(3)(d). Only if Brown-Forman reduces its

[1] The record does show that Brown-Forman's promotional allowances "effectively lowered the price to wholesalers in Massachusetts below the affirmation price in New York" in a manner "designed to circumvent the New York State Alcoholic Beverage Control Law." App. to Juris. Statement 51a. This evidence, however, surely does not provide any basis for distinguishing this case from the *Seagram* case.

prices outside of New York would it violate its affirmation. But in that event, the State allows it to extend the same discount to its New York customers "for good cause shown and for reasons not inconsistent with the purpose of this chapter." § 101–b(3)(a).[2] There is nothing in the record to suggest that the State Liquor Authority would ever object to a price *reduction* to conform to a lower out-of-state price, and it is counter-intuitive to assume that it would. The whole purpose of the law, after all, is to provide New York consumers with the lowest prices that can be obtained. Consistent with this purpose, the State Liquor Authority has, in a similar situation, "offered to grant approval . . . to offer a cash discount in New York equivalent to the product discounts [the distiller] would offer in other states." *Joseph E. Seagram & Sons, Inc.* v. *Gazzara*, 610 F. Supp. 673, 678, n. 5 (SDNY 1985), appeal docketed, No. 85–7547 (CA2, July 1, 1985). The administrative flexibility demonstrated by the State Liquor Authority thus belies the Court's assumption to the contrary. See *ante*, at 582, n. 5. It also demonstrates the wisdom of the *Seagram* Court's unwillingness to "presume that the Authority will not exercise that discretion to alleviate any friction that might result should the ABC Law chafe against" a provision of the Federal Constitution. *Seagram & Sons* v. *Hostetter*, 384 U. S., at 46 (rejecting Supremacy Clause challenge predicated on federal antitrust laws). Cf. *id.*, at 51. The presumption of constitutionality applied in *Seagram* not only accords with tradition—agencies are frequently charged with rectifying questionable applica-

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[2] The Connecticut statute invalidated on its face in *United States Brewers Assn., Inc.* v. *Healy*, 692 F. 2d 275 (CA2 1982), summarily aff'd, 464 U. S. 909 (1983), had no escape clause. See 692 F. 2d, at 276–277, nn. 3, 5, 6, and 7. The Second Circuit panel construed the Connecticut statute "to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut." *Id.*, at 282.

tions of necessarily general rules—it is also consistent with the respect due state administrative organs responsible for the operation of a state law whose constitutionality is challenged on its face. Cf. *United States* v. *Vuitch*, 402 U. S. 62, 70 (1971).[3] And if the State Liquor Authority were in fact to allow Brown-Forman to extend discounts given outside the State to its customers in New York, there is no reason to suppose that those other States would in turn refuse to allow Brown-Forman to credit the value of its promotional allowances against its list prices in order to comply with the statutory recording obligations in those States.[4]

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[3] This discussion indulges the Court's unstated assumption that price changes are not preceded by sufficient lead time to comply with the 35-day notice provision of the ABC Law. Again, however, there is nothing in the record to indicate that Brown-Forman has ever found it necessary to make a price change that could not be preceded by sufficient notice. *Amicus curiae* Wine & Spirits Wholesalers of America, Inc., informs us that the 18 States with liquor monopolies "perhaps typically" require suppliers "to warrant that quoted prices will remain in effect for a minimum of 90 days." Brief for Wine and Spirits Wholesalers of America, Inc., as *Amicus Curiae* 9, n. 6. If, as a result of such contracts, prices in this industry are changed quarterly or at other infrequent intervals and are normally preceded by an announcement that the effective date of the change will be two or more months in the future, the statute would not have any inhibiting effect whatsoever on Brown-Forman's pricing decisions.

[4] "In making this argument, appellant assumes, and properly so, that other States will enforce their liquor laws. But appellant also requires us to assume that other States will enforce their laws without regard for reality, and this we are unwilling to do.

". . . It is certainly reasonable to expect that other States will recognize that the prices on appellant's New York schedules have been adjusted, because of New York's statutory requirements, to take into account the effect of credits enjoyed by wholesalers elsewhere—credits which the other States receiving the tangible benefits of appellant's program apparently have already chosen not to consider in determining the affirmed price.

". . . It would require us to engage in mere speculation were we to declare, on such a tenuous basis, the lowest-price affirmation statute

Even if these open questions are all resolved in the Court's favor, its conclusion that the ABC Law trenches on interstate commerce does not follow from *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935), the authority on which it primarily relies. Decided 30 years before *Seagram*, that case invalidated the New York Milk Control Act on the ground that it was designed to inflate milk prices in order to protect New York producers from out-of-state competition, see 294 U. S., at 519—a classic illustration of economic provincialism.[5] By contrast, the New York ABC Act was designed to keep the prices of liquor down in order to give New York consumers the benefit of out-of-state competition. See 384 U. S., at 38–39, and n. 9. The obvious infirmity of the statute struck down in *Seelig* thus says nothing about the constitutionality of the statute before us.

Moreover, as Judge Friendly observed, "[f]or some of us who were 'present at the creation' of the Twenty-First Amendment, there is an aura of unreality in [the] assumption that we must examine the validity of New York's Alcoholic Beverage Control Law (ABC Law) just as we would examine the constitutionality of a state statute governing the sale of gasoline"—or, I would add, of milk. *Battipaglia* v. *New York State Liquor Authority*, 745 F. 2d 166, 168 (CA2 1984), cert. denied, 470 U. S. 1027 (1985). The statute in *Seelig* regulated an article of commerce that New York had no

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unconstitutional as applied." 64 N. Y. 2d 479, 489–490, 479 N. E. 2d 764, 769–770 (1985) (citations omitted).

Moreover, such possible consequences in States other than New York would seem to provide as good a reason for invalidating those States' laws as it does for striking down New York's statute.

[5] Seelig had purchased milk from Vermont farmers at a competitive price—instead of the New York regulated price—and was therefore denied a license to resell that milk in New York. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S., at 520. As Justice Cardozo explained, Seelig "may keep his milk or drink it, but sell it he may not." *Id.*, at 521.

power to exclude from the State;[6] the statute challenged here, in contrast, regulates the sale of a product that the Twenty-first Amendment expressly authorizes New York to exclude entirely from its local market.[7] As Justice Stewart explained for a unanimous Court in *Seagram:*

> "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' As this Court has consistently held, 'That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories.' *United States* v. *Frankfort Distilleries*, 324 U. S. 293, 299 [1945]. Cf. *Nippert* v. *Richmond*, 327 U. S. 416, 425, n. 15 [1946]. Just two Terms ago we took occasion to reiterate that 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 330 [1964]. See *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 [1936]; *Mahoney* v.

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[6] "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. This again is not disputed." *Ibid.*

[7] New York's ABC Law complies with the letter and spirit of the Twenty-first Amendment. The New York law imposes a condition precedent to importation of liquor into the State pursuant to the literal terms of the Amendment, and it does so "for the purpose of fostering and promoting temperance in th[e] consumption [of alcoholic beverages] and respect for and obedience to the law." § 101-b(1). Cf. *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984).

> *Joseph Triner Corp.*, 304 U. S. 401 [1938]; *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 [1939]; *California* v. *Washington*, 358 U. S. 64 [1958]. Cf. *Indianapolis Brewing Co.* v. *Liquor Comm'n*, 305 U. S. 391 [1939]; *Joseph S. Finch & Co.* v. *McKittrick*, 305 U. S. 395 [1939]." 384 U. S., at 41–42.[8]

Of more recent vintage, see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 712–713 (1984); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 110 (1980).

It may well be true that the network of statutes that have spread across the Nation since the Court's decision in *Seagram* has created "so grave an interference with" interstate commerce as to exceed the "wide latitude for [state] regulation" under the Twenty-first Amendment and to make "the regulation invalid under the Commerce Clause." 384 U. S., at 42–43. If that be the case, however, there should be ample evidence available to a concerned litigant to prove that this consequence has in fact developed. Until that is done, I believe we have a duty to adhere to the ruling in *Seagram*. Accordingly, I respectfully dissent.

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[8] The Court's Twenty-first Amendment analysis, unsupported by any citation to authority, appears to be at war with itself. I simply cannot understand how the Twenty-first Amendment gives New York *no* right to condition access to *its* market on compliance with a "lowest price" affirmation (because to do so affects liquor sales in other States), and yet at the same time gives other States authority "to purchase brands of liquor that are sold in New York." *Ante*, at 585. By reading the Twenty-first Amendment broadly to encompass any interstate regulation of liquor, but removing the constitutional shield when the faintest economic ripples begin to flow outside state borders, the Court has, at least in the interdependent national liquor market in which Brown-Forman participates, gutted the constitutional provision.

UNITED STATES v. HUGHES PROPERTIES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 85-554. Argued April 23, 1986—Decided June 3, 1986

Respondent, in its gambling casino in Reno, Nev., operated a number of "progressive" slot machines. In addition to paying fixed amounts when certain symbol combinations appear on their reels, these machines have a "progressive" jackpot that is won only when a different specified combination appears. The amount of the jackpot increases as money is gambled on the machine until the jackpot is won. A Nevada Gaming Commission regulation prohibits reducing the indicated payoff without paying the jackpot. Utilizing the accrual method of accounting, respondent's practice was, at the end of each fiscal year, to enter the total of the progressive jackpot amounts as an accrued liability on its books, and from that total to subtract the corresponding figure for the preceding year to produce the current tax year's increase in accrued liability. On its federal income tax returns for certain fiscal years, respondent claimed this net figure as a deduction under § 162(a) of the Internal Revenue Code of 1954, as an ordinary and necessary business expense incurred during the taxable year. The Commissioner of Internal Revenue (Commissioner) disallowed the deductions on the ground that, under Treasury Regulations, an expense may not be deducted until "all the events have occurred which determine the fact of liability and the amount thereof can be determined with reasonable accuracy," and that, until a patron actually won a progressive jackpot, respondent's liability to pay the jackpot was contingent and therefore was not a deductible expense. Accordingly, the Commissioner determined deficiencies in respondent's income taxes for the years in question. Respondent paid the deficiencies, and, when its claims for refunds were denied, brought suit in the Claims Court. The court granted respondent's motion for summary judgment, holding that respondent's liability to pay the progressive jackpots was fixed by the Nevada regulation. The Court of Appeals affirmed.

Held: Respondent was entitled to claim the deductions in question. Pp. 599–606.

(a) The "all events" test prescribed by the Treasury Regulations requires that before an expense can be regarded as "incurred" for federal income tax purposes, a liability must be fixed and absolute. Pp. 600–601.

(b) Here, the effect of the Nevada regulation was to fix respondent's liability. Identification of the winning players is irrelevant to respondent, since the obligation to pay exists and whether it turns out that the winner is one patron or another makes no difference as to liability. The event creating liability was the last play of each progressive slot machine before the end of the fiscal year, since that play fixed the jackpot amount irrevocably. That event occurred during the taxable year. *Brown* v. *Helvering*, 291 U. S. 193, distinguished. Pp. 601–603.

(c) Granting that the Commissioner has broad discretion to determine whether a taxpayer's accounting methods clearly reflect income, that financial accounting does not control for tax purposes, and that the mere desirability of matching expenses with income will not necessarily sustain a taxpayer's deduction, the disallowance of respondent's deductions was not justified. As noted, the jackpot liabilities were fixed, and only the exact times of payment and the winners' identity remained uncertain. Pp. 603–604.

(d) Nothing in the record indicates that respondent used its progressive slot machines for tax-avoidance purposes. Pp. 604–605.

(e) The potential that a casino operator might go out of business, or surrender or lose its license, or go into bankruptcy, with the result that the progressive jackpot would never be paid, does not prevent accrual of the expense. Pp. 605–606.

(f) One of the expenses that necessarily attends the production of income from a progressive slot machine is the commitment of a particular portion of the income generated to an irrevocable jackpot. Cf. *United States* v. *Anderson*, 269 U. S. 422. Respondent's true income from its progressive slot machines is only that portion of the money gambled that it is entitled to keep. P. 606.

760 F. 2d 1292, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 607.

Albert G. Lauber, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Acting Assistant Attorney General Olsen*, *Richard Farber*, and *William A. Whitledge*.

O. Clayton Lilienstern argued the cause for respondent. With him on the brief was *Denton N. Thomas*.*

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*Briefs of *amici curiae* urging affirmance were filed for the Atlantic City Casino Association by *Herbert J. Miller, Jr.*, and *David O. Stewart*;

JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the deductibility for federal income tax purposes, by a casino operator utilizing the accrual method of accounting, of amounts guaranteed for payment on "progressive" slot machines but not yet won by playing patrons.

I

A

There is no dispute as to the relevant facts; many of them are stipulated. Respondent Hughes Properties, Inc., is a Nevada corporation. It owns Harolds Club, a gambling casino, in Reno, Nev. It keeps its books and files its federal income tax returns under the accrual method of accounting. During the tax years in question (the fiscal years that ended June 30 in 1973 to 1977, inclusive), respondent owned and operated slot machines at its casino. Among these were a number of what are called "progressive" machines. A progressive machine, like a regular one, pays fixed amounts when certain symbol combinations appear on its reels. But a progressive machine has an additional "progressive" jackpot, which is won only when a different specified combination appears. The casino sets this jackpot initially at a minimal amount. The figure increases, according to a ratio determined by the casino, as money is gambled on the machine. The amount of the jackpot at any given time is registered on a "payoff indicator" on the face of the machine. That amount continues to increase as patrons play the machine until the jackpot is won or until a maximum, also determined by the casino, is reached.

The odds of winning a progressive jackpot obviously are a function of the number of reels on the machine, the number of positions on each reel, and the number of winning symbols. The odds are determined by the casino, provided only that

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for New York Life Insurance Co. by *Matthew J. Zinn* and *J. Walker Johnson;* and for Transamerica Corp. by *W. Reece Bader* and *Cameron W. Wolfe, Jr.*

there exists a possibility that the winning combination of symbols can appear.[1]

The Nevada Gaming Commission closely regulates the casino industry in the State, including the operation of progressive slot machines. In September 1972, the Commission promulgated § 5.110 of the Nevada Gaming Regulations. See App. 55. This section requires a gaming establishment to record at least once a day the jackpot amount registered on each progressive machine. § 5.110.5. Furthermore,

> "[n]o payoff indicator shall be turned back to a lesser amount, unless the amount by which the indicator has been turned back is actually paid to a winning player, or unless the change in the indicator reading is necessitated through a machine malfunction, in which case an explanation must be entered on the daily report as required in subsection 5." § 5.110.2; App. 55.

The regulation is strictly enforced. Nevada, by statute, authorizes the Commission to impose severe administrative sanctions, including license revocation, upon any casino that wrongfully refuses to pay a winning customer a guaranteed jackpot. See Nev. Rev. Stat. § 463.310 (1985).

It is respondent's practice to remove the money deposited by customers in its progressive machines at least twice every week and also on the last day of each month. The Commission does not regulate respondent's use of the funds thus collected, but, since 1977, it has required that a casino maintain a cash reserve sufficient to provide payment of the guaranteed amounts on all its progressive machines available to the public. Nev. Gaming Regs. § 5.110(3); App. 56.

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[1] A 1976 study of the 24 4-reel progressive machines then in operation at respondent's casino revealed that the average period between payoffs was approximately 4½ months, although one machine had been in operation for 13 months and another for 35 months without a payoff as of September 1, 1976. The payoff frequency of the other 22 machines ranged from a high of 14.3 months to a low of 1.9 months.

B

At the conclusion of each fiscal year, that is, at midnight on June 30, respondent entered the total of the progressive jackpot amounts shown on the payoff indicators as an accrued liability on its books. From that total, it subtracted the corresponding figure for the preceding year to produce the current tax year's increase in accrued liability. On its federal income tax return for each of its fiscal years 1973, 1974, 1975, and 1977, respondent asserted this net figure as a deduction under § 162(a) of the Internal Revenue Code of 1954, as amended, 26 U. S. C. § 162(a), as an ordinary and necessary expense "paid or incurred during the taxable year in carrying on any trade or business."[2] There is no dispute as to the amounts so determined or that a progressive jackpot qualifies for deduction as a proper expense of running a gambling business. See Tr. of Oral Arg. 7.

On audit, the Commissioner of Internal Revenue disallowed the deduction. He did so on the ground that, under Treas. Reg. § 1.461–1(a)(2), 26 CFR § 1.461–1(a)(2) (1985), an expense may not be deducted until "all the events have occurred which determine the fact of the liability and the amount thereof can be determined with reasonable accuracy." In his view, respondent's obligation to pay a particular progressive jackpot matures only upon a winning patron's pull of the handle in the future. According to the Commissioner, until that event occurs, respondent's liability to pay the jackpot is contingent and therefore gives rise to no deductible expense. Indeed, until then, there is no one who can make a claim for payment. See Tr. of Oral Arg. 11. Accordingly, the Commissioner determined deficiencies in respondent's income taxes for the years in question in the total amount of $433,441.88, attributable solely to the denial of these pro-

[2] No deduction was asserted for fiscal 1976 because the aggregate accrued liability at the end of fiscal 1976 was less than that at the end of fiscal 1975.

gressive jackpot deductions. Respondent paid the asserted deficiencies and filed timely claims for refund. When the claims were denied, respondent brought this suit for refunds in the Claims Court.

C

Each side moved for summary judgment. App. 15, 52. Respondent contended that the year-end amounts shown on the payoff indicators of the progressive slot machines were deductible, claiming that there was a reasonable expectation that payment would be made at some future date, that the casino's liability was fixed and irrevocable under Nevada law, that the accrual of those amounts conformed with generally accepted accounting principles, and that deductibility effected a timely and realistic matching of revenue and expenses.

The Claims Court denied the Government's motion for summary judgment but granted respondent's motion. 5 Cl. Ct. 641 (1984). It concluded that, under the Nevada Commission's rule, respondent's liability to pay the amounts on the progressive jackpot indicators became "unconditionally fixed," *id.*, at 645, at "midnight of the last day of the fiscal year," *id.*, at 647. The final event was "the last play (successful or not) of the machine before the close of the fiscal year, that is, the last change in the jackpot amount before the amount is recorded for accounting purposes." *Id.*, at 645. A contrary result would mismatch respondent's income and expenses. The court acknowledged that, if respondent were to go out of business, it would not owe the jackpot amount to any particular person. *Id.*, at 646. Nevertheless, the jackpot indicator amount "would still continue to be an *incurred* liability fixed by state law, for which [respondent] would continue to be responsible" (emphasis in original). *Id.*, at 645.

The Claims Court further acknowledged that its ruling was in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Nightingale* v. *United States*, 684 F. 2d 611 (1982), having to do with another Nevada casino, but it de-

clined to follow that precedent and specifically disavowed its reasoning. 5 Cl. Ct., at 644–647.

The Court of Appeals for the Federal Circuit affirmed the judgment "on the basis of the United States Claims Court opinion." 760 F. 2d 1292, 1293 (1985). It ruled that, under the accrual method of accounting, an expense is deductible in the tax year in which all the events have occurred that determine the fact of liability and the amount thereof can be determined with reasonable accuracy, and that liability exists "if there is an obligation to perform an act and the cost of performance can be measured in money." *Ibid.* The liability here was not contingent upon the time of payment or the identity of the jackpot winner. Rather, it was fixed by the Commission's regulation. The "contrary conclusion" of the Ninth Circuit in *Nightingale* was noted. 760 F. 2d, at 1293.

Because of the clear conflict between the two Circuits, we granted certiorari. 474 U. S. 1004 (1985).

II

Section 162(a) of the Internal Revenue Code allows a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Section 446(a) provides that taxable income "shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books." Under the "cash receipts and disbursements method," specifically recognized by § 446(c)(1), a taxpayer is entitled to deduct business expenses only in the year in which they are paid. Treas. Reg. §§ 1.446–1(c)(1)(i) and 1.461–1(a)(1), 26 CFR §§ 1.446–1(c)(1)(i), 1.461–1(a)(1) (1985). The Code also permits a taxpayer to compute taxable income by the employment of "an accrual method." § 446(c)(2). An accrual-method taxpayer is entitled to deduct an expense in the year in which it is "incurred," § 162(a), regardless of when it is actually paid.

For a number of years, the standard for determining when an expense is to be regarded as "incurred" for federal income tax purposes has been the "all events" test prescribed by the Regulations. See Treas. Reg. § 1.446–1(c)(1)(ii) (accruals in general); § 1.451–1(a) (accrual of income); and § 1.461–1(a)(2) (accrual of deductions). This test appears to have had its origin in a single phrase that appears in this Court's opinion in *United States* v. *Anderson*, 269 U. S. 422, 441 (1926) ("[I]t is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it"). Since then, the Court has described the "all events" test "established" in *Anderson* as "the 'touchstone' for determining the year in which an item of deduction accrues," and as "a fundamental principle of tax accounting." *United States* v. *Consolidated Edison Co. of New York*, 366 U. S. 380, 385 (1961) (citing cases).

Under the Regulations, the "all events" test has two elements, each of which must be satisfied before accrual of an expense is proper. First, all the events must have occurred which establish the fact of the liability. Second, the amount must be capable of being determined "with reasonable accuracy." Treas. Reg. § 1.446–1(c)(1)(ii). This case concerns only the first element, since the parties agree that the second is fully satisfied.

III

The Court's cases have emphasized that "a liability does not accrue as long as it remains contingent." *Brown* v. *Helvering*, 291 U. S. 193, 200 (1934); accord, *Dixie Pine Products Co.* v. *Commissioner*, 320 U. S. 516, 519 (1944). Thus, to satisfy the all-events test, a liability must be "final and definite in amount," *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281, 287 (1944), must be "fixed and absolute," *Brown* v. *Helvering*, 291 U. S., at 201, and must be "unconditional," *Lucas* v. *North Texas Lumber Co.*, 281 U. S. 11, 13 (1930). And one may say that "the tax law requires that a deduction be deferred until 'all the events' have

occurred that will make it fixed and certain." *Thor Power Tool Co.* v. *Commissioner*, 439 U. S. 522, 543 (1979).

A

The Government argues that respondent's liability for the progressive jackpots was not "fixed and certain," and was not "unconditional" or "absolute," by the end of the fiscal year, for there existed no person who could assert any claim to those funds. It takes the position, quoting *Nightingale* v. *United States*, 684 F. 2d, at 614, that the indispensable event "is the winning of the progressive jackpot by some fortunate gambler." It says that, because respondent's progressive jackpots had not been won at the close of the fiscal year, respondent had not yet incurred liability. Nevada law places no restriction on the odds set by the casino, as long as a possibility exists that the winning combination can appear. Thus, according to the Government, by setting very high odds respondent can defer indefinitely into the future the time when it actually will have to pay off the jackpot. The Government argues that if a casino were to close its doors and go out of business, it would not owe the jackpots to anyone. Similarly, if it were to sell its business, or cease its gaming operations, or go into bankruptcy, or if patrons were to stop playing its slot machines, it would have no obligation.

B

We agree with the Claims Court and with the Federal Circuit and disagree with the Government for the following reasons:

1. The effect of the Nevada Gaming Commission's regulations was to fix respondent's liability. Section 5.110.2 forbade reducing the indicated payoff without paying the jackpot, except to correct a malfunction or to prevent exceeding the limit imposed. App. 55. Respondent's liability, that is, its obligation to pay the indicated amount, was not contingent. That an extremely remote and speculative possibility

existed that the jackpot might never be won,[3] did not change the fact that, as a matter of state law, respondent had a fixed liability for the jackpot which it could not escape. The effect of Nevada's law was equivalent to the situation where state law requires the amounts of the jackpot indicators to be set aside in escrow pending the ascertainment of the identity of the winners. The Government concedes that, in the latter case, the liability has accrued, Tr. of Oral Arg. 20–21, even though the same possibility would still exist that the winning pull would never occur.

2. The Government misstates the need for identification of the winning player. That is, or should be, a matter of no relevance for the casino operator. The obligation is there, and whether it turns out that the winner is one patron or another makes no conceivable difference as to basic liability.

3. The Government's heavy reliance on *Brown* v. *Helvering*, 291 U. S. 193 (1934), in our view, is misplaced. That case concerned an agent's commissions on sales of insurance policies, and the agent's obligation to return a proportionate part of the commission in case a policy was canceled. The agent sought to deduct from gross income an amount added during the year to his reserve for repayment of commissions. This Court agreed with the Commissioner's disallowance of the claimed deduction because the actual event that would create the liability—the cancellation of a particular policy in a later year—"[did] not occur during the taxable year," *id.*, at 200, but rather occurred only in the later year in which the policy was in fact canceled. Here, however, the event creating liability, as the Claims Court recognized, was the last play of the machine before the end of the fiscal year,

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[3] An affidavit of the president of respondent's Harolds Club Division, submitted in the Claims Court in support of respondent's motion for summary judgment, states that all the progressive machine jackpots unpaid as of June 30, 1977, "were subsequently won and paid to customers." App. 62.

since that play fixed the jackpot amount irrevocably. 5 Cl. Ct., at 645. That event occurred during the taxable year.

4. The Government's argument that the fact that respondent treats unpaid jackpots as liabilities for financial accounting purposes does not justify treating them as liabilities for tax purposes is unpersuasive. Proper financial accounting and acceptable tax accounting, to be sure, are not the same. Justice Brandeis announced this fact well over 50 years ago: "The prudent business man often sets up reserves to cover contingent liabilities. But they are not allowable as deductions." *Lucas* v. *American Code Co.*, 280 U. S. 445, 452 (1930). See also *Brown* v. *Helvering*, 291 U. S., at 201–202, and *Lucas* v. *Kansas City Structural Steel Co.*, 281 U. S. 264, 269 (1930). The Court has long recognized "the vastly different objectives that financial and tax accounting have." *Thor Power Tool Co.* v. *Commissioner*, 439 U. S., at 542. The goal of financial accounting is to provide useful and pertinent information to management, shareholders, and creditors. On the other hand, the major responsibility of the Internal Revenue Service is to protect the public fisc. *Ibid.* Therefore, although § 446(c)(2) permits a taxpayer to use an accrual method for tax purposes if he uses that method to keep his books, § 446(b) specifically provides that if the taxpayer's method of accounting "does not clearly reflect income," the Commissioner may impose a method that "does clearly reflect income." Thus, the "Commissioner has broad powers in determining whether accounting methods used by a taxpayer clearly reflect income." *Commissioner* v. *Hansen*, 360 U. S. 446, 467 (1959). See also *Thor Power Tool Co.* v. *Commissioner*, 439 U. S., at 532; *American Automobile Assn.* v. *United States*, 367 U. S. 687, 697–698 (1961). The Regulations carry this down specifically to "the accounting treatment of any item." Treas. Reg. § 1.446–1(a)(1).

Granting all this—that the Commissioner has broad discretion, that financial accounting does not control for tax purposes, and that the mere desirability of matching expenses

with income will not necessarily sustain a taxpayer's deduction, see *American Automobile Assn.* v. *United States*, 367 U. S., at 690; *Thor Power Tool Co.* v. *Commissioner*, 439 U. S., at 541—the Commissioner's disallowance of respondent's deductions was not justified in this case. As stated above, these jackpot liabilities were definitely fixed. A part of the machine's intake was to be paid out, that amount was known, and only the exact time of payment and the identity of the winner remained for the future. But the accrual method itself makes irrelevant the timing factor that controls when a taxpayer uses the cash receipts and disbursements method.[4]

5. The Government suggests that respondent's ability to control the timing of payouts shows both the contingent nature of the claimed deductions and a potential for tax avoidance. It speaks of the time value of money, of respondent's ability to earn additional income upon the jackpot amounts it retains until a winner comes along, of respondent's "virtually unrestricted discretion in setting odds," Brief for United States 31, and of its ability to transfer amounts from one machine to another with the accompanying capacity to defer indefinitely into the future the time at which it must make payment to its customers. All this, the Government says, unquestionably contains the "potential for tax avoidance." See *Thor Power Tool Co.* v. *Commissioner*, 439 U. S., at 538. And the Government suggests that a casino operator could put extra machines on the floor on the last day of the tax year with whatever initial jackpots it specifies and with whatever odds it likes, and then, on the taxpayer's theory,

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[4] The fact that Congress once briefly adopted statutory provisions that specifically would have permitted a taxpayer to deduct anticipated expenses by a reserve mechanism is hardly significant. See §§ 462(a) and (d)(1)(B) of the 1954 Code as originally adopted, 68A Stat. 158–159, repealed retroactively by the Act of June 15, 1955, ch. 143, §§ 1 and 3, 69 Stat. 134, 135. But see Deficit Reduction Act of 1984, § 91(a), 98 Stat. 598.

could take a current deduction for the full amount even though payment of the jackpots might not occur for many years, citing *Nightingale*, 684 F. 2d, at 615.

None of the components that make up this parade of horribles, of course, took place here. Nothing in this record even intimates that respondent used its progressive machines for tax-avoidance purposes. Its income from these machines was less than 1% of its gross revenue during the tax years in question. See App. 35–36. Respondent's revenue from progressive slot machines depends on inducing gamblers to play the machines, and, if it sets unreasonably high odds, customers will refuse to play and will gamble elsewhere. Thus, respondent's economic self-interest will keep it from setting odds likely to defer payoffs too far into the future.[5] Nor, with Nevada's strictly imposed controls, was any abuse of the kind hypothesized by the Government likely to happen. In any event, the Commissioner's ability, under § 446(b) of the Code, 26 U. S. C. § 446(b), to correct any such abuse is the complete practical answer to the Government's concern. If a casino manipulates its use of progressive slot machines to avoid taxes, the Commissioner has the power to find that its accounting does not accurately reflect its income and to require it to use a more appropriate accounting method. Finally, since the casino of course must pay taxes on the income it earns from the use of as-yet-unwon jackpots, the Government vastly overestimates the time value of respondent's deductions.

6. There is always a possibility, of course, that a casino may go out of business, or surrender or lose its license, or go

[5] Respondent also is unlikely to set extremely high initial jackpots on its machines, since that practice would increase the casino's risk. The initial progressive jackpot amount is the casino's money. If a patron gets the winning combination soon after the machine goes into service, the casino will not have time to recoup the initial jackpot from money gambled by the public. Thus, casinos will tend to set rather low initial jackpots, relying on a percentage of the funds gambled by previous players to contribute the bulk of the progressive jackpot.

into bankruptcy, with the result that the amounts shown on the jackpot indicators would never be won by playing patrons. But this potential nonpayment of an incurred liability exists for every business that uses an accrual method, and it does not prevent accrual. See, *e. g.*, *Wien Consolidated Airlines, Inc.* v. *Commissioner*, 528 F. 2d 735 (CA9 1976). "The existence of an absolute liability is necessary; absolute certainty that it will be discharged by payment is not." *Helvering* v. *Russian Finance & Constr. Corp.*, 77 F. 2d 324, 327 (CA2 1935). And if any of the events hypothesized by the Government should occur, the deducted amounts would qualify as recaptured income subject to tax. Treas. Reg. § 1.461–1(a)(2).

7. Finally, the result in *United States* v. *Anderson*, 269 U. S. 422 (1926), a case to which the Government makes repeated reference, is itself instructive. The issue there was the propriety of the accrual of a federal munitions tax prior to its actual assessment. The assessment was required before the tax became due. The Government's position, in contrast to its position in the present case, was that the tax liability accrued before assessment. The Court held that the absence of the assessment did not prevent accrual of the tax. It recognized that the taxpayer's "true income for the year . . . could not have been determined without deducting . . . the . . . expenses attributable to the production of that income during the year." *Id.*, at 440. One of the expenses that necessarily attended the production of munitions income was the commitment of a particular portion of the revenue generated to a "reserve for munitions taxes." *Ibid.* Similarly, one of the expenses that necessarily attends the production of income from a progressive slot machine is the commitment of a particular portion of the revenue generated to an irrevocable jackpot. Respondent's true income from its progressive slot machines is only that portion of the money gambled which it is entitled to keep.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE joins, dissenting.

Unlike the Court, see *ante*, at 605–606, I believe that the distinction between the nonpayment of an existing obligation and the nonexistence of an obligation is of controlling importance in this case.

It is common ground that the taxpayer can accrue as a deduction the jackpots in its progressive slot machines only if "all the events have . . . occurred which fix the liability." Treas. Reg. § 1.461–1(a)(2), 26 CFR § 1.461–1(a)(2) (1985). See, *e. g.*, *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281, 284, 287 (1944); *Dixie Pine Products Co.* v. *Commissioner*, 320 U. S. 516, 519 (1944); *Brown* v. *Helvering*, 291 U. S. 193, 200–201 (1934). See generally *United States* v. *Consolidated Edison Co. of New York*, 366 U. S. 380, 385–386 (1961). The question is whether an "obligation" created by the rules of a state gaming commission and defeasible at the election of the taxpayer is "fixed" within the meaning of the Treasury Regulation. To me, the answer is clearly "no."

"Under Nevada law," if the taxpayer in this case "were to surrender its gaming license, it would no longer be subject to the gaming laws and regulations and could thus avoid the payment of the liability." App. 23. Thus, "the bankruptcy of the [taxpayer], or the surrender of its gaming license could relieve it of its obligation." *Id.*, at 44.

On these facts, the taxpayer has no present liability to accrue. Rather, the taxpayer's obligation to pay the jackpots in this case resembles the taxpayer's obligation to pay the cost of overhauling its aircraft engines and airframes in *World Airways, Inc.* v. *Commissioner*, 62 T. C. 786 (1974), aff'd, 564 F. 2d 886 (CA9 1977). In that case, the Tax Court held that the taxpayer, an airline, did not satisfy the "all events" test and hence could not accrue and deduct any portion of these costs, 62 T. C., at 802, 805—despite the existence of contracts obligating the taxpayer to pay, upon the completion of an overhaul, an amount for each hour of

flight time since the previous overhaul, *id.*, at 791–793, and a statutory obligation to overhaul its engines and airframes after a specified number of flight hours, *id.*, at 803. Of critical importance to the decision before us today, the court distinguished between the *nonpayment* of a legal obligation and the *nonexistence* of an obligation by considering the taxpayer's liability in the event of a bankruptcy:

> "The bankruptcy of petitioner [the taxpayer] or the crash or permanent grounding of an aircraft might conceivably relieve petitioner of the payment of overhaul costs. The occurrences of any of these contingencies, however, would not relieve petitioner of an *existing* obligation to pay any overhaul costs. Rather, the occurrence would mean that no obligation to pay would ever come into existence. Petitioner has not shown that its liability for the accrued overhaul costs was absolutely fixed in the year of accrual. The contingencies referred to would act to prevent a potential liability from coming into existence." *Id.*, at 804 (emphasis in original).

The court recognized that the risk of bankruptcy or disaster was remote. But it added that "there exists another contingency whose occurrence is not unlikely": "Petitioner has sold five piston aircraft and one jet aircraft since 1965. The five piston aircraft owned by petitioner during 1965, and 1966, were sold prior to the time when major airframe overhaul was required." *Ibid.*

Here, too, the taxpayer has no obligation that could be discharged in a bankruptcy court—a fact that confirms that it has no present liability to pay the jackpots on its progressive slot machines. And there likewise exists a contingency under which it is not at all unlikely that a slot machine owner would elect to escape its liability. If the gross amount of the accruals on these machines should ever exceed the net value of the business—perhaps as a result of shrewd management—it could liquidate at a profit without having any liabil-

ity to anyone for what the Court mistakenly describes as a "fixed liability." By simply tendering its gaming license the taxpayer would avoid its liability on the jackpots. This option is exercisable in the sole discretion of the taxpayer at any point in time. My research has revealed no other instance in which the Commissioner has been forced to allow accrual of a deduction when the expense deducted may be avoided entirely at the election of the taxpayer. This feature of the deduction before us unquestionably contains the "potential for tax avoidance," *Thor Power Tool Co.* v. *Commissioner*, 439 U. S. 522, 538 (1979), and I think it lies well within the Commissioner's authority to interpret the Regulation to forbid it, see *Lucas* v. *American Code Co.*, 280 U. S. 445, 449 (1930). I respectfully dissent.

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* AMERICAN HOSPITAL ASSOCIATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84-1529. Argued January 15, 1986—Decided June 9, 1986

Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." In 1984, the Secretary of Health and Human Services (Secretary) promulgated regulations requiring: (1) health care providers receiving federal funds to post notices that because of § 504's prohibition against discrimination on the basis of handicap, health care should not be withheld from infants on the basis of their mental or physical impairments; (2) state child protective services agencies to establish procedures to prevent unlawful medical neglect of handicapped infants, and when considered necessary, in the judgment of the responsible official of the Department of Health and Human Services, to protect a handicapped infant's life or health; (3) immediate access to patient records; and (4) expedited compliance actions. In consolidated actions in Federal District Court, respondents sought to declare the regulations invalid and to enjoin their enforcement. The court granted the requested relief on the authority of *United States* v. *University Hospital*, 729 F. 2d 144 (CA2), and the Court of Appeals affirmed on the basis of that earlier decision.

Held: The judgment is affirmed.

794 F. 2d 676, affirmed.

JUSTICE STEVENS, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE POWELL, concluded that the regulations in question are not authorized by § 504. Pp. 624-647.

(a) A hospital's withholding of treatment from a handicapped infant when no parental consent has been given cannot violate § 504, for without the parents' consent the infant is neither "otherwise qualified" for treatment nor has he been denied care "solely by reason of his handicap." There is nothing in the administrative record documenting the Secretary's belief that there exists "discriminatory withholding of medical care" in violation of § 504 which would justify federal regulation. None

of the examples cited by the Secretary as justification for the regulation suggest that the hospitals receiving federal funds, as opposed to parents, withheld medical care on the basis of handicap. Pp. 630–636.

(b) The complaint-handling process the Secretary would impose on unwilling state agencies is totally foreign to the authority to prevent discrimination conferred on him by § 504. While the Secretary can require state agencies to document their *own* compliance with § 504, nothing in § 504 authorizes him to commandeer state agencies to enforce compliance by *other* recipients of federal funds (in this instance, hospitals). Pp. 637–642.

(c) The Secretary's basis for federal intervention is perceived discrimination against handicapped infants in violation of § 504, and yet the Secretary has pointed to no evidence that such discrimination occurs. The administrative record does not contain the reasoning and evidence necessary to sustain federal intervention into a historically state-administered decisional process that appears—for lack of any contrary evidence—to be functioning in full compliance with § 504. Nothing in § 504 authorizes the Secretary to dispense with the law's focus on discrimination and instead to employ federal resources to save the lives of handicapped newborns, without regard to whether they are victims of discrimination by recipients of federal funds or not. Section 504 does not authorize the Secretary to give unsolicited advice either to parents, to hospitals, or to state officials who are faced with difficult treatment decisions concerning handicapped children. The administrative record demonstrates that the Secretary has asserted the authority to conduct on-site investigations, to inspect hospital records, and to participate in the decisional process in emergency cases in which there was no colorable basis for believing that a violation of § 504 had occurred or was about to occur. These investigative actions are not authorized by § 504, and the regulations that purport to authorize a continuation of them are invalid. Pp. 642–647.

STEVENS, J., announced the judgment of the Court, and delivered an opinion in which MARSHALL, BLACKMUN, and POWELL, JJ., joined. BURGER, C. J., concurred in the judgment. WHITE, J., filed a dissenting opinion, in which BRENNAN, J., joined and in Parts I, II, IV, and V of which O'CONNOR, J., joined, *post*, p. 648. O'CONNOR, J., filed a dissenting opinion, *post*, p. 665. REHNQUIST, J., took no part in the consideration or decision of the case.

Deputy Assistant Attorney General Cooper argued the cause for petitioner. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Reynolds, Dep-*

uty Solicitor General Wallace, Edwin S. Kneedler, Brian K. Landsberg, and *Mark L. Gross.*

Richard L. Epstein argued the cause for respondents American Hospital Association et al. With him on the brief were *Stuart M. Gerson, William G. Kopit, David H. Larry,* and *Robert W. McCann. Benjamin W. Heineman, Jr.,* argued the cause for respondents American Medical Association et al. With him on the brief were *Carter G. Phillips, Vincent F. Prada, Newton N. Minow, Jack R. Bierig, Ann E. Allen,* and *Joseph A. Keyes, Jr.**

JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE POWELL join.

This case presents the question whether certain regulations governing the provision of health care to handicapped infants are authorized by § 504 of the Rehabilitation Act of 1973. That section provides, in part:

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*Briefs of *amici curiae* urging reversal were filed for the American Association on Mental Deficiency et al. by *James W. Ellis* and *Ruth A. Luckasson;* for the American Coalition of Citizens with Disabilities et al. by *Thomas K. Gilhool, Frank J. Laski, Michael Churchill,* and *Timothy M. Cook;* for the Associaion for Retarded Citizens of the United States et al. by *Martin H. Gerry;* for the Disability Rights Education & Defense Fund, Inc., et al. by *Barbara M. Milstein;* for the Rutherford Institute et al. by *W. Charles Bundren, Guy O. Farley, Jr., James J. Knicely, John W. Whitehead, Thomas O. Kotouc, Wendell R. Bird,* and *William B. Hollberg;* for Carlton Johnson by *James Bopp, Jr.,* and *Thomas J. Marzen;* and for David G. McLone, M. D., et al. by *Dennis J. Horan, Victor G. Rosenblum, Edward R. Grant,* and *Maura K. Quinlan.*

Briefs of *amici curiae* urging affirmance were filed for the American Academy of Pediatrics et al. by *Stephan E. Lawton, Jack N. Goodman,* and *John A. Hodges;* for the State University of New York by *Robert Abrams,* Attorney General of New York, *Robert Hermann,* Solicitor General, *Frederick K. Mehlman, Stanley A. Camhi, Paul M. Glickman, Donna Miller, Martha O. Shoemaker,* and *Jane Levine,* Assistant Attorneys General, and *Sanford H. Levine;* and for George P. Smith II, *pro se.*

James Bopp, Jr., filed a brief for Senator Orrin G. Hatch et al. as *amici curiae.*

"No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 87 Stat. 394, 29 U. S. C. § 794.[1]

I

The American Medical Association, the American Hospital Association, and several other respondents[2] challenge the validity of Final Rules promulgated on January 12, 1984, by the Secretary of the Department of Health and Human Services.[3] These Rules establish "Procedures relating to health care for handicapped infants," and in particular require the posting of informational notices, authorize expedited access to records and expedited compliance actions, and command state child protective services agencies to "prevent instances of unlawful medical neglect of handicapped infants." 45 CFR § 84.55 (1985).

Although the Final Rules comprise six parts, only the four mandatory components are challenged here.[4] Subsection (b)

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[1] "Handicapped individual" is defined in § 7(7)(B) of the Act, as amended, as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 92 Stat. 2985, 29 U. S. C. § 706(7)(B).

[2] The respondents include the Hospital Association of New York State, the American College of Obstetricians and Gynecologists, the Association of American Medical Colleges, the American Academy of Family Physicians, and certain individual physicians.

[3] Margaret Heckler occupied the position of Secretary throughout the rulemaking period. On December 13, 1985, after certiorari had been granted, Dr. Otis Bowen assumed that position. Despite the fact that Dr. Bowen was not responsible for promulgation of the Final Rules, for the sake of continuity our references assume that he was. For ease of reference we refer to the Secretary, the Department, and HHS interchangeably.

[4] In subsection (a) the Department "encourages each recipient health care provider that provides health care services to infants" to establish an

is entitled "Posting of informational notice" and requires every "recipient health care provider that provides health care services to infants in programs or activities receiving

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"Infant Care Review Committee (ICRC)" to assist in the development of treatment standards for handicapped infants and to provide assistance in making individual treatment decisions. 45 CFR § 84.55(a) (1985). In subsection (f), the Department describes its version of a model ICRC.

Subsection (f) also provides that "[t]he activities of the ICRC will be guided by . . . [t]he interpretative guidelines of the Department." 45 CFR § 84.55(f)(1)(ii)(A) (1985). These guidelines, which are "illustrative" and "do not independently establish rules of conduct," pt. 84, appendix C, ¶ (a), set forth the Department's interpretation of § 504. Although they do not contain any definition of "discrimination," they do state that § 504 is not applicable to parents and that the regulation applies to only two categories of activities of hospitals: (1) refusals to provide treatment or nourishment to handicapped infants whose parents have consented to, or requested, such treatment; and (2) the failure or refusal to take action to override a parental decision to withhold consent for medically beneficial treatment or nourishment. With respect to the second category, the guidelines state that the hospital may not "solely on the basis of the infant's present or anticipated future mental or physical impairments, fail to follow applicable procedures on reporting such incidents to the child protective services agency or to seek judicial review." 45 CFR pt. 84, appendix C, ¶ (a)(4) (1985).

With respect to the first category, the guidelines do not state that § 504 categorically prohibits a hospital from withholding requested treatment or nourishment "solely on the basis of present or anticipated physical or mental impairments of an infant." 45 CFR pt. 84, appendix C, ¶ (a)(1). Rather, the substantive guidelines and two of the illustrative examples recognize that the etiology of and prognosis for particular handicapping conditions may justify "a refusal to treat solely on the basis of those handicapping conditions." ¶ (a)(2) (§ 504 does not require "futile treatment"); ¶ (a)(5)(iii) (§ 504 does not require treatment of anencephaly because it would "do no more than temporarily prolong the act of dying"); ¶ (a)(iv) (same with severely premature and low birth weight infants). In general, the guidelines seem to make a hospital's liability under § 504 dependent on proof that (1) it refused to provide requested treatment or nourishment solely on the basis of an infant's handicapping condition, and (2) the treatment or nourishment would have been medically beneficial. See ¶¶ (a)(1)–(3), (5).

The guidelines also describe how HHS will respond to "complaints of suspected life threatening noncompliance" with § 504 in this context, progress-

Federal financial assistance"—a group to which we refer generically as "hospitals"—to post an informational notice in one of two approved forms. 45 CFR § 84.55(b) (1985). Both forms include a statement that § 504 prohibits discrimination on the basis of handicap, and indicate that because of this prohibition "nourishment and medically beneficial treatment (as determined with respect for reasonable medical judgments) should not be withheld from handicapped infants solely on the basis of their present or anticipated mental or physical impairments." 45 CFR §§ 84.55(b)(3), (4) (1985). The notice's statement of the legal requirement does not distinguish between medical care for which parental consent has been obtained and that for which it has not. The notice must identify the telephone number of the appropriate child protective services agency and, in addition, a toll-free number for the Department that is available 24 hours a day. *Ibid.* Finally, the notice must state that the "identity of callers will be kept confidential" and that federal law prohibits retaliation "against any person who provides information about possible violations." *Ibid.*

Subsection (c), which contains the second mandatory requirement, sets forth "Responsibilities of recipient state child protective services agencies." Subsection (c) does not mention § 504 (or any other federal statute) and does not even use the word "discriminate." It requires every designated agency to establish and maintain procedures to ensure that

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ing from telephone inquiries to the hospital to obtain information about the condition of the infant, to requests for access to records, and finally to on-site investigations and litigation in appropriate cases. ¶ (b). The guidelines do not draw any distinction between cases in which parental consent has been withheld and those in which it has been given. Nor do they draw any distinction between cases in which hospitals have made a report of parental refusal to consent to treatment and those in which no report to a state agency has been made. They do announce that the "Department will also seek to coordinate its investigation with any related investigations by the state child protective services agency so as to minimize potential disruption," ¶ (b)(4), indicating that the Department's investigations may continue even in cases that have previously been referred to a state agency.

"the agency utilizes its full authority pursuant to state law to prevent instances of unlawful medical neglect of handicapped infants." 45 CFR § 84.55(c)(1). Mandated procedures must include (1) "[a] requirement that health care providers report on a timely basis . . . known or suspected instances of unlawful medical neglect of handicapped infants," § 84.55(c)(1)(i); (2) a method by which the state agency can receive timely reports of such cases, § 84.55(c)(1)(ii); (3) "immediate" review of those reports, including "on-site investigation," where appropriate, § 84.55(c)(1)(iii); (4) protection of "medically neglected handicapped infants" including, where appropriate, legal action to secure "timely court order[s] to compel the provision of necessary nourishment and medical treatment," § 84.55(c)(1)(iv); and (5) "[t]imely notification" to HHS of every report of "suspected unlawful medical neglect" of handicapped infants. The preamble to the Final Rules makes clear that this subsection applies "where a refusal to provide medically beneficial treatment is a result, not of decisions by a health care provider, but of decisions by parents." 49 Fed. Reg. 1627 (1984).

The two remaining mandatory regulations authorize "[e]xpedited access to records" and "[e]xpedited action to effect compliance." 45 CFR §§ 84.55(d), (e) (1985). Subsection (d) provides broadly for immediate access to patient records on a 24-hour basis, with or without parental consent, "when, in the judgment of the responsible Department official, immediate access is necessary to protect the life or health of a handicapped individual." § 84.55(d). Subsection (e) likewise dispenses with otherwise applicable requirements of notice to the hospital "when, in the judgment of the responsible Department official, immediate action to effect compliance is necessary to protect the life or health of a handicapped individual." § 84.55(e). The expedited compliance provision is intended to allow "the government [to] see[k] a temporary restraining order to sustain the life of a handicapped infant in

imminent danger of death." 49 Fed. Reg. 1628 (1984). Like the provision affording expedited access to records, it applies without regard to whether parental consent to treatment has been withheld or whether the matter has already been referred to a state child protective services agency.

II

The Final Rules represent the Secretary's ultimate response to an April 9, 1982, incident in which the parents of a Bloomington, Indiana, infant with Down's syndrome and other handicaps refused consent to surgery to remove an esophageal obstruction that prevented oral feeding. On April 10, the hospital initiated judicial proceedings to override the parents' decision, but an Indiana trial court, after holding a hearing the same evening, denied the requested relief. On April 12 the court asked the local Child Protection Committee to review its decision. After conducting its own hearing, the Committee found no reason to disagree with the court's ruling.[5] The infant died six days after its birth.

Citing "heightened public concern" in the aftermath of the Bloomington Baby Doe incident, on May 18, 1982, the director of the Department's Office of Civil Rights, in response to a directive from the President, "remind[ed]" health care providers receiving federal financial assistance that newborn in-

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[5] At the instance of the local prosecutor, the Indiana courts on April 13 held another hearing at which the court concluded that "Baby Doe" had not been neglected under Indiana's Child in Need of Services statute. Additional attempts to seek judicial intervention were rebuffed the same day. On the following day, the Indiana Court of Appeals denied a request for an immediate hearing. *In re Infant Doe*, No. GU 8204-004A (Monroe County Cir. Ct., Apr. 12, 1982). The Indiana Supreme Court, by a vote of 3 to 1, rejected a petition for a writ of mandamus. *State ex rel. Infant Doe* v. *Baker*, No. 482 S 140 (May 27, 1982). The infant died while a stay was being sought in this Court, and we subsequently denied certiorari. *Infant Doe* v. *Bloomington Hospital*, 464 U. S. 961 (1983).

fants with handicaps such as Down's syndrome were protected by § 504. 47 Fed. Reg. 26027 (1982).[6]

This notice was followed, on March 7, 1983, by an "Interim Final Rule" contemplating a "vigorous federal role." 48 Fed. Reg. 9630. The Interim Rule required health care providers receiving federal financial assistance to post "in a conspicuous place in each delivery ward, each maternity ward, each pediatric ward, and each nursery, including each intensive care nursery" a notice advising of the applicability of § 504 and the availability of a telephone "hotline" to report suspected violations of the law to HHS. *Id.*, at 9631. Like the Final Rules, the Interim Rule also provided for expedited compliance actions and expedited access to records and facilities when, "in the judgment of the responsible Department official," immediate action or access was "necessary to protect the life or health of a handicapped individual." *Id.*, at 9632. The Interim Rule took effect on March 22.

On April 6, 1983, respondents American Hospital Association et al. filed a complaint in the Federal District Court for the Southern District of New York seeking a declaration that the Interim Final Rule was invalid and an injunction against its enforcement. Little more than a week later, on April 14, in a similar challenge brought by the American Academy of Pediatrics and other medical institutions, the Federal District Court for the District of Columbia declared the Interim Final Rule "arbitrary and capricious and promulgated in violation of the Administrative Procedure Act." *American Academy of Pediatrics* v. *Heckler*, 561 F. Supp. 395, 404 (1983). The District Judge in that case "conclude[d] that haste and inexperience ha[d] resulted in agency action based on inadequate consideration" of several relevant concerns

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[6] The notice maintained that hospitals would violate § 504 if they "allow[ed] [an] infant" to remain in their care after "the infant's parents or guardian [had withheld consent to] treatment or nourishment discriminatorily." 47 Fed. Reg. 26027 (1982). The Secretary no longer subscribes to this reading of the statute. See 49 Fed. Reg. 1631 (1984).

and, in the alternative, found that the Secretary had improperly failed to solicit public comment before issuing the Rule. *Id.*, at 399–401.

On July 5, 1983, the Department issued new "Proposed Rules" on which it invited comment. Like the Interim Final Rule, the Proposed Rules required hospitals to post informational notices in conspicuous places and authorized expedited access to records to be followed, if necessary, by expedited compliance action. 48 Fed. Reg. 30851. In a departure from the Interim Final Rule, however, the Proposed Rules required federally assisted state child protective services agencies to utilize their "full authority pursuant to State law to prevent instances of medical neglect of handicapped infants." *Ibid.* Mandated procedures mirrored those contained in the Final Rules described above. *Ibid.* The preamble and appendix to the Proposed Rules did not acknowledge that hospitals and physicians lack authority to perform treatment to which parents have not given their consent.[7]

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[7] In explaining the need for the Proposed Rules, the preamble, although mentioning "parental rights over their children," insisted that physicians' "acquiescence in nontreatment of Down's children is apparently *because of* the handicap," rather than, it must be supposed, lack of parental consent. 48 Fed. Reg. 30848 (1983).

The effect of parental nonconsent was not even mentioned in the appendix to the Proposed Rules. That section, which set forth the Department's view of "the manner in which Section 504 applies to the provision of health care services to handicapped infants," *id.*, at 30851, declared that § 504 mandated "the basic provision of nourishment, fluids, and routine nursing care." *Id.*, at 30852. The provision of sustenance, according to the Department, was "not an option for medical judgment." *Ibid.* Thus, "[e]ven if a handicapped infant faces imminent and unavoidable death, no health care provider should take upon itself to cause death by starvation or dehydration." *Ibid.*

In addition to its unqualified endorsement of nourishment as required by § 504, the appendix announced that "[a]ny decision not to correct intestinal atresia in a Down's Syndrome child, unless an additional complication medically warrants such decision, *must* be deemed a denial of services based on

After the period for notice and comment had passed, HHS, on December 30, 1983, promulgated the Final Rules and announced that they would take effect on February 13, 1984. On March 12 of that year respondents American Hospital Association et al. amended their complaint and respondents American Medical Association et al. filed suit to declare the new regulations invalid and to enjoin their enforcement. The actions were consolidated in the Federal District Court for the Southern District of New York, which awarded the requested relief on the authority of the decision of the United States Court of Appeals for the Second Circuit in *United States* v. *University Hospital*, 729 F. 2d 144 (1984). *American Hospital Assn.* v. *Heckler*, 585 F. Supp. 541 (1984); App. to Pet. for Cert. 50a. On appeal, the parties agreed that the reasoning of the Court of Appeals in *University Hospital*, if valid, required a judgment against the Government in this case.[8] In accordance with its earlier decision, the Court of Appeals summarily affirmed the District Court. 694 F. 2d 676 (1984). Since the judgment here thus rests entirely on the reasoning of *University Hospital*, it is appropriate to examine that case now.

III

On October 11, 1983, after the Department's Interim Final Rule had been declared invalid but before it had promulgated the Final Rules challenged here, a child with multiple congenital defects known as "Baby Jane Doe" was born in Long

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the handicap of Down's Syndrome. The same reasoning applies to a case of Down's Syndrome [infant] with esophogeal atresia, and the denial of surgery to correct atresia." *Ibid.* (emphasis added). The Department did not discuss the relevance of parental nonconsent to the hospital's treatment obligation under § 504, presumably because it was irrelevant given its understanding of the provision at that time.

[8] Indeed, although the Government took an appeal from the District Court's judgment, it filed a motion for summary disposition after the Court of Appeals denied its motion for initial consideration en banc. Its motion expressly acknowledged that an affirmance was compelled by the decision in *University Hospital*.

Island, New York, and was promptly transferred to University Hospital for corrective surgery. After consulting with physicians and other advisers, the parents decided to forgo corrective surgery that was likely to prolong the child's life, but would not improve many of her handicapping conditions.

On October 16, 1983, an unrelated attorney named Washburn filed suit in the New York Supreme Court, seeking the appointment of a guardian *ad litem* for the infant who would direct the hospital to perform the corrective surgery. The trial court granted that relief on October 20, but was reversed the following day by the Appellate Division which found that the "concededly concerned and loving parents" had "chosen one course of appropriate medical treatment over another" and made an informed decision that was "in the best interest of the infant." *Weber* v. *Stony Brook Hospital*, 95 App. Div. 2d 587, 589, 467 N. Y. S. 2d 685, 687 *(per curiam)*. On October 28, the New York Court of Appeals affirmed, but on the ground that the trial court should not have entertained a petition to initiate child neglect proceedings by a stranger who had not requested the aid of the responsible state agency. *Weber* v. *Stony Brook Hospital*, 60 N. Y. 2d 208, 211–213, 456 N. E. 2d 1186, 1187–1188 *(per curiam)*.

While the state proceedings were in progress, on October 19, HHS received a complaint from a "private citizen" that Baby Jane Doe was being discriminatorily denied medically indicated treatment. HHS promptly referred this complaint to the New York State Child Protective Service. (The agency investigated the charge of medical neglect and soon thereafter concluded that there was no cause for state intervention.) In the meantime, before the State Child Protective Service could act, HHS on October 22, 1983, made repeated requests of the hospital to make its records available for inspection in order to determine whether the hospital was in compliance with § 504. The hospital refused the requests

and advised HHS that the parents had not consented to a release of the records.

Subsequently, on November 2, 1983, the Government filed suit in Federal District Court invoking its general authority to enforce § 504 and 45 CFR § 84.61 (1985), a regulation broadly authorizing access to information necessary to ascertain compliance. The District Court allowed the parents to intervene as defendants, expedited the proceeding, and ruled against the Government. It reasoned that the Government had no right of access to information because the record clearly established that the hospital had not violated the statute. *United States* v. *University Hospital, State Univ. of N. Y. at Stony Brook*, 575 F. Supp. 607, 614 (EDNY). Since the uncontradicted evidence established that the hospital "ha[d] at all times been willing to perform the surgical procedures in question, if only the parents . . . would consent," the hospital "failed to perform the surgical procedures in question, not because Baby Jane Doe [wa]s handicapped, but because her parents ha[d] refused to consent." *Ibid.*

The Court of Appeals affirmed. In an opinion handed down on February 23, 1984, six weeks after promulgation of the Final Rules, it agreed with the District Court that "an agency is not entitled to information sought in an investigation that 'overreaches the authority Congress has given.'" 729 F. 2d, at 150 (quoting *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 217 (1946)). It further held that although Baby Jane Doe was a "handicapped individual," she was not "otherwise qualified" within the meaning of § 504 because "where medical treatment is at issue, it is typically the handicap itself that gives rise to, or at least contributes to the need for services"; as a result "the 'otherwise qualified' criterion of section 504 cannot be meaningfully applied to a medical treatment decision." 729 F. 2d, at 156. For the same reason, the Court of Appeals rejected the Government's argument that Baby Jane Doe had been "subjected to discrimination" under § 504: "Where the handicapping condi-

tion is related to the condition(s) to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was 'discriminatory'." *Id.*, at 157. The difficulty of applying § 504 to individual medical treatment decisions confirmed the Court of Appeals in its view that "[C]ongress never contemplated that section 504 of the Rehabilitation Act would apply to treatment decisions involving defective newborn infants when the statute was enacted in 1973, when it was amended in 1974, or at any subsequent time." *Id.*, at 161. It therefore rejected "the far-reaching position advanced by the government in this case" and concluded that until Congress had spoken, "it would be an unwarranted exercise of judicial power to approve the type of investigation that ha[d] precipitated this lawsuit." *Ibid.*

Judge Winter dissented. He pointed out that § 504 was patterned after § 601 of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race in federally funded programs, and asserted that a refusal to provide medical treatment because of a person's handicapping condition is as clearly covered by § 504 as a refusal based on a person's race is covered by § 601:

> "A judgment not to perform certain surgery because a person is black is not a *bona fide* medical judgment. So too, a decision not to correct a life threatening digestive problem because an infant has Down's Syndrome is not a *bona fide* medical judgment. The issue of parental authority is also quickly disposed of. A denial of medical treatment to an infant because the infant is black is not legitimated by parental consent." *Id.*, at 162.

The Government did not file a certiorari petition in *University Hospital*. It did, however, seek review of the judgment in this case. We granted certiorari, 472 U. S. 1016 (1985), and we now affirm.

IV

The Solicitor General is correct that "handicapped individual" as used in § 504 includes an infant who is born with a congenital defect. If such an infant is "otherwise qualified" for benefits under a program or activity receiving federal financial assistance, § 504 protects him from discrimination "solely by reason of his handicap."[9] It follows, under our decision in *Alexander* v. *Choate*, 469 U. S. 287, 301 (1985), that handicapped infants are entitled to "meaningful access" to medical services provided by hospitals, and that a hospital rule or state policy denying or limiting such access would be subject to challenge under § 504.

However, no such rule or policy is challenged, or indeed has been identified, in this case. Nor does this case, in contrast to the *University Hospital* litigation, involve a claim that any specific individual treatment decision violates § 504. This suit is not an enforcement action, and as a consequence it is not necessary to determine whether § 504 ever applies to individual medical treatment decisions involving handicapped infants. Respondents brought this litigation to challenge the four mandatory components of the Final Rules on their face,[10] and the Court of Appeals' judgment which we review merely affirmed the judgment of the District Court which "declared invalid and enjoined enforcement of [the final] regulations,

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[9] As the case comes to us, we have no reason to review the Court of Appeals' assumption that the provision of health care to infants in hospitals receiving Medicare or Medicaid payments is a part of a "program or activity receiving Federal financial assistance." See *Consolidated Rail Corp.* v. *Darrone*, 465 U. S. 624, 635–636 (1984).

[10] See, *e. g.*, Brief in Opposition for Respondents American Medical Assn. et al. 7–8, n. 8; Record, Doc. No. 4, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction 12 ("The Final Regulation which is challenged in this action contains four mandatory provisions" (citations omitted)); *id.*, at 28 ("After *University Hospital* . . . must fall all of the mandatory obligations imposed by the Final Regulation"). Cf. App. 138–140 (complaint of American Medical Association et al.).

purportedly promulgated pursuant to section 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794 (1982)." App. to Pet. for Cert. 2a.[11] The specific question presented by this

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[11] It is true that the District Court, in addition to declaring "[t]he Final Regulation . . . invalid and unlawful as exceeding" § 504 and enjoining petitioner from "any further implementation of the Final Regulation," also declared invalid and enjoined "[a]ny other actions" of the Secretary "to regulate treatment involving impaired newborn infants taken under authority of Section 504, including currently pending investigation and other enforcement actions." App. to Pet. for Cert. 51a. This language must, however, be given a limited construction. The complaints in this case did not challenge the Department's authority to regulate all treatment decisions, but more precisely the mandatory provisions of the Final Rules and enforcement activity along those lines but undertaken pursuant to the Department's "general authority" to enforce § 504, as occurred in the *University Hospital* litigation and in 41 of the 49 full-scale investigations conducted by the Secretary up to that point in time. See App. 138–139 (complaint of American Medical Association et al.); *id.*, at 145 (same); *id.*, at 159 (complaint of American Hospital Association et al.). See also Record, Doc. No. 4, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction 10–11. From these pleadings, the Court of Appeals apparently interpreted the District Court's use of the word "any" to forbid "[a]ny other actions" resembling the "currently pending investigation and other enforcement actions" specified in the injunction, App. to Pet. for Cert. 51a, rather than all possible regulatory and investigative activity that might involve the provision of health care to handicapped infants. Thus, as will become clear from our analysis of the Final Rules below, the injunction forbids continuation or initiation of regulatory and investigative activity directed at instances in which parents have refused consent to treatment and, if the Secretary were to undertake such action, efforts to seek compliance with affirmative requirements imposed on state child protective services agencies. "Because of the rightly serious view courts have traditionally taken of violations of injunctive orders, and because of the severity of punishment which may be imposed for such violation," *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 439 (1976); see *Longshoremen* v. *Marine Trade Assn.*, 389 U. S. 64, 76 (1967); *Gunn* v. *University Committee*, 399 U. S. 383, 389 (1970), the Court of Appeals properly construed the District Court's judgment as pertaining to the regulations challenged in this litigation (and enforcement activity independent of the Final Rules but paralleling the procedures set forth therein). Cf. *Schmidt* v. *Lessard*, 414 U. S. 473, 477 (1974) *(per curiam)*

case, then, is whether the four mandatory provisions of the Final Rules are authorized by § 504.

V

It is an axiom of administrative law that an agency's explanation of the basis for its decision must include "a 'rational connnection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Assn.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168 (1962)).[12] Agency deference has not come so far that we will uphold regulations whenever it is possible to "conceive a basis" for administrative action. To the contrary, the "presumption of

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(noting desirability of precise construction of injunction orders to facilitate appellate review). It is, of course, the Court of Appeals' judgment that we are called on to review, not the District Court's. See *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 593 (1896). Cf. *Davis* v. *Packard*, 6 Pet. 41, 49 (1832). Accordingly, we give great weight to the Court of Appeals' construction of the judgment it affirmed. Cf. *United States* v. *Colgate & Co.*, 250 U. S. 300, 301–302 (1919). For purposes of comparison, the dissent's expansive reading of the judgment is supported neither by the Court of Appeals nor by the parties. See Brief for Respondents American Medical Assn. et al. 14, 48, n. 60. Cf. Brief for Respondents American Hospital Assn. et al. 4 (quoting final judgment of the District Court). In view of the fact that we affirm this judgment on reasoning narrower than that employed by the lower courts, it bears repetition that this Court "reviews judgments, not opinions." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984). See, *e. g.*, *Black* v. *Cutter Laboratories*, 351 U. S. 292, 297 (1956); *J. E. Riley Investment Co.* v. *Commissioner*, 311 U. S. 55, 59 (1940); *Williams* v. *Norris*, 12 Wheat. 117, 120 (1827); *McClung* v. *Silliman*, 6 Wheat. 598, 603 (1821).

[12] See *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U. S. 87, 105–106 (1983); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 285–286 (1974); *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233, 249 (1972); *FPC* v. *United Gas Pipe Line Co.*, 393 U. S. 71, 72–73 (1968) *(per curiam)*; *Siegel Co.* v. *FTC*, 327 U. S. 608, 613 (1946).

regularity afforded an agency in fulfilling its statutory mandate," is not equivalent to "the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause." *Motor Vehicle Mfrs. Assn.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S., at 43, n. 9. Thus, the mere fact that there is "some rational basis within the knowledge and experience of the [regulators]," *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938) (footnote omitted), under which they "might have concluded" that the regulation was necessary to discharge their statutorily authorized mission, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487 (1955), will not suffice to validate agency decisionmaking. See *Industrial Union Dept.* v. *American Petroleum Inst.*, 448 U. S. 607, 639–659 (1980) (opinion of STEVENS, J.); *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 169 (1962). Our recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgment in both.

Before examining the Secretary's reasons for issuing the Final Rules, it is essential to understand the pre-existing state-law framework governing the provision of medical care to handicapped infants. In broad outline, state law vests decisional responsibility in the parents, in the first instance, subject to review in exceptional cases by the State acting as *parens patriae*.[13] Prior to the regulatory activity culminat-

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[13] The basic pattern of decisionmaking is well summarized in the 1983 report of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research:

"The paucity of directly relevant cases makes characterization of the law in this area somewhat problematic, but certain points stand out. First, there is a presumption, strong but rebuttable, that parents are the appro-

ing in the Final Rules, the Federal Government was not a participant in the process of making treatment decisions for newborn infants. We presume that this general framework was familiar to Congress when it enacted § 504. See *Cannon v. University of Chicago*, 441 U. S. 677, 696–697 (1979). It therefore provides an appropriate background for evaluating the Secretary's action in this case.

The Secretary has identified two possible categories of violations of § 504 as justifications for federal oversight of handicapped infant care. First, he contends that a hospital's refusal to furnish a handicapped infant with medically beneficial treatment "solely by reason of his handicap" constitutes unlawful discrimination. Second, he maintains that a hospital's failure to report cases of suspected medical neglect to a

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priate decisionmakers for their infants. Traditional law concerning the family, buttressed by the emerging constitutional right of privacy, protects a substantial range of discretion for parents. Second, as persons unable to protect themselves, infants fall under the *parens patriae* power of the state. In the exercise of this authority, the state not only punishes parents whose conduct has amounted to abuse or neglect of their children but may also supervene parental decisions before they become operative to ensure that the choices made are not so detrimental to a child's interests as to amount to neglect and abuse.

". . . [A]s long as parents choose from professionally accepted treatment options the choice is rarely reviewed in court and even less frequently supervened. The courts have exercised their authority to appoint a guardian for a child when the parents are not capable of participating in the decisionmaking or when they have made decisions that evidence substantial lack of concern for the child's interests. Although societal involvement usually occurs under the auspices of governmental instrumentalities—such as child welfare agencies and courts—the American legal system ordinarily relies upon the private initiative of individuals, rather than continuing governmental supervision, to bring the matter to the attention of legal authorities." Report, at 212–214 (footnotes omitted).

This summary accords with the Secretary's understanding of the state-law framework, at least in other contexts. See 50 Fed. Reg. 14880 (1985) (final rule implementing Child Abuse Amendments of 1984) ("The decision to provide or withhold medically indicated treatment is, except in highly unusual circumstances, made by the parents or legal guardian").

state child protective services agency may also violate the statute. We separately consider these two possible bases for the Final Rules.[14]

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[14] Rather than address these issues, the dissent would remand to the Court of Appeals. See *post*, at 656. In light of its willingness to address the broader hypothetical question whether § 504 ever authorizes regulation of medical treatment decisions—"even if the judgment below were limited to invalidation of these regulations," *post*, at 650, n. 4—it comes as something of a surprise to read the references to the Solicitor General's argument that "this claim in its current form is not properly in the case," *post*, at 657, n. 9. The procedural objections are plainly without substance. Respondents AMA et al. raised the lack of factual support in their brief in opposition to the petition for certiorari. See Brief in Opposition for Respondents American Medical Association et al. 20 ("First, the fundamental problem with the Secretary's position is that it is based on a situation that has not occurred—and will not occur—in real life. . . . Not surprisingly, the Secretary cites no case where [his hypothetical problem] has occurred"); *id.*, at 20–21; *id.*, at 26 ("B. The Secretary Has Shown No Problem With the Historic State Law Framework That Warrants Direct Federal Investigation and Regulation"); *id.*, at 26–29. The Solicitor General, although responding that such evidence exists, see Reply Memorandum for Petitioner 9, did not raise a procedural bar. As a result, the objection is waived. See *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 815–816 (1985). Although further discussion of this objection is therefore unnecessary, the dissent is also wrong in suggesting that respondents' complaints did not raise "the lack of a factual basis involving situations in which parents *have* consented to treatment." *Post*, at 657, n. 9. In fact, the complaint of respondents AMA et al. alleged "COUNT II: Violation of the Administrative Procedure Act," App. 146, and incorporated by reference the allegation that "None of the mandatory provisions of the Final Regulation have a basis in fact or are designed to meet a documented problem," *id.*, at 140. Accord, *id.*, at 158 (complaint of respondents AHA et al.). The fact that our decision rests on grounds narrower than that relied on by the lower courts is surely not an infirmity. We can only add that the lack of factual support for these regulations was fully briefed in this Court, see especially Brief for Respondents American Medical Assn. et al. 39–41; Brief for Respondents American Hospital Assn. et al. 48–49, and the fact that the Solicitor General responds with so little, so late bespeaks the absence of evidentiary support for the regulations, not an inadequate opportunity to direct us to it.

The Solicitor General also contends, for the first time in his reply brief on the merits, see Reply Brief for Petitioner 16, n. 6, that the Final Rules are

VI

In the immediate aftermath of the Bloomington Baby Doe incident, the Secretary apparently proceeded on the assumption that a hospital's statutory duty to provide treatment to handicapped infants was unaffected by the absence of parental consent. See *supra*, at 617–619. He has since abandoned that view. Thus, the preamble to the Final Rules correctly states that when "a non-treatment decision, no matter how discriminatory, is made by parents, rather than by the hospital, section 504 does not mandate that the hospital unilaterally overrule the parental decision and provide treatment notwithstanding the lack of consent." 49 Fed. Reg. 1631 (1984). A hospital's withholding of treatment when no parental consent has been given cannot violate § 504, for without the consent of the parents or a surrogate decisionmaker the infant is neither "otherwise qualified" for treatment nor has he been denied care "solely by reason of his handicap."[15] Indeed, it would almost certainly be a tort as a matter of state law to operate on an infant without parental consent. This analysis makes clear that the Government's heavy reliance on the analogy to race-based refusals which violate § 601

"interpretative guidelines" which "merely explained the Secretary's construction of Section 504 in this setting," *ibid.* This assertion was rejected the only occasion on which it was tendered, see *American Academy of Pediatrics* v. *Heckler*, 561 F. Supp. 395, 401 (DC 1983), is belied by the Secretary's own decision to provide notice and request comment on the regulations, cf. 5 U. S. C. § 553(b), and is patently without merit. To its credit, the dissent does not ultimately rely on either of these arguments. See *post*, at 657, n. 9.

[15] Just as "[t]he failure of the hospital to itself provide the treatment" because of the unavailability of medical equipment or expertise would not be "on the basis of the handicap" but "on the fact that the hospital is incapable of providing the treatment," according to the Secretary's regulations, 49 Fed. Reg. 1637 (1984), it is equally clear that a refusal to provide care because of the absence of parental consent would not be "solely by reason of [the infant's] handicap."

of the Civil Rights Act is misplaced. If, pursuant to its normal practice, a hospital refused to operate on a black child whose parents had withheld their consent to treatment, the hospital's refusal would not be based on the race of the child even if it were assumed that the parents based *their decision* entirely on a mistaken assumption that the race of the child made the operation inappropriate.

Now that the Secretary has acknowledged that a hospital has no statutory treatment obligation in the absence of parental consent, it has become clear that the Final Rules are not needed to prevent hospitals from denying treatment to handicapped infants. The Solicitor General concedes that the administrative record contains no evidence that hospitals have ever refused treatment authorized either by the infant's parents or by a court order. Tr. of Oral Arg. 8. Even the Secretary never seriously maintained that posted notices, "hotlines," and emergency on-site investigations were necessary to process complaints against hospitals that might refuse treatment requested by parents. The parental interest in calling such a refusal to the attention of the appropriate authorities adequately vindicates the interest in enforcement of § 504 in such cases, just as that interest obviates the need for a special regulation to deal with refusals to provide treatment on the basis of race which may violate § 601 of the Civil Rights Act.

The Secretary's belated recognition of the effect of parental nonconsent is important, because the supposed need for federal monitoring of hospitals' treatment decisions rests *entirely* on instances in which parents have refused their consent. Thus, in the Bloomington, Indiana, case that precipitated the Secretary's enforcement efforts in this area,[16] as

[16] The Secretary's summary of this case makes it clear that the hospital's failure to perform surgery was based on the parents' refusal of consent: "*Bloomington, Indiana.* Investigation into April 1982, death of infant with Down's syndrome and esophageal atresia from whom surgery was

well as in the *University Hospital* case that provided the basis for the summary affirmance in the case now before us,[17] the hospital's failure to perform the treatment at issue rested on the lack of parental consent. The Secretary's own summaries of these cases establish beyond doubt that the respective hospitals did not withhold medical care on the basis of handicap and therefore did not violate § 504; as a result, they provide no support for his claim that federal regulation is needed in order to forestall comparable cases in the future.

The Secretary's initial failure to recognize that withholding of consent by *parents* does not equate with discriminatory denial of treatment by *hospitals* likewise undermines the Secretary's findings in the preamble to his proposed rulemaking. In that statement, the Secretary cited four sources in support of the claim that "Section 504 [is] not being uniformly followed." 48 Fed. Reg. 30847 (1983). None of the cited examples, however, suggests that recipients of federal financial assistance, as opposed to parents, had withheld medical care on the basis of handicap.[18]

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withheld *on the instructions of the parents.*" *Id.*, at 1646 (emphasis added).

As recounted earlier, the hospital initiated judicial review to override the parents' decision, but its efforts proved unavailing. The Solicitor General now acknowledges that there was no basis for finding a violation of § 504 in this case. See Tr. of Oral Arg. 12.

[17] Notwithstanding that the Secretary's summary of this case demonstrates both that treatment was withheld because of refusal of parental consent and that state-court proceedings to override the parents' decision had been instituted before the Department intervened, the Department proceeded with its own investigation anyway:

"*Long Island, New York.* October 19, 1983, complaint, based on newspaper article, that infant with spina bifida not receiving surgery *due to refusal of parents to consent; legal proceedings ha[d] been initiated in State court.* Inquiry initiated October 19. On October 27, HHS asked Department of Justice to commence legal action to overcome refusal of hospital to permit review of pertinent records." 49 Fed. Reg. 1649 (1984) (emphasis added).

[18] The Secretary first cited a 1973 survey by Raymond Duff and A. G. M. Campbell calculating that 14% of deaths in the special nursery of the Yale-

Notwithstanding the ostensible recognition in the preamble of the effect of parental nonconsent on a hospital's obligation to provide care, in promulgating the Final Rules the Secretary persisted in relying on instances in which parents had refused consent to support his claim that, regardless of its "magnitude," there is sufficient evidence of "illegality" to justify "establishing basic mechanisms to allow for effective enforcement of a clearly applicable statute." 49 Fed. Reg. 1645 (1984). We have already discussed one source of this evidence—"the several specific cases cited in the preamble to the proposed rule." *Ibid.* Contrary to the Secretary's belief, these cases do *not* "support the proposition that handicapped infants may be subjected to unlawful discrimination." *Ibid.* In addition to the evidence relied on in prior notices, the Secretary included a summary of the 49 "Infant Doe

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New Haven hospital "were related to withholding treatment." 48 Fed. Reg. 30847 (1983). The Secretary's solitary quotation from this study, accurately illustrating the locus of the treatment decisions reviewed by the authors, involved refusal of parental consent:

"'An infant with Down's syndrome and intestinal atresia, like the much publicized one at Johns Hopkins Hospital, was not treated *because his parents thought the surgery was wrong for their baby and themselves.* He died several days after birth.'" *Ibid.* (emphasis added) (quoting Duff & Campbell, Moral and Ethical Dilemmas in the Special-Care Nursery, 289 New Eng. J. Med. 890, 891 (1973)).

The Secretary next referred to an incident at Johns Hopkins Hospital which, as the above quotation intimates, also concerned parental refusal of consent. Then followed brief mention of the "Bloomington Baby Doe" incident, in which the parents, as the Secretary now admits, refused consent to treatment despite the hospital's insistence that it be provided. The Secretary's fourth and final example involved "a 1979 death of an infant with Down's syndrome and an intestinal obstruction at the Kapiolani-Children's Medical Center in Honolulu, Hawaii," 48 Fed. Reg. 30847 (1983), which again appears to have resulted from "a lack of parental consent," *id.*, at 30848.

Generalizing from these examples, the Secretary reported the results of a survey of physician attitudes. He faulted "[t]heir acquiescence in nontreatment of Down's children" which he surmised was "apparently *because of* the handicap represented by Down's syndrome." *Ibid.* See n. 22, *infra*.

cases" that the Department had processed before December 1, 1983.[19] Curiously, however, by the Secretary's own admission *none* of the 49 cases had "resulted in a finding of discriminatory withholding of medical care." *Id.*, at 1649. In fact, in the entire list of 49 cases there is no finding that a hospital failed or refused to provide treatment to a handicapped infant for which parental consent had been given.[20]

Notwithstanding this concession, the Secretary "believes three of these cases demonstrate the utility of the procedural

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[19] The Secretary also reprinted selected quotations from various commenters reporting the existence of "discriminatory" decisions denying sustenance and care to handicapped infants. None of these comments disclosed whether those "discriminatory" decisions were made by parents or by hospitals.

[20] The Secretary's repeated inability to identify a single treatment decision in violation of § 504 lends an aura of unreality to JUSTICE WHITE's criticism of the Court of Appeals' decision in *University Hospital*. In explaining why he believes "the stated basis for the Court of Appeals' holding in *University Hospital* was incorrect," *post*, at 656; see *post*, at 655, n. 8, JUSTICE WHITE completely ignores the fact that the case involved a specific treatment decision made by parents. Since JUSTICE WHITE elsewhere agrees that parental decisions are not covered by § 504, *post*, at 657, n. 10, and that the infant involved in the *University Hospital* case was therefore not "otherwise qualified" for treatment, *post*, at 654, n. 7, he implicitly acknowledges that the *judgment* in *University Hospital* is correct; only by ignoring the actual facts of that case—as well as the actual facts of the 49 cases that were investigated by the Secretary—and speculating about nonexistent hypothetical cases in which a hospital might refuse to provide treatment requested by parents, does the dissent offer any basis for questioning the decision in *University Hospital*.

Indeed, even the dissent's criticism of the *reasoning* of the Court of Appeals' decision is based on a hypothetical situation that the Court of Appeals did not address. That court was concerned with the treatment of cases in which "the handicapping condition *is related* to the condition(s) to be treated," 729 F. 2d, at 157 (emphasis added); see *id.*, at 147, whereas JUSTICE WHITE has carefully limited his hypothetical discussion to cases in which "the treatment *is completely unrelated* to the baby's handicapping condition." *Post*, at 655 (emphasis added). Thus, like bishops of opposite colors, the opinions of JUSTICE WHITE and the Court of Appeals do not even touch one another.

mechanisms called for in the final rules." *Ibid.* Accord, *ibid.* ("[T]hese cases provide additional documentation of the need for governmental involvement and the appropriateness of the procedures established by the final rules"). However, these three cases, which supposedly provide the strongest support for federal intervention, fail to disclose any discrimination against handicapped newborns in violation of § 504. For example, in Robinson, Illinois, the Department conducted an on-site investigation when it learned that the "hospital *(at the parents' request)* failed to perform necessary surgery." *Id.*, at 1646 (emphasis added). After "[t]he parents refused consent for surgery," "the hospital referred the matter to state authorities, who accepted custody of the infant and arranged for surgery and adoption," all "in compliance with section 504." *Ibid.* The Secretary concluded that "the involvement of the state child protective services agency," at the behest of the hospital, "was the most important element in bringing about corrective surgery for the infant. . . . Had there been no *governmental* involvement in the case, the outcome might have been much less favorable." *Id.*, at 1649 (emphasis added).[21]

The Secretary's second example illustrates with even greater force the effective and nondiscriminatory functioning of state mechanisms and the consequent lack of support for federal intervention. In Daytona Beach, Florida, the Department's hotline received a complaint of medical neglect of a handicapped infant; immediate contact with the hospital and state agency revealed that "the parents did not consent to surgery" for the infant. *Id.*, at 1648. Notwithstanding this information, which was confirmed by both the hospital and the state agency, and despite the fact that the state agency had "obtained a court order to provide surgery" the day *before* HHS was notified, the Department conducted an

[21] The preamble repeatedly makes the assumption that evidence showing the need for *governmental* involvement provides a basis for *federal* involvement. See, *e. g.*, 49 Fed. Reg. 1649 (1984).

on-site investigation. *Ibid.* In the third case, in Colorado Springs, Colorado, the Department intervened so soon after birth that "the decisionmaking process was in progress at the time the OCR [Office of Civil Rights] inquiry began," and "it is impossible to say the surgery would not have been provided without this involvement." *Id.*, at 1649. "However," the Secretary added, "the involvement of OCR and the OCR medical consultant was cooperatively received by the hospital and apparently constructive." *Ibid.*

In sum, there is nothing in the administrative record to justify the Secretary's belief that "discriminatory withholding of medical care" in violation of § 504 provides any support for federal regulation: In two of the cases (Robinson, Illinois, and Daytona Beach, Florida), the hospital's refusal was based on the absence of parental consent, but the parents' decision was overridden by state authorities and the operation was performed; in the third case (Colorado Springs, Colorado) it is not clear whether the parents would have given their consent or not, but the corrective surgery was in fact performed.[22]

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[22] JUSTICE WHITE's dissent suggests that regulation of health care providers can be justified on a theory the Secretary did not advance—a supposed need to curtail discriminatory advice by biased physicians. See *post*, at 658–661. After observing that at least some handicapped infants have not been treated, the dissent identifies physician attitudes as a likely explanation and concludes that mandated informational notices were presumably designed to "foste[r] an awareness by health care professionals of their responsibility not to act in a discriminatory manner with respect to medical treatment decisions for handicapped infants." *Post*, at 660.

The dissent's theory finds no support in the text of the regulation, the reasoning of the Secretary, or the briefs filed on his behalf in this Court. The regulations in general—and the informational notices in particular—do not purport to place any constraints on the advice that physicians may give their patients. Moreover, since it is now clear that parental decisionmaking is not covered by § 504, *supra*, at 630–631, the dissent's theory rests on the unstated premise that the statute may prevent the giving of advice to do something which § 504 does not itself prohibit. It is hardly obvious that the Rehabilitation Act of 1973 prohibits physicians from "aiding and abet-

VII

As a backstop to his manifestly incorrect perception that withholding of treatment in accordance with parental instructions necessitates federal regulation, the Secretary contends that a hospital's failure to report parents' refusals to consent to treatment violates § 504, and that past breaches of this kind justify federal oversight.

By itself, § 504 imposes no duty to report instances of medical neglect—that undertaking derives from state-law reporting obligations or a hospital's own voluntary practice. Although a hospital's selective refusal to report medical neglect of handicapped infants might violate § 504,[23] the Secretary

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ting" a parental decision which parents admittedly have a right to make. And if Congress did intend this counterintuitive result, one might expect an explanation from the Secretary as to how the hotlines and emergency on-site inspections contemplated by the Final Rules square with the constitutional doctrines on regulation, direct or indirect, of speech in general and of decisionmaking by health professionals in particular.

In reality, the Secretary neither found nor implied that physicians' predispositions against treating handicapped infants had resulted in parental refusals to consent to treatment. Indeed, he principally relied on attitudinal surveys for the converse proposition that regulation is necessary because parents refuse consent to treatment and physicians will "acquiesce in parental refus[als] to treat." 48 Fed. Reg. 30848 (1983). To the extent *any* theory may be discerned in the Secretary's two-column summary of physician surveys, it is that doctors would not *correct* "bad" parental decisions, not that they were responsible for helping them to make such choices in the first place. Moreover, even if the Secretary had relied on this evidence to insinuate that doctors imposed their own value judgments on parents by lobbying them to refuse consent, he never explains that the parental decisionmaking process is one in which doctors exercise the decisive influence needed to force such results. Compare *ibid.*, with *post*, at 658–659. The Secretary, in short, has not even adumbrated a theory of "discrimination" remotely resembling the one invented by the dissent, and therefore has not made the essential connection between the evidence of physician attitudes and the regulatory choice made here.

[23] Of course, § 504 would be violated only if the hospital failed to report medical neglect of a handicapped infant when it would report such neglect of a similarly situated nonhandicapped infant. Because respondents have

has failed to point to any specific evidence that this has occurred. The 49 actual investigations summarized in the preamble to the Final Rules do not reveal *any* case in which a hospital either failed, or was accused of failing, to make an appropriate report to a state agency.[24] Nor can we accept the Solicitor General's invitation to infer discriminatory nonreporting from the studies cited in the Secretary's proposed rulemaking. Even assuming that cases in which parents have withheld consent to treatment for handicapped infants have gone unreported, that fact alone would not prove

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challenged the Secretary's regulations on their face, we have no occasion to address the question whether infants with birth defects are similarly situated with infants in need of blood transfusions (the paradigm case in which hospitals have reported or have sought to override parental decisions, according to the Solicitor General, Brief for Petitioner 28, and n. 16), or whether a hospital could legitimately distinguish between the two situations on the basis of the different risks and benefits inhering in certain operations to correct birth defects, on the one hand, and blood transfusions, on the other hand.

[24] To the contrary, the Secretary's case summaries reveal numerous instances in which hospitals have voluntarily reported instances of suspected medical neglect and have even initiated legal proceedings themselves. In the Bloomington, Indiana, case which prompted these regulations, and in the *University Hospital* case which supported the summary affirmance now before us, the parents' decision was the subject of judicial review in the state courts. In the Robinson, Illinois, case on which the Secretary relies as one of three examples illustrating the need for federal regulation, the hospital reported the parents' refusal to consent to state authorities who arranged for surgery and adoption. 49 Fed. Reg. 1646 (1984). Most dramatically, in the Daytona Beach, Florida, case HHS received its hotline complaint the day *after* the state agency had already obtained a court order overriding the parents' refusal to consent to surgery. *Id.*, at 1648. Notwithstanding the Department's "immediate contact" with the hospital *and the state agency*—which surely must have made it clear that the case had already been reported to that agency and that there was no colorable basis for suspecting a violation of § 504—the Department conducted an on-site investigation. *Ibid.* In the third case on which the Secretary placed special emphasis, the Department intervened before the parents had decided whether to authorize treatment or not, so that no reporting obligation could have been triggered. *Ibid.*

that the hospitals involved had discriminated on the basis of handicap rather than simply failed entirely to discharge their state-law reporting obligations, if any, a matter which lies wholly outside the nondiscrimination mandate of § 504.

The particular reporting mechanism chosen by the Secretary—indeed the entire regulatory framework imposed on state child protective services agencies—departs from the nondiscrimination mandate of § 504 in a more fundamental way. The mandatory provisions of the Final Rules omit any direct requirement that hospitals make reports when parents refuse consent to recommended procedures.[25] Instead, the Final Rules command *state agencies* to require such reports, regardless of the state agencies' own reporting requirements (or lack thereof). 45 CFR § 84.55(c)(1)(i) (1985). Far from merely preventing state agencies from remaining calculatedly indifferent to handicapped infants while they tend to the needs of the similarly situated nonhandicapped, the Final Rules command state agencies to utilize their "full authority" to "prevent instances of unlawful medical neglect of handicapped infants." § 84.55(c)(1). The Rules effectively make medical neglect of handicapped newborns a state investigative priority, possibly forcing state agencies to shift scarce resources away from other enforcement activities—perhaps even from programs designed to protect handicapped children outside hospitals. The Rules also order state agencies to "immediate[ly]" review reports from hospitals, § 84.55(c)(1)(iii), to conduct "on-site investigation[s]," *ibid.*, and to take legal action "to compel the provision of necessary nourishment and medical treatment,"

[25] The interpretative guidelines appended to the Final Rules do impose on hospitals and other health care providers the duty not to discriminate against handicapped infants in reporting instances of parental neglect. We do not address the question whether reporting, either as a hospital practice or as a requirement of state law, constitutes a "program or activity receiving Federal financial assistance" under § 504. See *Consolidated Rail Corp.* v. *Darrone*, 465 U. S., at 635–636. Cf. *Grove City College* v. *Bell*, 465 U. S. 555, 570–574 (1984).

§ 84.55(c)(1)(iv)—all without any regard to the procedures followed by state agencies in handling complaints filed on behalf of nonhandicapped infants. These operating procedures were imposed over the objection of several state child protective services agencies that the requirement that they turn over reports to HHS "conflicts with the confidentiality requirements of state child abuse and neglect statutes," 49 Fed. Reg. 1627 (1984)—thereby requiring under the guise of nondiscrimination a service which state law denies to the nonhandicapped.[26]

The complaint-handling process the Secretary would impose on unwilling state agencies is totally foreign to the authority to prevent discrimination conferred on him by § 504. "Section 504 seeks to assure evenhanded treatment," *Alexander* v. *Choate*, 469 U. S., at 304; "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation" on recipients of federal financial assistance, *Southeastern Community College* v. *Davis*, 442 U. S. 397, 411 (1979).[27] The Solicitor General also recognizes that § 504 is concerned with discrimination and with discrimination alone. In his attempt to distinguish the Secretary's 1976 determination that it "is beyond the authority of section 504" to promulgate regulations "concerning ade-

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[26] JUSTICE WHITE's dissent, quoting the Secretary's explanation for these requirements, concludes that they form, in "substance," a nondiscrimination requirement. *Post*, at 663. This assertion is repetitive, not responsive. The rules governing state child protective services agencies operate independently of any provisions of state law; they go further than them in several respects; they flatly contradict them in others (*e. g.*, confidentiality); and they do not accommodate the revision, modification, or repeal of state laws. To say that the Secretary can give detailed marching orders to state agencies upon discovering that both the agencies and HHS are working toward the same general objective—at least when defined with sufficient abstractness—would countenance a novel and serious intrusion on state autonomy.

[27] See *Southeastern Community College* v. *Davis*, 442 U. S., at 410 (language and structure of 1973 Rehabilitation Act recognizes "the distinction between . . . evenhanded treatment . . . and affirmative efforts").

quate and appropriate psychiatric care or safe and humane living conditions for persons institutionalized because of handicap or concerning payment of fair compensation to patients who perform work," 41 Fed. Reg. 29548, 29559, the Solicitor General explains:

> "This conclusion of course was consistent with the fact that, as relevant here, Section 504 is essentially concerned only with discrimination in the *relative* treatment of handicapped and nonhandicapped persons and does not confer any *absolute* right to receive particular services or benefits under federally assisted programs." Brief for Petitioner 40, n. 33.

See also 48 Fed. Reg. 30846 (1983) ("Section 504 is in essence an equal treatment, non-discrimination standard").[28]

The Final Rules, however, impose just the sort of absolute obligation on state agencies that the Secretary had previously disavowed. The services state agencies are required to make available to handicapped infants are in no way tied to the level of services provided to similarly situated nonhandicapped infants. Instead, they constitute an "*absolute* right to receive particular services or benefits" under a federally assisted program. Even if a state agency were scrupulously impartial as between the protection it offered handicapped and nonhandicapped infants, it could still be denied federal funding for failing to carry out the Secretary's mission with sufficient zeal.

It is no answer to state, as does the Secretary, that these regulations are a necessary "'metho[d] . . . to give reasonable assurance' of compliance." 49 Fed. Reg. 1627 (1984) (quoting 45 CFR § 80.4(b), which requires state agencies to

[28] The Secretary notes that "by enacting section 504 Congress intended to eliminate all of the 'many forms of potential discrimination' against handicapped people through 'the establishment of a broad governmental policy.' S. Rep. No. 1297, 93d Cong., 2d Sess. 38 (1974)." 49 Fed. Reg. 1636 (1984). But no matter how broad the prohibition contained in § 504 may be, what it prohibits is discrimination.

report on their compliance with Title VI). For while the Secretary can require state agencies to document their *own* compliance with § 504, nothing in that provision authorizes him to commandeer state agencies to enforce compliance by *other* recipients of federal funds (in this instance, hospitals). State child protective services agencies are not field offices of the HHS bureaucracy, and they may not be conscripted against their will as the foot soldiers in a federal crusade.[29] As we stated in *Alexander* v. *Choate*, 469 U. S., at 307, "nothing in the pre- or post-1973 legislative discussion of § 504 suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix" of services provided by state agencies.

VIII

Section 504 authorizes any head of an Executive Branch agency—regardless of his agency's mission or expertise—to promulgate regulations prohibiting discrimination against the handicapped. See S. Rep. No. 93-1297, pp. 39-40 (1974).[30] As a result of this rulemaking authority, the Secretary of

[29] Important principles of federalism are implicated by any "federal program that compels state agencies . . . to function as bureaucratic puppets of the Federal Government." *FERC* v. *Mississippi*, 456 U. S. 742, 783 (1982) (opinion of O'CONNOR, J.).

[30] Twenty-seven agencies, including the National Endowment for the Arts, the Nuclear Regulatory Commission, and the Tennessee Valley Authority, have promulgated regulations forbidding discrimination on the basis of handicap in programs or activities receiving federal financial assistance. The Department of Housing and Urban Development has issued a proposed rulemaking. See Jones & Wolfe, Regulations Promulgated Pursuant to Section 504 of the Rehabilitation Act of 1973: A Brief History and Present Status 8-9 (Congressional Research Service, Feb. 28, 1986). There is thus not the same basis for deference predicated on expertise as we found with respect to the Environmental Protection Agency's interpretation of the 1977 Clean Air Act Amendments in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S., at 842-845, and with respect to the Federal Reserve Board's construction of the Bank Holding Act in *Board of Governors, FRS* v. *Investment Company Inst.*, 450 U. S. 46, 56, and n. 21 (1981).

HHS has "substantial leeway to explore areas in which discrimination against the handicapped pos[es] particularly significant problems and to devise regulations to prohibit such discrimination." *Alexander* v. *Choate*, 469 U. S., at 304, n. 24.

Even according the greatest respect to the Secretary's action, however, deference cannot fill the lack of an evidentiary foundation on which the Final Rules must rest. The Secretary's basis for federal intervention is perceived discrimination against handicapped infants in violation of § 504, and yet the Secretary has pointed to no evidence that such discrimination occurs. Neither the fact that regulators generally may rely on generic information in a particular field or comparable experience gained in other fields, nor the fact that regulations may be imposed for preventative or prophylactic reasons, can substitute for evidence supporting the Secretary's own chosen rationale. For the principle of agency accountability recited earlier means that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Assn.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S., at 50 (citations omitted).[31]

The need for a proper evidentiary basis for agency action is especially acute in this case because Congress has failed to indicate, either in the statute or in the legislative history, that it envisioned federal superintendence of treatment decisions traditionally entrusted to state governance. "[W]e must assume that the implications and limitations of our federal system constitute a major premise of all congressional legislation, though not repeatedly recited therein." *United States* v. *Gambling Devices*, 346 U. S. 441, 450 (1953) (opin-

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[31] Accord, *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490, 539 (1981); *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168 (1962); *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947); *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87 (1943).

ion of Jackson, J.).[32] Congress therefore "will not be deemed to have significantly changed the federal-state balance," *United States* v. *Bass*, 404 U. S. 336, 349 (1971)—or to have authorized its delegates to do so—"unless otherwise the purpose of the Act would be defeated," *FTC* v. *Bunte Bros., Inc.*, 312 U. S. 349, 351 (1941).[33] Although the nondiscrimi-

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[32] See Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 540 (1947) ("The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation").

[33] Cf. *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U. S. 275, 281–282 (1972) ("'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance.'" (quoting *United States* v. *Bass*, 404 U. S., at 349); *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 152 (1944) ("Where Congress has not clearly indicated a purpose to precipitate conflict [between federal agencies and state authority] we should be reluctant to do so by decision" (footnote omitted)); *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U. S. 261, 275 (1943) ("An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous"); *FTC* v. *Bunte Bros., Inc.*, 312 U. S., at 354–355 ("The construction of § 5 [of the Federal Trade Commission Act] urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. . . . An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress"); *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 513 (1940) ("The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress"); *United States* v. *Altobella*, 442 F. 2d 310, 313–316 (CA7 1971); 3 C. Sands, Sutherland on Statutory Construction § 62.01, p. 64 (4th ed. 1974) ("[T]he rule of strict construction [of statutes in derogation of sovereignty] serves a quasi-constitutional purpose in our federal system of split sovereignty by helping to secure both levels of sovereign power against encroachment by each other" (footnote omitted)).

The legislative history of the Rehabilitation Act does not support the notion that Congress intended intervention by federal officials into treatment

nation mandate of § 504 is cast in language sufficiently broad to suggest that the question is "not one of authority, but of its appropriate exercise[,] [t]he propriety of the exertion of the authority must be tested by its relation to the purpose of the [statutory] grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear." *Florida* v. *United States*, 282 U. S. 194, 211–212 (1931). Accord, *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 355 U. S. 300, 306 (1958). That is, "it must appear that there are findings, supported by evidence, of the essential facts . . . which would justify [the Secretary's] conclusion." *Florida* v. *United States*, 282 U. S., at 212. The administrative record does not contain the reasoning and evidence that is necessary to sustain federal intervention into a historically state-administered decisional process that appears—for lack of any evidence to the contrary—to be functioning in full compliance with § 504.

The history of these regulations exposes the inappropriateness of the extraordinary deference—virtually a *carte blanche*—requested by the Government. The Secretary's

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decisions traditionally left by state law to concerned parents and the attending physicians or, in exceptional cases, to state agencies charged with protecting the welfare of the infant. As the Court of Appeals noted, there is nothing in the legislative history that even remotely suggests that Congress contemplated the possibility that "section 504 could or would be applied to treatment decisions, involving defective newborn infants." 729 F. 2d 144, 159 (1984).

"'As far as can be determined, no congressional committee or member of the House or Senate ever even suggested that section 504 would be used to monitor medical treatment of defective newborn infants or establish standards for preserving a particular quality of life. No medical group appeared alert to the intrusion into medical practice which some doctors apprehend from such an undertaking, nor were representatives of parents or spokesmen for religious beliefs that would be affected heard.'" *Id.*, at 158 (quoting *American Academy of Pediatrics* v. *Heckler*, 561 F. Supp., at 401).

present reading of § 504 has evolved only after previous, patently erroneous interpretations had been found wanting.[34] The checkered history of these regulations began in 1982, when the Department notified hospitals that they would violate § 504 if they "allow[ed] an infant" to remain in their care after "the infant's parents or guardian [had withheld consent to] treatment or nourishment discriminatorily." 47 Fed. Reg. 26027. By the time the Proposed Rules were announced one year later, the Secretary had abandoned that construction. But the Department substituted the equally untenable view that "the basic provision of nourishment, fluids, and routine nursing care" was "not an option for medical judgment" and that "[t]he decision to forego medical treatment of a correctable life-threatening defect because an infant also suffers from a permanent irremediable handicap that is not life-threatening, such as mental retardation, is a violation of Section 504," insinuating by omission that lack of parental consent did not alter the hospital's obligation to provide corrective surgery. 48 Fed. Reg. 30852, 30847 (1983). Although the preamble to the Final Rules corrects the prior erroneous signals from the Department that § 504 authorizes it to override parental decisions and to save the lives of handicapped infants, it persists in advocating federal regulation on the basis of treatment denials precipitated by refusals of parental consent and on the ground that its experience with the Baby Doe hotline has demonstrated that "the assumption that handicapped infants will receive medically beneficial treatment is not always justified." 49 Fed. Reg. 1646 (1984).

This response, together with its previous remarks, makes irresistible the inference that the Department regards its

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[34] The fact that the agency's interpretation "has been neither consistent nor longstanding . . . substantially diminishes the deference to be given to HEW's [now HHS's] present interpretation of the statute." *Southeastern Community College* v. *Davis*, 442 U. S., at 412, n. 11 (citing *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 143 (1976)).

mission as one principally concerned with the quality of medical care for handicapped infants rather than with the implementation of § 504. We could not quarrel with a decision by the Department to concentrate its finite compliance resources on instances of life-threatening discrimination rather than instances in which merely elective care has been withheld. Cf. *Heckler* v. *Chaney*, 470 U. S. 821 (1985). But nothing in the statute authorizes the Secretary to dispense with the law's focus on discrimination and instead to employ federal resources to save the lives of handicapped newborns, without regard to whether they are victims of discrimination by recipients of federal funds or not. Section 504 does not authorize the Secretary to give unsolicited advice either to parents, to hospitals, or to state officials who are faced with difficult treatment decisions concerning handicapped children. We may assume that the "qualified professionals" employed by the Secretary may make valuable contributions in particular cases, but neither that assumption nor the sincere conviction that an immediate "on-site investigation" is "necessary to protect the life or health of a handicapped individual" can enlarge the statutory powers of the Secretary.

The administrative record demonstrates that the Secretary has asserted the authority to conduct on-site investigations, to inspect hospital records, and to participate in the decisional process in emergency cases in which there was no colorable basis for believing that a violation of § 504 had occurred or was about to occur. The District Court and the Court of Appeals correctly held that these investigative actions were not authorized by the statute and that the regulations which purport to authorize a continuation of them are invalid.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

CHIEF JUSTICE BURGER concurs in the judgment.

JUSTICE REHNQUIST took no part in the consideration or decision of this case.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins and with whom JUSTICE O'CONNOR joins as to Parts I, II, IV, and V, dissenting.

Section 504 of the Rehabilitation Act of 1973 forbids discrimination solely on the basis of handicap in programs or activities receiving federal financial assistance. The issue before us is whether the Secretary of Health and Human Services has any authority under the Act to regulate medical treatment decisions concerning handicapped newborn infants. Relying on its prior decision in *United States* v. *University Hospital*, 729 F. 2d 144 (CA2 1984), the Court of Appeals held that the Secretary was without power in this respect and affirmed a decision of the District Court that § 504 does not extend so far and that the Secretary may not regulate such decisions in any manner.

Although it is my view that we granted certiorari to address this issue, the plurality avoids it by first erroneously reading the decision below as enjoining only the enforcement of specific regulations and by then affirming on the basis that the promulgation of the regulations did not satisfy established principles of administrative law, a matter that the Court of Appeals had no occasion to, and did not, discuss. With all due respect, I dissent.

I

The plurality's initial and fundamental error is its statement that the only question presented here is the specific question whether the four mandatory provisions of the Final Rules issued by the Secretary are authorized by § 504. This conclusion misconstrues the opinion and judgment of the Court of Appeals. The plurality concedes that the District Court's judgment on its face did not stop with enjoining the

enforcement of the final regulations. *Ante*, at 625–626, n. 11. In fact, the District Court permanently enjoined the Secretary from implementing the final regulations and also from "continuing or undertaking any other actions to investigate or regulate treatment decisions involving impaired newborn infants taken under authority of Section 504, including pending investigation and other enforcement actions." App. to Pet. for Cert. 51a–52a. This broad injunction ousted the Secretary from the field entirely and granted the precise relief sought by the complaint, which was filed after *University Hospital* and which sought to take full advantage of that decision.[1] The Court of Appeals affirmed and in no way modified the injunction that the District Court had entered. In doing so, the Court of Appeals relied on its previous determination in *University Hospital* that the Secretary had no statutory authority to regulate medical treatment decisions regarding newborn infants. See App. to Pet. for Cert. 2a–3a.[2]

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[1] I disagree with the plurality's conclusion that "[t]he complaints in this case did not challenge the Department's authority to regulate all treatment decisions, but more precisely the mandatory provisions of the Final Rules and enforcement activity along those lines but undertaken pursuant to the Department's 'general authority' to enforce § 504." *Ante*, at 625, n. 11. Although focusing most extensively on the regulations and pending HHS investigations, the complaint specifically cited the *University Hospital* holding that "Section 504 [does] not apply to 'treatment decisions involving defective newborn infants.'" App. 138. The complaint also specifically requested that the District Court "issue a preliminary and permanent injunction prohibiting the defendant from enforcing her final rule embodied in 45 CFR § 84.55, 49 Fed. Reg. 1622, *et seq.* (Jan. 12, 1984), and prohibiting defendant from otherwise acting pursuant to the claimed authority of Section 504 of the Rehabilitation Act of 1973 in regard to the medical treatment of infants with birth defects." *Id.*, at 159. The complaint thus requested both invalidation of the regulations and an injunction against all other actions by the Secretary in this area.

[2] The Court of Appeals' brief order affirming the District Court's judgment, although characterizing that judgment generally as having struck down the regulations, cited *University Hospital* and made no changes in the broad relief awarded by the District Court. The Court of Appeals

It is true that the regulations themselves were invalidated and their enforcement enjoined. This result, however, was directly compelled by the *University Hospital* conclusion that the Secretary was without power to issue any regulations whatsoever that dealt with infants' medical care, and it did not comprise the whole relief awarded by the District Court and affirmed by the Court of Appeals. I thus see no justification for the plurality's distortion of the Court of Appeals' affirmance of the District Court's all-inclusive injunction, which, like *University Hospital*, now represents the law in the Second Circuit.[3] We should resolve the threshold statutory question that this case and *University Hospital* clearly pose—namely, whether the Secretary has any authority at all under the Act to regulate medical care decisions with respect to the handicapped newborn.[4]

II

Section 504 of the Act, which was construed in *University Hospital*, provides:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title,

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gave absolutely no indication that it was construing the District Court's judgment one whit less broadly than that judgment's language indicated. Nowhere, therefore, is there a justification for the plurality's reconstructive reading of the Court of Appeals' judgment.

[3] I note in this regard that the parties as well do not appear to have contemplated the more limited reading of the judgment below adopted by the plurality. See Brief for Petitioner 9; Brief for Respondents American Hospital Association et al. 4; Brief for Respondents American Medical Association et al. 14.

[4] I would not avoid the issue of the validity of *University Hospital* even if the judgment below were limited to invalidation of these regulations. Given that the judgment below, whether it extends as far as *University Hospital* or not, was based on the *University Hospital* view that *all* regulation of medical treatment decisions is outside the Secretary's § 504 authority because of the nature of those decisions, I believe that the better approach here would be for the Court to determine the correctness of *University Hospital* in any case.

shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U. S. C. § 794.

After determining that § 706(7), which defines handicapped persons, is not limited to adults and includes the newborn, the Court of Appeals in *University Hospital* construed the "otherwise qualified" language of § 504 to limit the reach of the section to situations in which the handicap is "unrelated to, and thus improper to consideration of, the services in question." 729 F. 2d, at 156.[5] This, concluded the Court of Appeals, would exclude most handicapped newborns because their handicaps are not normally irrelevant to the need for medical services. Furthermore, the Court of Appeals thought that the "otherwise qualified" limitation should not be applied in the "comparatively fluid context of medical treatment decisions" because "[w]here the handicapping condition is related to the condition(s) to be treated, it will

[5]The Court of Appeals first addressed and reserved the question whether the hospital or its functions comprised a program or activity receiving federal financial assistance. Noting that this was a fact-specific inquiry, cf. *Grove City College* v. *Bell*, 465 U. S. 555 (1984), the Court of Appeals assumed that the entire hospital was covered by § 504 and proceeded to consider "whether, assuming the entire hospital is covered by section 504, the statute authorizes the type of investigation initiated here." 729 F. 2d, at 151.

I also do not consider whether or under what circumstances hospitals or hospital neonatal programs may constitute programs or activities receiving federal financial assistance. The judgment of the District Court which was affirmed by the Court of Appeals does not set forth guidelines for interpreting this language in this context: It merely enjoins actions directed at such programs or activities. The regulations as well simply adopt the statutory language without interpreting it. Thus, I assume here that the § 504 strictures would be applied only to appropriate programs or activities, and I therefore would leave discussion of this fact-specific issue for further proceedings. I would not now hold that § 504 may never apply on this basis.

rarely, if ever, be possible to say with certainty that a particular decision was 'discriminatory.'" *Id.*, at 156–157.

Having identified these perceived incongruities between the language of § 504 and the potential regulation of medical decisions regarding handicapped newborns, the Court of Appeals concluded that "[b]efore ruling that congress intended to spawn this type of litigation under section 504, we would want more proof than is apparent from the face of the statute." *Id.*, at 157. Thus, the Court of Appeals turned to the legislative history, where it again found nothing to persuade it that Congress intended § 504 to apply to medical treatment of handicapped infants and hence to enter a field so traditionally occupied by the States. Neither did it consider the current administrative interpretation of § 504 to be a longstanding agency construction calling for judicial deference. In the Court of Appeals' view, therefore, the section was inapplicable to medical treatment decisions regarding the newborn absent some further indication of congressional intent.

I disagree with this conclusion, which the Court of Appeals adhered to in the case before us now. Looking first at the language of the statute, I agree with the Court of Appeals' preliminary conclusion that handicapped newborns are handicapped individuals covered by the Act. There is no reason for importing an age limitation into the statutory definition, and this Court has previously stated that "§ 504 protects handicapped persons of all ages from discrimination in a variety of programs and activities receiving federal financial assistance." *Smith* v. *Robinson*, 468 U. S. 992, 1016–1017 (1984).[6] This leaves the critical question whether a handi-

[6] Although infants with birth defects are clearly handicapped individuals covered by § 504, there is one manner in which they may differ from most other handicapped individuals for § 504 purposes. Specifically, they may have a combination of conditions—some of which are medically correctable and some of which are not. In older handicapped individuals, medically correctable conditions may have been corrected so that only irreparable handicapping conditions remain. In a newborn infant, however, both correctable and incorrectable conditions may exist. Thus, since both of these

capped infant can ever be "otherwise qualified" for medical treatment and hence possibly subjected to unlawful discrimination when he or she is denied such treatment.[7]

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may interfere with major life activities, both types of conditions may be considered to be handicaps. In this context, however, it might make more sense to consider as handicaps only those conditions that cannot be medically treated to the point that they will not impair major life activities. For such correctable conditions would not be likely to cause the infant to be regarded as handicapped. In any case, I believe that defining an infant's handicap may well be a delicate problem and one that deserves some consideration.

[7] It would appear that for an infant to be qualified for treatment his or her parents must have consented to such treatment. For the purposes of this discussion of whether the Court of Appeals was correct that medical treatment decisions may *never* be regulated by § 504, I assume that parental consent has been given and that the arguably discriminatory treatment decision is being made by the hospital or doctor. The Court of Appeals in *University Hospital* concentrated on the nature of these decisions in concluding that § 504 may not properly be applied, and I concentrate on that as well. That a situation in which treatment is refused where parental consent has been given may not have been shown to have arisen does not undermine this assumption here. The critical question is whether the operative provisions of § 504 may *ever* apply here given the nature of the decision.

For the purposes of addressing the Court of Appeals' *University Hospital* analysis, the most straightforward fact situation to consider is one in which the benefit provided is the medical treatment itself and in which a hospital refuses treatment in the face of parental consent. In this context, the Court of Appeals' conclusion that the nature of the decisions themselves precludes application of § 504 may be addressed with maximum simplicity. I note, however, that it may well be that the benefits provided by hospitals and doctors and covered by § 504 extend beyond treatment itself. For example, one benefit provided by hospitals and doctors to patients who cannot make their own medical treatment decisions may be medical advice in those patients' best interest to those who must ultimately make the relevant medical treatment decisions. To the extent that the provision of this benefit is a program or activity covered by the statute, I would think that the statute requires that the same advice be given to parents of a handicapped baby as to the parents of a similarly situated nonhandicapped baby. Another benefit provided may be the reporting of nontreatment to the relevant state agency in the case of a parental decision not to treat. Again,

It may well be that our prior consideration of this language has implied that the Court of Appeals' construction is correct. In *Southeastern Community College* v. *Davis*, 442 U. S. 397, 406 (1979), we held that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." This formulation may be read as implying that where a handicapped person meets all of the requirements normally necessary to receive a program's benefits regardless of his or her handicap, he or she is otherwise qualified because that handicap does not interfere with and is thus irrelevant to his or her qualification for the program. Thus, the Court of Appeals' view—that refusing treatment that is called for only because of the handicapping condition cannot constitute discrimination on the basis of handicap since there will be no similarly situated nonhandicapped newborn, *i. e.*, one who needs the same treatment—draws support from our holding in *Davis* since it turns on the same underlying perception that discrimination occurs only when the handicapping condition is irrelevant to the qualification for the program.

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to the extent that the provision of this benefit is a program or activity covered by the statute, see n. 13, *infra*, I would think that § 504 requires that the hospital or doctor report nontreatment of a handicapped baby when it would report the denial of the same treatment for a nonhandicapped baby.

My conclusions in this regard are buttressed by my view of § 504's coverage in the case of a medical treatment decision regarding a black baby. If a hospital or doctor advised different or less efficacious treatment for a black baby than for a white baby, I believe that this would be discrimination under the statute. Similarly, a failure to report a parental decision not to treat because of race would seem to me to be illegally discriminatory—assuming that this decision otherwise came within the statute.

In sum, although these additional situations present the same issue as to when a handicapped baby is otherwise qualified and when such a baby is subjected to discrimination as does the direct example of a refusal to treat and although it may well be that it would be in these contexts that the statute would most likely be given effect, for simplicity's sake I have centered my discussion of *University Hospital* on the refusal-to-treat example.

Even under the Court of Appeals' interpretation of "otherwise qualified," however, it does not follow that § 504 may never apply to medical treatment decisions for the newborn. An esophageal obstruction, for example, would not be part and parcel of the handicap of a baby suffering from Down's syndrome, and the infant would benefit from and is thus otherwise qualified for having the obstruction removed in spite of the handicap. In this case, the treatment is completely unrelated to the baby's handicapping condition. If an otherwise normal child would be given the identical treatment, so should the handicapped child if discrimination on the basis of the handicap is to be avoided.[8]

It would not be difficult to multiply examples like this. And even if it is true that in the great majority of cases the handicap itself will constitute the need for treatment, I doubt that this consideration or any other mentioned by the Court of Appeals justifies the wholesale conclusion that § 504 never applies to newborn infants with handicaps. That some or most failures to treat may not fall within § 504, that discerning which failures to treat are discriminatory may be difficult, and that applying § 504 in this area may intrude into the traditional functions of the State do not support the categori-

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[8] There are substantial arguments that could be made that the Court of Appeals too narrowly read the statute. It could be argued, for example, that the benefit provided by hospitals is not defined in terms of specific treatments. Rather, the benefit is "general medical care for whatever happens to need treating." If this is the benefit, then a much broader application of the statute in this context is reasonable. Alternatively, even if the benefit is defined more narrowly, "reasonable accommodation" might require more than mere impartial dispensing of identical treatment. See *Alexander* v. *Choate*, 469 U. S. 287, 299–300, and nn. 19, 20 (1985). I need not resolve this issue of the exact meaning of § 504 and *Davis* in this context, however, because my conclusion that *University Hospital*'s broad reasoning was incorrect does not depend on it. Although I do not resolve these issues, I note that while the more expansive interpretations seem consistent with the interpretation adopted by the Secretary in the regulations, the more restrictive one does not. See 45 CFR pt. 84, Appendix C(a) (1985).

cal conclusion that the section may never be applied to medical decisions about handicapped infants. And surely the absence in the legislative history of any consideration of handicapped newborns does not itself narrow the reach of the statutory language. See *Jefferson County Pharmaceutical Assn.* v. *Abbott Laboratories*, 460 U. S. 150, 159–162, and n. 18 (1983). Furthermore, the broad remedial purpose of the section would be undermined by excluding handicapped infants from its coverage; and if, as the plurality indicates, *ante*, at 642–643, the Secretary has substantial leeway to explore areas in which discrimination against the handicapped poses serious problems and to devise regulations to prohibit the discrimination, it is appropriate to take note of the Secretary's present view that § 504 properly extends to the subject matter at issue here. Thus, I believe that the Court of Appeals in *University Hospital* incorrectly concluded that § 504 may never apply to medical treatment decisions concerning handicapped newborn infants. Where a decision regarding medical treatment for a handicapped newborn properly falls within the statutory provision, it should be subject to the constraints set forth in § 504. Consequently, I would reverse the judgment below.

III

Having determined that the stated basis for the Court of Appeals' holding in *University Hospital* was incorrect and that the decision below cannot be supported by *University Hospital*'s blanket prohibition, I would remand the case to the Court of Appeals. The respondents have, as the plurality's opinion itself demonstrates, raised significant issues aside from the threshold statutory issue presented here. There are, for example, substantial questions regarding the scope of the Secretary's statutory authority in this area and whether these particular regulations are consistent with the statute. I would decline to reach and decide these questions for the first time in this Court without the benefit of the

lower courts' deliberations.[9] The plurality, however, has chosen to reach out and address one of those subsidiary issues. Because the plurality has resolved that issue in a manner that I find indefensible on its own terms, I too address it.

The plurality concludes that the four mandatory provisions of the final regulations are invalid because there is no "'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Assn., Inc.* v. *State Farm Mutual Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168 (1962)). The basis for this conclusion is the plurality's perception that two and only two wholly discrete categories of decisions are the object of the final regulations: (1) decisions made by hospitals to treat or not treat where parental consent has been given and (2) decisions made by hospitals to refer or not to refer a case to the state child protective services agency where parental consent has been withheld.[10]

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[9] In addition, although the Secretary did not brief the merits of the respondents' claim that the regulations are invalid because arbitrary and capricious, the Secretary did indicate his view that this claim in its current form is not properly in the case and that it is inadequate on its face. See Reply Brief for Petitioner 16, n. 6.

Specifically, the Secretary first asserts that the respondents' argument as to the lack of factual basis involving situations in which parents *have* consented to treatment was not raised in the complaint. See App. 146 (challenging lack of showing of instances where "erroneous" parental decisions were made and where medical authorities did not take proper measures under state law). Thus, the Secretary contends that the first major claim addressed and relied on by the plurality was never properly raised. Second, the Secretary contends that these are interpretative regulations that impose no new substantive duties, see 49 Fed. Reg. 1628 (1984), and that no factual basis for their issuance need therefore be given. Cf. 5 U. S. C. § 553(b).

These contentions, although not perhaps representing a procedural bar to our reaching this claim, see *ante*, at 629, n. 14, do provide an additional sign that the plurality's resolution of this case rests on shaky ground.

[10] At this point in the case, as the plurality observes, all parties concerned agree that parental decisions are not included in § 504's application. See *ante*, at 630.

Since the Secretary has not specifically pointed to discriminatory actions that provably resulted from either of these two specific types of decisions, the plurality finds that the Secretary's conclusion that discrimination is occurring is unsupported factually. The plurality's characterization of the Secretary's rationale, however, oversimplifies both the complexity of the situations to which the regulations are addressed and the reasoning of the Secretary.

First, the Secretary's proof that treatment is in fact being withheld from handicapped infants is unquestioned by the plurality. It is therefore obvious that whoever is making them, *decisions* to withhold treatment from such infants are in fact being made. This basic understanding is critical to the Secretary's further reasoning, and the discussion accompanying the proposed regulations clearly indicates that this was the Secretary's starting point. See 48 Fed. Reg. 30847–30848 (1983). Proceeding with this factual understanding, the next question is whether such withholding of treatment constitutes prohibited discrimination under § 504 in some or all situations. It is at this point that the plurality errs. In the plurality's view, only two narrow paradigmatic types of decisions were contemplated by the Secretary as potentially constituting discrimination in violation of the statute. See *ante*, at 628–629. The plurality does not explain, however, precisely what in the Secretary's discussion gives rise to this distillation, and my reading of the explanation accompanying the regulations does not leave me with so limited a view of the Secretary's concerns.

The studies cited by the Secretary in support of the regulations and other literature concerning medical treatment in this area generally portray a decisionmaking process in which the parents and the doctors and often other concerned persons as well are involved—although the parental decision to consent or not is obviously the critical one.[11] Thus, the pa-

[11] See, *e. g.*, Duff & Campbell, Moral and Ethical Dilemmas in the Special-Care Nursery, 289 N. Eng. J. Med. 890 (1973). See also Gross,

rental consent decision does not occur in a vacuum. In fact, the doctors (directly) and the hospital (indirectly) in most cases participate in the formulation of the final parental decision and in many cases substantially influence that decision.[12] Consequently, discrimination against a handicapped infant may assume guises other than the outright refusal to treat once parental consent has been given. Discrimination may occur when a doctor encourages or fails to discourage a parental decision to refuse consent to treatment for a handicapped child when the doctor would discourage or actually oppose a parental decision to refuse consent to the same treatment for a nonhandicapped child. Or discrimination may occur when a doctor makes a discriminatory treatment recommendation that the parents simply follow. Alternatively, discrimination may result from a hospital's explicit laissez-faire attitude about this type of discrimination on the part of doctors.

Contrary to the plurality's constrained view of the Secretary's justification for the regulations, the stated basis for those regulations reveals that the Secretary was cognizant of this more elusive discrimination. For example, the evidence cited most extensively by the Secretary in his initial proposal of these regulations was a study of attitudes of practicing and teaching pediatricians and pediatric surgeons. See 48 Fed. Reg. 30848 (1983) (citing Shaw, Randolph, & Manard, Ethical Issues in Pediatric Surgery: A National Survey of Pediatricians and Pediatric Surgeons, 60 Pediatrics 588 (1977)). This study indicated that a substantial number of these doctors (76.8% of pediatric surgeons and 49.5% of pedi-

Cox, Tatyrek, Pollay, & Barnes, Early Management and Decision Making for the Treatment of Myelomeningocele, 72 Pediatrics 450 (1983).

[12] Presumably, the program or activity that § 504 would apply to in this context would be the hospital's neonatal program of medical care or the hospital's program of medical care generally. In either case, actions of both doctors and hospitals that cause or permit discriminatory decisions that are taken as part of the program or activity would be subject to § 504's constraints.

atricians) would "acquiesce in parents' decision to refuse consent for surgery in a newborn with intestinal atresia if the infant also had . . . Down's syndrome." *Id.*, at 590. It also indicated that a substantial minority (23.6% of pediatric surgeons and 13.2% of pediatricians) would in fact encourage parents to refuse consent to surgery in this situation and that only a small minority (3.4% of pediatric surgeons and 15.8% of pediatricians) would attempt to get a court order mandating surgery if the parents refused consent. In comparison, only a small minority (7.9% of pediatric surgeons and 2.6% of pediatricians) would acquiesce in parental refusal to treat intestinal atresia in an infant with no other anomaly. And a large majority (78.3% of pediatric surgeons and 88.4% of pediatricians) would try to get a court order directing surgery if parental consent were withheld for treatment of a treatable malignant tumor. The Secretary thus recognized that there was evidence that doctors would act differently in terms of attempts to affect or override parental decisions depending on whether the infant was handicapped.

Based on this evidence, the Secretary conceded that "[t]he full extent of discriminatory and life-threatening practices toward handicapped infants is not yet known" but concluded "that for even a single infant to die due to lack of an adequate notice and complaint procedure is unacceptable." 48 Fed. Reg. 30847 (1983). Thus, the Secretary promulgated the regulations at issue here. These regulations, in relevant part, require that a notice of the federal policies against discrimination on the basis of handicap be posted in a place where a hospital's health care professionals will see it. This requirement is, as the Secretary concluded, "[c]onsistent with the Department's intent to target the notice to nurses and other health care professionals." App. 25. The notice requirement, therefore, may reasonably be read as aimed at fostering an awareness by health care professionals of their responsibility not to act in a discriminatory manner with respect to medical treatment decisions for handicapped infants.

The second requirement of the regulations, that state agencies provide mechanisms for requiring and reporting medical neglect of handicapped children, is also consistent with the Secretary's focus on discrimination in the form of discriminatory reporting.[13]

I therefore perceive a rational connection between the facts found by the Secretary and the regulatory choice made. The Secretary identified an existing practice that there was reason to believe resulted from discrimination on the basis of handicap. Given this finding, the amorphous nature of much of the possible discrimination, the Secretary's profession that the regulations are appropriate no matter how limited the problem,[14] and the focus of the regulations on loci where unlawful discrimination seems most likely to occur and on persons likely to be responsible for it, I conclude that these regulations are not arbitrary and capricious and that the Court errs in striking them down on that basis. Although the Secretary's path here may be marked with "'less than ideal clarity,'" we will uphold such a decision "'if the agency's path may reasonably be discerned.'" *Motor Vehicles Mfrs. Assn.*, 463 U. S., at 43 (quoting *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286 (1974)).

The plurality also objects to the regulations' requirement concerning the state protective agencies' reporting proce-

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[13] The plurality reserves the question whether reporting would be a program or activity receiving federal financial assistance, *ante*, at 639, n. 25, and I follow that course.

[14] The plurality itself says that "regulations may be imposed for preventative or prophylactic reasons," *ante*, at 643, but concludes that the Secretary here proceeded based on the perception of an actual problem rather than a need for prophylactic rules. To me, however, the Secretary's statement that the rules are appropriate if necessary for even one problem situation makes the plurality's distinction in this respect questionable: The line between a prophylactic rule and a rule that draws its justification from the likely existence of even one unlawful action seems to me a very fine one.

dures on another ground. Specifically, the plurality finds that this requirement is in fact a substantive prescription rather than a prohibition of discrimination. The plurality bases this conclusion on the fact that the regulation sets forth specific procedures that must be adopted by state agencies.

The plurality's conclusion disregards the Secretary's explanation for this requirement. In the preamble to the proposed regulations, the Secretary explicitly stated:

> "The Department has determined that under every state's law, failure of parents to provide necessary, medically indicated care to a child is either explicitly cited as grounds for action by the state to compel treatment or is implicitly covered by the state statute. These state statutes also provide for appropriate administrative and judicial enforcement authorities to prevent such instances of medical neglect, including requirements that medical personnel report suspected cases to the state child protective services agency, agency access to medical files, immediate investigations and authority to compel treatment." 48 Fed. Reg. 30848 (1983).

This finding was repeated in the statement accompanying the final regulations:

> "Although there are some variations among state child protective statutes, all have the following basic elements: a requirement that health care providers report suspected cases of child abuse or neglect, including medical neglect; a mechanism for timely receipt of such reports; a process for administrative inquiry and investigation to determine the facts; and the authority and responsibility to seek an appropriate court order to remedy the apparent abuse and neglect, if it is found to exist." 49 Fed. Reg. 1627 (1984).

The regulations, in turn, require that the State provide these same services with respect to medical neglect of handicapped infants. See 45 CFR § 84.55(c) (1985). The only

additional requirements imposed by the regulations involve provisions enabling the Department itself to review for compliance with the nondiscrimination requirements. Consequently, the regulations simply track the existing state procedures found to exist by the Secretary, requiring that funded state agencies provide those same procedures for handicapped children. The fact that the regulations specify the procedures that are necessary to ensure an absence of discrimination and do not instead speak in "nondiscrimination" terms is irrelevant. The substance of the requirement is nondiscrimination. The plurality's conclusion in this regard, however, apparently rests on a determination that implementation of a nondiscrimination mandate may be accomplished in only one form—even if the same result may be accomplished by another route. See *ante*, at 640, n. 26. I would not elevate regulatory form over statutory substance in this manner. In sum, the plurality's determination that the regulations were inadequately supported and explained as a matter of administrative law does not withstand examination of the Secretary's discussion of the underlying problem and of the contours of the regulations themselves.

IV

My disagreement with the plurality in this case does not end here, however. For even under its chosen rationale, I find its ultimate conclusion dubious. Having assiduously restricted its discussion to the validity of the regulations only, the plurality ends up concluding expansively that not only the regulations but also other investigations taken by the Secretary independent of the regulations are invalid. Thus, the Court apparently enjoins the Secretary's on-site investigations as well as "the regulations which purport to authorize a continuation of them." *Ante*, at 647. And the plurality rests this action on the conclusion that the lower courts "correctly held that these investigative actions were not authorized by the statute." *Ibid.*

I am at a loss to understand the plurality's reasoning in this respect. In construing the judgment below, the plurality appears to conclude that, although the injunction entered by the District Court and affirmed by the Court of Appeals did not purport to prohibit *all* actions by the Secretary under the statute, the injunction did in fact extend beyond merely these particular regulations. Thus, the plurality indicates that the judgment below applied as well to actions that "resemble," "parallel," or are "along [the] lines [of]" the regulations. *Ante*, at 625–626, n. 11. The plurality further defines what actions it believes the Court of Appeals and District Court contemplated: "[T]he injunction forbids continuation or initiation of regulatory and investigative activity directed at instances in which parents have refused consent to treatment and, if the Secretary were to undertake such action, efforts to seek compliance with affirmative requirements imposed on state child protective services agencies." *Ante*, at 625, n. 11.

Aside from the fact that I see absolutely nothing in either the District Court's or the Court of Appeals' judgment that would support a constrained reading of the broadly phrased relief awarded by the District Court and affirmed without modification by the Court of Appeals,[15] I have some doubt as to how different the Court's holding today is from a holding that § 504 gives HHS no authority whatsoever over decisions to treat handicapped infants. The plurality's lack of coherence on this crucial point raises substantial doubts as to the reach of the holding and as to the basis for that holding.

Finally, I am puzzled as to how and why the plurality's determination that the regulations are invalid because they are arbitrary and capricious extends to other actions not taken under the regulations. The plurality apparently would enjoin all enforcement actions by the Secretary in situations in which parents have refused to consent to treatment. See *ante*, at 625–626, n. 11. Yet it is not clear to me that the

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[15] See nn. 1–2, *supra*, and accompanying text.

plurality's basis for invalidating these regulations would extend to all such situations. I do not see, for example, why the plurality's finding that the Secretary did not adequately support his conclusion that failures to report refusals to treat likely result from discrimination means that such a conclusion will *never* be justified. The Secretary might be able to prove that a particular hospital generally fails to report nontreatment of handicapped babies for a specific treatment where it reports nontreatment of nonhandicapped babies for the same treatment. In essence, a determination that these regulations were inadequately supported factually would not seem to be properly extended beyond actions taken pursuant to these regulations: The fact that the Secretary has not adequately justified generalized action under the regulations should not mean that individualized action in appropriate circumstances is precluded.

V

In sum, the plurality today mischaracterizes the judgment below and, based on that mischaracterization, is sidetracked from the straightforward issue of statutory construction that this case presents. The plurality incorrectly resolves an issue that was not fully addressed by the parties, gives no guidance to the Secretary or the other parties as to the proper construction of the governing statute, and fails adequately to explain the precise scope of the holding or how that holding is supported under the plurality's chosen rationale. From this misguided effort, I dissent.

JUSTICE O'CONNOR, dissenting.

I fully agree with JUSTICE WHITE's conclusion that the only question properly before us is whether the Court of Appeals correctly concluded that the Secretary has no power under 29 U. S. C. § 794 to regulate medical treatment decisions concerning handicapped newborn infants. I also agree that application of established principles of statutory construction and of the appropriate standard for judicial review

of agency action leads inescapably to the conclusion that the Secretary has the authority to regulate in this area. Because, however, I see no need at this juncture to address the details of the regulations or to assess whether they are sufficiently rational to survive review under 5 U. S. C. § 706 (2)(A), I join only parts I, II, IV, and V of JUSTICE WHITE's dissent.

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. v. MICHIGAN ACADEMY OF FAMILY PHYSICIANS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85-225. Argued January 22, 1986—Decided June 9, 1986

Respondents, who include an association of family physicians and several individual doctors, filed suit in Federal District Court to challenge the validity of a regulation that was promulgated under Part B of the Medicare program and that authorizes the payment of benefits in different amounts for similar physicians' services. Holding that the regulation contravened several statutory provisions governing the Medicare program, the court rejected the Secretary of Health and Human Services' contention (the question presented in this Court) that Congress has forbidden judicial review of all questions affecting the amount of benefits payable under Part B of the Medicare program. The Court of Appeals agreed.

Held: In neither 42 U. S. C. § 1395ff (1982 ed. and Supp. II) nor § 1395ii (1982 ed., Supp. II), has Congress barred judicial review of regulations promulgated under Part B of the Medicare program. Pp. 670–682.

(a) There is a strong presumption that Congress intends judicial review of administrative action. Only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review. Pp. 670–673.

(b) The provisions of § 1395ff(b) that authorize administrative and judicial review of determinations as to the amount of benefits under Part A of the Medicare program do not impliedly foreclose judicial review of Part B regulations. The reticulated statutory scheme, which details the forum and limits of review of determinations of the amounts of benefits payable under Parts A and B, simply does not speak to challenges as to the *method* by which such amounts are to be determined rather than the *determinations* themselves. That Congress did not preclude review of the method by which Part B awards are computed (as opposed to the computation) is supported by the legislative history. *United States* v. *Erika, Inc.*, 456 U. S. 201, explained. Pp. 674–678.

(c) Nor does § 1395ii, which states that 42 U. S. C. § 405(h) (1982 ed., Supp. II), along with other provisions of the Social Security Act, shall be applicable to the Medicare program, preclude judicial review here. Regardless of the abstract meaning of § 405(h), which prohibits certain ac-

tions against the Government or its officers, that section does not apply on its own terms to Part B, but is instead incorporated *mutatis mutandis* by § 1395ii. The legislative history of the Medicare program provides specific evidence of Congress' intent to foreclose review only of "amount determinations," not of substantial statutory and constitutional challenges to the Secretary's administration of Part B. Pp. 678–681.

757 F. 2d 91, affirmed.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except REHNQUIST, J., who took no part in the consideration or decision of the case.

Edwin S. Kneedler argued the cause for petitioners. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller,* and *Anthony J. Steinmeyer.*

Alan G. Gilchrist argued the cause and filed a brief for respondents.*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented in this case is whether Congress, in either § 1395ff or § 1395ii of Title 42 of the United States Code, barred judicial review of regulations promulgated under Part B of the Medicare program.

Respondents, who include an association of family physicians and several individual doctors, filed suit to challenge the validity of 42 CFR § 405.504(b) (1985), which authorizes the payment of benefits in different amounts for similar physicians' services. The District Court held that the regulation contravened several provisions of the statute governing the Medicare program:

> "There is no basis to justify the segregation of allopathic family physicians from all other types of physicians. Such segregation is not rationally related to any legitimate purpose of the Medicare statute. To lump MDs who are family physicians, but who have chosen not

**Jack R. Bierig* filed a brief for the American Medical Association as *amicus curiae* urging affirmance.

> to become board certified family physicians for whatever motive, with chiropractors, dentists, and podiatrists for the purpose of determining Medicare reimbursement defies all reason." *Michigan Academy of Family Physicians* v. *Blue Cross and Blue Shield of Michigan*, 502 F. Supp. 751, 755 (ED Mich. 1980).

Because it ruled in favor of respondents on statutory grounds, the District Court did not reach their constitutional claims. See *id.*, at 756. The Court of Appeals agreed with the District Court that the Secretary's regulation was "obvious[ly] inconsisten[t] with the plain language of the Medicare statute" and held that "this regulation is irrational and is invalid." *Michigan Academy of Family Physicians* v. *Blue Cross and Blue Shield of Michigan*, 728 F. 2d 326, 332 (CA6 1984). Like the District Court, it too declined to reach respondents' constitutional claims. See *id.*, at 332, n. 5.

The Secretary of Health and Human Services has not sought review of the decision on the merits invalidating the regulation. Instead, he renews the contention, rejected by both the District Court and the Court of Appeals, that Congress has forbidden judicial review of all questions affecting the amount of benefits payable under Part B of the Medicare program. Because the question is important and has divided the Courts of Appeals,[1] we granted the petition for a writ of certiorari.[2] We now affirm.

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[1] The Court of Appeals for the Fourth Circuit, in conflict with the Court of Appeals for the Sixth Circuit, has held that regulations promulgated under Part B of the Medicare program are insulated from judicial review. See *Starnes* v. *Schweiker*, 748 F. 2d 217, 218 (1984) *(per curiam)*, cert. denied, 471 U. S. 1017 (1985).

[2] In fact, we did so twice. We first granted the petition for a writ of certiorari to allow the Court of Appeals to consider its jurisdictional ruling in the light of *Heckler* v. *Ringer*, 466 U. S. 602 (1984). 467 U. S. 1223 (1984). On remand, the Court of Appeals ultimately decided to reinstate its original judgment, see *Michigan Academy of Family Physicians* v. *Blue Cross and Blue Shield of Michigan*, 757 F. 2d 91 (1985); *Michigan Academy of Family Physicians* v. *Blue Cross and Blue Shield of Michi-*

I

We begin with the strong presumption that Congress intends judicial review of administrative action. From the beginning "our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) (citing cases). See generally L. Jaffe, Judicial Control of Administrative Action 339–353 (1965). In *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803), a case itself involving review of executive action, Chief Justice Marshall insisted that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." Later, in the lesser known but nonetheless important case of *United States* v. *Nourse*, 9 Pet. 8, 28–29 (1835), the Chief Justice noted the traditional observance of this right and laid the foundation for the modern presumption of judicial review:

> "It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States."

Committees of both Houses of Congress have endorsed this view. In undertaking the comprehensive rethinking of the place of administrative agencies in a regime of separate and

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gan, 751 F. 2d 809 (1984), whereupon we issued the writ on which the judgment is now before us. 474 U. S. 815 (1985).

divided powers that culminated in the passage of the Administrative Procedure Act (APA), 5 U. S. C. §§ 551–559, 701–706, the Senate Committee on the Judiciary remarked:

> "Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board." S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

Accord, H. R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946). The Committee on the Judiciary of the House of Representatives agreed that Congress ordinarily intends that there be judicial review, and emphasized the clarity with which a contrary intent must be expressed:

> "The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." *Ibid.*

Taking up the language in the House Committee Report, Justice Harlan reaffirmed the Court's holding in *Rusk* v. *Cort*, 369 U. S. 367, 379–380 (1962), that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U. S., at 141 (citations omitted). This standard has been invoked time and again when

considering whether the Secretary has discharged "the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision," *Dunlop* v. *Bachowski*, 421 U. S. 560, 567 (1975).[3]

Subject to constitutional constraints, Congress can, of course, make exceptions to the historic practice whereby

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[3] See, *e. g.*, *Lindahl* v. *Office of Personnel Management*, 470 U. S. 768, 778 (1985); *Dunlop* v. *Bachowski*, 421 U. S., at 567; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 410 (1971); *Barlow* v. *Collins*, 397 U. S. 159, 166–167 (1970) ("Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated"). See also *Wong Wing Hang* v. *INS*, 360 F. 2d 715, 718 (CA2 1966) (Friendly, J.) ("[O]nly in the rare—some say non-existent—case . . . may review for 'abuse' be precluded"). Of course, this Court has "never applied the 'clear and convincing evidence' standard in the strict evidentiary sense"; nevertheless, the standard serves as "a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 350–351 (1984).

A strong presumption finds support in a wealth of scholarly literature. See, *e. g.*, 2 K. Davis, Administrative Law § 9:6, p. 240 (1979) (praising "the case law since 1974" for being "strongly on the side of reviewability"); L. Jaffe, Judicial Control of Administrative Action 327 (1965) ("An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law, the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the 'common law,' and the ultimate guarantees associated with the Constitution"); B. Schwartz, Administrative Law § 8.1, p. 436 (2d ed. 1984) ("The responsibility of enforcing the limits of statutory grants of authority is a judicial function; . . . [w]ithout judicial review, statutory limits would be naught but empty words"); Jaffe, The Right to Judicial Review I, 71 Harv. L. Rev. 401, 432 (1958) ("[J]udicial review is the rule. . . . It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest"); Shapiro, Administrative Discretion: The Next Stage, 92 Yale L. J. 1487, 1489, n. 11 (1983) (since passage of the APA, the sustained effort of administrative law has been to "continuously narro[w] the category of actions considered to be so discretionary as to be exempted from review").

courts review agency action. The presumption of judicial review is, after all, a presumption, and "like all presumptions used in interpreting statutes, may be overcome by," *inter alia*, "specific language or specific legislative history that is a reliable indicator of congressional intent," or a specific congressional intent to preclude judicial review that is "'fairly discernible' in the detail of the legislative scheme." *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349, 351 (1984).[4]

In this case, the Government asserts that two statutory provisions remove the Secretary's regulation from review under the grant of general federal-question jurisdiction found in 28 U. S. C. § 1331. First, the Government contends that 42 U. S. C. § 1395ff(b) (1982 ed., Supp. II), which authorizes "Appeal by individuals," impliedly forecloses administrative or judicial review of any action taken under Part B of the Medicare program by failing to authorize such review while simultaneously authorizing administrative and judicial review of "any determination . . . as to . . . the amount of benefits under part A," § 1395ff(b)(1)(C). Second, the Government asserts that 42 U. S. C. § 1395ii (1982 ed., Supp. II), which makes applicable 42 U. S. C. § 405(h) (1982 ed., Supp. II), of the Social Security Act to the Medicare program, expressly precludes all administrative or judicial review not otherwise provided in that statute. We find neither argument persuasive.

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[4] "The congressional intent necessary to overcome the presumption may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it, see, *e. g.*, *Ludecke* v. *Watkins*, 335 U. S. 160 (1948), or from the collective import of legislative and judicial history behind a particular statute, see, *e. g.*, *Heikkila* v. *Barber*, 345 U. S. 229 (1953). More important for purposes of this case, the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole. See, *e. g.*, *Morris* v. *Gressette*, 432 U. S. 491 (1977); *Switchmen* v. *National Mediation Board*, 320 U. S. 297 (1943)." *Block* v. *Community Nutrition Institute*, 467 U. S., at 349.

II

Section 1395ff on its face is an explicit authorization of judicial review, not a bar.[5] As a general matter, "'[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.'" *Abbott Laboratories* v. *Gardner*, 387 U. S., at 141 (quoting L. Jaffe, Judicial Control of Administrative Action 357 (1965)). See *Barlow* v. *Collins*, 397 U. S. 159, 166 (1970); *Stark* v. *Wickard*, 321 U. S. 288, 309 (1944).

In the Medicare program, however, the situation is somewhat more complex. Under Part B of that program, which is at issue here, the Secretary contracts with private health insurance carriers to provide benefits for which individuals voluntarily remit premiums. This optional coverage, which is federally subsidized, supplements the mandatory institu-

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[5] The pertinent text of § 1395ff reads as follows:

"(a) Entitlement to and amount of benefits

"The determination of whether an individual is entitled to benefits under part A or part B, and the determination of the amount of benefits under part A, shall be made by the Secretary in accordance with regulations prescribed by him.

"(b) Appeal by individuals

"(1) Any individual dissatisfied with any determination under subsection (a) of this section as to—

"(A) whether he meets the conditions of section 426 or section 426a of this title [which set forth eligibility requirements to be satisfied before an individual is permitted to participate in Part A of the Medicare program], or

"(B) whether he is eligible to enroll and has enrolled pursuant to the provisions of part B of [the Medicare program] . . . , or,

"(C) the amount of the benefits under part A (including a determination where such amount is determined to be zero)

shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title."

tional health benefits (such as coverage for hospital expenses) provided by Part A. Subject to an amount-in-controversy requirement, individuals aggrieved by delayed or insufficient payment with respect to benefits payable under Part B are afforded an "opportunity for a fair hearing by the *carrier*," 42 U. S. C. § 1395u(b)(3)(C) (emphasis added); in comparison, and subject to a like amount-in-controversy requirement, a similarly aggrieved individual under Part A is entitled "to a hearing thereon by the *Secretary* . . . and to judicial review," 42 U. S. C. §§ 1395ff(b)(1)(C), (b)(2) (1982 ed. and Supp. II). "In the context of the statute's precisely drawn provisions," we held in *United States* v. *Erika, Inc.*, 456 U. S. 201, 208 (1982), that the failure "to authorize further review for determinations of the amount of Part B awards . . . provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims." Not limiting our consideration to the statutory text, we investigated the legislative history which "confirm[ed] this view," *ibid.*, and disclosed a purpose to "'avoid overloading the courts'" with "'trivial matters,'" a consequence which would "'unduly ta[x]'" the federal court system with "'little real value'" to be derived by participants in the program, *id.*, at 210, n. 13 (quoting 118 Cong. Rec. 33992 (1972) (remarks of Sen. Bennett)).

Respondents' federal-court challenge to the validity of the Secretary's regulation is not foreclosed by § 1395ff as we construed that provision in *Erika*. The reticulated statutory scheme, which carefully details the forum and limits of review of "any determination . . . of . . . the amount of benefits under part A," 42 U. S. C. § 1395ff(b)(1)(C) (1982 ed., Supp. II), and of the "amount of . . . payment" of benefits under Part B, 42 U. S. C. § 1395u(b)(3)(C), simply does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves. As the Secretary has made clear, "the legality, constitutional or otherwise, of any provision of

the Act or regulations relevant to the Medicare Program" is not considered in a "fair hearing" held by a carrier to resolve a grievance related to a determination of the amount of a Part B award.[6] As a result, an attack on the validity of a regulation is not the kind of administrative action that we described in *Erika* as an "amount determination" which decides "the amount of the Medicare payment to be made on a particular claim" and with respect to which the Act impliedly denies judicial review. 456 U. S., at 208.

That Congress did not preclude review of the method by which Part B awards are computed (as opposed to the computation) is borne out by the very legislative history we found persuasive in *Erika*. The Senate Committee Report on the original 1965 legislation reveals an intention to preclude "judicial review of a determination concerning the *amount of benefits* under part B where claims will probably

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[6] Medicare Carrier's Manual § 12016 (1985). In a "fair hearing" conducted pursuant to § 1395u(b)(3)(C), see 42 CFR § 405.820 (1985), the carrier designates a hearing officer, § 405.823, whose jurisdiction is circumscribed by regulation as follows:

"The hearing officer in exercising the authority to conduct a hearing under section 1842(b)(3)(C) of the Act is to comply with all the provisions of title XVIII of the Act and regulations issued thereunder, as well as with policy statements, instructions, and other guides issued by the Health Care Financing Administration in accordance with the Secretary's agreement with the carriers." § 405.860.

One of those guides is a compilation of instructions prepared by the Secretary and entitled the "Carrier's Manual." Section 12016 of the Manual, part of which is quoted in text, provides as follows:

"Authority—the HO [Hearing Officer] occupies a significant position in the administration appeals process. Authority of the HO is limited to the extent that he must comply with all provisions of title XVIII of the Act and regulations issued thereunder, as well as with HCFA. The HO may not overrule the provisions of the law or interpret them in a way different than HCFA does when he disagrees with their intent; nor may he use hearing decisions as a vehicle for commenting upon the legality, constitutional or otherwise, of any provision of the Act or regulations relevant to the Medicare Program."

be for substantially smaller amounts than under part A." S. Rep. No. 404, 89th Cong., 1st Sess., 54–55 (1965) (emphasis added). The Report makes plain that "carriers, not the Secretary, would review beneficiary complaints regarding the *amount of benefits*." *Ibid.* (emphasis added). Accord, H. R. Rep. No. 213, 89th Cong., 1st Sess., 47 (1965) ("Under the supplementary plan [Part B], carriers, not the Secretary, would review beneficiary complaints regarding the *amount of benefits*" (emphasis added)). The legislative history of the pertinent 1972 amendment likewise reveals that judicial review was precluded only as to controversies regarding determinations of amounts of benefits. The Conference Report on the 1972 amendment explains that "there is no authorization for an appeal to the Secretary or for judicial review on matters *solely involving amounts of benefits under Part B*." H. R. Conf. Rep. No. 92–1605, p. 61 (1972) (emphasis added). Senator Bennett's introductory explanation to the amendment confirms that preclusion of judicial review of Part B awards—designed "to avoid overloading the courts with quite minor matters"—embraced only "decisions on a claim for payment for a given service." 118 Cong. Rec. 33992 (1972). The Senator feared that "[i]f judicial review is made available where any claim is denied, as some court decisions have held, the resources of the Federal court system would be unduly taxed and little real value would be derived by the enrollees. The proposed amendment would merely clarify the original intent of the law and prevent the overloading of the courts with trivial matters because the intent is considered unclear." *Ibid.* As we found in *Erika*, 456 U. S., at 206, Congress has precluded judicial review only "of adverse hearing officer determinations of the amount of Part B payments."[7]

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[7] The fourth footnote of our opinion in *Heckler* v. *Ringer*, 466 U. S., at 608–609, n. 4, on which the Government relies for the proposition that Part B challenges are never cognizable in a judicial forum, merely declined to review "claims for Part B benefits." *Id.*, at 609, n. 4. The single sen-

Careful analysis of the governing statutory provisions and their legislative history thus reveals that Congress intended to bar judicial review only of determinations of the amount of benefits to be awarded under Part B. Congress delegated this task to carriers who would finally determine such matters in conformity with the regulations and instructions of the Secretary. We conclude, therefore, that those matters which Congress did *not* leave to be determined in a "fair hearing" conducted by the carrier—including challenges to the validity of the Secretary's instructions and regulations—are not impliedly insulated from judicial review by 42 U. S. C. § 1395ff (1982 ed. and Supp. II).

III

In light of Congress' express provision for carrier review of millions of what it characterized as "trivial" claims, it is implausible to think it intended that there be *no* forum to adjudicate statutory and constitutional challenges to regulations promulgated by the Secretary. The Government nevertheless maintains that this is precisely what Congress intended to accomplish in 42 U. S. C. § 1395ii (1982 ed., Supp. II). That section states that 42 U. S. C. § 405(h) (1982 ed., Supp. II), along with a string citation of 10 other provisions of Title II of the Social Security Act, "shall also apply with respect to this subchapter to the same extent as they are applicable with respect to subchapter II of this chapter." Section 405(h), in turn, reads in full as follows:

"(h) Finality of Secretary's decision

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tence in which we disposed of respondents' claim rested entirely on *Erika* and its companion case of *Schweiker* v. *McClure*, 456 U. S. 188 (1982). (*Schweiker* upheld the constitutionality of "fair hearing" proceedings conducted by private insurance carriers against a Due Process Clause attack.) We did not, in that single sentence, extend the preclusion of judicial review beyond the Part B "amount determinations" with which both *Erika* and that part of the *Ringer* opinion were concerned.

"The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter."

The Government contends that the third sentence of § 405(h) by its terms prevents any resort to the grant of general federal-question jurisdiction contained in 28 U. S. C. § 1331.[8] It finds support for this construction in *Weinberger* v. *Salfi*, 422 U. S. 749, 756–762 (1975), and *Heckler* v. *Ringer*, 466 U. S. 602, 614–616, 620–626 (1984). Respondents counter that the dispositions in these two cases are consistent with the view that Congress' purpose was to make clear that whatever specific procedures it provided for judicial review of final action by the Secretary were exclusive, and could not be circumvented by resort to the general jurisdiction of the federal courts.[9] Cf. *Weinberger* v. *Salfi*, 422 U. S., at 764–765; *Heckler* v. *Ringer*, 466 U. S., at 621–622.

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[8] The Government also argues that the challenged regulation is a "decision of the Secretary" which the second sentence of § 405(h) excepts from "revie[w] by any . . . tribunal." The Government's assumption that the regulation is such a decision, however, ignores the contextual definition of "decision" in the first sentence as those determinations made by "the Secretary after a hearing." The purpose of "the first two sentences of § 405(h)," as we made clear in *Weinberger* v. *Salfi*, 422 U. S. 749, 757 (1975), is to "assure that administrative exhaustion will be required." Respondents' attack on the regulation here is not subject to such a requirement because there is no hearing, and thus no administrative remedy, to exhaust.

[9] See *Ellis* v. *Blum*, 643 F. 2d 68, 74 (CA2 1981) (Friendly, J.). Cf. S. Rep. No. 734, 76th Cong., 1st Sess., 52 (1939); H. R. Rep. No. 728, 76th Cong., 1st Sess., 43–44 (1939).

Whichever may be the better reading of *Salfi* and *Ringer*, we need not pass on the meaning of § 405(h) in the abstract to resolve this case. Section 405(h) does not apply on its own terms to Part B of the Medicare program, but is instead incorporated *mutatis mutandis* by § 1395ii. The legislative history of both the statute establishing the Medicare program and the 1972 amendments thereto provides specific evidence of Congress' intent to foreclose review only of "amount determinations"—*i. e.*, those "quite minor matters," 118 Cong. Rec. 33992 (1972) (remarks of Sen. Bennett), remitted finally and exclusively to adjudication by private insurance carriers in a "fair hearing."[10] By the same token, matters which Congress did *not* delegate to private carriers, such as challenges to the validity of the Secretary's instructions and regulations, are cognizable in courts of law. In the face of this persuasive evidence of legislative intent, we will not indulge the Government's assumption that Congress contemplated review by carriers of "trivial" monetary claims, *ibid.*, but intended no review at all of substantial statutory and constitutional challenges to the Secretary's administration of Part B of the Medicare program.[11] This is an extreme position, and one

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[10] In this connection it bears mention that the legislative history summarized in the preceding section speaks to provisions for appeal generically, and is thus as probative of congressional intent in enacting § 1395ii as it is of § 1395ff. See S. Rep. No. 404, 89th Cong., 1st Sess., 54 (1965) *("Appeals");* H. R. Rep. No. 213, 89th Cong., 1st Sess., 47 (1965) *("Appeals");* H. R. Conf. Rep. No. 92–1605, p. 61 (1972) ("CLARIFICATION OF MEDICARE APPEAL PROCEDURES"); 118 Cong. Rec. 33991 (1972) ("DETERMINATIONS AND APPEALS") (caption to amendment proposed by Sen. Bennett).

[11] We do not believe that our decision will open the floodgates to millions of Part B Medicare claims. Unlike the *determinations* of amounts of benefits, the *method* by which such amounts are determined ordinarily affects vast sums of money and thus differs qualitatively from the "quite minor matters" review of which Congress confined to hearings by carriers. In addition, as one commentator pointed out, "permitting review only [of] . . . a particular statutory or administrative standard . . . would not result in a costly flood of litigation, because the validity of a standard can be readily

we would be most reluctant to adopt without "a showing of 'clear and convincing evidence,'" *Abbott Laboratories* v. *Gardner*, 387 U. S., at 141, to overcome the "strong presumption that Congress did not mean to prohibit all judicial review" of executive action, *Dunlop* v. *Bachowski*, 421 U. S., at 567. We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command. That presumption has not been surmounted here.[12]

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established, at times even in a single case." Note, 97 Harv. L. Rev. 778, 792 (1984) (footnote omitted). We observed no flood of litigation in the first 20 years of operation of Part B of the Medicare program, and we seriously doubt that we will be inundated in the future.

[12] Our disposition avoids the "serious constitutional question" that would arise if we construed § 1395ii to deny a judicial forum for constitutional claims arising under Part B of the Medicare program. *Weinberger* v. *Salfi*, 422 U. S., at 762 (citing *Johnson* v. *Robison*, 415 U. S. 361, 366–367 (1974). See *Yakus* v. *United States*, 321 U. S. 414, 433–444 (1944); *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 84 (1936) (Brandeis, J., concurring); Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895, 921, n. 113 (1984) ("[A]ll agree that Congress cannot bar all remedies for enforcing federal constitutional rights"). Cf. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1378–1379 (1953). It also accords with our decision in *Schweiker* v. *McClure*, 456 U. S. 188 (1982), in which we resolved a constitutional challenge arising under Part B of the Medicare program. Although the Government notes, quite accurately, that our opinion in *McClure* makes no mention of the jurisdictional question, we can hardly be charged with overlooking that point. *McClure* was argued and announced the same day as *Erika*, a case which did concern the judicial competence to review a challenge arising under Part B; it was written by the same Member of this Court who authored *Erika*, immediately precedes *Erika* in the United States Reports, and contains a number of cross-references to that opinion. Finally, we cannot, as the Government would have us, dismiss respondents' constitutional attack as insubstantial—that is to say, "essentially fictitious," "obviously frivolous," and "obviously without merit"—under *Hagans* v. *Lavine*, 415 U. S. 528, 537 (1974) (internal quotations omitted), as would be necessary to decline jurisdiction over

The judgment of the Court of Appeals is

Affirmed.

JUSTICE REHNQUIST took no part in the consideration or decision of this case.

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the case. Both courts below found the classification embodied in the regulation to be "irrational," see *supra*, at 668–669, and although this finding was made with respect to respondents' statutory claims, it surely casts sufficient doubt on the constitutionality of the classification under the Due Process and Equal Protection Clauses to merit resolution of the constitutional challenge.

CRANE v. KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 85-5238. Argued April 23, 1986—Decided June 9, 1986

Prior to his trial for murder in a Kentucky court, petitioner moved to suppress his confession. Following a hearing, the trial court determined that the confession was voluntary and denied the motion. At trial, petitioner, who was 16 years old at the time of his arrest, sought to introduce testimony describing the length of the interrogation and the manner in which it was conducted. In attempting to introduce such testimony, petitioner hoped to show that the confession, which was the principal component of the State's case, was unworthy of belief. The trial court ruled that the testimony pertained solely to the issue of voluntariness and was therefore inadmissible. The jury returned a verdict of guilty. The Kentucky Supreme Court affirmed, rejecting petitioner's claim that the exclusion of the testimony violated his rights under the Sixth and Fourteenth Amendments.

Held: The exclusion of the testimony about the circumstances of his confession deprived petitioner of his fundamental constitutional right—whether under the Due Process Clause of the Fourteenth Amendment or under the Compulsory Process or Confrontation Clauses of the Sixth Amendment—to a fair opportunity to present a defense. Evidence about the manner in which a confession was secured, in addition to bearing on its voluntariness, often bears on its credibility, a matter that is exclusively for the jury to assess. The physical and psychological environment that yielded a confession is not only relevant to the legal question of voluntariness but can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence, especially in a case such as this where there apparently was no physical evidence to link petitioner to the crime. Respondent's argument that any error was harmless since the excluded evidence came in through other witnesses, should be directed in the first instance to the state court. Pp. 687-692.

690 S. W. 2d 753, reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Frank W. Heft, Jr., argued the cause for petitioner. With him on the briefs were *J. David Niehaus* and *Daniel T. Goyette*.

John S. Gillig, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief

were *David L. Armstrong*, Attorney General, and *Virgil W. Webb III*, Assistant Attorney General.

JUSTICE O'CONNOR delivered the opinion of the Court.

Prior to his trial for murder, petitioner moved to suppress his confession. The trial judge conducted a hearing, determined that the confession was voluntary, and denied the motion. At trial, petitioner sought to introduce testimony about the physical and psychological environment in which the confession was obtained. His objective in so doing was to suggest that the statement was unworthy of belief. The trial court ruled that the testimony pertained solely to the issue of voluntariness and was therefore inadmissible. The question presented is whether this ruling deprived petitioner of his rights under the Sixth and Fourteenth Amendments to the Federal Constitution.

I

On August 7, 1981, a clerk at the Keg Liquor Store in Louisville, Kentucky, was shot to death, apparently during the course of a robbery. A complete absence of identifying physical evidence hampered the initial investigation of the crime. A week later, however, the police arrested petitioner, then 16 years old, for his suspected participation in an unrelated service station holdup. According to police testimony at the suppression hearing, "just out of the clear blue sky," petitioner began to confess to a host of local crimes, including shooting a police officer, robbing a hardware store, and robbing several individuals at a bowling alley. App. 4. Their curiosity understandably aroused, the police transferred petitioner to a juvenile detention center to continue the interrogation. After initially denying any involvement in the Keg Liquors shooting, petitioner eventually confessed to that crime as well.

Subsequent to his indictment for murder, petitioner moved to suppress the confession on the grounds that it had been impermissibly coerced in violation of the Fifth and Fourteenth

Amendments to the Federal Constitution. At the ensuing hearing, he testified that he had been detained in a windowless room for a protracted period of time, that he had been surrounded by as many as six police officers during the interrogation, that he had repeatedly requested and been denied permission to telephone his mother, and that he had been badgered into making a false confession. Several police officers offered a different version of the relevant events. Concluding that there had been "no sweating or coercion of the defendant" and "no overreaching" by the police, the court denied the motion. *Id.*, at 21.

The case proceeded to trial. In his opening statement, the prosecutor stressed that the Commonwealth's case rested almost entirely on petitioner's confession and on the statement of his uncle, who had told the police that he was also present during the holdup and murder. Tr. 10–14. In response, defense counsel outlined what would prove to be the principal avenue of defense advanced at trial—that, for a number of reasons, the story petitioner had told the police should not be believed. The confession was rife with inconsistencies, counsel argued. For example, petitioner had told the police that the crime was committed during daylight hours and that he had stolen a sum of money from the cash register. In fact, counsel told the jury, the evidence would show that the crime occurred at 10:40 p. m. and that no money at all was missing from the store. Beyond these inconsistencies, counsel suggested, "[t]he very circumstances surrounding the giving of the [confession] are enough to cast doubt on its credibility." *Id.*, at 16. In particular, she continued, evidence bearing on the length of the interrogation and the manner in which it was conducted would show that the statement was unworthy of belief.

In response to defense counsel's opening statement, and before any evidence was presented to the jury, the prosecutor moved *in limine* to prevent the defense from introducing any testimony bearing on the circumstances under which the

confession was obtained. Such testimony bore only on the "voluntariness" of the confession, the prosecutor urged, a "legal matter" that had already been resolved by the court in its earlier ruling. App. 27. Defense counsel responded that she had no intention of relitigating the issue of voluntariness, but was seeking only to demonstrate that the circumstances of the confession "cas[t] doubt on its validity and its credibility." *Ibid.* Rejecting this reasoning, the court granted the prosecutor's motion. Although the precise contours of the ruling are somewhat ambiguous, the court expressly held that the defense could inquire into the inconsistencies contained in the confession, but would not be permitted to "develop in front of the jury" any evidence about the duration of the interrogation or the individuals who were in attendance. *Id.*, at 28.

After registering a continuing objection, petitioner invoked a Kentucky procedure under which he was permitted to develop a record of the evidence he would have put before the jury were it not for the court's evidentiary ruling. That evidence included testimony from two police officers about the size and other physical characteristics of the interrogation room, the length of the interview, and various other details about the taking of the confession. *Id.*, at 45–53.

The jury returned a verdict of guilty, and petitioner was sentenced to 40 years in prison. The sole issue in the ensuing appeal to the Kentucky Supreme Court was whether the exclusion of testimony about the circumstances of the confession violated petitioner's rights under the Sixth and Fourteenth Amendments to the Federal Constitution. Over one dissent, the court rejected the claim and affirmed the conviction and sentence. 690 S. W. 2d 753 (1985). The excluded testimony "related solely to voluntariness," the court reasoned. *Id.*, at 754. Although evidence bearing on the credibility of the confession would have been admissible, under established Kentucky procedure a trial court's pretrial voluntariness determination is conclusive and may not be

relitigated at trial. Because the proposed testimony about the circumstances of petitioner's confession pertained only to the voluntariness question, the court held, there was no error in keeping that testimony from the jury.

Because the reasoning of the Kentucky Supreme Court is directly at odds with language in several of this Court's opinions, see, *e. g.*, *Lego* v. *Twomey*, 404 U. S. 477, 485–486 (1972), and because it conflicts with the decisions of every other state court to have confronted the issue, see, *e. g.*, *Beaver* v. *State*, 455 So. 2d 253, 256 (Ala. Crim. App. 1984); *Palmes* v. *State*, 397 So. 2d 648, 653 (Fla. 1981), we granted the petition for certiorari. 474 U. S. 1019 (1985). We now reverse and remand.

II

The holding below rests on the apparent assumption that evidence bearing on the voluntariness of a confession and evidence bearing on its credibility fall in conceptually distinct and mutually exclusive categories. Once a confession has been found voluntary, the Supreme Court of Kentucky believed, the evidence that supported that finding may not be presented to the jury for any other purpose. This analysis finds no support in our cases, is premised on a misconception about the role of confessions in a criminal trial, and, under the circumstances of this case, contributed to an evidentiary ruling that deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense. *California* v. *Trombetta*, 467 U. S. 479, 485 (1984).

It is by now well established that "certain interrogation techniques, either in isolation, or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller* v. *Fenton*, 474 U. S. 104, 109 (1985). To assure that the fruits of such techniques are never used to secure a conviction, due process also requires "that a jury [not] hear a confession unless and until the trial judge [or some

other independent decisionmaker] has determined that it was freely and voluntarily given." *Sims* v. *Georgia*, 385 U. S. 538, 543–544 (1967). See generally *Jackson* v. *Denno*, 378 U. S. 368 (1964).

In laying down these rules the Court has never questioned that "evidence surrounding the making of a confession bears on its credibility" as well as its voluntariness. *Id.*, at 386, n. 13. As the Court noted in *Jackson*, because "questions of credibility, whether of a witness or of a confession, are for the jury," the requirement that the court make a pretrial *voluntariness* determination does not undercut the defendant's traditional prerogative to challenge the confession's *reliability* during the course of the trial. *Ibid.* To the same effect was *Lego* v. *Twomey*, *supra*, where the Court stated,

> "Nothing in *Jackson* [v. *Denno*] questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness." *Id.*, at 485–486.

Thus, as *Lego* and *Jackson* make clear, to the extent the Court has addressed the question at all, it has expressly assumed that evidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess.

The decisions in both *Jackson* and *Lego*, while not framed in the language of constitutional command, reflect the common-sense understanding that the circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual. The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness, a question most, but not all, States assign to the trial judge alone to re-

solve. See *Jackson* v. *Denno*, *supra*, at 378. But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be "insufficiently corroborated or otherwise . . . unworthy of belief." *Lego* v. *Twomey*, *supra*, at 485–486. Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

This simple insight is reflected in a federal statute, 18 U. S. C. § 3501(a), the Federal Rules of Evidence, Fed. Rule of Evid. 104(e), and the statutory and decisional law of virtually every State in the Nation. See, *e. g.*, Mont. Code Ann. § 46–13–301(5) (1983); *Palmes* v. *State*, *supra*, at 653. We recognize, of course, that under our federal system even a consensus as broad as this one is not inevitably congruent with the dictates of the Constitution. We acknowledge also our traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts. In any given criminal case the trial judge is called upon to make dozens, sometimes hundreds, of decisions concerning the admissibility of evidence. As we reaffirmed earlier this Term, the Constitution leaves to the judges who must make these decisions "wide latitude" to exclude evidence that is "repetitive . . . , only marginally relevant" or poses an undue risk of

"harassment, prejudice, [or] confusion of the issues." *Delaware* v. *Van Arsdall*, 475 U. S. 673, 679 (1986). Moreover, we have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted. *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973). Nonetheless, without "signal[ing] any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures," we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial. *Id.*, at 302–303.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers* v. *Mississippi*, *supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington* v. *Texas*, 388 U. S. 14, 23 (1967); *Davis* v. *Alaska*, 415 U. S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California* v. *Trombetta*, 467 U. S., at 485; cf. *Strickland* v. *Washington*, 466 U. S. 668, 684–685 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U. S. 257, 273 (1948); *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the cru-

cible of meaningful adversarial testing." *United States* v. *Cronic*, 466 U. S. 648, 656 (1984). See also *Washington* v. *Texas*, *supra*, at 22–23.

Under these principles, the Kentucky courts erred in foreclosing petitioner's efforts to introduce testimony about the environment in which the police secured his confession. As both *Lego* and *Jackson* make clear, evidence about the manner in which a confession was obtained is often highly relevant to its reliability and credibility. Such evidence was especially relevant in the rather peculiar circumstances of this case. Petitioner's entire defense was that there was no physical evidence to link him to the crime and that, for a variety of reasons, his earlier admission of guilt was not to be believed. To support that defense, he sought to paint a picture of a young, uneducated boy who was kept against his will in a small, windowless room for a protracted period of time until he confessed to every unsolved crime in the county, including the one for which he now stands convicted. We do not, of course, pass on the strength or merits of that defense. We do, however, think it plain that introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of its succeeding. Especially since neither the Supreme Court of Kentucky in its opinion, nor the respondent in its argument to this Court, has advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence, the decision below must be reversed.

Respondent contends that any error was harmless since the very evidence excluded by the trial court's ruling ultimately came in through other witnesses. Petitioner concedes, and we agree, that the erroneous ruling of the trial court is subject to harmless error analysis. Tr. of Oral Arg. 7; cf. *Delaware* v. *Van Arsdall*, *supra*. We believe, however, that the respondent's harmless error argument should be directed in the first instance to the state court.

Accordingly, the judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

Reporter's Note

Orders commencing with May 27, 1986, begin with page 1137. The preceding orders in 476 U. S., from May 5 through May 21, 1986, were reported in Part 1, at 1101–1137. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

MAY 21, 1936

Dismissal Under Rule 53

No. 85-6770. ADAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 786 F. 2d 1157.

MAY 27, 1986

Appeals Dismissed

No. 85-31. OWENS ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. Appeal from D. C. C. D. Cal. dismissed.

No. 85-1493. METROPOLITAN EDISON CO. ET AL. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 509 Pa. 324, 502 A. 2d 130.

No. 85-1637. BUDGET RENT-A-CAR OF CINCINNATI, INC. *v.* KENTUCKY REVENUE CABINET. Appeal from Sup. Ct. Ky. dismissed for want of substantial federal question. Reported below: 704 S. W. 2d 199.

No. 85-1610. NORTHERN INDIANA PUBLIC SERVICE CO. *v.* CITIZENS ACTION COALITION OF INDIANA, INC., ET AL. Appeal from Sup. Ct. Ind. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 485 N. E. 2d 610.

No. 85-6635. WILKERSON *v.* TOWNSHIP OF EAST BRUNSWICK, NEW JERSEY. Appeal from Super. Ct. N. J., App. Div., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 84-1859. MARSH *v.* BOARD OF EDUCATION OF THE CITY OF FLINT ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wygant* v. *Jackson Board of Education*, *ante*, p. 267. Reported below: 762 F. 2d 1009.

No. 85-912. BROCK, SECRETARY OF LABOR *v.* SOUTHEASTERN ARIZONA GOVERNMENTS ORGANIZATION. C. A. 9th Cir. Cer-

tiorari granted, judgment vacated, and case remanded for further consideration in light of *Brock* v. *Pierce County*, *ante*, p. 253.

No. 85–1105. CARTER ET AL. *v.* UNITED STATES;
No. 85–1118. MURRAY *v.* UNITED STATES; and
No. 85–1120. ROONEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Henderson* v. *United States*, *ante*, p. 321. JUSTICE STEVENS would deny the petitions for writs of certiorari. Reported below: 771 F. 2d 589.

No. 85–5040. ISAAC *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Henderson* v. *United States*, *ante*, p. 321. JUSTICE STEVENS would deny the petition for writ of certiorari. Reported below: 762 F. 2d 1000.

Vacated and Remanded After Certiorari Granted

No. 85–236. EICHENLAUB *v.* YURKY ET AL. C. A. 3d Cir. [Certiorari granted, 474 U. S. 1049.] Judgment vacated and case remanded to the Court of Appeals to consider whether the case is moot.

Certiorari Dismissed

No. 85–6947. STRAIGHT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Petition for writ of certiorari dismissed as moot. Reported below: 791 F. 2d 830.

Miscellaneous Orders

No. ——. PEEDE *v.* FLORIDA. Motion to direct the Clerk to file the petition for writ of certiorari without the affidavit in support of motion for leave to proceed *in forma pauperis* granted.

No. D–509. IN RE DISBARMENT OF ALEXANDER. Disbarment entered. [For earlier order herein, see 474 U. S. 977.]

No. D–557. IN RE DISBARMENT OF KEIDEN. It is ordered that Bruce H. Keiden, of Southfield, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 85–88. PAULUSSEN *v.* HERION, 475 U. S. 557. Motion of appellee to retax costs denied. JUSTICE BLACKMUN would grant this motion.

No. 85–495. ANSONIA BOARD OF EDUCATION ET AL. *v.* PHILBROOK ET AL. C. A. 2d Cir. [Certiorari granted, 474 U. S. 1080.] Motion of The Rutherford Institute of Alabama et al. for leave to file a brief as *amici curiae* granted.

No. 85–608. ILLINOIS *v.* KRULL ET AL. Sup. Ct. Ill. [Certiorari granted, 475 U. S. 1080.] Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 85–1033. KELLY, CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL. *v.* ROBINSON. C. A. 2d Cir. [Certiorari granted, 475 U. S. 1009.] Motion of National Governors' Association et al. for leave to file a brief as *amici curiae* granted.

No. 85–1529. GRUMMAN AEROSPACE CORP. *v.* SHAW. C. A. 11th Cir.; and

No. 85–1623. ISLAMIC REPUBLIC OF IRAN ET AL. *v.* BOEING CO. ET AL. C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 85–6823. IN RE THAPER. Petition for writ of mandamus denied.

Certiorari Granted

No. 85–1208. FALL RIVER DYEING & FINISHING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari granted. Reported below: 775 F. 2d 425.

No. 85–1347. PENNSYLVANIA *v.* RITCHIE. Sup. Ct. Pa. Certiorari granted. Reported below: 509 Pa. 357, 502 A. 2d 148.

No. 85–1384. TURNER ET AL. *v.* SAFLEY ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 777 F. 2d 1307.

No. 85–1589. IOWA MUTUAL INSURANCE CO. *v.* LAPLANTE ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 774 F. 2d 1174.

No. 85–1259. TULL *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 769 F. 2d 182.

No. 85-1613. UNITED STATES *v.* JOHN DOE, INC. I, ET AL. C. A. 2d Cir. Motion of petitioners in No. 85-1840, *Archer-Daniels-Midland Co. et al.* v. *United States*, for contemporaneous consideration denied. Certiorari granted. Reported below: 774 F. 2d 34.

No. 85-5348. BUCHANAN *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 691 S. W. 2d 210.

Certiorari Denied. (See also Nos. 85-1610 and 85-6635, *supra.*)

No. 84-6590. ROWAN *v.* OWENS, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied. Reported below: 752 F. 2d 1186.

No. 84-6854. BECK *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 687 S. W. 2d 155.

No. 84-7000. COLSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 507 Pa. 440, 490 A. 2d 811.

No. 85-949. ST. REGIS MOHAWK TRIBE, NEW YORK *v.* BROCK, SECRETARY OF LABOR. C. A. 2d Cir. Certiorari denied. Reported below: 769 F. 2d 37.

No. 85-1109. MILWAUKEE COUNTY, WISCONSIN *v.* BROCK, SECRETARY OF LABOR. C. A. 7th Cir. Certiorari denied. Reported below: 771 F. 2d 983.

No. 85-1167. MAYOR'S OFFICE OF EMPLOYMENT AND TRAINING, CITY OF CHICAGO, ET AL. *v.* UNITED STATES DEPARTMENT OF LABOR. C. A. 7th Cir. Certiorari denied. Reported below: 775 F. 2d 196.

No. 85-1304. SPANG & CO. *v.* DELGROSSO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 769 F. 2d 928.

No. 85-1319. BUTTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 699.

No. 85-1430. GARTH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 773 F. 2d 1469.

No. 85-1448. LOCAL 560 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 267.

No. 85-1463. MARQUES *v.* UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1062.

No. 85-1545. BACA, COMMISSIONER OF PUBLIC LANDS OF THE STATE OF NEW MEXICO, ET AL. *v.* ROE ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 103 N. M. 517, 710 P. 2d 84.

No. 85-1569. DAMERON *v.* WASHINGTON MAGAZINE, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 250 U. S. App. D. C. 346, 779 F. 2d 736.

No. 85-1599. CITY OF SAN DIEGO ET AL. *v.* SPORTS ARENAS PROPERTIES ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 40 Cal. 3d 808, 710 P. 2d 338.

No. 85-1611. ARNEBERGH *v.* E. F. HUTTON & CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 775 F. 2d 1061.

No. 85-1616. TRANS RENT-A-CAR, INC. *v.* HERTZ CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 766 F. 2d 1292.

No. 85-1618. SLATTON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied Reported below: 173 Cal. App. 3d 487, 219 Cal. Rptr. 70.

No. 85-1621. HON YIP, AKA YIP HON *v.* PAGANO. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1033.

No. 85-1622. ANDERSON, FKA JENKINS *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 379 N. W. 2d 70.

No. 85-1640. DINEEN *v.* MAINE BOARD OF OVERSEERS OF THE BAR. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 500 A. 2d 262.

No. 85-1643. STROH CONTAINER CO. *v.* DELPHI INDUSTRIES, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 783 F. 2d 743.

No, 85-1655. KAISER GYPSUM CO., INC. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DEIGO (SAN DIEGO ASBESTOS LITIGATION PLAINTIFFS, REAL PARTIES IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-1687. HOME INSURANCE CO. v. TAYLOR. C. A. 4th Cir. Certiorari denied. Reported below: 777 F. 2d 849.

No. 85-1697. DAY v. SEABOLD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 307.

No. 85-1698. GUTHRIE v. INTERNATIONAL DAIRY QUEEN, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 3.

No. 85-1720. VITTECK ET UX. v. WASHINGTON FEDERAL SAVINGS & LOAN ASSN. Super. Ct. Pa. Certiorari denied. Reported below: 348 Pa. Super. 639, 501 A. 2d 296.

No. 85-1738. GANOE ET AL. v. NEFF, INDEPENDENT EXECUTOR OF THE ESTATE OF LUMMIS, ET AL. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 85-1739. HUNTER v. UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 240.

No. 85-1747. MCCLAIN v. UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1166.

No. 85-1749. HARTSEL ET AL. v. UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 223.

No. 85-1767. CAGGIANO v. UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 1044.

No. 85-1768. REALE v. UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 782 F. 2d 179.

No. 85-1785. CARLEY v. UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 783 F. 2d 341.

No. 85-6278. BROWNING v. UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 779 F. 2d 58.

No. 85-6465. KIMBERLIN v. UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 1344.

No. 85-6472. MENDOZA v. MILLER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 1287.

No. 85-6481. FRAZIER v. BOARD OF TRUSTEES OF NORTHWEST MISSISSIPPI REGIONAL MEDICAL CENTER ET AL. C. A.

5th Cir. Certiorari denied. Reported below: 765 F. 2d 1278 and 777 F. 2d 329.

No. 85-6623. BROWN *v.* JEFFERSON. C. A. D. C. Cir. Certiorari denied.

No. 85-6634. CONNEL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 85-6636. KOFF *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Nevada County. Certiorari denied.

No. 85-6639. TORNERO *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-6640. VICK *v.* LONG. C. A. 3d Cir. Certiorari denied. Reported below: 774 F. 2d 1153.

No. 85-6641. HALL *v.* ROGERS. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 45.

No. 85-6644. HOLLAND *v.* BUTTERWORTH, SHERIFF, BROWARD COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6647. DAVIDSON *v.* DAVIS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 203.

No. 85-6658. NOVEL *v.* PICARIELLO, JUDGE, ET AL. C. A. 2d Cir. Certiorari denied.

No. 85-6659. MARKS *v.* LEE WAY MOTOR FREIGHT ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-6661. BONVILLAIN *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 780 F. 2d 1248.

No. 85-6662. BECKTEL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 137 Ill. App. 3d 810, 485 N. E. 2d 474.

No. 85-6663. BOYT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 109 Ill. 2d 403, 488 N. E. 2d 264.

No. 85-6677. TRAWICK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 473 So. 2d 1235.

No. 85-6683. HARROD *v.* HALFORD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 773 F. 2d 234.

No. 85-6712. GIBSON *v.* SCROGGY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1164.

No. 85-6730. ORTIZ *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 104 Wash. 2d 479, 706 P. 2d 1069.

No. 85-6754. AL-AZZAWY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 784 F. 2d 890.

No. 85-6757. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 85-6759. CORONEL *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 85-6763. LAMP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 1088.

No. 85-6765. CARY *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 85-6772. MARKUS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1149.

No. 85-6776. ASSAAD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1111.

No. 85-6780. KELLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 311.

No. 85-6782. CHEIKH *v.* UNITED STATES; and
No. 85-6794. FARRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1111.

No. 85-6801. BATUOLI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1036.

No. 85-6802. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 6.

No. 85-6803. FISHERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 782 F. 2d 1054.

No. 85-6806. NOLAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 784 F. 2d 496.

No. 85-6813. SCOTT ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 784 F. 2d 787.

No. 85-6822. KORYTO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 593.

No. 85-6829. PARADISO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 787 F. 2d 578.

No. 84-6187. KEETEN ET AL. *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 129.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting as to petitioner Larry Darnell Williams.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 84-6667. MONROE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 748 F. 2d 958.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I would grant certiorari in this case to resolve the serious questions it raises concerning the scope of a defendant's rights under *Brady* v. *Maryland*, 373 U. S. 83 (1963), during the period following his conviction. While lower courts here have adhered to our precedents in finding petitioner's *Brady* rights to have been violated, the remedy ordered impermissibly dilutes those rights even as it recognizes them.

I

In 1980, after a previous conviction had been overturned, petitioner was brought to trial in New Orleans, once again charged with the 1978 murder of Lenora Collins, a neighbor. The State's case consisted of eyewitness identifications by the victim's two children, both of whom were present when the assailant broke into their mother's bedroom. *State* v. *Monroe*, 397 So. 2d 1258, 1268 (La. 1981). Accepting the testimony of the two children, who at the time of the murder were aged 12 and 11, the jury re-

jected petitioner's alibi, found him guilty of first-degree murder, and unanimously recommended the death sentence.

Six months after petitioner's conviction, but while his appeal was still pending, the New Orleans Police Department was contacted by Detective Joseph Gallardo of the Pontiac, Michigan, Police Department. In the course of investigating one George Stinson's murder of his common-law wife in Michigan, Gallardo had received information suggesting that Stinson may also have murdered his previous wife, three years earlier in New Orleans. His previous wife was Lenora Collins, for whose murder petitioner has been sentenced to die. Two months later, Detective Gallardo again called the New Orleans police. This time, he related to Sergeant John McKenzie the substance of an interview he had had with Stinson's cellmate during which the cellmate had quoted Stinson as first confessing to the Michigan murder and then saying that "the same thing happened" to his first wife, Lenora Collins. Noting that a second source had corroborated this admission, Detective Gallardo also reported having received information that Stinson had threatened Lenora Collins' two children into identifying petitioner as their mother's killer.

All this information was carefully recorded by Sergeant McKenzie, who then dispatched his notes to the detectives who had been involved in the Collins investigation. These notes did not trigger further police inquiries. Neither was their existence ever disclosed to petitioner, who under Louisiana law, could have sought the remand of his case so that he might move in the trial court for a new trial. See *State* v. *Spell*, 388 So. 2d 754 (La. 1980). Indeed, it was not until late 1983 that independent investigation by petitioner's counsel led him to Detective Gallardo, who told of Stinson's incriminating admissions and of the fact that the New Orleans police had long before known of the new evidence. Petitioner thereupon filed a motion in New Orleans Criminal District Court seeking a new trial or, in the alternative, postconviction relief, and also a stay of his execution, then scheduled for January 4, 1984. In this motion, petitioner claimed that the State had unconstitutionally suppressed material, exculpatory evidence. While petitioner was still unaware of the existence of Sergeant McKenzie's actual notes, his counsel's independent efforts in Pontiac enabled him to present the Criminal District Court with all of the information contained in the notes.

The day before petitioner's scheduled date of execution, the Criminal District Court denied petitioner's motion without an evidentiary hearing. Weighing the eyewitness testimony of the victim's children against the affidavit of Stinson's cellmate, the court found that the new evidence was not "so material that it ought to produce a different result then *[sic]* the verdict reached." The Louisiana Supreme Court affirmed hours later, *State ex rel Monroe* v. *Maggio*, 444 So. 2d 606 (1984), although two justices would have granted a stay and ordered a "full evidentiary hearing on the newly discovered evidence issue." The two noted: "Because the death penalty is so final, surely no harm would come from continuing this matter one month to allow the defense to produce witnesses from Michigan, and having the trial court evaluate this evidence." *Ibid.*

After the state court denied relief, the Federal District Court acted upon a habeas petition filed several days earlier, and stayed petitioner's execution. After a hearing in which he heard testimony from Detective Gallardo and Stinson, a Magistrate held that the information allowed to sit undisturbed in New Orleans police files was both improperly suppressed and clearly favorable to petitioner. He recommended that the writ be granted.

The District Court adopted the Magistrate's report, agreeing that the information received from Detective Gallardo was material, exculpatory information that under *United States* v. *Agurs*, 427 U. S. 97 (1976), should have been disclosed to petitioner. The District Court noted that, when coupled with the absence of physical evidence linking petitioner to the murder, the possibility that the eyewitness testimony of the victim's children may have been coerced, and testimony by petitioner's mother placing Stinson at the victim's house on the day of the murder, the suppressed evidence "makes the assertion that Stinson committed the murder plausible." Finding the evidence to "creat[e] a reasonable doubt as to Monroe's guilt that did not previously exist," the court issued the writ. However, having concluded that petitioner's due process rights under *Brady* had been violated, the court did not order that he be released or retried. Rather, it ordered Louisiana

> "to grant to Petitioner whatever he was entitled to by way of post-conviction relief during the limitation period provided by Louisiana law for a request for a new trial based on the excul-

> patory material which the State courts did not have an opportunity to consider, so that Petitioner may fully and effectively exercise and exhaust his post-conviction rights under Louisiana law."

The Court of Appeals upheld the District Court's choice of remedy. 748 F. 2d 958, 960 (CA5 1984).

II

In *Brady* v. *Maryland*, *supra*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, at 87. In *United States* v. *Agurs*, *supra*, we recognized that

> "there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.'" *Id.*, at 110–111 (footnote omitted).

The message of *Brady* and its progeny is that a trial is not a mere "sporting event"; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory. See *United States* v. *Bagley*, 473 U. S. 667, 675 (1985) (*Brady* rule to "ensure that a miscarriage of justice does not occur").

The quest for truth may not terminate with a defendant's conviction. In Louisiana, a convicted defendant must receive a new trial whenever

> "[n]ew and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty." La. Code Crim. Proc. Ann., Art. 851(3) (West 1984).

When the sovereign has decided that justice will be best served by qualifying the finality of a conviction so that a convicted defendant may yet prove his innocence, its attorney is not free to choose

otherwise. And until factfinding proceedings, or the possibility of them, is terminated, the State remains bound by the rules of simple fairness that *Brady* held to be of constitutional dimension. It would hardly make sense to hold the State to a special duty to disclose exculpatory evidence in any adversarial proceeding and then permit the State to avoid this obligation by suppressing the very evidence that would enable a defendant to trigger such proceedings.[1]

In this case there can be no doubt that petitioner's due process rights were violated by the State's failure to disclose to him the information that Detective Gallardo related to the New Orleans police. That the information lay undisturbed in the files of the police and not those of the prosecutor should make no difference. The police files that so readily provided the State with the incriminating material to convict a defendant cannot be turned into a dead-letter repository where evidence of innocence is concerned. See *Moore* v. *Illinois*, 408 U. S. 786, 810 (1972) (MARSHALL, J., concurring in part and dissenting in part); *Smith* v. *Florida*, 410 F. 2d 1349, 1351 (CA5 1969). If by now police are not fully aware of their constitutional obligation to disclose exculpatory evidence even in the absence of a specific request by the prosecutor or defense counsel, this Court should seize this case as a chance to educate them.

This is certainly not a case in which the failure, whether intentional or inadvertent, of the police to alert petitioner to the new information can be attributed to their failure to understand the complexities of the *Brady* rule. At the time the evidence was suppressed, *Agurs* obliged the State to disclose evidence that created "a reasonable doubt that did not otherwise exist" as to defendant's guilt. 427 U. S., at 112. And though the District Court here quite properly made a careful examination of the transcripts from petitioner's second trial before holding the informa-

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[1] Because in this case, the State suppressed exculpatory evidence while petitioner could still have sought postconviction relief under state law, we need not consider whether the State also deprived petitioner of a federal right to seek habeas relief on the basis of evidence that undermines the sufficiency of the evidence supporting his conviction. See *Dobbert* v. *Wainwright*, 468 U. S. 1231, 1234 (1984) (BRENNAN, J., dissenting from denial of stay and certiorari); Wright & Sofaer, Federal Habeas Corpus for State Prisoners, 75 Yale L. J. 895, 958, n. 223 (1966).

tion from Detective Gallardo to be "material" under the *Agurs* standard,[2] I cannot believe that either an examination of the record or a law degree is needed to appreciate that admissions by a wife-killer incriminating himself in the murder of a former wife cannot be dismissed as idle gossip.

III

While it was correct to find a *Brady* violation, the District Court appears to have believed that because the Louisiana courts were not given an opportunity to consider the evidence that petitioner was able to develop in the course of his federal habeas proceeding—to wit, Sergeant McKenzie's actual notes of his conversations with Detective Gallardo and the testimony of Detective Gallardo at the habeas hearing—they should now be allowed to decide whether they were a bit hasty in denying petitioner's new trial motion on the eve of his execution. However, the only reason why the state courts never considered this evidence was that they dismissed petitioner's motion without an evidentiary hearing. It was only after the Federal District Court gave petitioner the chance to subpoena the evidence that it came to light. Moreover, as the Court of Appeals observed, the state courts were presented with the "same underlying information" as that contained in Sergeant McKenzie's notes. Having adequately asserted in state courts the basis for his *Brady* claim, petitioner plainly satisfied the exhaustion requirement of federal habeas corpus.

Sending petitioner back to state court with his already exhausted claim is particularly inappropriate here because of the nature of the constitutional violation. If the police had not improperly suppressed the exculpatory information, petitioner would have been able to seek a new trial under Art. 851(3). To require petitioner now to pursue this same remedy is thus to treat the suppressed information just as if it had been "found in a neutral source" and therefore to ignore the "special significance" of the police's obligation to serve the cause of justice. *United States* v. *Agurs*, 427 U. S., at 111. The remedy ordered here removes from the State any incentive to make timely disclosure of material, exculpatory evidence and trivializes the constitutional right

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[2] It is clear that this evidence would also be material under the standard established by this Court in *United States* v. *Bagley*, 473 U. S. 667 (1985).

recognized in *Brady* and its progeny. The only way this right can be guaranteed is to grant petitioner the remedy that until now has always followed a determination that the *Brady* rule has been violated: He must be released or retried. Because I do not believe this Court should stand by in the face of the dilution of the due process rights of an individual who may not even be guilty of the crime for which he stands under death sentence, I respectfully dissent from the denial of certiorari.

No. 85-1262. TEXAS ASSOCIATION OF CONCERNED TAXPAYERS, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 2d 163.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner Texas Association of Concerned Taxpayers challenges the Tax Equity and Fiscal Responsibility Act of 1982, 96 Stat. 324 (TEFRA), on the ground that it was enacted in violation of the Origination Clause of the United States Constitution, which provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." Art. I, § 7, cl. 1. Specifically, the petitioner asserts that when the bill originated in the House of Representatives, it was not a "bill for raising revenue" within the meaning of the Origination Clause because the net effect of the bill would have been to reduce the amount of revenue collected.

The United States Court of Appeals for the Fifth Circuit held that this issue was a nonjusticiable political question. 772 F. 2d 163, 165-167 (1985). This holding conflicts with the Ninth Circuit's explicit holding with respect to an identical challenge to TEFRA that the Origination Clause issue was in fact justiciable. See *Armstrong* v. *United States*, 759 F. 2d 1378, 1381-1382 (1985). See also *Wardell* v. *United States*, 757 F. 2d 203 (CA8 1985) *(per curiam)* (adjudicating same claim on the merits); *Heitman* v. *United States*, 753 F. 2d 33 (CA6 1984) *(per curiam)* (same). The Fifth Circuit's holding is also in tension with this Court's decision in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 142-143 (1911), in which we also adjudicated an Origination Clause challenge to a statute. To resolve this conflict among the Circuits, I would grant certiorari.

No. 85-1321. RAMIREZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 39 Cal. 3d 931, 705 P. 2d 897.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE POWELL join, dissenting.

Petitioner Rudy Ramirez is currently serving a prison term imposed by the State of California for a crime committed before January 1, 1983. As of that date, a new plan for awarding sentence reduction credits and their forfeiture became effective. See Cal. Penal Code Ann. §§ 2931, 2932 (West Supp. 1986). Ramirez was charged in January 1983 with altering the paperwork relating to a television set. This resulted in a loss under the new plan of 95 days of behavior credits, which was later reduced to 48 days. Under the old plan, Ramirez would have forfeited at most 15 days.

Ramirez then filed a habeas corpus petition in the California state courts, challenging the application to him of the new system on the ground that such application violated the *Ex Post Facto* Clause of the United States Constitution. Art. I, § 10. A divided California Supreme Court upheld the new system, as applied to Ramirez, applying the two-part test set forth in *Weaver* v. *Graham*, 450 U. S. 24, 29 (1981), and concluding that the new provisions were not unconstitutionally retrospective because the increased sanctions were imposed only for misconduct occurring after the changes became effective. *In re Ramirez*, 39 Cal. 3d 931, 705 P. 2d 897 (1985).

The decision of the California Supreme Court conflicts with the decision of the United States Court of Appeals for the Fifth Circuit in *Beebe* v. *Phelps*, 650 F. 2d 774 (1981). In *Beebe*, the Fifth Circuit held that the application of new provisions for revoking previously earned credits for parole violations to a prisoner who had been incarcerated before the new provisions became effective violated the *Ex Post Facto* Clause even where the parole violations occurred after the effective date of the new provisions. The decision of the California Supreme Court also is in tension with our decision in *Weaver*, *supra*, in which we held that the application to a prisoner of a new system for earning good-time credits, which system reduced the credits that could be earned, violated the *Ex Post Facto* Clause. See also *Greenfield* v. *Scafati*, 277 F. Supp. 644 (Mass. 1967), summarily aff'd, 390 U. S. 713 (1968). In *Weaver*, we analyzed the question of retrospectivity according to whether the new rule "substantially alters the consequences

attached to a crime already completed," 450 U. S., at 33, and the California Supreme Court's distinction here between the ability to earn good-time credits, at issue in *Weaver*, and the forfeiture of such credits, at issue here, does not seem immediately relevant to this analysis. To resolve the conflict with *Beebe* and the tension with *Greenfield* and *Weaver*, I would grant certiorari and set the case for argument.

No. 85-1646. KEMP, WARDEN *v.* WILSON. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 777 F. 2d 621.

No. 85-1752. KAIRYS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 782 F. 2d 1374.

No. 85-5022. RUSHING *v.* LOUISIANA. Sup. Ct. La.;
No. 85-5082. WATSON *v.* BLACKBURN, WARDEN. C. A. 5th Cir.;
No. 85-6308. LOWENFIELD *v.* LOUISIANA. Sup. Ct. La.;
No. 85-6551. BROCK *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;
No. 85-6584. KORDENBROCK *v.* KENTUCKY. Sup. Ct. Ky.;
No. 85-6643. BEAM *v.* IDAHO. Sup. Ct. Idaho;
No. 85-6665. BARNES *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 85-6668. HARBISON *v.* TENNESSEE. Sup. Ct. Tenn.; and
No. 85-6675. BYRD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 85-5022, 464 So. 2d 268; No. 85-5082, 756 F. 2d 1055; No. 85-6308, 495 So. 2d 1245; No. 85-6551, 781 F. 2d 1152; No. 85-6584, 700 S. W. 2d 384; No. 85-6643, 109 Idaho 616, 710 P. 2d 526; No. 85-6665, 703 S. W. 2d 611; No. 85-6668, 704 S. W. 2d 314; No. 85-6675, 481 So. 2d 468.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 85-301. AMEY, INC., ET AL. *v.* GULF ABSTRACT & TITLE, INC., ET AL., 475 U. S. 1107. Petition for rehearing denied.

No. 85-6432. JACKSON *v.* NEWSOME, WARDEN, 475 U. S. 1126. Petition for rehearing denied.

No. 85-531. CITY OF LOS ANGELES ET AL. *v.* HELLER, 475 U. S. 796. Petition for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

JUNE 2, 1986

Appeals Dismissed

No. 85-1344. TAYLOR *v.* MOONEY, SUPERINTENDENT, WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY, ET AL. Appeal from Cir. Ct. W. Va., Kanawha County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-1823. STROOM *v.* CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 787 F. 2d 584.

No. 85-6669. KEANE *v.* AMBACH. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 788 F. 2d 5.

No. 85-6670. D'AREZZO *v.* ESTATE OF CHRISTY ET AL. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 499 A. 2d 744.

No. 85-6709. ARNOLD *v.* SOUTH DAKOTA. Appeal from Sup. Ct. S. D. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 379 N. W. 2d 322.

No. 85-1714. PAYNE ET UX. *v.* MOUNT, SHERIFF OF WHATCOM COUNTY, WASHINGTON, ET AL. Appeal from Ct. App. Wash. dismissed for want of jurisdiction. Reported below: 41 Wash. App. 627, 705 P. 2d 297.

No. 85-6521. CAMPBELL *v.* GRIFFIN, DISTRICT JUDGE, FIRST JUDICIAL DISTRICT COURT OF NEVADA, CARSON CITY. Appeal

from Sup. Ct. Nev. dismissed for want of substantial federal question. Reported below: 101 Nev. 718, 710 P. 2d 70.

No. 85-6687. ACEN ET AL. *v.* MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: 396 Mass. 472, 487 N. E. 2d 189.

Miscellaneous Orders

No. ——. MANRIQUE-FERNANDEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. ——. GRACE *v.* HEARTLAND TRANSPORTATION INC., 475 U. S. 1042. Motion for reconsideration of order of Court entered March 3, 1986, denied.

No. D-546. IN RE DISBARMENT OF AUGUST. Irving A. August, of Birmingham, Mich., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 24, 1986 [475 U. S. 1004], is hereby discharged.

No. D-549. IN RE DISBARMENT OF DUKE. Charles Louis Duke, of Houston, Tex., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on March 24, 1986 [475 U. S. 1079], is hereby discharged.

No. D-552. IN RE DISBARMENT OF PLAZA. Disbarment entered. [For earlier order herein, see 475 U. S. 1106.]

No. 84-2022. 324 LIQUOR CORP., DBA YORKSHIRE WINE & SPIRITS *v.* MCLAUGHLIN ET AL. Ct. App. N. Y. [Probable jurisdiction noted, 475 U. S. 1080.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-495. ANSONIA BOARD OF EDUCATION ET AL. *v.* PHILBROOK ET AL. C. A. 2d Cir. [Certiorari granted, 474 U. S. 1080.] Motion of respondents Ansonia Federation of Teachers et al. for divided argument granted.

No. 85-971. CLARKE, COMPTROLLER OF THE CURRENCY *v.* SECURITIES INDUSTRY ASSN.; and

No. 85–972. SECURITY PACIFIC NATIONAL BANK *v.* SECURITIES INDUSTRY ASSN. C. A. D. C. Cir. [Certiorari granted, 475 U. S. 1044.] Motion of Legal Foundation of America for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 85–1027. ARIZONA *v.* HICKS. Ct. App. Ariz. [Certiorari granted, 475 U. S. 1107.] Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 85–1233. INTERNATIONAL PAPER CO. *v.* OUELLETTE ET AL. C. A. 2d Cir. [Certiorari granted, 475 U. S. 1081.] Motion of Mid-America Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 85–1388. ROSE *v.* ARKANSAS STATE POLICE. Ct. App. Ark. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 85–6698. CAPPIELLO *v.* CAPPIELLO. Ct. App. N. Y.;

No. 85–6768. RAMIREZ *v.* UNITED STATES. Ct. Mil. App.; and

No. 85–6769. MCNEAIR *v.* GEORGETOWN UNIVERSITY HOSPITAL. C. A. D. C. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 23, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 85–5957. IN RE SHEWCHUN. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 85–1658. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* FLORIDA POWER CORP. ET AL.; and

No. 85–1660. GROUP W CABLE, INC., ET AL. *v.* FLORIDA POWER CORP. ET AL. Appeals from C. A. 11th Cir. Probable

jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 772 F. 2d 1537.

Certiorari Granted

No. 85–1736. JERSEY SHORE STATE BANK *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 781 F. 2d 974.

No. 85–184. STRINGFELLOW ET AL. *v.* CONCERNED NEIGHBORS IN ACTION ET AL. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 755 F. 2d 1383 and 783 F. 2d 821.

No. 85–1222. INTERSTATE COMMERCE COMMISSION *v.* TEXAS ET AL.; and

No. 85–1267. MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL. *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 770 F. 2d 452.

No. 85–1239. AMOCO PRODUCTION CO. ET AL. *v.* VILLAGE OF GAMBELL ET AL.; and

No. 85–1406. HODEL, SECRETARY OF THE INTERIOR, ET AL. *v.* VILLAGE OF GAMBELL ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 774 F. 2d 1414.

No. 85–1563. CALIFORNIA *v.* BROWN. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 40 Cal. 3d 512, 709 P. 2d 440.

No. 85–5221. GRIFFITH *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari is granted limited to the following question: "In cases pending on direct appeal, should the holding in *Batson* v. *Kentucky*, *ante*, p. 79, be given retroactive effect?" Case is set for oral argument in tandem with No. 85–5731, *Brown* v. *United States*, immediately *infra*.

No. 85–5731. BROWN *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari is granted limited to the following question: "In cases pending on direct appeal, should the holding in *Batson* v. *Kentucky*, *ante*, p. 79, be given retroactive effect?" Case is set

for oral argument in tandem with No. 85-5221, *Griffith* v. *Kentucky*, immediately *supra*. Reported below: 770 F. 2d 912.

Certiorari Denied. (See also Nos. 85-1344, 85-1823, 85-6669, 85-6670, and 85-6709, *supra*.)

No. 85-112. LITTLE CROW MILLING CO., INC., ET AL. *v.* BALTIMORE & OHIO RAILROAD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 759 F. 2d 1305.

No. 85-1229. RUSSELL ET AL. *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 771 F. 2d 493.

No. 85-1279. UNITED NUCLEAR CORP. ET AL. *v.* THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. (two cases);

No. 85-1280. AMERICAN MINING CONGRESS *v.* THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. (two cases); and

No. 85-6404. KEPFORD *v.* THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: Nos. 85-1279 and 85-1280 (first cases), 772 F. 2d 617; Nos. 85-1279 and 85-1280 (second cases) and No. 85-6404, 772 F. 2d 640.

No. 85-1291. LEVINE ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (UNITED STATES, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied. Reported below: 764 F. 2d 590 and 775 F. 2d 1054.

No. 85-1339. COHEN ET AL. *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 103 N. M. 558, 711 P. 2d 3.

No. 85-1386. HOLLOWAY *v.* UNITED STATES; and

No. 85-1391. SULLIVAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 778 F. 2d 653.

No. 85-1410. MALONE & HYDE, INC. *v.* TANDY CORP. C. A. 6th Cir. Certiorari denied. Reported below: 769 F. 2d 362 and 777 F. 2d 1130.

No. 85-1431. BOLTON ET AL., DBA PRYOR & GLEN COAL CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 781 F. 2d 528.

No. 85-1486. LOCAL 32, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION *v.* PACIFIC MARITIME ASSN. ET AL.

C. A. 9th Cir. Certiorari denied. Reported below: 773 F. 2d 1012.

No. 85-1505. TURNBULL CONE BAKING COMPANY OF TENNESSEE *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 778 F. 2d 292.

No. 85-1538. KATZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 778 F. 2d 963.

No. 85-1541. BATTAGLIA ET AL. *v.* BERGER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 992.

No. 85-1555. ROSE *v.* TOWN OF HARWICH. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 2d 77.

No. 85-1642. CUNNINGHAM *v.* SAFEWAY TRAILS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 795 F. 2d 78.

No. 85-1661. COONEY *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 136 Ill. App. 3d 989, 484 N. E. 2d 802.

No. 85-1662. WALKER *v.* TIME LIFE FILMS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 784 F. 2d 44.

No. 85-1669. FINDLAY *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 198 Conn. 328, 502 A. 2d 921.

No. 85-1670. CAMPBELL, TRUSTEE *v.* WELLS FARGO BANK, N. A., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 781 F. 2d 440.

No. 85-1671. AQUAMARINE OPERATORS, INC. *v.* DOWNER. Sup. Ct. Tex. Certiorari denied. Reported below: 701 S. W. 2d 238.

No. 85-1677. JOHNSON *v.* ALABAMA AGRICULTURAL AND MECHANICAL UNIVERSITY ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 481 So. 2d 336.

No. 85-1679. DALEY *v.* FRANK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 776 F. 2d 834.

No. 85-1680. E. B. *v.* BURLINGTON COUNTY WELFARE AGENCY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 85-1711. GRIMES *v.* LOUISVILLE & NASHVILLE RAILROAD CO. C. A. 7th Cir. Certiorari denied. Reported below: 767 F. 2d 925.

No. 85-1724. UNDERWOOD *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 484 So. 2d 520.

No. 85-1725. KENNEDY *v.* GENERAL SERVICES ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 326.

No. 85-1729. MEADS ET AL. *v.* FLYING TIGER LINE, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 661.

No. 85-1756. POOL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 483 So. 2d 331.

No. 85-1758. TURNER *v.* PARSONS. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 584.

No. 85-1783. ARDITO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 782 F. 2d 358.

No. 85-1784. BONANSINGA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 773 F. 2d 166.

No. 85-1787. WISNIEWSKI *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 370.

No. 85-1795. HOFFMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 784 F. 2d 798.

No. 85-1800. FREEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1164.

No. 85-1810. SCHREIBER, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSS *v.* CHASE FEDERAL SAVINGS & LOAN ASSN. Sup. Ct. Fla. Certiorari denied. Reported below: 479 So. 2d 90.

No. 85-1833. STANGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 6.

No. 85-5990. MONTGOMERY *v.* SEITER ET AL. C. A. 6th Cir. Certiorari denied.

No. 85-6330. FUENTES-JIMENEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 750 F. 2d 1495.

No. 85-6356. BUTLER *v.* JOHNSON ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6498. CARDINAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 782 F. 2d 34.

No. 85-6510. JENKINS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 780 F. 2d 472.

No. 85-6518. GLOVER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 66 N. Y. 2d 931, 489 N. E. 2d 765.

No. 85-6538. HALL *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 85-6672. COLEMAN *v.* ABACUS CORP. ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 508 A. 2d 72.

No. 85-6673. FRONEBERGER *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1153.

No. 85-6681. HURTADO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-6682. PARKHURST *v.* QUARLES, WARDEN, ET AL. Ct. App. Mich. Certiorari denied.

No. 85-6684. RANDALL *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 85-6689. NABOZNY *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 781 F. 2d 83.

No. 85-6697. LOFTON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 85-6700. ROSBERG *v.* COMMERCIAL STATE BANK OF WAUSA, NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 222 Neb. ——.

No. 85-6703. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 693.

No. 85-6706. DAY *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ET AL. C. A. 5th Cir. Certiorari before judgment denied.

No. 85-6741. STRATTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 820.

No. 85-6743. LIPSMAN *v.* ANDERSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 800 F. 2d 1128.

No. 85-6747. COCHRAN *v.* UNITED STATES POSTAL SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 1061.

No. 85-6751. THERRIEN *v.* VOSE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION. C. A. 1st Cir. Certiorari denied. Reported below: 782 F. 2d 1.

No. 85-6766. LARKIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 1031.

No. 85-6785. MAYBERRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 402.

No. 85-6792. CORLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-6799. SPANO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SPANO *v.* ONONDAGA COUNTY, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 35.

No. 85-6807. SAUERS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 771 F. 2d 64.

No. 85-6812. DAVIDSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 85-6827. ANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 1036.

No. 85-6838. WALETZKI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1168.

No. 85-6841. ORGERA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1148.

No. 85-6858. GARZA-PACHECO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 784 F. 2d 1112.

No. 85-6860. BUTLER ET AL. *v.* BROOKLYN UNION GAS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 6.

No. 85-6861. HYDE *v.* PITTMAN, ATTORNEY GENERAL OF MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 788 F. 2d 759.

No. 85-6865. FRITTS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 85-1349. INTAKE WATER CO. *v.* YELLOWSTONE RIVER COMPACT COMMISSION ET AL. C. A. 9th Cir. Motion of Yellowstone Pipeline Co. Inc. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 769 F. 2d 568.

No. 85-1439. FRANKLIN AND MARSHALL COLLEGE *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 775 F. 2d 110.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The Equal Employment Opportunity Commission is investigating petitioner on a charge of discriminating on the basis of national origin in denying tenure to a former assistant professor. In the course of its investigation, the EEOC issued a subpoena *duces tecum* for evaluations submitted by petitioner's faculty in all cases in which tenure was granted or denied from 1977 to the present. The EEOC offered to accept the subpoenaed materials with names and identifying characteristics deleted. Petitioner resisted the subpoena, asserting a privilege against the compelled production of confidential peer review materials absent a showing of facts supporting an inference of discrimination. The United States Court of Appeals for the Third Circuit rejected the asserted privilege, 775 F. 2d 110 (1985), which has been accepted by another Court of Appeals, see *EEOC* v. *University of Notre Dame du Lac*, 715 F. 2d 331, 337, n. 4 (CA7 1983). I would grant certiorari to resolve this conflict.

No. 85-1631. RANDOLPH *v.* SUPREME COURT OF NEW JERSEY ET AL. Sup. Ct. N. J. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE BLACKMUN would grant certiorari. Reported below: 101 N. J. 425, 502 A. 2d 533.

No. 85-1649. MIDWEST COMMUNICATIONS, INC. *v.* MINNESOTA TWINS, INC., ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 779 F. 2d 444.

No. 85-1652. KEMP, WARDEN *v.* COLEMAN; and KEMP, WARDEN *v.* ISAACS ET AL. C. A. 11th Cir. Motions of respondents Coleman, Dungee, and Isaacs for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE would grant certiorari. Reported below: 778 F. 2d 1487 (first case); 778 F. 2d 1482 (second case).

No. 85-1673. MILLER *v.* SOUTH CAROLINA. Ct. Gen. Sess. S. C., Horry County. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari.

No. 85-5394. JENKINS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 763 F. 2d 1390.

No. 85-5446. BERRY *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 2d 451.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

This is yet another capital case in which defense counsel failed to present *any* mitigation evidence whatsoever during the sentencing phase of a defendant's trial. I believe that, except perhaps in the extraordinary case, counsel's failure even to attempt to give the jury some reason for believing a defendant is not deserving of death denies defendant his Sixth Amendment right to the effective assistance of counsel. And I have yet to see that extraordinary case. I would grant the petition for certiorari and vacate the sentence.

No. 85-5466. CELESTINE *v.* BLACKBURN, WARDEN. C. A. 5th Cir.;

No. 85-5491. HOUSTON *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 85-5564. CABELLO *v.* MISSISSIPPI. Sup. Ct. Miss.;

No. 85-5607. BOWDEN *v.* KEMP, WARDEN. C. A. 11th Cir.;

No. 85-5640. LILES *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 85-5736. McDowell *v.* North Carolina. Super. Ct. N. C., Lee County;

No. 85-5852. Malone *v.* Missouri. Sup. Ct. Mo.;

No. 85-6676. Neal *v.* Illinois. Sup. Ct. Ill.; and

No. 85-6692. Brown *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: No. 85-5564, 471 So. 2d 332; No. 85-5607, 774 F. 2d 1494; No. 85-5640, 702 P. 2d 1025; No. 85-5852, 694 S. W. 2d 723; No. 85-6676, 111 Ill. 2d 180, 489 N. E. 2d 845; No. 85-6692, 315 N. C. 40, 337 S. E. 2d 808.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 85-1343. Humphrey et al., dba Humphrey & Haas *v.* Committee on Professional Ethics and Conduct of the Iowa State Bar Assn., 475 U. S. 1114;

No. 85-6501. Robinson *v.* United States, 475 U. S. 1134; and

No. 85-6579. Volino *v.* United States, 475 U. S. 1128. Petitions for rehearing denied.

No. 85-6052. Augustyniak *v.* City of New York et al., 475 U. S. 1027. Motion for leave to file petition for rehearing denied.

June 8, 1986

Miscellaneous Order

No. A-950. Esquivel *v.* McCotter, Director, Texas Department of Corrections. Application for stay of execution of sentence of death, presented to Justice White, and by him referred to the Court, denied.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay in order

to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

JUNE 9, 1986

Appeals Dismissed

No. 84-623. CINCINNATI BELL TELEPHONE CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL. Appeal from Sup. Ct. Ohio. Motion of GTE Service Corp. for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of substantial federal question. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this case. Reported below: 12 Ohio St. 3d 280, 466 N. E. 2d 848.

No. 84-870. LOUISIANA PUBLIC SERVICE COMMISSION ET AL. *v.* SOUTH CENTRAL BELL TELEPHONE CO. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari granted. Judgment vacated and case remanded for further consideration in light of *Public Service Comm'n* v. *Chesapeake & Potomac Tel. Co., ante,* p. 445. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 744 F. 2d 1107.

No. 85-132. HEMME ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. S. D. Ill. dismissed for want of jurisdiction.

No. 85-1644. BRIEHLER *v.* POSEIDON VENTURE, INC., ET AL. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 502 A. 2d 821.

No. 85-6727. VALWAY ET AL. *v.* BURLINGAME. Appeal from Sup. Ct. N. H. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 85-1689. GINOCCHI *v.* BURRELL SCHOOL DISTRICT. Appeal from Pa. Commw. Ct. dismissed for want of substantial federal question.

No. 85-6742. JOHNSTON *v.* PERROTT. Appeal from Sup. Ct. Vt. dismissed for want of a properly presented federal question.

Certiorari Granted—Vacated and Remanded. (See also No. 84-870, *supra*.)

No. 84-483. ARKANSAS PUBLIC SERVICE COMMISSION ET AL. *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 8th Cir. Motion of National Association of Regulatory Utility Commissioners et al. for leave to file a brief as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Public Service Comm'n* v. *Chesapeake & Potomac Tel. Co.*, *ante*, p. 445. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this case. Reported below: 738 F. 2d 901.

No. 85-55. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* POLASKI ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bowen* v. *City of New York*, *ante*, p. 467. Reported below: 751 F. 2d 943.

No. 85-474. HYATT ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bowen* v. *City of New York*, *ante*, p. 467. Reported below: 757 F. 2d 1455.

No. 85-6553. GIBSON ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Motion of petitioner Norman Bonds for leave to proceed *in forma pauperis* granted. The petition for writ of certiorari as to Norman Bonds is granted, the judgment is vacated, and the case is remanded for further consideration in light of *Lee* v. *Illinois*, *ante*, p. 530. The petition for writ of certiorari as to Sammy Gibson is denied. Reported below: 137 Ill. App. 3d 330, 484 N. E. 2d 858.

Miscellaneous Orders

No. A-901. CARTER ET AL. *v.* FARM BUREAU SERVICES, INC. C. A. 6th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-907. HOFFART *v.* TEXAS. Ct. App. Tex., 14th Sup. Jud. Dist. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A-919. MILLER *v.* IDAHO. Sup. Ct. Idaho. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–542. IN RE DISBARMENT OF BOWLES. Disbarment entered. [For earlier order herein, see 474 U. S. 1079.]

No. D–548. IN RE DISBARMENT OF MARBLE. Disbarment entered. [For earlier order herein, see 475 U. S. 1079.]

No. 85–99. MESSERSCHMITT BOLKOW BLOHM, GMBH. *v.* WALKER ET AL. C. A. 5th Cir. The order entered April 21, 1986, granting the petition for writ of certiorari is vacated.

No. 85–6836. GUTIERREZ *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 30, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

Probable Jurisdiction Postponed

No. 85–1708. CALIFORNIA ET AL. *v.* CABAZON BAND OF MISSION INDIANS ET AL. Appeal from C. A. 9th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 783 F. 2d 900.

Certiorari Granted

No. 85–1695. SOCIÉTÉ NATIONALE INDUSTRIELLE AEROSPATIALE ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA. C. A. 8th Cir. Certiorari granted. Reported below: 782 F. 2d 120.

No. 85–1433. RICHARDSON, WARDEN *v.* MARSH. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 781 F. 2d 1201.

No. 85–5939. CRUZ *v.* NEW YORK. Ct. App. N. Y. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 66 N. Y. 2d 61, 485 N. E. 2d 221.

No. 85–6756. HITCHCOCK *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Mo-

tion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions I, II, and IV presented by the petition. Reported below: 770 F. 2d 1514.

Certiorari Denied. (See also Nos. 85-1644, 85-6727, and 85-6553, *supra.*)

No. 85-239. HOFFMAN ET AL. *v.* SYLVA. C. A. 11th Cir. Certiorari denied. Reported below: 757 F. 2d 1112.

No. 85-502. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* QUINCY CABLE TV, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 248 U. S. App. D. C. 1, 768 F. 2d 1434.

No. 85-1372. OHIO *v.* THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 6th Cir. Certiorari denied. Reported below: 776 F. 2d 1333.

No. 85-1382. ROSE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 2d 1166.

No. 85-1405. MACKENZIE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 777 F. 2d 811.

No. 85-1441. WASHINGTON ET AL. *v.* HAWAII ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 68 Haw. ——, 708 P. 2d 129.

No. 85-1546. MID-STATE HOMES, INC. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 F. 2d 1001.

No. 85-1561. ORGANIZED FISHERMEN OF FLORIDA ET AL. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 775 F. 2d 1544.

No. 85-1591. SCHWANECKE ET AL. *v.* ALI ET AL. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 85-1600. BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY ET AL. *v.* FRIEDMAN. C. A. 10th Cir. Certiorari denied. Reported below: 781 F. 2d 777.

No. 85-1602. TEXAS *v.* VAN GUILDER. Ct. Crim. App. Tex. Certiorari denied. Reported below: 709 S. W. 2d 178.

No. 85-1625. PEARL INVESTMENT CO. *v.* CITY AND COUNTY OF SAN FRANCISCO. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1460.

No. 85-1665. PROBE ET AL. *v.* CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 776.

No. 85-1667. RHODE *v.* SAN JACINTO COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 776 F. 2d 107.

No. 85-1684. COLLETTI ET AL. *v.* COUNTY OF PRINCE WILLIAM, VIRGINIA. Cir. Ct. Prince William County, Va. Certiorari denied.

No. 85-1686. BUSSANICH ET AL. *v.* UNITED STATES LINES, INC. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 1, 489 N. E. 2d 1042.

No. 85-1692. LOVELACE *v.* AMETEK, INC. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 111 App. Div. 2d 953, 490 N. Y. S. 2d 49.

No. 85-1699. LASALLE NATIONAL BANK OF CHICAGO, TRUSTEE, ET AL. *v.* COUNTY OF DUPAGE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 2d 377.

No. 85-1700. FIRST FIDELITY BANCORPORATION ET AL. *v.* PARELL, COMMISSIONER OF BANKING OF THE STATE OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 783 F. 2d 360.

No. 85-1701. POWELL *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 780 F. 2d 419.

No. 85-1705. FELDER *v.* SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 779 F. 2d 56.

No. 85-1706. CLARK *v.* INDIANA DEPARTMENT OF PUBLIC WELFARE ET AL. Ct. App. Ind. Certiorari denied. Reported below: 478 N. E. 2d 699.

No. 85-1709. CROSS *v.* GENERAL MOTORS CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 778 F. 2d 468.

No. 85-1712. WILSMANN *v.* UPJOHN CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 775 F. 2d 713.

No. 85-1715. CITY HOSPITAL OF BELLAIRE *v.* DELGUZZO, EXECUTRIX OF THE ESTATE OF DELGUZZO. Ct. App. Ohio, Belmont County. Certiorari denied.

No. 85-1718. MORGAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 177 Cal. App. 3d 466, 225 Cal. Rptr. 673.

No. 85-1719. OWENS ET AL. *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 85-1734. CONNOR ET AL. *v.* PHILLIPS ET AL. Sup. Ct. N. J. Certiorari denied.

No. 85-1744. ESSNER *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 785 F. 2d 38.

No. 85-1753. UNRUH *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 713 P. 2d 370.

No. 85-1760. PAPALINI ET AL. *v.* FITHIAN. Sup. Ct. Mich. Certiorari denied. Reported below: 424 Mich. 77, 378 N. W. 2d 467.

No. 85-1774. LEVIN *v.* GUEST. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 629, 490 N. E. 2d 546.

No. 85-1777. FARLEY *v.* ITT LIFE INSURANCE CORP. C. A. 10th Cir. Certiorari denied. Reported below: 783 F. 2d 978.

No. 85-1794. SAGERMARK *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 645.

No. 85-1807. ZLOTNICKI *v.* HARSCO CORP. C. A. 3d Cir. Certiorari denied. Reported below: 779 F. 2d 906.

No. 85-1830. KADIN CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 782 F. 2d 175.

No. 85-1832. HEAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 1422.

No. 85-1841. ROBINSON, BY HIS GUARDIAN AD LITEM, YOUNG *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 783 F. 2d 1144.

No. 85-1850. YARIS ET AL., ON THEIR OWN BEHALF AND AS NEXT FRIENDS OF YARIS, ET AL. *v.* MALLORY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 780 F. 2d 724.

No. 85-6519. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 768.

No. 85-6536. FERRI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 778 F. 2d 985.

No. 85-6540. ANDREWS *v.* BECHTEL CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 780 F. 2d 124.

No. 85-6620. CASTALDI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 783 F. 2d 119.

No. 85-6699. MCCAFFERTY *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 384 N. W. 2d 323.

No. 85-6705. SELLERS *v.* STEIN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1166.

No. 85-6710. KOENIG *v.* FOSHEIM ET AL. C. A. 8th Cir. Certiorari denied.

No. 85-6713. CAREY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 85-6716. SUTTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 85-6717. OBOLENSKY *v.* POTTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 38.

No. 85-6718. WILLIAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 402.

No. 85-6724. MAYORGA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 171 Cal. App. 3d 929, 218 Cal. Rptr. 830.

No. 85-6726. ALLEN *v.* GILMORE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 785 F. 2d 1035.

No. 85-6729. GORDON *v.* NUCCI ET AL. C. A. 1st Cir. Certiorari denied.

No. 85-6731. WRIGHT *v.* COLLINS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 782 F. 2d 1037.

No. 85-6733. JOHNSON *v.* ONION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 787 F. 2d 586.

No. 85-6734. WAHID *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 716 P. 2d 678.

No. 85-6737. RANDOLPH *v.* MUNCY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 780 F. 2d 1018.

No. 85-6738. RAPPUHN *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 310.

No. 85-6739. SMITH *v.* ABSHIRE, SUPERINTENDENT, RIVERSIDE CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1136.

No. 85-6744. KINDER *v.* KEITH. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 703 S. W. 2d 53.

No. 85-6745. DAY *v.* ATTWELL ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-6746. DAY *v.* ALLSTATE INSURANCE CO. C. A. 8th Cir. Certiorari denied. Reported below: 794 F. 2d 678.

No. 85-6750. REED *v.* STANTON CORRECTIONAL CENTER ET AL. C. A. 11th Cir. Certiorari denied.

No. 85-6758. JACKSON *v.* SOUTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1169.

No. 85-6798. MARTIN *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied.

No. 85-6820. ANDREZ *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 2d 326.

No. 85-6864. BURKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 784 F. 2d 1090.

No. 85-6867. CRAWFORD ET AL. *v.* METROPOLITAN IMPEX, INC. C. A. 2d Cir. Certiorari denied. Reported below: 800 F. 2d 1127.

No. 85-6875. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 781 F. 2d 1114.

No. 85-6876. LITTLEHALES *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 22 M. J. 17.

No. 85-6885. STEELE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1171.

No. 85-6887. CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 1470.

No. 84-900. NEW ENGLAND TELEPHONE & TELEGRAPH CO. *v.* PUBLIC UTILITIES COMMISSION OF MAINE ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 742 F. 2d 1.

No. 85-1544. BURLINGTON NORTHERN INC. *v.* ANDERSON. Sup. Ct. Mont. Motion of Association of American Railroads et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: —— Mont. ——, 709 P. 2d 641.

No. 85-1629. INTERNATIONAL MOLDERS & ALLIED WORKERS UNION, AFL-CIO, ET AL. *v.* HOWARD ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 779 F. 2d 1546.

No. 85-1641. MULLIGAN *v.* HAZARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 777 F. 2d 340.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting.

In *Wilson* v. *Garcia*, 471 U. S. 261 (1985), we held that an action brought under 42 U. S. C. § 1983 should be considered a personal injury action for purposes of borrowing an appropriate state statute of limitations. Since our decision in that case, the Courts of Appeals have differed on whether *Wilson* should be given retro-

active effect. In the present case, the Sixth Circuit held, without qualification, that *Wilson* should be given retroactive effect. 777 F. 2d 340 (1985). The Courts of Appeals for the Fifth and Eleventh Circuits have reached similar results. *Gates* v. *Spinks*, 771 F. 2d 916 (CA5 1985), cert. denied, 475 U. S. 1065 (1986); *Jones* v. *Preuit & Mauldin*, 763 F. 2d 1250 (CA11 1985), cert. denied, 474 U. S. 1105 (1986). Two other Courts of Appeals, however, have determined that when retroactive application would shorten the statute of limitations, *Wilson* merits only prospective relief. *Gibson* v. *United States*, 781 F. 2d 1334 (CA9 1986); *Jackson* v. *City of Bloomfield*, 731 F. 2d 652 (CA10 1984). Although the Third and Eighth Circuits have applied *Wilson* retroactively in certain cases, it is unclear whether their holdings are designed to have universal application. See *Wycoff* v. *Menke*, 773 F. 2d 983, 986–987 (CA8 1985); *Fitzgerald* v. *Larson*, 769 F. 2d 160, 162–164 (CA3 1985); *Smith* v. *City of Pittsburgh*, 764 F. 2d 188, 194–196 (CA3 1985).

In addition, the Courts of Appeals also have reached conflicting results concerning what should be done when more than one state statute of limitations applies to personal injury actions. In *Hamilton* v. *City of Overton Park*, 730 F. 2d 613 (1984) (en banc), cert. denied, 471 U. S. 1052 (1985), and *Mismash* v. *Murray City*, 730 F. 2d 1366 (1984) (en banc), cert. denied, 471 U. S. 1052 (1985), the Tenth Circuit rejected, for § 1983 purposes, the state statute of limitations for intentional torts, and chose instead a State's residual statute of limitations. See generally *Preuit & Mauldin* v. *Jones*, 474 U. S. 1105, 1106–1107 (1986) (WHITE, J. dissenting from denial of certiorari). The Eleventh Circuit in *Jones* v. *Preuit & Mauldin*, *supra*, the Fifth Circuit in *Gates* v. *Spinks*, *supra*, and the Sixth Circuit in the present case, however, follow a different rule, and select the state statute of limitations governing intentional torts.

The Court's decision not to review the instant case marks the third time this Term that it has refused to address these differences that exist between the Courts of Appeals; differences that are not likely to disappear without guidance from this Court. Given the square conflicts among the Circuits, and the frequency with which these cases arise, I would grant the petition for certiorari in this case.

No. 85-1710. MALLINCKRODT, INC. *v.* BENNETT ET AL. Ct. App. Mo., Eastern Dist. Motions of Syncor International Corp., American College of Radiology, Society of Nuclear Medicine et al., and American College of Nuclear Physicians for leave to file briefs as *amici curiae* granted. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE O'CONNOR would grant certiorari. Reported below: 698 S. W. 2d 854.

No. 85-5555. MOORE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 774 F. 2d 97.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The petitioner in this case was sentenced to death by a jury that was "led to believe that the responsibility for determining the appropriateness of [his] death rests elsewhere," *Caldwell* v. *Mississippi*, 472 U. S. 320, 329 (1985). Under our recent decision in *Caldwell*, petitioner's sentence cannot stand unless this error "had no effect on the sentencing decision," *id.*, at 341, a point the courts below did not consider and the State does not contest here. I would therefore grant the petition for certiorari, vacate the District Court's judgment, and remand for reconsideration in light of *Caldwell*.

At the penalty phase of petitioner's trial, the prosecutor argued:

> "And it's a tough thing to ask, but there is only one penalty really available for this type of crime and that is the death penalty. This is where it will begin. From the next point forward it goes through the court system to be thoroughly reviewed and checked, through every court in this land. But it has to begin here, right here with the jury." App. to Pet. for Cert. 10; *State* v. *Moore*, 414 So. 2d 340, 347 (La. 1982).

On direct appeal to the Louisiana Supreme Court, petitioner argued that these statements had injected passion, prejudice, or other arbitrary factors into the sentencing determination. That court, while admitting that the prosecutor's argument was "close to reversible error," *ibid.*, concluded that the argument had not diminished the jury's sense of responsibility for its sentencing decision. The Fifth Circuit, reviewing the District Court's rejection of the same claim in petitioner's first federal habeas petition,

reached the same conclusion. *Moore* v. *Maggio*, 740 F. 2d 308, 320 (1984). Subsequently, this Court decided *Caldwell*, and petitioner filed a second habeas petition claiming that the prosecutor's argument violated the Eighth Amendment as construed in our decision in that case.

The District Court denied this petition, and the Court of Appeals denied a certificate of probable cause. 774 F. 2d 97 (1985). The latter court held that the *Caldwell* claim had been raised in petitioner's first application, and was therefore barred by Rule 9(b) of the Rules Governing Section 2254 Cases, and by the principles enunciated in *Sanders* v. *United States*, 373 U. S. 1 (1963). The court also concluded that its prior determination that the prosecutor's argument had not diminished the jury's sense of responsibility, see 740 F. 2d, at 320, was "consistent with the rule set forth in *Caldwell*." 774 F. 2d, at 98. Even had the *Caldwell* claim not been raised previously, the court held, it would have denied that claim as an abuse of the writ, because a competent lawyer would have been aware of the possibility of such a claim.

The Court of Appeals was mistaken in believing that its prior pronouncement that the jury's sense of responsibility was not diminished disposed of the *Caldwell* claim. The prosecutor's argument in this case is essentially identical to the argument held unconstitutional in *Caldwell*. The lesson of *Caldwell*, at a minimum, is that a misleading or incomplete statement concerning appellate review of a death sentence *necessarily* diminishes the jury's sense of responsibility. In the present case, no less than in *Caldwell*, the jury may have "harbor[ed] misconceptions about the power of state appellate courts or, for that matter, *this* Court to override a jury's sentence of death." 472 U. S., at 342 (O'CONNOR, J., concurring in part and concurring in judgment). Under those circumstances, we cannot be confident that the jury did not conclude that the ultimate responsibility for petitioner's fate rested elsewhere.

This case, then, falls squarely within the "ends of justice" exception to the general rule forbidding successive assertions of the same claim on habeas, see *Sanders*, *supra*, at 16–17. In *Sanders*, this Court held that "[i]f purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law." 373 U. S., at 17. *Caldwell* constitutes an intervening change in the law concerning the precise argument used by the prosecutor in this case—a change that re-

quires reexamination of the Court of Appeals' earlier conclusion about the effect of that argument on the jury. The clear import of *Sanders* is that petitioner is entitled to present his claim to the federal courts, and I therefore dissent from the denial of certiorari.

No. 85–5868. MAPES *v.* OHIO. Sup. Ct. Ohio;
No. 85–5886. RAULT *v.* LOUISIANA. C. A. 5th Cir.;
No. 85–5979. HARPER *v.* KENTUCKY. Sup. Ct. Ky.;
No. 85–5986. JONES *v.* LOUISIANA. Sup. Ct. La.;
No. 85–6048. GILMORE *v.* MISSOURI. Sup. Ct. Mo.;
No. 85–6389. FOSTER, AKA LEE *v.* MISSOURI. Sup. Ct. Mo.;
No. 85–6390. CAVE *v.* FLORIDA. Sup. Ct. Fla.;
No. 85–6456. KIRKPATRICK *v.* BLACKBURN, WARDEN. C. A. 5th Cir.;
No. 85–6547. HARICH *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla.;
No. 85–6771. SUAREZ *v.* FLORIDA. Sup. Ct. Fla.; and
No. 85–6932. EVANS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: No. 85–5868, 19 Ohio St. 3d 108, 484 N. E. 2d 140; No. 85–5886, 772 F. 2d 117 and 774 F. 2d 675; No. 85–5979, 694 S. W. 2d 665; No. 85–5986, 474 So. 2d 919; No. 85–6048, 697 S. W. 2d 172; No. 85–6389, 700 S. W. 2d 440; No. 85–6390, 476 So. 2d 180; No. 85–6456, 777 F. 2d 272; No. 85–6547, 484 So. 2d 1237; No. 85–6771, 481 So. 2d 1201; No. 85–6932, 485 So. 2d 276.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 85–6707. GOLUB *v.* ERNST & ERNST (WHINNEY) ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 779 F. 2d 38.

No. 85–6721. TONEY-EL *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 777 F. 2d 1224.

Rehearing Denied

No. 84–1288. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* JEFF D. ET AL., MINORS, BY AND THROUGH THEIR NEXT FRIEND, JOHNSON, ET AL., 475 U. S. 717;

No. 85–1095. AAMODT ET UX. *v.* UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL., 475 U. S. 1082;

No. 85–1407. CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL. *v.* PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, 475 U. S. 1114;

No. 85–1478. BOYCE *v.* RIDGELY ET AL., PERSONAL REPRESENTATIVES OF THE ESTATE OF BOYCE, 475 U. S. 1123;

No. 85–6431. DALE *v.* SOUTH DAKOTA, 475 U. S. 1126; and

No. 85–6499. STARADUMSKY *v.* RHODE ISLAND, 475 U. S. 1114. Petitions for rehearing denied.

No. 85–6003. HURLEY *v.* HONGISTO ET AL., 475 U. S. 1025. Motion for leave to file petition for rehearing denied.

JUNE 10, 1986

Miscellaneous Order

No. A–959. KEMP, WARDEN *v.* COLLINS. Application of the Attorney General of Georgia for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE POWELL, and by him referred to the Court, denied.

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OF

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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Equal protection of the laws—Veterans' preference in public employment—Validity of New York law.—Where (1) New York law granted a civil service employment preference to New York residents who were honorably discharged military veterans, had served during time of war, and were New York residents when they entered military service, (2) appellee veterans, New York residents, were denied preference because they were not New York residents when they joined Army, (3) they brought an action alleging that residency requirement violated Equal Protection Clause and their constitutional right to travel, and (4) District Court dismissed complaint, Court of Appeals' reversal of District Court's judgment was affirmed. Attorney General of N. Y. v. Soto-Lopez, p. 898.

Freedom of religion—Social Security number—Use in AFDC and Food Stamp programs.—Federal statutory requirement that state agencies utilize aid recipients' Social Security numbers in administering Aid to Families with Dependent Children program and Food Stamp program does not violate free exercise rights of recipients such as appellees, who asserted a violation of their Native American religious beliefs. Bowen v. Roy, p. 693.

Right to abortion—Pennsylvania statutory requirements—Information to be given to woman—Physician's duties.—In proceedings challenging validity of Pennsylvania abortion statute, Court of Appeals properly held to be unconstitutional provisions requiring, *inter alia*, (1) that a woman seeking an abortion be informed of specified matters, including availability of medical assistance, father's financial responsibilities if child was born, and detrimental effects and medical risks of an abortion, (2) that woman be furnished printed materials describing fetus and listing agencies offering alternatives to abortion, (3) that physician report such matters as woman's race, age, marital status, and prior pregnancies, and physician's basis for his determination, after first trimester, that child is not viable, (4) that a physician performing a postviability abortion use technique affording best opportunity for a live birth, unless it would present a significantly greater risk to woman's life or health, and (5) that a second physician attend a

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postviability abortion and take all reasonable steps necessary to preserve child's life and health. Thornburgh v. American College of Obstetricians & Gynecologists, p. 747.

CRIMINAL LAW. See **Indians.**

DELETERIOUS SUBSTANCES IN FOOD. See **Federal Food, Drug, and Cosmetic Act.**

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ELECTRIC POWER RATES.

Interstate commerce—State Commission's order—Pre-emption by federal law.—Where (1) appellants, related corporations, owned hydroelectric powerplants that were operated by Tennessee Valley Authority under an arrangement whereby TVA furnished them with certain types of electric power, (2) one appellant sold power to North Carolina retail customers, (3) North Carolina Utilities Commission, in calculating rate to be charged that appellant's North Carolina customers, issued an order allocating types of power between that appellant and another appellant that sold its power to a Tennessee corporation, and (4) State Commission's order differed from allocation by Federal Energy Regulatory Commission in a wholesale rate-making proceeding, State Commission's allocation was pre-empted by federal law. Nantahala Power & Light Co. v. Thornburg, p. 953.

EMERGENCY LOANS TO FARMERS. See **Constitutional Law.**

EMPLOYER AND EMPLOYEES. See **Constitutional Law.**

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EQUAL PROTECTION OF THE LAWS. See **Constitutional Law.**

FARMERS' EMERGENCY LOANS. See **Constitutional Law.**

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Aflatoxin in food—Tolerance level—FDA's discretion.—Food and Drug Administration's interpretation of § 346 of Act—as giving FDA discretion whether to promulgate tolerance levels for poisonous or deleterious substances in food so as to excuse its failure to set a tolerance level for aflatoxin before allowing shipment of tainted corn—was sufficiently rational to preclude a court from substituting its judgment for FDA's. Young v. Community Nutrition Institute, p. 974.

FEDERAL-STATE RELATIONS. See **Electric Power Rates; Indians.**

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FOOD REGULATIONS. See **Federal Food, Drug, and Cosmetic Act.**

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IMMUNITY OF INDIAN TRIBES FROM SUIT. See **Indians.**

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Hunting rights—Preservation of eagles.—In a prosecution of respondent member of Yankton Sioux Tribe for violations of Bald Eagle Protection Act and Endangered Species Act by shooting bald eagles and a golden eagle without a Government permit, respondent could not assert defense that under an 1858 treaty he had right to hunt eagles within Yankton Reservation for noncommercial purposes and Acts in question did not abrogate such right. United States v. Dion, p. 734.

Jurisdiction of Indian Tribe's claim—State's disclaimer statute—Preemption by federal law.—Where petitioner Tribe brought suit in a North Dakota court against respondent for negligence and breach of contract in connection with a construction project on Tribe's reservation, suit was improperly dismissed under a state statute that, absent a tribe's waiver of sovereign immunity, disclaimed unconditional state-court civil jurisdiction that had been extended in such cases under earlier state statute, since disclaimer statute was pre-empted by federal statute which governed state assumption of jurisdiction over Indian country and which did not provide for disclaimers of jurisdiction. Three Affiliated Tribes v. Wold Engineering, p. 877.

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QUIET TITLE ACT OF 1972.

Indian allotment lands—Action against Government—Limitations period.—Where (1) at respondent's request, Bureau of Indian Affairs, in 1967, provided her with a list of her inherited interests in Indian land allotments but did not include three allotments that Government, as trustee, had sold in 1954, (2) in response to a specific inquiry in 1981, Bureau informed her that such allotments had been sold, and (3) alleging that sale was void, she filed a federal-court suit against Government, action was one to adjudicate a disputed title to real property in which United States claimed an interest within meaning of Act, and was barred by Act's 12-year limitations period, which began to run at least by 1967. United States v. Mottaz, p. 834.

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BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. v. ROY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 84-780. Argued January 14, 1986—Decided June 11, 1986

Appellees applied for and received benefits under the Aid to Families with Dependent Children (AFDC) program and the Food Stamp program. They refused, however, to comply with the federal statutory requirements that participants in those programs furnish the state welfare agencies who administer the programs with their Social Security numbers and those of each member of their household as a condition of receiving benefits, and that each state agency utilize those numbers in administering the programs. Appellees contended that obtaining a Social Security number for their 2-year-old daughter would violate their Native American religious beliefs. Thereafter, the Pennsylvania Department of Public Welfare terminated AFDC benefits payable to appellees on the child's behalf and instituted proceedings to reduce the level of food stamps that appellees' household was receiving. Appellees then filed an action in Federal District Court, claiming that the Free Exercise Clause of the First Amendment entitled them to an exemption from the Social Security number requirements, and requesting injunctive and other relief. Following a trial in which it was disclosed that the child had in fact been assigned a Social Security number, the court held that the public interest in maintaining an efficient and fraud-resistant system could be met without requiring a Social Security number for the child. The court then enjoined the Secretary of Health and Human Services from using and disseminating the Social Security number issued in the child's name and also enjoined the federal and state defendants from denying appellees benefits, until the child's 16th birthday, because of their refusal to provide a Social Security number for her.

Held: The judgment is vacated, and the case is remanded.

590 F. Supp. 600, vacated and remanded.

CHIEF JUSTICE BURGER delivered the opinion of the Court with respect to Parts I and II, concluding that the statutory requirement that a state agency utilize Social Security numbers in administering the programs in question does not violate the Free Exercise Clause. That Clause affords an individual protection from certain forms of governmental compulsion but does not afford an individual a right to dictate the conduct of the Government's internal procedures. The Government's

use of a Social Security number for appellees' child does not itself impair appellees' freedom to exercise their religion. Pp. 699–701.

CHIEF JUSTICE BURGER, joined by JUSTICE POWELL and JUSTICE REHNQUIST, concluded in Part III that the statutory requirement that applicants provide a Social Security number as a condition of eligibility for the benefits in question does not violate the Free Exercise Clause. That requirement is facially neutral in religious terms, applies to all applicants for the benefits involved, and clearly promotes a legitimate and important public interest. Preventing fraud in these benefit programs is an important goal, and the Social Security number requirement is a reasonable means of promoting that goal. Government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or compels conduct that some find objectionable for religious reasons. Pp. 701–712.

BURGER, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which BRENNAN, MARSHALL, BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined, and an opinion with respect to Part III, in which POWELL and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in part, *post*, p. 712. STEVENS, J., filed an opinion concurring in part and concurring in the result, *post*, p. 716. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 724. WHITE, J., filed a dissenting opinion, *post*, p. 733.

Deputy Solicitor General Geller argued the cause for appellants. With him on the briefs were *Solicitor General Fried, Acting Assistant Attorney General Willard, Kathryn A. Oberly*, and *Peter R. Maier*.

Gary S. Gildin argued the cause for appellees. With him on the brief were *Franklin A. Miles, Jr., Stefan Presser*, and *Charles S. Sims*.*

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*Briefs of *amici curiae* urging affirmance were filed for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the National Congress of American Indians et al. by *Steven C. Moore;* and for the Rutherford Institute et al. by *W. Charles Bundren, Guy O. Farley, Jr., John W. Whitehead, James J. Knicely, Thomas O. Kotouc, Wendell R. Bird*, and *William B. Hollberg*.

CHIEF JUSTICE BURGER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Part III, in which JUSTICE POWELL and JUSTICE REHNQUIST join.

The question presented is whether the Free Exercise Clause of the First Amendment compels the Government to accommodate a religiously based objection to the statutory requirements that a Social Security number be provided by an applicant seeking to receive certain welfare benefits and that the States use these numbers in administering the benefit programs.

I

Appellees Stephen J. Roy and Karen Miller applied for and received benefits under the Aid to Families with Dependent Children program and the Food Stamp program. They refused to comply, however, with the requirement, contained in 42 U. S. C. § 602(a)(25)[1] and 7 U. S. C. § 2025(e), that participants in these programs furnish their state welfare agencies with the Social Security numbers of the members of their household as a condition of receiving benefits. Appellees contended that obtaining a Social Security number for their 2-year-old daughter, Little Bird of the Snow, would violate their Native American religious beliefs. The Pennsylvania Department of Public Welfare thereafter terminated AFDC and medical benefits payable to appellees on the child's behalf and instituted proceedings to reduce the level of food stamps that appellees' household was receiving. Appellees then filed this action against the Secretary of the Pennsylvania Department of Public Welfare, the Secretary of Health and Human Services, and the Secretary of Agriculture, arguing that the Free Exercise Clause entitled them to an exemption from the Social Security number requirement. In their com-

[1] We refer to the statutory scheme as it existed at the time appellees filed suit. The scheme has since been amended, although the Social Security number requirement has been retained in virtually identical form. See Deficit Reduction Act of 1984, Pub. L. 98-369, § 2651(a), 98 Stat. 1147.

plaint, appellees stated that "[t]he sole basis" for the denial of welfare benefits was "Mr. Roy's refusal to obtain a Social Security Number for Little Bird of the Snow," and thus requested injunctive relief, damages, and benefits. In the statement of "undisputed facts," the parties agreed that Little Bird of the Snow did not have a Social Security number.

At trial, Roy testified that he had recently developed a religious objection to obtaining a Social Security number for Little Bird of the Snow.[2] Roy is a Native American descended from the Abenaki Tribe, and he asserts a religious belief that control over one's life is essential to spiritual purity and indispensable to "becoming a holy person." Based on recent conversations with an Abenaki chief, Roy believes that technology is "robbing the spirit of man." In order to prepare his daughter for greater spiritual power, therefore, Roy testified to his belief that he must keep her person and spirit unique and that the uniqueness of the Social Security number as an identifier, coupled with the other uses of the number over which she has no control, will serve to "rob the spirit" of his daughter and prevent her from attaining greater spiritual power.

For purposes of determining the breadth of Roy's religious concerns, the trial judge raised the possibility of using the phonetics of his daughter's name to derive a Social Security number. Although Roy saw "a lot of good" in this suggestion, he stated it would violate his religious beliefs because the special number still would apply uniquely and identify her. Roy also testified that his religious objection would not be satisfied even if the Social Security Administration appended the daughter's full tribal name to her Social Security number.

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[2] Roy and Miller both have Social Security numbers. They also obtained a Social Security number for their 5-year-old daughter Renee at some time prior to the present dispute.

In Roy's own testimony, he emphasized the evil that would flow simply from *obtaining* a number.[3] On the last day of trial, however, a federal officer inquired whether Little Bird of the Snow already had a Social Security number; he learned that a number had been assigned—under first name "Little", middle name "Bird of the Snow", and last name "Roy."

The Government at this point suggested that the case had become moot because, under Roy's beliefs, Little Bird of the Snow's spirit had already been "robbed." Roy, however, was recalled to the stand and testified that her spirit would be robbed only by "use" of the number. Since no known use of the number had yet been made, Roy expressed his belief that her spirit had not been damaged. The District Court concluded that the case was not moot because of Roy's beliefs regarding "use" of the number. See *Roy* v. *Cohen*, 590 F. Supp. 600, 605 (MD Pa. 1984) (finding of fact 33) ("Roy believes that the establishment of a social security number for Little Bird of the Snow, without more, has not 'robbed her spirit,' but widespread use of the social security number by the federal or state governments in their computer systems would have that effect").

After hearing all of the testimony, the District Court denied appellees' request for damages and benefits, but granted injunctive relief. Based on the testimony of the Government's experts and the obvious fact that many people share certain names, the District Court found that "[u]tilization in

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[3] "[Q.] Mr. Roy, could you explain why obtaining a Social Security Number for Little Bird of the Snow would be contrary to your religious beliefs as a native Abenaki?

"A. Yes. Because we felt that this number would be used to rob her of her ability to have greater power in that this number is a unique number. It serves unique purposes. It's applied to her and only her; and being applied to her, that's what offends us, and we try to keep her person unique, and we try to keep her spirit unique, and we're scared that if we were to use this number, she would lose control of that and she would have no ability to protect herself from any evil that that number might be used against her." App. 85.

the computer system of the name of a benefit recipient alone frequently is not sufficient to ensure the proper payment of benefits." The court nevertheless concluded that the public "interest in maintaining an efficient and fraud resistant system can be met without requiring use of a social security number for Little Bird of the Snow," elaborating:

> "It appears to the Court that the harm that the Government might suffer if [appellees] prevailed in this case would be, at worst, that one or perhaps a few individuals could fraudulently obtain welfare benefits. Such a result would obtain only if (1) Little Bird of the Snow attempted fraudulently to obtain welfare benefits or someone else attempted fraudulently to obtain such benefits using Little Bird of the Snow's name *and* (2) identification procedures available to the Defendants that do not require utilization of a social security number failed to expose the fraud. This possibility appears to the Court to be remote." *Id.*, at 612–613.

Citing our decision in *United States* v. *Lee*, 455 U. S. 252 (1982), the court entered an injunction containing two basic components. *First*, the Secretary of Health and Human Services was "permanently restrained from making any use of the social security number which was issued in the name of Little Bird of the Snow Roy and from disseminating the number to any agency, individual, business entity, or any other third party." *Second*, the federal and state defendants were enjoined until Little Bird of the Snow's 16th birthday from denying Roy cash assistance, medical assistance, and food stamps "because of the [appellees'] refusal to provide a social security number for her."

We noted probable jurisdiction, 472 U. S. 1016 (1985), and we vacate and remand.

II

Appellees raise a constitutional challenge to two features of the statutory scheme here.[4] They object to Congress' requirement that a state AFDC plan "*must* . . . provide (A) that, *as a condition of eligibility* under the plan, *each* applicant for or recipient of aid *shall* furnish to the State agency his social security account number." 42 U. S. C. § 602(a)(25) (emphasis added). They also object to Congress' requirement that "such State agency *shall utilize* such account numbers . . . in the administration of such plan." *Ibid.* (emphasis added).[5] We analyze each of these contentions, turning to the latter contention first.

Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute. This case implicates only the latter concern. Roy objects to the statutory requirement that state agencies "shall utilize" Social Security numbers not because it places any restriction on what he may believe or what he may do, but because he believes the use of the number may harm his daughter's spirit.

Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in

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[4] They also raise a statutory argument—that the Government's denial of benefits to them constitutes illegal discrimination on the basis of religion or national origin. See 42 U. S. C. § 2000d; 7 U. S. C. § 2011. We find these claims to be without merit.

[5] The Food Stamp program restrictions that appellees challenge contain restrictions virtually identical to those in the AFDC program quoted in the text. See 7 U. S. C. § 2025(e).

any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Sherbert* v. *Verner*, 374 U. S. 398, 412 (1963) (Douglas, J., concurring).

As a result, Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets. The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.

As Roy points out, eight years ago Congress passed a Joint Resolution concerning American Indian religious freedom that provides guidance with respect to this case. As currently codified, the Resolution provides:

> "On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." 42 U. S. C. § 1996.

That Resolution—with its emphasis on protecting the freedom to believe, express, and exercise a religion—accurately identifies the mission of the Free Exercise Clause itself. The Federal Government's use of a Social Security number for Little Bird of the Snow does not itself in any degree impair Roy's "freedom to believe, express, and exercise" his re-

ligion.[6] Consequently, appellees' objection to the statutory requirement that each state agency "shall utilize" a Social Security number in the administration of its plan is without merit. It follows that their request for an injunction against use of the Social Security number in processing benefit applications should have been rejected. We therefore hold that the portion of the District Court's injunction that permanently restrained the Secretary from making any use of the Social Security number that had been issued in the name of Little Bird of the Snow Roy must be vacated.

III

Roy also challenges Congress' requirement that a state AFDC plan "*must* . . . provide (A) that, *as a condition of eligibility* under the plan, *each* applicant for or recipient of aid *shall furnish* to the State agency his social security account number." 42 U. S. C. § 602(a)(25) (emphasis added).[7] The

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[6] Roy's religious views may not accept this distinction between individual and governmental conduct. See, *e. g.*, n. 3, *supra*. It is clear, however, that the Free Exercise Clause, and the Constitution generally, recognize such a distinction; for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference.

[7] This issue is clearly not moot in light of our discussion in Part II, contrary to the suggestion of the two concurrences. JUSTICE STEVENS asserts that "there is nothing in the record to suggest that the Government will not pay the benefits in dispute as soon as the District Court's injunction against the use of the number has been vacated." *Post*, at 723. To my mind, this statement, while true, fundamentally misperceives the nature of appellees' suit. Appellees do not seek to have the Government "pay the benefits in dispute as soon as the District Court's injunction against use of the number has been vacated." Such payment would entail use of Little Bird of the Snow's Social Security number, use that appellees filed suit to prevent.

JUSTICE BLACKMUN similarly believes that on remand "it is possible that the Government, in a welcome display of reasonableness, will decide that since it already has a Social Security number for Little Bird of the Snow, it will not insist that appellees resupply it." *Post*, at 714–715. My reading of the record is that such an occurrence is not a mere "possibility." JUS-

First Amendment's guarantee that "Congress shall make no law . . . prohibiting the free exercise" of religion holds an important place in our scheme of ordered liberty, but the Court has steadfastly maintained that claims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the government. Not all burdens on religion are unconstitutional. See *Reynolds* v. *United States*, 98 U. S. 145 (1879). This was treated recently in *United States* v. *Lee:*

> "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'" 455 U. S., at 259.

TICE STEVENS cites federal regulations that provide that the Government will assist households that, for some reason or other, are unable to furnish a Social Security number. See *post*, at 721–722. Moreover, the Government's brief in this Court reports that "we are advised by the Social Security Administration that *the agency itself assigns [Social Security numbers] to persons who are required by federal law to have one but decline to complete an application.* If, for religious reasons, the individual requiring [a Social Security number] does not wish to receive a social security card, the agency will accommodate that request. Similarly, when an applicant refuses to sign an application for [a Social Security number] on religious grounds, [Social Security Administration personnel] may sign in lieu of the applicant." Brief for Appellants 46, n. 19 (emphasis added; citations omitted). Thus, the Government undoubtedly would be happy to "supply" the number for appellees—*i. e.*, fill the number in on their applications—if this is what they wanted. But appellees do not desire any such assistance from the Government; instead they filed suit seeking a ruling excluding them from the operation of any portion of the statutory scheme involving Social Security numbers. They continue to press this claim in this Court. For the reasons advanced here this claim ultimately lacks merit, but it certainly is not moot.

Also, in view of our analysis of the case, because all relevant facts are before the Court and further proceedings in the District Court could not produce information that would change the result, the case is ripe for decision.

The statutory requirement that applicants provide a Social Security number is wholly neutral in religious terms and uniformly applicable. There is no claim that there is any attempt by Congress to discriminate invidiously or any covert suppression of particular religious beliefs. The administrative requirement does not create any danger of censorship[8] or place a direct condition or burden on the dissemination of religious views.[9] It does not intrude on the organization of a religious institution[10] or school.[11] It may indeed confront some applicants for benefits with choices, but in no sense does it affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct[12] or to engage in conduct that they find objectionable for religious reasons.[13] Rather, it is appellees who seek benefits from the Government and who assert that, because of certain religious beliefs, they should be excused from compliance with a condition that is binding on all other persons who seek the same benefits from the Government.

This is far removed from the historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause of the First Amendment. See generally M. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1978). We are not unmindful of the importance of many government benefits today or of the value of sincerely held religious be-

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[8] Cf. *Cantwell* v. *Connecticut*, 310 U. S. 296, 305 (1940).

[9] Cf. *Follett* v. *Town of McCormick*, 321 U. S. 573, 577–578 (1944); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 112 (1943).

[10] Cf. *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S, 94 (1952).

[11] Cf. *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490 (1979).

[12] Cf. *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Cox* v. *New Hampshire*, 312 U. S. 569, 574 (1941); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Reynolds* v. *United States*, 98 U. S. 145, 167 (1879).

[13] *United States* v. *Lee*, 455 U. S. 252, 259 (1982); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Gillette* v. *United States* 401 U. S. 437 (1971); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943); *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905).

liefs. However, while we do not believe that no government compulsion is involved, we cannot ignore the reality that denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications.

This distinction is clearly revealed in the Court's opinions. Decisions rejecting religiously based challenges have often recited the fact that a mere denial of a governmental benefit by a uniformly applicable statute does not constitute infringement of religious liberty. In *Hamilton* v. *Regents of University of California*, 293 U. S. 245 (1934), for example, the Court rejected a religious challenge by students to military courses required as part of their curriculum, explaining:

> "The fact that they are able to pay their way in this university but not in any other institution in California is without significance upon any constitutional or other question here involved. California has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war . . . ." *Id.*, at 262.[14]

In cases upholding First Amendment challenges, on the other hand, the Court has often relied on the showing that compulsion of certain activity with religious significance was in-

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[14] Concurring in *McGowan* v. *Maryland*, 366 U. S. 420, 521 (1961), Justice Frankfurter viewed it as important that the challenged statutes "do not make criminal, do not place under the onus of civil or criminal disability, any act which is itself prescribed by the duties of the Jewish or other religions." In *Braunfeld* v. *Brown*, 366 U. S. 599, 605–606 (1961), the plurality opinion emphasized: "Fully recognizing that the alternatives open to appellants and others similarly situated . . . may result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful."

volved. In *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), for example, the Court distinguished the earlier *Hamilton* holding and upheld a challenge to a flag salute requirement:

> "Here . . . we are dealing with a compulsion of students to declare a belief. . . . This issue is not prejudiced by the Court's previous holding that where a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. It was held that those who take advantage of its opportunities may not on ground of conscience refuse compliance with such conditions. *Hamilton* v. *Regents*, 293 U. S. 245. In the present case attendance is not optional." 319 U. S., at 631–632.[15]

The distinction between governmental compulsion and conditions relating to governmental benefits contained in these two cases was emphasized by JUSTICE BRENNAN in his concurring opinion in *Abington School District* v. *Schempp*, 374 U. S. 203 (1963):

> "The different results of *[Hamilton* and *Barnette]* are attributable only in part to a difference in the strength of the particular state interests which the respective statutes were designed to serve. Far more significant is the fact that *Hamilton* dealt with the voluntary attendance at college of young adults, while *Barnette* involved the compelled attendance of young children at elementary and secondary schools. This distinction warrants a difference in constitutional results." *Id.*, at 252–253 (footnote omitted).

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[15] In *Wisconsin* v. *Yoder*, *supra*, at 218, we similarly relied on the fact that "[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."

We have repeatedly emphasized this distinction: In rejecting a Free Exercise challenge in *Bob Jones University* v. *United States*, 461 U. S. 574, 603–604 (1983), for example, we observed that the "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets."[16]

We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons. Although the denial of government benefits over religious objection can raise serious Free Exercise problems, these two very different forms of government action are not governed by the same constitutional standard. A governmental burden on religious liberty is not insulated from review simply because it is indirect, *Thomas* v. *Review Board of Indiana Employment Security Div.*, 450 U. S. 707, 717–718 (1981) (citing *Sherbert* v. *Verner*, 374 U. S., at 404);

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[16] JUSTICE O'CONNOR's partial dissent asserts that the Court's holding "has no basis in precedent," *post*, at 727. To the contrary, it is the history advanced by the dissenting opinions that is revisionist. The dissent characterizes our prior cases as holding that the denial of a benefit is the same, for constitutional purposes, as the imposition of a criminal sanction. In *Bob Jones University*, however, the Court upheld the denial of tax benefits to a school that prohibited interracial dating, observing that the school remained wholly free to "observ[e] [its] religious tenets." 461 U. S., at 604. If denying governmental benefits is the same as imposing criminal sanctions, then the Free Exercise Clause could not prevent the Government from ordering Bob Jones University, under pain of criminal penalty, to violate its religious beliefs and permit interracial dating on its campus. But that difficult question is still an open one since "the Constitution may compel toleration of private discrimination in some circumstances." *Norwood* v. *Harrison*, 413 U. S. 455, 463 (1973).

but the nature of the burden is relevant to the standard the government must meet to justify the burden.

The general governmental interests involved here buttress this conclusion. Governments today grant a broad range of benefits; inescapably at the same time the administration of complex programs requires certain conditions and restrictions. Although in some situations a mechanism for individual consideration will be created, a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference. Moreover, legitimate interests are implicated in the need to avoid any appearance of favoring religious over nonreligious applicants.

The test applied in cases like *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972), is not appropriate in this setting. In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest.[17] Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government

[17] It is readily apparent that virtually *every* action that the Government takes, no matter how innocuous it might appear, is potentially susceptible to a Free Exercise objection. For example, someone might raise a religious objection, based on Norse mythology, to filing a tax return on a Wednesday (Woden's day). Accordingly, if the dissent's interpretation of the Free Exercise Clause is to be taken seriously, then the Government will be unable to enforce any generally applicable rule unless it can satisfy a federal court that it has a "compelling government interest." While libertarians and anarchists will no doubt applaud this result, it is hard to imagine that this is what the Framers intended.

meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.

We reject appellees' contention that *Sherbert* and *Thomas* compel affirmance. The statutory conditions at issue in those cases provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, as was urged in *Thomas*, to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality, towards religion. See Brief for Petitioner 15, and Brief for American Jewish Congress as *Amicus Curiae* 11, in *Thomas* v. *Review Board of Indiana Employment Security Div.*, O. T. 1979, No. 79-952. See also *Sherbert*, *supra*, at 401-402, n. 4; *United States* v. *Lee*, 455 U. S., at 264, n. 3 (STEVENS, J., concurring in part and in result) (*Thomas* and *Sherbert* may be viewed "as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect"). In those cases, therefore, it was appropriate to require the State to demonstrate a compelling reason for denying the requested exemption.

Here there is nothing whatever suggesting antagonism by Congress towards religion generally or towards any particular religious beliefs. The requirement that applicants provide a Social Security number is facially neutral and applies to all applicants for the benefits involved. Congress has made no provision for individual exemptions to the requirement in the two statutes in question. Indeed, to the contrary, Congress has specified that a state AFDC plan "*must* . . . provide (A) that, *as a condition of eligibility* under the plan, *each* applicant for or recipient of aid *shall* furnish to the

State agency his social security account number," 42 U. S. C. § 602(a)(25) (emphasis added), and that "[s]tate agencies *shall* (1) *require, as a condition of eligibility* for participation in the food stamp program, that *each* household member furnish to the State agency their social security account number," 7 U. S. C. § 2025(e) (emphasis added). Nor are these requirements relics from the past; Congress made the requirement mandatory for the Food Stamp program in 1981. Compare 7 U. S. C. § 2025(f) (1976 ed., Supp. IV) (State agencies "may" require that each household member furnish their Social Security number), with 7 U. S. C. § 2025(e) (States "shall" require that such numbers be furnished). Congress also recently extended to several other aid programs the mandatory requirement that the States use Social Security numbers in verifying eligibility for benefits. See Deficit Reduction Act of 1984, Pub. L. 98–369, § 2651(a), 98 Stat. 1147.

The Social Security number requirement clearly promotes a legitimate and important public interest. No one can doubt that preventing fraud in these benefits programs is an important goal. As Representative Richmond explained in support of the bill that made the Social Security number requirement mandatory for the Food Stamp program:

> "We know that however generously motivated Americans may be to furnish resources to the poor to enable them to survive, . . . they understandably object if they believe that those resources are being abused or wasted. . . .
>
> "We want to be certain that the food stamp program is run as efficiently and as error-free as possible.
>
> "We want applicants and recipients alike constantly to be aware that the Congress does not and will not tolerate any refusal to disclose earnings accurately, and underreporting of welfare or other assistance program benefits, any efforts to evade the work requirement or any other attempts to take advantage of the program and dollars intended only for those who completely satisfy the strin-

> gent eligibility requirements set forth in sections 5 and 7 of the Food Stamp Act of 1977 and further tightened this year and in this bill." 127 Cong. Rec. 24783 (1981).

We also think it plain that the Social Security number requirement is a reasonable means of promoting that goal. The programs at issue are of truly staggering magnitude. Each year roughly 3.8 million families receive $7.8 billion through federally funded AFDC programs and 20 million persons receive $11 billion in food stamps. The Social Security program itself is the largest domestic governmental program in the United States today, distributing approximately $51 billion monthly to 36 million recipients. Because of the tremendous administrative problems associated with managing programs of this size, the District Court found:

> "Social security numbers are used in making the determination that benefits in the programs are properly paid and that there is no duplication of benefits or failure of payment. . . . Utilization in the computer system of the name of a benefit recipient alone frequently is not sufficient to ensure the proper payment of benefits."

Social Security numbers are unique numerical identifiers and are used pervasively in these programs. The numbers are used, for example, to keep track of persons no longer entitled to receive food stamps because of past fraud or abuses of the program. Moreover, the existence of this unique numerical identifier creates opportunities for ferreting out fraudulent applications through computer "matching" techniques. One investigation, "Project Match," compared federal employee files against AFDC and Medicaid files to determine instances of Government employees receiving welfare benefits improperly. Data from 26 States were examined, and 9,000 individuals were identified as receiving duplicate welfare payments. While undoubtedly some fraud escapes detection in spite of such investigations, the President's Private Sector Survey on Cost Control, known more popularly as the "Grace Commis-

sion," recently reported that matching "is the Federal Government's most cost-effective tool for verification or investigation in the prevention and detection of fraud, waste and abuse." 7 The President's Private Sector Survey on Cost Control, Management Office Selected Issues—Information Gap in the Federal Government 90 (1984).

The importance of the Social Security number to these matching techniques is illustrated by the facts of this case. The District Court found that "efficient operation of these [matching] programs requires the use of computer systems that utilize unique numerical identifiers such as the social security number." 590 F. Supp., at 606. It further found that exempting even appellees alone from this requirement could result in "one or perhaps a few individuals . . . fraudulently obtain[ing] welfare benefits," *id.*, at 612, a prospect the court termed "remote." *Id.*, at 613. The District Court's assessment of this probability seems quite dubious.[18] But in any event, we know of no case obligating the Government to tolerate a slight risk of "one or perhaps a few individuals" fraudulently obtaining benefits in order to satisfy a religious objection to a requirement designed to combat that very risk. Appellees may not use the Free Exercise Clause to demand

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[18] The District Court's assessment appears to have turned in part on its belief that it was unlikely that Little Bird of the Snow or her parents would attempt fraudulently to obtain welfare benefits. Without in any way questioning the conclusion that appellees are law-abiding citizens, we believe that the District Court misperceived the nature of the Government's interest. The Government's interest is ensuring a fraud-resistent system in the event that a fraudulent application *is made* by appellees.

This misunderstanding of the Government's interest probably accounts for the District Court's conclusion that the Government's interest in preventing fraud "can be satisfied without requiring a social security number for Little Bird of the Snow." 590 F. Supp., at 607. In any event, this conclusionary statement is certainly at odds with the District Court's more specific statement quoted in text regarding the prospects for "one or perhaps a few individuals . . . fraudulently obtain[ing] welfare benefits." Indeed, the partial dissent appears to concede that its position might result in one or perhaps a few individuals fraudulently receiving benefits.

Government benefits, but only on their own terms, particularly where that insistence works a demonstrable disadvantage to the Government in the administration of the programs.

As the Court has recognized before, given the diversity of beliefs in our pluralistic society and the necessity of providing governments with sufficient operating latitude, some incidental neutral restraints on the free exercise of religion are inescapable. As a matter of legislative policy, a legislature might decide to make religious accommodations to a general and neutral system of awarding benefits,[19] "[b]ut our concern is not with the wisdom of legislation but with its constitutional limitation." *Braunfeld* v. *Brown*, 366 U. S. 599, 608 (1961) (plurality opinion). We conclude that the Congress' refusal to grant appellees a special exemption does not violate the Free Exercise Clause.

The judgment of the District Court is vacated and the case is remanded.

It is so ordered.

JUSTICE BLACKMUN, concurring in part.

I join only Parts I and II of the opinion written by THE CHIEF JUSTICE.

In August 1983, appellees Stephen J. Roy and Karen Miller sued to prevent the Government from requiring them to provide a social security number for their 2-year-old daughter, Little Bird of the Snow, as a condition for obtaining food stamps and welfare benefits for the child. They object to the social security number requirement because of their sincere religious conviction that the Government's widespread use of a unique numerical identifier for their daughter will deprive her of spiritual power. After it developed at trial that the Government already had a social secu-

[19] An exemption adopted by Congress to accommodate religious beliefs such as appellees' would not violate the First Amendment's Establishment Clause. See *Sherbert* v. *Verner*, 374 U. S. 398, 409–410 (1963).

rity number for Little Bird of the Snow, the District Court enjoined the Government not only from denying benefits to her based on her parents' failure to provide a social security number, but also from using or disseminating the number already in the Government's possession until the child's 16th birthday. App. to Juris. Statement 25a.

I agree with the Court that the District Court erred in enjoining the Government's internal use of Little Bird of the Snow's social security number. It is easy to understand the rationale for that part of the District Court's injunction: appellees argue plausibly that the Government's threat to put the social security number into active use if they apply for benefits for their daughter requires them to choose between the child's physical sustenance and the dictates of their faith, the same dilemma created by the Government's initial requirement that appellees themselves supply a social security number for Little Bird of the Snow. Cf. *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963). They claim that, absent some compelling state interest, the Government should refrain from acting in ways that appellees believe on religious grounds will harm their daughter's spiritual development.

Although this argument has some facial appeal, I conclude, for the reasons stated in Part II of the Court's opinion, that it stretches the Free Exercise Clause too far. Consequently, I agree that the portion of the District Court's judgment that enjoins the Government from using or disseminating the social security number already assigned to Little Bird of the Snow must be vacated. I would also vacate the remainder of the judgment and remand the case for further proceedings, because once the injunction against use or dissemination is set aside, it is unclear on the record presently before us whether a justiciable controversy remains with respect to the rest of the relief ordered by the District Court. Roy and Miller evidently objected to the social security number requirement primarily because they did not want the *Govern-*

ment to be able to use a unique numerical identifier for Little Bird of the Snow, and that injury cannot be redressed if, as the Court today holds, the Government cannot be enjoined from using the pre-existing number. It is possible, however, that appellees still would have an independent religious objection to their being forced to cooperate actively with the Government by themselves providing their daughter's social security number on benefit applications. Cf. *United States* v. *Lee*, 455 U. S. 252, 257 (1982); *Thomas* v. *Review Board of Indiana Employment Security Div.*, 450 U. S. 707, 711 (1981).

In my view, the record is ambiguous on this score. In rejecting the Government's argument that the existence of the number rendered the case moot, the District Court found that Roy "feels compelled by his religious belief to avoid any use of that number and, to that end, has refused to provide the number to the Defendants in order to receive welfare benefits for Little Bird of the Snow." *Roy* v. *Cohen*, 590 F. Supp. 600, 608 (MD Pa. 1984). It is unclear whether the "use" to which the District Court referred included use by Roy and Miller, or just the more extensive use of the number by the Government. And even if the court meant to refer only to use by the Government, it is not clear that appellees do not also have an independent religious objection to the requirement that *they* provide a social security number for their daughter.

On the other hand, even if appellees do have such an objection, vacating the District Court's injunction against governmental use or dissemination of the number may moot this case in other ways. Regardless of whether Roy and Miller are required to provide their daughter's social security number on applications for benefits, they may simply be unwilling to apply for benefits without an assurance that the application will not trigger the use of the number. Conversely, it is possible that the Government, in a welcome display of rea-

sonableness, will decide that since it already has a social security number for Little Bird of the Snow, it will not insist that appellees resupply it.[1]

Since the proceedings on remand might well render unnecessary any discussion of whether appellees constitutionally may be required to provide a social security number for Little Bird of the Snow in order to obtain government assistance on her behalf, that question could be said not to be properly before us. I nonetheless address it, partly because the rest of the Court has seen fit to do so, and partly because I think it is not the kind of difficult constitutional question that we should refrain from deciding except when absolutely necessary. Indeed, for the reasons expressed by JUSTICE O'CONNOR, see *post*, at 726–732, I think the question requires nothing more than a straightforward application of

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[1] Unfortunately, I cannot agree that such flexibility on the Government's part is assured either by the Government's earlier argument to the District Court that the case should be dismissed as moot, or by regulations providing special assistance to handicapped applicants and applicants who cannot read and write English. Cf. *ante*, at 701–702, n. 7 (opinion of BURGER, C. J.); *post*, at 720 (STEVENS, J., concurring in part and in result). Before this Court, the Government concedes only that "*it would not be an unreasonable construction* of the statutes [at issue in this case] to conclude that they are satisfied by the government's ability to use [social security numbers] already in its possession, as is the case with Little Bird of the Snow, or by the government's ability to assign (and then use) [a number] for a person who refuses to apply for one." Brief for Appellants 46, n. 19 (emphasis added). What the Government does not say is that it in fact will adopt this construction, which it does not appear to have followed in the past. It is worth recalling that the Government's response to appellees' refusal to supply a social security number for their daughter was not to assign her a number unilaterally, or to offer to do so, but rather to cut off benefits for the child.

Given THE CHIEF JUSTICE's contrary view that the Government "undoubtedly" will not insist that appellees themselves provide a social security number for Little Bird of the Snow, see *ante*, at 702, n. 7, I am at a loss to understand why THE CHIEF JUSTICE believes there is still a live controversy.

Sherbert, *Thomas*, and *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972).[2] If it proves necessary to reach the issue on remand, I agree with JUSTICE O'CONNOR that, on the facts as determined by the District Court, the Government may not deny assistance to Little Bird of the Snow solely because her parents' religious convictions prevent them from supplying the Government with a social security number for their daughter.

JUSTICE STEVENS, concurring in part and concurring in the result.

Members of the Abenaki Indian Tribe are unquestionably entitled to the same constitutional protection against governmental action "prohibiting the free exercise" of their religion as are the adherents of other faiths.[1] Our respect for the sincerity of their religious beliefs does not, however, relieve us from the duty to identify the precise character of the two quite different claims that the parents of Little Bird of the Snow have advanced. They claim, first, that they are entitled to an injunction preventing the Government from making any use of a Social Security number assigned to Little Bird of the Snow; and second, that they are entitled to receive a full allowance of food stamps and cash assistance for Little Bird of the Snow without providing a Social Security number for her.

As the Court holds in Part II of its opinion, which I join, the first claim must fail because the Free Exercise Clause

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[2] I do not share JUSTICE STEVENS' narrow view of *Sherbert* and *Thomas*. Compare *post*, at 722, n. 17, with *Goldman* v. *Weinberger*, 475 U. S., 503, 524 (1986) (BLACKMUN, J., dissenting). Consequently, I have no occasion to consider separately, as he does, the "hypothetical questions," *post*, at 723, that would arise if the Government refused to grant religious objectors an exemption from the social security number requirement, while simultaneously offering comparable exemptions and special assistance to applicants who are prevented in other ways from completing the required application forms. See *post*, at 720–722.

[1] The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

does not give an individual the right to dictate the Government's method of recordkeeping. The second claim, I submit, is either moot or not ripe for decision.

I

In order to understand the precise nature and current posture of appellees' claims, it is necessary to emphasize an extremely unusual feature of this case. At the outset of the litigation, the parties assumed—indeed, they stipulated to—a critical fact that was discovered to be inaccurate on the last day of the trial. Although the parties believed that Little Bird of the Snow did not have a Social Security number, the District Court found, and the parties now agree, that she has had a Social Security number since birth. The contrary belief had been central to the parties' perception of the litigation, and to the requested relief. It is thus also central to the state of the record as we find it.

At the state agency administrative hearing on the threatened withdrawal of certain benefits, the issue had been framed as whether to affirm a decision "determining the appellant's daughter, Little Bird of the Snow, ineligible for public assistance and Medical Assistance because the appellant would not apply for a Social Security Number for her."[2] In their complaint, Little Bird's parents alleged that "[t]he sole basis" for the denial of welfare benefits was "Mr. Roy's refusal to obtain a Social Security Number for Little Bird of the Snow,"[3] and thus requested injunctive relief, damages, and benefits. In the statement of "undisputed facts," the parties stipulated that Little Bird of the Snow did not have a Social Security number.[4] In the District Court's opinion

[2] Department of Public Welfare Adjudication, Complaint, Ex. A, p. 2.

[3] Complaint ¶ 11.

[4] Statement of Undisputed Facts ¶ 6, App. 13 ("With the exception of Little Bird of the Snow, [the members of the Roy family] all have Social Security Numbers"); ¶ 20, App. 14 ("The sole basis for these actions [the reduction of AFDC and medical assistance] was Mr. Roy's refusal to obtain a Social Security Number for Little Bird of the Snow").

denying summary judgment, the court began its opinion by observing that Roy and Miller "have refused to obtain a Social Security number for their two-year-old daughter, Little Bird of the Snow, on the ground that doing so would be contrary to their Native Abenaki Indian religious beliefs."[5] At trial, Roy's counsel introduced his case by emphasizing that Little Bird of the Snow, unlike the other members of the family, did not have a Social Security number and thus had not been exposed to the evil that the number represents.[6] In Roy's own testimony, he emphasized the evil that would flow from *obtaining* a number.[7] On the last day of trial, however, in response to questions, a federal official inquired, during a court recess, whether Little Bird of the Snow already had a Social Security number and discovered that she had been assigned a Social Security number at birth.[8]

This discovery had a dramatic impact on the litigation, and on the judgment under review. Because there was no longer any apparent basis for the dispute, the Government

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[5] App. to Juris. Statement 27a.

[6] See App. 52–53. ("Mr. Roy has a Social Security number, as does his eldest daughter, Renee; but, as Mr. Roy will explain, the number was obtained before he became aware of what he perceives as a potential for evil of these numbers; and he will tell you that once that number is provided the evil is done and continuing to do so has no further effect; but with respect to Little Bird of the Snow, he simply cannot do so").

[7] "[Q.] Mr. Roy, could you explain why obtaining a Social Security Number for Little Bird of the Snow would be contrary to your religious beliefs as a native Abenaki?

"A. Yes. Because we felt that this number would be used to rob her of her ability to have greater power in that this number is a unique number. It serves unique purposes. It's applied to her and only her; and being applied to her, that's what offends us, and we try to keep her person unique, and we try to keep her spirit unique, and we're scared that if we were to use this number, she would lose control of that and she would have no ability to protect herself from any evil that that number might be used against her." *Id.*, at 85.

[8] *Id.*, at 442–443.

suggested that the case had become moot.[9] Roy, however, responded to the discovery by changing his request for relief and asking for a cancellation of the existing number.[10]

Concluding that the discovery did not moot the case,[11] the District Court denied the request for damages and benefits, but granted injunctive relief. The injunction—the judgment that we are considering—contains two basic components. First, the Secretary of Health and Human Services is "permanently restrained from making any use of the social security number which was issued in the name of Little Bird of the Snow Roy and from disseminating the number to any agency, individual, business entity, or any other third party."[12] Second, the federal and state defendants are enjoined until Little Bird of the Snow's 16th birthday from denying Roy cash assistance, medical assistance, and food stamps "because of the Plaintiffs' refusal to provide a social security number for her."[13] Of course, if the injunction preventing the Secretary from making use of the already existing number had not been granted, there would have been no apparent impediment to providing the benefits that had previously been denied.

As the case comes to us, the first question to be decided is whether the District Court erred in effectively canceling the number that had already been issued for Little Bird of the Snow and that established the appellees' eligibility for the benefits in dispute. The Court correctly holds that the Dis-

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[9] See *id.*, at 514–515 (argument of Deputy Attorney General of Pennsylvania); *id.*, at 521 (argument of Attorney for United States Dept. of Justice); Record, Doc. No. 68, p. 2 (federal defendants' motion to dismiss).

[10] Record, Doc. No. 65, pp. 2–3.

[11] See *Roy* v. *Cohen*, 590 F. Supp. 600, 605 (MD Pa. 1984) (finding of fact 33) ("Roy believes that the establishment of a social security number for Little Bird of the Snow, without more, has not 'robbed her spirit,' but widespread use of the social security number by the federal or state governments in their computer systems would have that effect").

[12] App. to Juris. Statement 24a.

[13] *Id.*, at 25a.

trict Court did err and that "the portion of the District Court's injunction that permanently restrained the Secretary from making any use of the Social Security number that had been issued in the name of Little Bird of the Snow Roy must be vacated." *Ante*, at 701. Having so held, however, the Court should pause to consider whether any other constitutional issue need be addressed. For, as the Court demonstrates, an objection to the Government's use of a Social Security number, and a possible objection to "providing" the number when the Government already has it, pose very different constitutional problems.

II

Once we vacate the injunction preventing the Government from making routine use of the number that has already been assigned to Little Bird of the Snow, there is nothing disclosed by the record to prevent the appellees from receiving the payments that are in dispute. Indeed, since the Government itself suggested to the District Court that the case had become moot as soon as it was learned that a Social Security number already existed, it is obvious that the Government perceives no difficulty in making the requested payments in the future. The only issue that prevented the case from becoming moot was the claim asserted by Roy that he was entitled to an injunction that effectively canceled the existing number. Since that issue has now been resolved, nothing remains of the case.

Neither Roy nor the Government has pointed to anything in the record suggesting that Roy will be under any further obligation to "provide" a Social Security number for Little Bird of the Snow. Even if one makes the unsupported assumption that Roy may object to filing certain forms in the future, there is a conspicuous lack of evidence and findings concerning the extent to which such requirements might impose a burden either on Roy, or on any other person who finds difficulty in providing information on pertinent forms.

The absence of this information in the record is significant. Current regulations suggest that assistance for such difficulties may well be available in the programs at issue,[14] particularly for those with mental, physical, and linguistic handicaps that prevent completion of the required forms,[15] or other required steps in the application process.[16] To the extent that

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[14] See, *e. g.*, 7 CFR § 273.2(c)(1) (1985) ("The household shall be advised that it . . . may file an incomplete application form as long as the form contains the applicant's name and address and is signed by a responsible member of the household or the household's authorized representative").

[15] See 7 CFR § 282.17(c)(3)(v) (1985) ("Households which require special assistance in order to apply for food stamps if that special assistance will not be available for completing the monthly reports. Special assistance shall include authorized representatives to complete monthly reports, home visits or telephone reporting in lieu of the report form. Such households may be comprised of blind, mentally or physically disabled persons, persons whose reading and writing skills are so limited that they cannot complete monthly reports on their own, or non-English speaking persons residing in project areas where the bilingual requirement of § 272.4(c) do not apply").

[16] See 7 CFR § 273.2(e)(2) (1985) ("The office interview shall be waived if requested by any household which is unable to appoint an authorized representative and which has no household members able to come to the food stamp office because they are 65 years of age or older, or are mentally or physically handicapped"); *ibid.* ("The State agency shall waive the office interview on a case-by-case basis for any household which is unable to appoint an authorized representative and which has no household members able to come to the food stamp office because of transportation difficulties or similar hardships which the State agency determines warrants a waiver of the office interview. These hardship conditions include, but are not limited to: Illness, care of a household member, prolonged severe weather, or work hours which preclude in-office interview").

Indeed, the regulations suggest that there may be a limited exception to the Social Security number requirement itself. See 7 CFR § 273.6 (b)(2) (1985) ("For those individuals required to provide an SSN who do not have one, the State agency shall act as follows. . . . If an individual applies through the State agency, the State agency shall complete the application for an SSN, Form SS-5"); 50 Fed. Reg. 10469 (1985) (proposed 7 CFR § 273.6(d)) ("In determining if good cause exists for failure to comply with the requirement to apply for or provide the State agency with an SSN, the

other food stamp and welfare applicants are, in fact, offered exceptions and special assistance in response to their inability to "provide" required information, it would seem that a religious inability should be given no less deference. For our recent free exercise cases suggest that religious claims should not be disadvantaged in relation to other claims.[17]

These considerations highlight the fact that, if this case is not moot, it surely is not ripe. The case, as litigated, simply bears no resemblance to the currently abstract question about what the Government may require if it seeks a Social Security number that it already has.

Consistent with our longstanding principles of constitutional adjudication, we should decide nothing more than is actually necessary to dispose of the precise dispute before the Court,[18] and nothing more than is fairly presented by the

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State agency shall consider information from the household member, the Social Security Administration and the State agency . . . . Good cause does not include delays due to illness, lack of transportation or temporary absences, because SSA makes provisions for mail-in applications in lieu of applying in person. . . . If the household member(s) applying for an SSN has been unable to obtain the documents required by SSA, the State agency caseworker should make every effort to assist the individual(s) in obtaining these documents").

[17] In *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981), and *Sherbert* v. *Verner*, 374 U. S. 398 (1963), the granting of a religious exemption was necessary to prevent the treatment of religious claims less favorably than other claims. See *United States* v. *Lee*, 455 U. S. 252, 264, n. 3 (1982) (STEVENS, J., concurring in judgment) (In *Thomas* and *Sherbert*, "the treatment of the religious objection to the new job requirements as though it were tantamount to a physical impairment that made it impossible for the employee to continue to work under changed circumstances could be viewed as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect").

[18] See *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 569 (1947) ("[C]onstitutional issues affecting legislation will not be determined . . . in broader terms than are required by the precise facts to which the ruling is to be applied"); *Coffman* v. *Breeze Corp.*, 323 U. S. 316, 324–325 (1945) ("[T]he Court will not pass upon the constitutionality of legislation . . . until

record and the factual findings.[19] Because the District Court has not made findings about the extent to which other exceptions and assistance are available for those who cannot, or do not, "provide" required information, and because there is nothing in the record to suggest that the Government will not pay the benefits in dispute as soon as the District Court's injunction against the use of the number has been vacated, I concur in the judgment vacating the remainder of the injunction. No matter how interesting, or how clear their answers may appear to be, however, I would not address the hypothetical questions debated by THE CHIEF JUSTICE and JUSTICE O'CONNOR because they are not properly presented by the record in this case.[20]

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it is necessary to do so to preserve the rights of the parties"); *Liverpool, New York and Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885) (This Court "is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied").

[19] See *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 542, n. 5 (1986) ("We have frequently recognized the importance of the facts and the fact-finding process in constitutional adjudication"); *Minnick* v. *California Dept. of Corrections*, 452 U. S. 105, 123 (1981) ("In this case our analysis of the question whether the federal constitutional issues may be affected by additional proceedings in the state courts . . . is . . . affected by ambiguities in the record"); *England* v. *Louisiana Board of Medical Examiners*, 375 U. S. 411, 416 (1964) ("How the facts are found will often dictate the decision of federal claims"); *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963) ("It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues"); *Wiener* v. *United States*, 357 U. S. 349, 352 (1958) ("The versatility of circumstances often mocks a natural desire for definitiveness"); *Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 171–172 (1927) ("Before any of the questions suggested, which are both novel and of far reaching importance, are passed upon by this Court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence").

[20] Curiously, in explaining why they discourse at length on constitutional questions, THE CHIEF JUSTICE and JUSTICE O'CONNOR appear to rely on

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and dissenting in part.

I join Parts I and II of THE CHIEF JUSTICE's opinion and I would vacate only a portion of the injunction issued by the District Court.

I

I believe that appellees cannot pursue their free exercise claim based solely on the actions of the Government with respect to the use of a Social Security number already in its possession, or with respect to any other identification number the Government may wish to assign and use in connection with its administration of its welfare assistance program. Accordingly, I join Parts I and II of THE CHIEF JUSTICE's opinion, and I would vacate that portion of the District Court's judgment that enjoins the Government from using or disseminating the Social Security number already assigned to Little Bird of the Snow.

In all, eight Members of the Court believe that the District Court's injunction was overbroad in preventing the Government from using information already in its possession. See *ante*, at 699–701 (opinion of BURGER, C. J., joined by POWELL and REHNQUIST, JJ.); *ante*, at 716–717 (STEVENS, J., concurring in part and concurring in result); *ante*, at 713 (BLACKMUN, J., concurring in part); *supra*.

A logical next step on the facts of this case is to consider whether the case is moot. Only two Members of the Court

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different factual assumptions. Compare *ante*, at 702, n. 7 (BURGER, C. J.) (The "Government undoubtedly would be happy to 'supply' the number for appellees—*i. e.*, fill the number in on their applications—if this is what they wanted"), with *post*, at 725 (O'CONNOR, J., concurring in part and dissenting in part) ("The Government still refuses to concede that it should now provide welfare benefits to Little Bird of the Snow, even though it now claims to possess Little Bird of the Snow's Social Security number"). It is, of course, an elementary principle of judicial restraint that uncertainty about the facts should prevent unnecessary constitutional disquisitions.

believe that the case is, or may be, moot. See *ante*, at 720–723 (STEVENS, J., concurring in part and concurring in result) (stating that the case is moot or not ripe); *ante*, at 714–716 (BLACKMUN, J., concurring in part) (District Court should consider whether the case is moot). I agree with THE CHIEF JUSTICE, *ante*, at 701–702, n. 7, that the case is not moot.

The District Court enjoined the Government not only from disseminating or using the Social Security number already in its possession, but "from denying Plaintiff Roy cash assistance and medical assistance benefits for Little Bird of the Snow for the Plaintiffs' failure to provide a social security number for her." App. to Juris. Statement 24a. Because of this portion of the District Court's injunction, we continue to have before us a live case or controversy. Mr. Roy sought in part an injunction that "restrai[ns the Government] from denying cash assistance and medical assistance to Little Bird of the Snow for failure to provide a Social Security Number." Record, Doc. No. 65, Proposed Orders Submitted by Plaintiff 1–2. The District Court granted that relief. App. to Juris. Statement 24a. The Government still refuses to concede that it should now provide welfare benefits to Little Bird of the Snow, even though it now claims to possess Little Bird of the Snow's Social Security number, and even though the Solicitor General has been "advised by the Social Security Administration that the agency itself assigns [Social Security numbers] to persons who are required by federal law to have one but decline to complete an application." Brief for Appellants 46, n. 19. Because the Government contests the District Court's decision that the Government may not deny welfare benefits to Little Bird of the Snow despite its acknowledgment of appellees' sincere religious objections, Mr. Roy may properly press his suit. Although the Government properly challenges part of the District Court's injunction as overbroad, it seeks to overturn the rest of the injunction only on the grounds that the District Court improperly applied the substantive standards of the First Amendment.

II

Given that a majority of the Court believes that the Government may use and disseminate information already in its possession, and given that the case is not moot, there is probably less remaining in this case than meets the eye. The interest asserted by the Government before the District Court could be wholly served after accommodating appellees' sincere religious beliefs, and the interests remaining after vacating the overbroad portion of the injunction are certainly no more difficult to pursue.

The Government has identified its goal as preventing fraud and abuse in the welfare system, a goal that is both laudable and compelling. The District Court, however, soundly rejected the Government's assertion that provision of the Social Security number was necessary to prevent such fraud and abuse. Among the means for which the Social Security number is used to reduce such fraud is "cross-matching," in which various computerized lists are compared with the welfare rolls to detect unreported income, individuals claimed as part of more than one household, and other fraudulent practices. *Roy* v. *Cohen*, 590 F. Supp. 600, 606–607 (MD Pa. 1984). As now appears, the Government not only has the Social Security number it wants for Little Bird of the Snow, but it can also use it. But even under the erroneous assumption of the District Court that no such number was available for use, that court found as a fact that, while cross-matching is "more difficult" without Social Security numbers, "[t]he file on a particular benefit recipient can be identified and cross-matching performed, if the recipient's full name, date of birth, and parents' names are entered into the computerized systems." *Id.*, at 607. The District Court's generalized evaluation of the asserted indispensability of the Social Security number similarly undermines the Government's claim here:

> "*The government's interest* in preventing Little Bird of the Snow from fraudulently receiving welfare benefits *can be satisfied without requiring a social security num-*

ber for Little Bird of the Snow." *Ibid.* (emphasis added).

Faced with these facts, however, THE CHIEF JUSTICE not only believes appellees themselves must provide a Social Security number to the Government before receiving benefits, but he also finds it necessary to invoke a new standard to be applied to test the validity of Government regulations under the Free Exercise Clause. *Ante*, at 707–708. He would uphold any facially neutral and uniformly applicable governmental requirement if the Government shows its rule to be "a reasonable means of promoting a legitimate public interest." *Ante*, at 708. Such a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides. I would apply our long line of precedents to hold that the Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means.

This Court has stated:

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U. S. 707, 717–718 (1981).

Indeed, THE CHIEF JUSTICE appears to acknowledge at least that the law at issue here involves governmental compulsion. See *ante*, at 704 ("we do not believe that no government compulsion is involved"). The Free Exercise Clause is therefore clearly implicated in this case. See *Thomas* v. *Review Board*, *supra*, at 717–718; *Sherbert* v. *Verner*, 374 U. S. 398, 403–406 (1963).

Once it has been shown that a governmental regulation burdens the free exercise of religion, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U. S. 205, 215 (1972). This Court has consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest," *United States* v. *Lee*, 455 U. S. 252, 257–258 (1982), or represents "the least restrictive means of achieving some compelling state interest," *Thomas* v. *Review Board*, *supra*, at 718. See also *Braunfeld* v. *Brown*, 366 U. S. 599, 607 (1961); *Sherbert* v. *Verner*, *supra*, at 406. Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.

Granting an exemption to Little Bird of the Snow, and to the handful of others who can be expected to make a similar religious objection to providing the Social Security number in conjunction with the receipt of welfare benefits, will not demonstrably diminish the Government's ability to combat welfare fraud. The District Court found that the governmental appellants had hardly shown that a significant number of other individuals were likely to make a claim similar to that at issue here:

> "There have been four reported cases involving challenges to the social security number requirement for welfare benefits based upon the contention that the number violates sincerely held religious beliefs of the welfare recipient." 590 F. Supp., at 607.

Cf. *United States* v. *Lee*, *supra* (refusing request for exemption from mandatory taxation); *Gillette* v. *United States*, 401 U. S. 437 (1971) (refusing request for exemption from involuntary military service). The danger that a religious exemption would invite or encourage fraudulent applications seek-

ing to avoid cross-matching performed with the use of Social Security numbers is remote on the facts as found by the District Court: few would-be lawbreakers would risk arousing suspicion by requesting an exemption granted only to a very few. And the sincerity of the appellees' religious beliefs is here undisputed. There is therefore no reason to believe that our previous standard for determining whether the Government must accommodate a free exercise claim does not apply.

Bob Jones University v. *United States*, 461 U. S. 574 (1983), does not support THE CHIEF JUSTICE's analysis. The Court stated in that case:

> "The governmental interest at stake here is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, see *United States* v. *Lee*, *supra*, at 259–260; and no 'less restrictive means,' see *Thomas* v. *Review Board of Indiana Employment Security Div.*, *supra*, at 718, are available to achieve the governmental interest." *Id.*, at 604 (footnotes omitted).

See also *id.*, at 603 ("'The state may justify a limitation on religious liberty by showing that it is *essential* to accomplish an *overriding* governmental interest'") (emphasis added) (quoting *United States* v. *Lee*, *supra*, at 257–258). It is clear that the Court in *Bob Jones University* did not adopt anything like the legitimate interest/rational means test propounded by THE CHIEF JUSTICE, but rather continued to require the Government to show pursuit of an especially important interest by narrowly tailored means. In addition,

the interest that the Court in *Bob Jones University* balanced against asserted religious interests was not merely a compelling governmental interest but a *constitutional* interest. Here, although prevention of welfare fraud is concededly a compelling interest, the Government asserts only administrative efficiency as its reason for refusing to exempt appellees from furnishing the Social Security number. The District Court found that assertion sorely wanting, and our conclusion that part of the resulting injunction was overbroad only makes the Government's assertion less plausible. Surely the fact that the Court was willing in *Bob Jones University* to give overriding weight to the Government's interest in eradicating the scourge of racial discrimination does not mean that the Court must also give overriding weight to the unanchored anxieties of the welfare bureaucracy.

Hamilton v. *Regents of University of California*, 293 U. S. 245 (1934), also fails to support THE CHIEF JUSTICE's construction of a new test. When the Court decided *Hamilton*, it had not yet applied, and did not in *Hamilton* apply, the Free Exercise Clause to actions of the States. Cf. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940). The Court's discussion in *Hamilton* of the state university's decision to require military training is therefore limited to a generalized analysis under the Fourteenth Amendment of whether the State's policy deprived the would-be students of "life, liberty, or property." See 293 U. S., at 261–262. The Court concluded that no such deprivation was involved when the State "ha[d] not drafted or called [the individuals] to [war]." *Id.*, at 262.

This Court's opinions have never turned on so slender a reed as whether the challenged requirement is merely a "reasonable means of promoting a legitimate public interest." *Ante*, at 708 (opinion of BURGER, C. J.). THE CHIEF JUSTICE appears to believe that the added inconvenience to the State of administering a selective exemption overbalances any burden on individual religious exercise. But this Court

has held that administrative inconvenience is not alone sufficient to justify a burden on free exercise unless it creates problems of substantial magnitude. See *Sherbert* v. *Verner*, 374 U. S., at 408–409. And as Part II of THE CHIEF JUSTICE's opinion makes clear, there is essentially no administrative burden imposed on the Government in this case.

Appellants have rested their case on vague allegations of administrative inconvenience and harm to the public fisc that are wholly unsubstantiated by the record and the findings of the District Court. The Court simply cannot, consistent with its precedents, distinguish this case from the wide variety of factual situations in which the Free Exercise Clause indisputably imposes significant constraints upon government. Indeed, five Members of the Court agree that *Sherbert* and *Thomas*, in which the government was required to accommodate sincere religious beliefs, control the outcome of this case to the extent it is not moot. See *ante*, at 716 (BLACKMUN, J., concurring in part); *post*, at 733 (WHITE, J., dissenting); *supra*, at 728–730.

THE CHIEF JUSTICE's distinction between this case and the Court's previous decisions on free exercise claims—that here "it is appellees who seek benefits from the Government and who assert that . . . they should be excused from compliance with a condition that is binding on all other persons who seek the same benefits from the Government," *ante*, at 703—has been directly rejected. The fact that the underlying dispute involves an award of benefits rather than an exaction of penalties does not grant the Government license to apply a different version of the Constitution:

> "[Welfare] benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right."' *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6 (1969). Relevant constitu-

> tional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert* v. *Verner*, 374 U. S. 398 (1963) . . . ." *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970) (footnote omitted).

See also *Sherbert* v. *Verner*, *supra*, at 404 ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege"). The fact that appellees seek exemption from a precondition that the Government attaches to an award of benefits does not, therefore, generate a meaningful distinction between this case and one where appellees seek an exemption from the Government's imposition of penalties upon them. Even if the Founding Fathers did not live in a society with the "broad range of benefits" and "complex programs" that the Federal Government administers today, *ante*, at 707 (opinion of BURGER, C. J.), they constructed a society in which the Constitution placed express limits upon governmental actions limiting the freedoms of that society's members. The rise of the welfare state was not the fall of the Free Exercise Clause.

Our precedents have long required the Government to show that a compelling state interest is served by its refusal to grant a religious exemption. The Government here has clearly and easily met its burden of showing that the prevention of welfare fraud is a compelling governmental goal. If the Government could meet its compelling needs only by refusing to grant a religious exemption, and chose a narrowly tailored means to do so, then the Government would prevail. But the Government has failed to show that granting a religious exemption to those who legitimately object to providing a Social Security number will do any harm to its compelling interest in preventing welfare fraud.

I would merely vacate that portion of the injunction issued by the District Court that enjoins the Government from

using or disseminating the Social Security number already in its possession.

JUSTICE WHITE, dissenting.

Being of the view that *Thomas* v. *Review Board of Indiana Employment Security Div.*, 450 U. S. 707 (1981), and *Sherbert* v. *Verner*, 374 U. S. 398 (1963), control this case, I cannot join the Court's opinion and judgment.

UNITED STATES *v.* DION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85-246. Argued March 25, 1986—Decided June 11, 1986

The Bald Eagle Protection Act (Eagle Protection Act) makes it a federal crime to hunt the bald eagle or the golden eagle, except that such hunting may be authorized, pursuant to a permit issued by the Secretary of the Interior, "for the religious purposes of Indian tribes" or for certain other narrow purposes compatible with preservation of those species. The Endangered Species Act imposes a similar ban on the hunting of the bald eagle. Respondent, a member of the Yankton Sioux Tribe, was convicted after a jury trial in Federal District Court of, *inter alia*, the shooting of four bald eagles in violation of the Endangered Species Act, but the court before trial dismissed a charge of shooting a golden eagle in violation of the Eagle Protection Act. The Court of Appeals reversed the convictions and affirmed the dismissal of the other charge, holding that members of the Tribe have a right under an 1858 treaty to hunt bald and golden eagles within the Yankton Reservation for noncommercial purposes, and that neither of the Acts in question abrogated this treaty right.

Held: The Court of Appeals erred in recognizing respondent's treaty defense to the prosecutions. Pp. 738-746.

(a) The Eagle Protection Act abrogated the rights of members of the Yankton Sioux Tribe under the 1858 treaty to hunt the bald or golden eagle on the Yankton Reservation. Congress' intention to abrogate Indian treaty rights must be clear and plain. Here, such intention is strongly suggested on the face of the Eagle Protection Act, and this view is supported by the legislative history. More particularly, Congress' action in 1962 in amending the Act to extend its ban to the golden eagle and authorizing the Secretary to issue permits for Indian hunting reflected an unmistakable and explicit legislative policy choice that Indian hunting of the bald or golden eagle, except pursuant to permit, is inconsistent with the need to preserve those species. Pp. 738-745.

(b) Since the Eagle Protection Act divested respondent of his treaty right to hunt bald eagles, he had no such right to hunt bald eagles that he could assert as a defense to the Endangered Species Act charge. Pp. 745-746.

762 F. 2d 674, reversed in part and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Jeffrey P. Minear argued the cause *pro hac vice* for the United States. On the briefs were *Solicitor General Fried, Assistant Attorney General Habicht, Deputy Solicitor General Wallace, Harriet S. Shapiro, Donald A. Carr, Claire L. McGuire,* and *James C. Kilbourne.*

Terry L. Pechota by appointment of the Court, 474 U. S. 978, argued the cause and filed a brief for respondent.*

JUSTICE MARSHALL delivered the opinion of the Court.

Respondent Dwight Dion, Sr., a member of the Yankton Sioux Tribe, was convicted of shooting four bald eagles on the Yankton Sioux Reservation in South Dakota in violation of the Endangered Species Act, 87 Stat. 884, as amended, 16 U. S. C. § 1531 *et seq.* (1982 ed. and Supp. II).[1] The District Court dismissed before trial a charge of shooting a golden eagle in violation of the Bald Eagle Protection Act, 54 Stat. 250, 16 U. S. C. § 668 *et seq.* (Eagle Protection Act). Dion was also convicted of selling carcasses and parts of eagles and other birds in violation of the Eagle Protection Act and the Migratory Bird Treaty Act, 40 Stat. 755, as amended, 16 U. S. C. § 703 *et seq.* The Court of Appeals for the Eighth Circuit affirmed all of Dion's convictions except those for

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*Briefs of *amici curiae* urging reversal were filed for the Environmental Defense Fund, Inc., et al. by *Michael J. Bean;* and for the International Association of Fish and Wildlife Agencies by *Paul A. Lenzini.*

Briefs of *amici curiae* urging affirmance were filed for the Assiniboine and Sioux Tribes of the Fort Peck Reservation et al. by *Harry R. Sachse* and *Arthur Lazarus, Jr.;* for the Hopi Indian Tribe by *Michael P. O'Connell;* for the National Congress of American Indians et al. by *Henry J. Sockbeson* and *Steven C. Moore;* and for the Seminole Indian Tribe of Florida by *Charles A. Hobbs* and *Jerry C. Straus.*

[1] The jury verdict at trial did not conclusively establish that Dion is a member of the Tribe or that the killings took place on the reservation. See 752 F. 2d 1261, 1270 (1985) (indicating that those questions remain open for determination on remand). Both parties, however, agree in this Court that Dion is a member of the Yankton Sioux Tribe. Brief for United States 10; Brief for Respondent 2. Dion testified at trial that the birds were all killed on the reservation, the Eighth Circuit assumed that fact for the purposes of its opinion, and we shall do the same.

shooting bald eagles in violation of the Endangered Species Act. 752 F. 2d 1261, 1270 (1985) (en banc); 762 F. 2d 674, 694 (1985) (panel opinion). As to those, it stated that Dion could be convicted only upon a jury determination that the birds were killed for commercial purposes. 752 F. 2d, at 1270. It also affirmed the District Court's dismissal of the charge of shooting a golden eagle in violation of the Eagle Protection Act. *Ibid.* We granted certiorari, 474 U. S. 900 (1985), and we now reverse the judgment of the Court of Appeals insofar as it reversed Dion's convictions under the Endangered Species Act and affirmed the dismissal of the charge against him under the Eagle Protection Act.

I

The Eagle Protection Act by its terms prohibits the hunting of the bald or golden eagle anywhere within the United States, except pursuant to a permit issued by the Secretary of the Interior. The Endangered Species Act imposes an equally stringent ban on the hunting of the bald eagle. The Court of Appeals for the Eighth Circuit, however, sitting en banc, held that members of the Yankton Sioux Tribe have a treaty right to hunt bald and golden eagles within the Yankton Reservation for noncommercial purposes.[2] It further held that the Eagle Protection Act and Endangered Species Act did not abrogate this treaty right. It therefore directed that Dion's convictions for shooting bald eagles be vacated, since neither the District Court nor the jury made any explicit finding whether the killings were for commercial or noncommercial purposes.[3]

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[2] The court held that tribal members have no treaty right to sell eagles, or to hunt eagles for commercial purposes. 752 F. 2d, at 1264–1265. Dion does not challenge that holding here, and its validity is not before us.

[3] On remand from the en banc court, an Eighth Circuit panel rejected a religious freedom claim raised by Dion. Dion does not pursue that claim here, and accordingly we do not consider it.

A statement made by the panel in rejecting that claim, though, casts some doubt on whether the issue of whether Dion had a treaty right to kill

The Court of Appeals relied on an 1858 treaty signed by the United States and by representatives of the Yankton Tribe. Treaty with the Yancton (previous spelling) Sioux, Apr. 19, 1858, 11 Stat. 743. Under that treaty, the Yankton ceded to the United States all but 400,000 acres of the land then held by the Tribe. The treaty bound the Yanktons to remove to, and settle on, their reserved land within one year. The United States in turn agreed to guarantee the Yanktons quiet and undisturbed possession of their reserved land, and to pay to the Yanktons, or expend for their benefit, various moneys in the years to come. The area thus reserved for the Tribe was a legally constituted Indian reservation, see *Minnesota* v. *Hitchcock*, 185 U. S. 373, 389–390 (1902); *Wood* v. *Jameson*, 130 N. W. 2d 95 (S. D. 1964). The treaty did not place any restriction on the Yanktons' hunting rights on their reserved land.

All parties to this litigation agree that the treaty rights reserved by the Yankton included the exclusive right to hunt and fish on their land. See Brief for United States 19; Brief

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eagles for noncommercial purposes is squarely before us. The panel stated: "The record reveals that Dion, Sr. was killing eagles and other protected birds for commercial gain . . . ." 762 F. 2d, at 680. Notwithstanding its statement that Dion's killings were for commercial gain, apparently inconsistent with the en banc court's refusal to pass on that issue, it issued a judgment vacating Dion's convictions for shooting bald eagles "pursuant to the opinion of this Court *en banc*." *Id.*, at 694.

We find that this case properly presents the issue whether killing eagles for noncommercial purposes is outside the scope of the Eagle Protection Act and the Endangered Species Act. The Eighth Circuit panel did not disturb the en banc court's holding that Dion cannot be convicted absent a jury determination of whether the killings were for a commercial purpose, and vacated his convictions for shooting bald eagles because the jury made no such finding. The Solicitor General argues that Dion's convictions should have been affirmed whether the killings were for commercial or noncommercial purposes. The correctness of the holding below that killing for noncommercial purposes is not punishable, therefore, is squarely before us.

for Respondent 7.[4] As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. F. Cohen, Handbook of Federal Indian Law 449 (1982) (hereinafter Cohen). These rights need not be expressly mentioned in the treaty. See *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968); *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78 (1918). Those treaty rights, however, little avail Dion if, as the Solicitor General argues, they were subsequently abrogated by Congress. We find that they were.[5]

II

It is long settled that "the provisions of an act of Congress, passed in the exercise of its constitutional authority, . . . if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty" with a foreign power. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 720 (1893); cf. *Goldwater* v. *Carter*, 444 U. S. 996 (1979). This Court applied that rule to congressional abrogation of Indian treaties in *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 566 (1903). Congress, the Court concluded, has the power "to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so." *Ibid.*

We have required that Congress' intention to abrogate Indian treaty rights be clear and plain. Cohen 223; see also

[4] Such treaty rights can be asserted by Dion as an individual member of the tribe. See *United States* v. *Winans*, 198 U. S. 371, 381 (1905); *Kimball* v. *Callahan*, 590 F. 2d 768, 773 (CA9), cert. denied, 444 U. S. 826 (1979); see also *United States* v. *Felter*, 752 F. 2d 1505, 1509 (CA10 1985).

[5] We therefore do not address the Solicitor General's argument that Dion's hunting is outside the scope of the treaty right because that right does not protect hunting "to extinction."

United States v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 353 (1941). "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . ." *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 690 (1979). We do not construe statutes as abrogating treaty rights in "a backhanded way," *Menominee Tribe* v. *United States*, 391 U. S., at 412; in the absence of explicit statement, "'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.'" *Id.*, at 413, quoting *Pigeon River Co.* v. *Cox Co.*, 291 U. S. 138, 160 (1934). Indian treaty rights are too fundamental to be easily cast aside.[6]

We have enunciated, however, different standards over the years for determining how such a clear and plain intent must be demonstrated. In some cases, we have required that Congress make "express declaration" of its intent to abrogate treaty rights. See *Leavenworth, L., & G. R. Co.* v. *United States*, 92 U. S. 733, 741–742 (1876); see also Wilkinson & Volkman 627–630, 645–659. In other cases, we have looked to the statute's "'legislative history'" and "'surrounding circumstances'" as well as to "'the face of the Act.'" *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584, 587 (1977), quoting *Mattz* v. *Arnett*, 412 U. S. 481, 505 (1973). Explicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights, cf. *Seminole Nation* v. *United States*, 316 U. S. 286, 296–297 (1942). We have not rigidly interpreted that preference, however, as a *per se* rule; where the evidence of congressional intent to abrogate is sufficiently compelling, "the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute." Cohen 223. What is

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[6] See also Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?, 63 Calif. L. Rev. 601 (1975) (hereinafter Wilkinson & Volkman).

essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.

A

The Eagle Protection Act renders it a federal crime to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof." 16 U. S. C. § 668(a). The prohibition is "sweepingly framed"; the enumeration of forbidden acts is "exhaustive and careful." *Andrus* v. *Allard*, 444 U. S. 51, 56 (1979). The Act, however, authorizes the Secretary of the Interior to permit the taking, possession, and transportation of eagles "for the religious purposes of Indian tribes," and for certain other narrow purposes, upon a determination that such taking, possession, or transportation is compatible with the preservation of the bald eagle or the golden eagle. 16 U. S. C. § 668a.

Congressional intent to abrogate Indian treaty rights to hunt bald and golden eagles is certainly strongly suggested on the face of the Eagle Protection Act. The provision allowing taking of eagles under permit for the religious purposes of Indian tribes is difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians, a recognition that such a prohibition would cause hardship for the Indians, and a decision that that problem should be solved not by exempting Indians from the coverage of the statute, but by authorizing the Secretary to issue permits to Indians where appropriate.

The legislative history of the statute supports that view. The Eagle Protection Act was originally passed in 1940, and did not contain any explicit reference to Indians. Its prohibitions related only to bald eagles; it cast no shadow on hunt-

ing of the more plentiful golden eagle. In 1962, however, Congress considered amendments to the Eagle Protection Act extending its ban to the golden eagle as well. As originally drafted by the staff of the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, the amendments simply would have added the words "or any golden eagle" at two places in the Act where prohibitions relating to the bald eagle were described. Miscellaneous Fish and Wildlife Legislation: Hearings before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 87th Cong., 2d Sess., 1 (1962) (hereinafter House Hearings).

Before the start of hearings on the bill, however, the Subcommittee received a letter from Assistant Secretary of the Interior Frank Briggs on behalf of the Interior Department. The Interior Department supported the proposed bill. It noted, however, the following concern:

> "The golden eagle is important in enabling many Indian tribes, particularly those in the Southwest, to continue ancient customs and ceremonies that are of deep religious or emotional significance to them. We note that the Handbook of American Indians (Smithsonian Institution, 1912) volume I, page 409, states in part, as follows:
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> "'Among the many birds held in superstitious and appreciative regard by the aborigines of North America, the eagle, by reason of its majestic, solitary, and mysterious nature, became an especial object of worship. This is expressed in the employment of the eagle by the Indian for religious and esthetic purposes only.
>
> . . . . .
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> "There are frequent reports of the continued veneration of eagles and of the use of eagle feathers in religious ceremonies of tribal rites. The Hopi, Zuni, and several of the Pueblo groups of Indians in the Southwest have

great interest in and strong feelings concerning eagles. In the circumstances, it is evident that the Indians are deeply interested in the preservation of both the golden and the bald eagle. If enacted, the bill should therefore permit the Secretary of the Interior, by regulation, to allow the use of eagles for religious purposes by Indian tribes." House Hearings 2–3.

The House Committee reported out the bill.[7] In setting out the need for the legislation, it explained in part:

> "Certain feathers of the golden eagle are important in religious ceremonies of some Indian tribes and a large number of the birds are killed to obtain these feathers, as well as to provide souvenirs for tourists in the Indian country. In addition, they are actively hunted by bounty hunters in Texas and some other States. As a result of these activities if steps are not taken as contemplated in this legislation, there is grave danger that the golden eagle will completely disappear." H. R. Rep. No. 1450, 87th Cong., 2d Sess., 2 (1962).

The Committee also reprinted Assistant Secretary Briggs' letter in its Report, *id.*, at 3–5, and adopted an exception for Indian religious use drafted by the Interior Department. The bill as reported out of the House Committee thus made three major changes in the law, along with other more technical ones. It extended the law's ban to golden eagles. It provided that the Secretary may exempt, by permit, takings of bald or golden eagles "for the religious purposes of Indian tribes." And it added a final proviso: "Provided, That bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior." *Id.*, at 7. The bill, as amended, passed the

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[7] Various witnesses, during the course of the Subcommittee hearings, gave testimony relating to the effect of the proposed ban on Indian tribes. See House Hearings 15, 20, 29, 34, 35, 39, 47.

House and was reported to the Senate Committee on Commerce.

At the Senate hearings, representatives of the Interior Department reiterated their position that, because "the golden eagle is an important part of the ceremonies and religion of many Indian tribes," the Secretary should be authorized to allow the use of eagles for religious purposes by Indian tribes. Protection for the Golden Eagle: Hearings before a Subcommittee of the Senate Committee on Commerce, 87th Cong., 2d Sess., 23 (1962). The Senate Committee agreed, and passed the House bill with an additional amendment allowing the Secretary to authorize permits for the taking of golden eagles that were preying on livestock. That Committee again reprinted Assistant Secretary Briggs' letter, S. Rep. No. 1986, 87th Cong., 2d Sess., 5–7 (1962), and summarized the bill as follows: "The resolution as hereby reported would bring the golden eagle under the 1940 act, allow their taking under permit for the religious use of the various Indian tribes (their feathers are an important part of Indian religious rituals) and upon request of a Governor of any State, be taken for the protection of livestock and game." *Id.*, at 3–4. The bill passed the Senate, and was concurred in by the House, with little further discussion.

It seems plain to us, upon reading the legislative history as a whole, that Congress in 1962 believed that it was abrogating the rights of Indians to take eagles. Indeed, the House Report cited the demand for eagle feathers for Indian religious ceremonies as one of the threats to the continued survival of the golden eagle that necessitated passage of the bill. See *supra*, at 742. Congress expressly chose to set in place a regime in which the Secretary of the Interior had control over Indian hunting, rather than one in which Indian on-reservation hunting was unrestricted. Congress thus considered the special cultural and religious interests of Indians, balanced those needs against the conservation purposes of the statute, and provided a specific, narrow ex-

ception that delineated the extent to which Indians would be permitted to hunt the bald and golden eagle.

Respondent argues that the 1962 Congress did not in fact view the Eagle Protection Act as restricting Indian on-reservation hunting. He points to an internal Interior Department memorandum circulated in 1962 stating, with little analysis, that the Eagle Protection Act did not apply within Indian reservations. Memorandum from Assistant Solicitor Vaughn, Branch of Fish and Wildlife, Office of the Solicitor to the Director, Bureau of Sport Fisheries and Wildlife, Apr. 26, 1962. We have no reason to believe that Congress was aware of the contents of the Vaughn memorandum. More importantly, however, we find respondent's contention that the 1962 Congress did not understand the Act to ban all Indian hunting of eagles simply irreconcilable with the statute on its face.

Respondent argues, and the Eighth Circuit agreed, that the provision of the statute granting permit authority is not necessarily inconsistent with an intention that Indians would have unrestricted ability to hunt eagles while on reservations. Respondent construes that provision to allow the Secretary to issue permits to *non*-Indians to hunt eagles "for Indian religious purposes," and supports this interpretation by pointing out testimony during the hearings to the effect that large-scale eagle bounty hunters sometimes sold eagle feathers to Indian tribes. We do not find respondent's argument credible. Congress could have felt such a provision necessary only if it believed that Indians, if left free to hunt eagles on reservations, would nonetheless be unable to satisfy their own needs and would be forced to call on non-Indians to hunt on their behalf. Yet there is nothing in the legislative history that even remotely supports that patronizing and strained view. Indeed, the Interior Department immediately after the passage of the 1962 amendments adopted regulations authorizing permits *only* to "individual Indians who are authen-

tic, bona fide practitioners of such religion." 28 Fed. Reg. 976 (1963).[8]

Congress' 1962 action, we conclude, reflected an unmistakable and explicit legislative policy choice that Indian hunting of the bald or golden eagle, except pursuant to permit, is inconsistent with the need to preserve those species. We therefore read the statute as having abrogated that treaty right.

B

Dion also asserts a treaty right to take bald eagles as a defense to his Endangered Species Act prosecution. He argues that the evidence that Congress intended to abrogate treaty rights when it passed the Endangered Species Act is considerably more slim than that relating to the Eagle Protection Act. The Endangered Species Act and its legislative history, he points out, are to a great extent silent regarding Indian hunting rights. In this case, however, we need not resolve the question of whether the Congress in the Endangered Species Act abrogated Indian treaty rights. We conclude that Dion's asserted treaty defense is barred in any event.

Dion asserts that he is immune from Endangered Species Act prosecution because he possesses a treaty right to hunt and kill bald eagles. We have held, however, that Congress in passing and amending the Eagle Protection Act divested Dion of his treaty right to hunt bald eagles. He therefore has no treaty right to hunt bald eagles that he can assert as a defense to an Endangered Species Act charge.

We do not hold that when Congress passed and amended the Eagle Protection Act, it stripped away Indian treaty protection for conduct not expressly prohibited by that statute.

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[8] Respondent's argument that Congress in amending the Eagle Protection Act meant to benefit nontreaty tribes is also flawed. Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty. See Cohen 224; *Antoine* v. *Washington*, 420 U. S. 194 (1975).

But the Eagle Protection Act and the Endangered Species Act, in relevant part, prohibit exactly the same conduct, and for the same reasons. Dion here asserts a treaty right to engage in precisely the conduct that Congress, overriding Indian treaty rights, made criminal in the Eagle Protection Act. Dion's treaty shield for that conduct, we hold, was removed by that statute, and Congress' failure to discuss that shield in the context of the Endangered Species Act did not revive that treaty right.

It would not promote sensible law to hold that while Dion possesses no rights derived from the 1858 treaty that bar his prosecution under the Eagle Protection Act for killing bald eagles, he nonetheless possesses a right to hunt bald eagles, derived from that same treaty, that bars his Endangered Species Act prosecution for the same conduct. Even if Congress did not address Indian treaty rights in the Endangered Species Act sufficiently expressly to effect a valid abrogation, therefore, respondent can assert no treaty defense to a prosecution under that Act for a taking already explicitly prohibited under the Eagle Protection Act.

III

We hold that the Court of Appeals erred in recognizing Dion's treaty defense to his Eagle Protection Act and Endangered Species Act prosecutions. For the reasons stated in n. 3, *supra*, we do not pass on the claim raised by *amici* that the Eagle Protection Act, if read to abrogate Indian treaty rights, invades religious freedom. Cf. *United States* v. *Abeyta*, 632 F. Supp. 1301 (NM 1986). Nor do we address respondent's argument, raised for the first time in this Court, that the statutes under which he was convicted do not authorize separate convictions for taking and for selling the same birds. The judgment of the Court of Appeals is reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. v. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-495. Argued November 5, 1985—Decided June 11, 1986

Appellees brought an action in Federal District Court alleging that the Pennsylvania Abortion Control Act of 1982 violated the Federal Constitution and seeking declaratory and injunctive relief. The court denied appellees' motion for a preliminary injunction, except as to one provision of the Act which it held was invalid. The Court of Appeals, after granting appellees' motion to enjoin enforcement of the entire Act, held unconstitutional, on the basis of the intervening decisions in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476, and *Simopoulos* v. *Virginia*, 462 U. S. 506, the following provisions of the Act: (1) the portions of § 3205 that, with respect to the requirement that the woman give her "informed consent" to an abortion, require her to be informed of the name of the physician who will perform the abortion, the "particular medical risks" of the abortion procedure to be used and of carrying her child to term, and the facts that there may be "detrimental physical and psychological effects," medical assistance benefits may be available for prenatal care, childbirth, and neonatal care, the father is liable to assist in the child's support, and printed materials are available from the State that describe the fetus and list agencies offering alternatives to abortion; (2) § 3208 that requires such printed materials to include a statement that there are agencies willing to help the mother carry her child to term and to assist her after the child is born and a description of the probable anatomical and physiological characteristics of an unborn child at "two-week gestational increments"; (3) §§ 3214(a) and (h) that require the physician to report, among other things, identification of the performing and referring physicians, information as to the woman's residence, age, race, marital status, and number of prior pregnancies, and the basis for any judgment that a medical emergency existed or for any determination of nonviability, and the method of payment for the abortion, and further provide that such reports shall not be deemed public records but shall be available for public inspection and copying in a form that will not lead to disclosure of the identity of any person filing a report; (4) § 3211(a) that requires the physician, after the

first trimester, to report the basis for his determination that a child is not viable; (5) § 3210(b) that requires a physician performing a post-viability abortion to exercise the degree of care required to preserve the life and health of any unborn child intended to be born and to use the abortion technique that would provide the best opportunity for the unborn child to be aborted alive unless it would present a significantly greater medical risk to the pregnant woman's life or health; and (6) § 3210(c) that requires that a second physician be present during an abortion performed when viability is possible, which physician is to take all reasonable steps necessary to preserve the child's life and health. The court held that the validity of other provisions of the Act might depend on evidence adduced at the trial and accordingly remanded these features of the case to the District Court.

Held:

1. In a situation such as is presented by this case, where the judgment below is not final and the case is remanded for further development of the facts, this Court has no appellate jurisdiction under 28 U. S. C. § 1254(2). But the jurisdictional statement here is treated as a petition for certiorari, and the writ is granted. Pp. 754–755.

2. With a full record before it on the issues as to the validity of the Act and with the intervening decisions in *Akron*, *Ashcroft*, and *Simopoulos* at hand, the Court of Appeals was justified in proceeding to plenary review of those issues. It was not limited to determining whether the District Court abused its discretion in denying a preliminary injunction. Pp. 755–757.

3. The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies. The provisions of the Pennsylvania Act that the Court of Appeals invalidated wholly subordinate constitutional privacy interests and concerns with maternal health to the effort to deter a woman from making a decision that, with her physician, is hers to make. Pp. 758–771.

(a) The printed materials required by §§ 3205 and 3208 are nothing less than an attempt to wedge the State's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician. Similarly, § 3205's requirement that the woman be advised that medical assistance may be available and that the father is responsible for financial assistance in support of the child are poorly disguised elements of discouragement for the abortion decision. And § 3205's requirements that the physician inform the woman of "detrimental physical and psychological effects" and of all "particular medical risks" are the antithesis of informed consent. Pp. 759–765.

(b) The scope of the information required by §§ 3214(a) and (h) and 3211(a) and its availability to the public belie any assertions by the State

that it is advancing any legitimate interest. The reporting requirements of those sections raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy. Thus, they pose an unacceptable danger of deterring the exercise of that right and must be invalidated. Pp. 765–768.

(c) Section 3210(b) is facially invalid as being unsusceptible to a construction that does not require the mother to bear an increased medical risk in order save her viable fetus. Section 3210(c), by failing to provide a medical-emergency exception for the situation where the mother's health is endangered by delay in the second physician's arrival, chills the performance of a late abortion, which, more than one performed at an earlier date, tends to be under emergency conditions. Pp. 768–771.

737 F. 2d 283, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 772. BURGER, C. J., filed a dissenting opinion, *post*, p. 782. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 785. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 814.

Andrew S. Gordon, Senior Deputy Attorney General of Pennsylvania, argued the cause for appellants. With him on the briefs were *LeRoy S. Zimmerman*, Attorney General, and *Allen C. Warshaw*, Chief Deputy Attorney General.

Kathryn Kolbert argued the cause for appellees. With her on the brief was *Thomas E. Zemaitis*.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Acting Solicitor General Fried, Acting Assistant Attorney General Willard, Deputy Assistant Attorney General Kuhl, John F. Cordes*, and *John M. Rogers;* for the National Right to Life Committee, Inc., by *James Bopp, Jr.;* for the United States Catholic Conference by *Wilfred R. Caron* and *Mark E. Chopko;* for Senator Gordon J. Humphrey et al. by *Robert A. Destro* and *Basile J. Uddo;* for Watson D. Bowes, Jr., et al. by *Steven Frederick McDowell;* and for John D. Lane et al. by *John E. McKeever*.

Briefs of *amici curiae* urging affirmance were filed for the Attorney General of New York by *Robert Abrams*, Attorney General, *pro se, Robert Hermann*, Solicitor General, *Rosemarie Rhodes*, Assistant Attorney General, and *Lawrence S. Kahn, Sanford M. Cohen*, and *Martha J. Olson*, Assistant Attorneys General; for the American Civil Liberties Union et al. by *Nan D. Hunter, Janet Benshoof*, and *Suzanne M. Lynn;* for the American

JUSTICE BLACKMUN delivered the opinion of the Court.

This is an appeal from a judgment of the United States Court of Appeals for the Third Circuit reviewing the District Court's rulings upon a motion for a preliminary injunction. The Court of Appeals held unconstitutional several provisions of Pennsylvania's current Abortion Control Act, 1982 Pa. Laws, Act No. 138, now codified as 18 Pa. Cons. Stat. § 3201 *et seq.* (1982).[1] Among the provisions ruled invalid by the Court of Appeals were portions of § 3205, relating to "informed consent"; § 3208, concerning "printed information"; §§ 3210(b) and (c), having to do with postviability abortions; and § 3211(a) and §§ 3214(a) and (h), regarding reporting requirements.[2]

Medical Association et al. by *Benjamin W. Heineman, Jr., Carter G. Phillips, Newton N. Minow, Jack R. Bierig, Stephan E. Lawton, Joel I. Klein, Joseph A. Keyes, Jr.*, and *Ann E. Allen;* for the Center for Constitutional Rights et al. by *Anne E. Simon, Nadine Taub, Rhonda Copelon*, and *Judith Levin;* for the National Abortion Federation by *David I. Shapiro, Sidney Dickstein, Kenneth M. Simon*, and *Amy G. Applegate;* for the National Abortion Rights Action League et al. by *Lynn I. Miller;* for the National Family Planning and Reproductive Health Association, Inc., by *Robert T. Crothers;* for the National Organization for Women et al. by *Diane E. Thompson;* and for the Planned Parenthood Federation of America, Inc., et al. by *Dara Klassel* and *Eve W. Paul.*

Briefs of *amici curiae* were filed for the American Psychological Association by *Donald N. Bersoff* and *Bruce J. Ennis;* for the Women's Lawyers' Association of Los Angeles, California, et al. by *Susan R. Schwartz, Carol Boyk, Judith Gordon, and Lorraine Loder;* for the Unitarian Universalist Association et al. by *Madeline Kochen;* for Senator Bob Packwood et al. by *Laurence H. Tribe* and *Kathleen M. Sullivan;* for Susan Bandes et al. by *Arthur Kinoy;* and for Olivia Gans et al. by *James Bopp, Jr.*

[1] The District Court had held invalid and had enjoined preliminarily only the requirement of § 3205(a)(2) that at least 24 hours must elapse between a woman's receipt of specified information and the performance of her abortion. 552 F. Supp. 791, 797–798, 811 (ED Pa. 1982).

[2] The Court of Appeals also held § 3215(e) invalid. That section requires health-care insurers to make available, at a lesser premium, policies expressly excluding coverage "for abortion services not necessary to avert

I

The Abortion Control Act was approved by the Governor of the Commonwealth on June 11, 1982. By its own terms, however, see § 7 of the Act, it was to become effective only 180 days thereafter, that is, on the following December 8. It had been offered as an amendment to a pending bill to regulate paramilitary training.

The 1982 Act was not the Commonwealth's first attempt, after this Court's 1973 decisions in *Roe* v. *Wade*, 410 U. S. 113, and *Doe* v. *Bolton*, 410 U. S. 179, to impose abortion restraints. The State's first post-1973 Abortion Control Act, 1974 Pa. Laws, Act No. 209, was passed in 1974 over the Governor's veto. After extensive litigation, various provisions of the 1974 statute were ruled unconstitutional, including those relating to spousal or parental consent, to the choice of procedure for a postviability abortion, and to the proscription of abortion advertisements. See *Planned Parenthood Assn.* v. *Fitzpatrick*, 401 F. Supp. 554 (ED Pa. 1975), summarily aff'd in part *sub nom. Franklin* v. *Fitzgerald*, 428 U. S. 901 (1976), and summarily vacated in part and remanded *sub nom. Beal* v. *Franklin*, 428 U. S. 901 (1976), modified on remand (No. 74–2440) (ED Pa. 1977), aff'd *sub nom. Colautti* v. *Franklin*, 439 U. S. 379 (1979). See also *Doe* v. *Zimmerman*, 405 F. Supp. 534 (MD Pa. 1975).

In 1978, the Pennsylvania Legislature attempted to restrict access to abortion by limiting medical-assistance funding for the procedure. 2 1978 Pa. Laws, Act No. 16A (pp. 1506–1507) and 1 1978 Pa. Laws, Act No. 148. This effort, too, was successfully challenged in federal court, *Roe* v. *Casey*, 464 F. Supp. 487 (ED Pa. 1978), and that judgment was affirmed by the Third Circuit. 623 F. 2d 829 (1980).

In 1981, abortion legislation was proposed in the Pennsylvania House as an amendment to a pending Senate bill to out-

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the death of the woman or to terminate pregnancies caused by rape or incest." This ruling on § 3215(e) is not before us.

law "tough-guy competitions."[3] The suggested amendment, aimed at limiting abortions, was patterned after a model statute developed by a Chicago-based, nonprofit anti-abortion organization. See Note, Toward Constitutional Abortion Control Legislation: The Pennsylvania Approach, 87 Dick. L. Rev. 373, 382, n. 84 (1983). The bill underwent further change in the legislative process but, when passed, was vetoed by the Governor. See 737 F. 2d 283, 288–289 (CA3 1984). Finally, the 1982 Act was formulated, enacted, and approved.

After the passage of the Act, but before its effective date, the present litigation was instituted in the United States District Court for the Eastern District of Pennsylvania. The plaintiffs, who are the appellees here, were the American College of Obstetricians and Gynecologists, Pennsylvania Section; certain physicians licensed in Pennsylvania; clergymen; an individual who purchases from a Pennsylvania insurer health-care and disability insurance extending to abortions; and Pennsylvania abortion counselors and providers. Alleging that the Act violated the United States Constitution, the plaintiffs, pursuant to 42 U. S. C. § 1983, sought declaratory and injunctive relief. The defendants named in the complaint were the Governor of the Commonwealth, other Commonwealth officials, and the District Attorney for Montgomery County, Pa.

The plaintiffs promptly filed a motion for a preliminary injunction. Forty-one affidavits accompanied the motion. The defendants, on their part, submitted what the Court of Appeals described as "an equally comprehensive opposing memorandum." 737 F. 2d, at 289. The District Court then ordered the parties to submit a "stipulation of uncontested facts," as authorized by local rule. The parties produced a stipulation "solely for purposes of a determination on plain-

[3] A "tough guy competition" is a physical contact bout between persons who lack professional experience and who attempt to render each other unconscious. See Note, 87 Dick. L. Rev. 373, 382, n. 84 (1983).

tiffs' motion for preliminary injunction," and "without prejudice to any party's right to controvert any facts or to prove any additional facts at any later proceeding in this action." App. 9a–10a.

Relying substantially on the opinions of the respective Courts of Appeals in *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 651 F. 2d 1198 (CA6 1981), later aff'd in part and rev'd in part, 462 U. S. 416 (1983), and in *Planned Parenthood Assn. of Kansas City* v. *Ashcroft*, 655 F. 2d 848 (CA8 1981), later aff'd in part and rev'd in part, 462 U. S. 476 (1983), the District Court concluded that, with one exception, see n. 1, *supra*, the plaintiffs had failed to establish a likelihood of success on the merits and thus were not entitled to preliminary injunctive relief. 552 F. Supp. 791 (1982).

Appellees appealed from the denial of the preliminary injunction, and appellants cross-appealed with respect to the single statutory provision as to which the District Court had allowed relief. The Third Circuit then granted appellees' motion to enjoin enforcement of the entire Act pending appeal. After expedited briefing and argument, the court withheld judgment pending the anticipated decisions by this Court in *Akron*, *supra*, *Ashcroft*, *supra*, and *Simopoulos* v. *Commonwealth*, 221 Va. 1059, 277 S. E. 2d 194 (1981), all of which had been accepted for review here, had been argued, and were under submission. Those three cases were decided by this Court on June 15, 1983. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416; *Planned Parenthood Assn. of Kansas City, Missouri, Inc.* v. *Ashcroft*, 462 U. S. 476; *Simopoulos* v. *Virginia*, 462 U. S. 506. After reargument in light of those decisions, the Court of Appeals, with one judge concurring in part and dissenting in part, ruled that various provisions of the Act were unconstitutional. 737 F. 2d 283 (1984). Appellants' petition for rehearing en banc was denied, with four judges voting to grant the petition. *Id.*, at 316, 317. When a jurisdictional state-

ment was filed here, we postponed further consideration of the question of our jurisdiction to the hearing on the merits. 471 U. S. 1014 (1985).

II

We are confronted initially with the question whether we have appellate jurisdiction in this case. Appellants purport to have taken their appeal to this Court pursuant to 28 U. S. C. § 1254(2).[4] It seems clear, and the parties appear to agree, see Brief for Appellants 21, that the judgment of the Court of Appeals was not a final judgment in the ordinary meaning of that term. The court did not hold the entire Act unconstitutional, but ruled, instead, that some provisions were invalid under *Akron*, *Ashcroft*, and *Simopoulos*, and that the validity of other provisions might depend on evidence adduced at the trial, see 737 F. 2d, at 299–300, or on procedural rules to be promulgated by the Supreme Court of Pennsylvania, see *id.*, at 296–297. It remanded these features of the case to the District Court. *Id.*, at 304.

Slaker v. *O'Connor*, 278 U. S. 188, 189–190 (1929), and *McLish* v. *Roff*, 141 U. S. 661, 665–666 (1891), surely suggest that, under these circumstances, we do not have appellate jurisdiction.[5] See also *South Carolina Electric & Gas Co.* v. *Flemming*, 351 U. S. 901 (1956). Although the authority of *Slaker* and *South Carolina Electric* has been questioned, the Court to date has found it unnecessary to put the issue to rest. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 927 (1975); *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 43–44, n. 1 (1986). In some cases raising this issue of the

[4] Section 1254 reads in pertinent part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

. . . . .

"(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ."

[5] Appellants ask that *Slaker* be overruled. See Brief for Appellants 10, 22–25.

scope of appellate jurisdiction, the Court has found any finality requirement to have been satisfied in light of the facts. See, *e. g.*, *New Orleans* v. *Dukes*, 427 U. S. 297, 302 (1976); *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 82–83 (1958). In other cases, the Court has avoided the issue by utilizing 28 U. S. C. § 2103 and granting certiorari. See, *e. g.*, *Doran*, 422 U. S., at 927; *El Paso* v. *Simmons*, 379 U. S. 497, 503 (1965); see also *Escambia County* v. *McMillan*, 466 U. S. 48, 50, n. 4 (1984).

We have concluded that it is time that this undecided issue be resolved. We therefore hold, on the reasoning of *McLish* v. *Roff*, 141 U. S., at 665–668, that in a situation such as this one, where the judgment is not final, and where the case is remanded for further development of the facts, we have no appellate jurisdiction under § 1254(2).

We nevertheless treat appellants' jurisdictional statement as a petition for certiorari, grant the writ, and move on to the merits.[5]

III

Appellants assert that the Court of Appeals erred in holding portions of the Act unconstitutional since the scope of its review of the District Court's denial of a preliminary injunction as to those sections should have been limited to determining whether the trial court abused its discretion in finding the presence or absence of irreparable harm and a probability that the plaintiffs would succeed on the merits. Such limited review normally is appropriate, see *Doran* v. *Salem Inn, Inc.*, 422 U. S., at 931–932; *Brown* v. *Chote*, 411 U. S. 452, 456–457 (1973), inasmuch as the primary purpose of a preliminary injunction is to preserve the relative positions of the parties. See *University of Texas* v. *Camenisch*, 451 U. S. 390, 395 (1981). Further, the necessity for an expeditious resolution often means that the injunction is issued on a pro-

[5] We continue, however, to refer to the parties as appellants and appellees, respectively.

cedure less stringent than that which prevails at the subsequent trial on the merits of the application for injunctive relief. See *United States Steel Corp.* v. *Fraternal Assn. of Steelhaulers*, 431 F. 2d 1046, 1048 (CA3 1970); see also *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 316 (1940).

This approach, however, is not inflexible. The Court on more than one occasion in this area has approved proceedings deviating from the stated norm. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952), the District Court had issued a preliminary injunction restraining the Secretary of Commerce from seizing the Nation's steel mills. The Court of Appeals stayed the injunction. This Court found that the case was ripe for review, despite the early stage of the litigation, and went on to address the merits. *Id.*, at 585. And in *Smith* v. *Vulcan Iron Works*, 165 U. S. 518 (1897), the District Court issued injunctions in two patent cases and referred them to a Master for accounting. The Court of Appeals reversed. This Court ruled that the Court of Appeals had acted properly in deciding the merits since review of interlocutory appeals was designed not only to permit the defendant to obtain immediate relief but also in certain cases to save the parties the expense of further litigation. *Id.*, at 525.

The Third Circuit's decision to address the constitutionality of the Pennsylvania Act finds further support in this Court's decisions that when the unconstitutionality of the particular state action under challenge is clear, a federal court need not abstain from addressing the constitutional issue pending state-court review. See, *e. g.*, *Bailey* v. *Patterson*, 369 U. S. 31, 33 (1962); *Turner* v. *City of Memphis*, 369 U. S. 350, 353 (1962); *Zwickler* v. *Koota*, 389 U. S. 241, 251, n. 14 (1967). See also *Singleton* v. *Wulff*, 428 U. S. 106, 121 (1976). See generally Spann, Simple Justice, 73 Geo. L. J. 1041, 1055, n. 77 (1985).[7]

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[7] This principle finds an analogy in an established doctrine of administrative law. In *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943), the Court

Thus, as these cases indicate, if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction.[8] The Court of Appeals in this case properly recognized and applied these principles when it observed:

> "Thus, although this appeal arises from a ruling on a request for a preliminary injunction, we have before us an unusually complete factual and legal presentation from which to address the important constitutional issues at stake. The customary discretion accorded to a District Court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law." 737 F. 2d, at 290.

That a court of appeals ordinarily will limit its review in a case of this kind to abuse of discretion is a rule of orderly judicial administration, not a limit on judicial power. With a full record before it on the issues now before us, and with the intervening decisions in *Akron*, *Ashcroft*, and *Simopoulos* at hand, the Court of Appeals was justified in proceeding to plenary review of those issues.

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ruled that a reviewing court could not affirm an agency on a principle the agency might not embrace. But the ruling in *Chenery* has not required courts to remand in futility. See *Illinois* v. *ICC*, 722 F. 2d 1341, 1348–1349 (CA7 1983); see also Friendly, *Chenery* Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 Duke L. J. 199.

[8] A different situation is presented, of course, when there is no disagreement as to the law, but the probability of success on the merits depends on facts that are likely to emerge at trial. See *Delaware & Hudson R. Co.* v. *United Transportation Union*, 146 U. S. App. D. C. 142, 159, 450 F. 2d 603, 620, cert. denied, 403 U. S. 911 (1971). See also *Airco, Inc.* v. *Energy Research & Development Admin.*, 528 F. 2d 1294, 1296 (CA7 1975); *California ex rel. Younger* v. *Tahoe Regional Planning Agency*, 516 F. 2d 215, 217 (CA9), cert. denied, 423 U. S. 868 (1975); *Natural Resources Defense Council, Inc.* v. *Morton*, 148 U. S. App. D. C. 5, 10, 458 F. 2d 827, 832 (1972); *Benda* v. *Grand Lodge*, 584 F. 2d 308, 314 (CA9 1978), cert. dism'd, 441 U. S. 937 (1979); *FTC* v. *Southwest Sunsites, Inc.*, 665 F. 2d 711, 717 (CA5), cert. denied, 456 U. S. 973 (1982).

IV

This case, as it comes to us, concerns the constitutionality of six provisions of the Pennsylvania Act that the Court of Appeals struck down as facially invalid: § 3205 ("informed consent"); § 3208 ("printed information"); §§ 3214(a) and (h) (reporting requirements); § 3211(a) (determination of viability); § 3210(b) (degree of care required in postviability abortions); and § 3210(c) (second-physician requirement). We have no reason to address the validity of the other sections of the Act challenged in the District Court.[9]

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[9] *Not* before us are: § 3203 (definition of "abortion"); § 3205 (24-hour waiting period and physician-only counseling); §§ 3207(b) and 3214(f) (public disclosure of reports); § 3209 (requirement of hospitalization for an abortion subsequent to the first trimester); § 3210(a) (penalties for abortion after viability, and the "complete defense" thereto); § 3215(c) (proscription of use of public funds for abortion services); and § 3215(e) (compulsory availability of insurance excluding certain abortion services).

Remanded for record development or otherwise not invalidated, and therefore not before us, are: § 3206 (parental consent—operation of statute enjoined until promulgation of rules by the Supreme Court of Pennsylvania assuring confidentiality and promptness of disposition); § 3207(b) (abortion facilities and reports from them for public disclosure); and §§ 3214(c), (d), (f), and (g) (other reporting requirements—challenges either not made or withdrawn).

On June 17, 1985, the District Court, after hearing, preliminarily enjoined the enforcement of §§ 3207(b) and 3214(f). 613 F. Supp. 656 (ED Pa.). See n. 12, *infra*.

The Supreme Court of Pennsylvania issued the suggested rules, mentioned above, on November 26, 1984, after the appeal in this case was docketed here. See Pennsylvania Orphans' Court Rules 16.1 to 16.8, reprinted in Pa. Stat. Ann., Tit. 20, pp. 65, 66 (Purdon Supp. 1986–1987). Appellants thereupon filed a motion with the District Court that the injunction against enforcement of § 3206 be vacated. App. 53a. That court, however, denied the motion, concluding that it had no jurisdiction "to issue the order [appellants] seek" while the case was on appeal here. *Id.*, at 57a, 61a. We decline appellants' suggestion that we now examine this feature of the case in the light of the new rules, for we conclude that this development should be considered by the District Court in the first instance.

A

Less than three years ago, this Court, in *Akron*, *Ashcroft*, and *Simopoulos*, reviewed challenges to state and municipal legislation regulating the performance of abortions. In *Akron*, the Court specifically reaffirmed *Roe* v. *Wade*, 410 U. S. 113 (1973). See 462 U. S., at 420, 426–431. Again today, we reaffirm the general principles laid down in *Roe* and in *Akron*.

In the years since this Court's decision in *Roe*, States and municipalities have adopted a number of measures seemingly designed to prevent a woman, with the advice of her physician, from exercising her freedom of choice. *Akron* is but one example. But the constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy. "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955). The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies. Appellants claim that the statutory provisions before us today further legitimate compelling interests of the Commonwealth. Close analysis of those provisions, however, shows that they wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician, is hers to make.

B

We turn to the challenged statutes:

1. Section 3205 ("informed consent") and § 3208 ("printed information"). Section 3205(a) requires that the woman give her "voluntary and informed consent" to an abortion. Failure to observe the provisions of § 3205 subjects the physician to suspension or revocation of his license, and subjects any

other person obligated to provide information relating to informed consent to criminal penalties. § 3205(c). A requirement that the woman give what is truly a voluntary and informed consent, as a general proposition, is, of course, proper and is surely not unconstitutional. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 67 (1976). But the State may not require the delivery of information designed "to influence the woman's informed choice between abortion or childbirth." *Akron*, 462 U. S., at 443–444.

Appellants refer to the Akron ordinance, Brief for Appellants 67, as did this Court in *Akron* itself, 462 U. S., at 445, as "a litany of information" and as "'a parade of horribles'" of dubious validity plainly designed to influence the woman's choice. They would distinguish the Akron situation, however, from the Pennsylvania one. Appellants assert that statutes "describing the general subject matter relevant to informed consent," *ibid.*, and stating "in general terms the information to be disclosed," *id.*, at 447, are permissible, and they further assert that the Pennsylvania statutes do no more than that.

We do not agree. We conclude that, like Akron's ordinance, §§ 3205 and 3208 fail the *Akron* measurement. The two sections prescribe in detail the method for securing "informed consent." Seven explicit kinds of information must be delivered to the woman at least 24 hours before her consent is given, and five of these must be presented by the woman's physician. The five are: (a) the name of the physician who will perform the abortion, (b) the "fact that there may be detrimental physical and psychological effects which are not accurately foreseeable," (c) the "particular medical risks associated with the particular abortion procedure to be employed," (d) the probable gestational age, and (e) the "medical risks associated with carrying her child to term." The remaining two categories are (f) the "fact that medical assistance benefits may be available for prenatal care, child-

birth and neonatal care," and (g) the "fact that the father is liable to assist" in the child's support, "even in instances where the father has offered to pay for the abortion." §§ 3205(a)(1) and (2). The woman also must be informed that materials printed and supplied by the Commonwealth that describe the fetus and that list agencies offering alternatives to abortion are available for her review. If she chooses to review the materials but is unable to read, the materials "shall be read to her," and any answer she seeks must be "provided her in her own language." § 3205(a)(2)(iii). She must certify in writing, prior to the abortion, that all this has been done. § 3205(a)(3). The printed materials "shall include the following statement":

> "'There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion.'" § 3208(a)(1).

The materials must describe the "probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival." § 3208(a)(2).

In *Akron*, this Court noted: "The validity of an informed consent requirement thus rests on the State's interest in protecting the health of the pregnant woman." 462 U. S., at 443. The Court went on to state:

> "This does not mean, however, that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an

abortion. It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances. *Danforth*'s recognition of the State's interest in ensuring that this information be given will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth." *Id.*, at 443–444.

The informational requirements in the *Akron* ordinance were invalid for two "equally decisive" reasons. *Id.*, at 445. The first was that "much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." *Id.*, at 444. The second was that a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient, intrudes upon the discretion of the pregnant woman's physician and thereby imposes the "undesired and uncomfortable straitjacket" with which the Court in *Danforth*, 428 U. S., at 67, n. 8, was concerned.

These two reasons apply with equal and controlling force to the specific and intrusive informational prescriptions of the Pennsylvania statutes. The printed materials required by §§ 3205 and 3208 seem to us to be nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician. The mandated description of fetal characteristics at 2-week intervals, no matter how objective, is plainly overinclusive. This is not medical information that is always relevant to the woman's decision, and it may serve only to confuse and punish her and to heighten her anxiety, contrary to accepted medical practice.[10] Even the listing of agencies in the printed Pennsylva-

[10] Following this Court's lead in *Akron*, federal courts consistently have stricken fetal-description requirements because of their inflammatory impact. See, *e. g.*, *Planned Parenthood League of Massachusetts* v. *Bellotti*, 641 F. 2d 1006, 1021–1022 (CA1 1981); *Charles* v. *Carey*, 627 F. 2d

nia form presents serious problems; it contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. See *Women's Medical Center of Providence, Inc.* v. *Roberts*, 530 F. Supp. 1136, 1154 (RI 1982). All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician.

The requirements of §§ 3205(a)(2)(i) and (ii) that the woman be advised that medical assistance benefits may be available, and that the father is responsible for financial assistance in the support of the child similarly are poorly disguised elements of discouragement for the abortion decision. Much of this would be nonmedical information beyond the physician's area of expertise and, for many patients, would be irrelevant and inappropriate. For a patient with a life-threatening pregnancy, the "information" in its very rendition may be cruel as well as destructive of the physician-patient relationship. As any experienced social worker or other counselor knows, theoretical financial responsibility often does not equate with fulfillment. And a victim of rape should not have to hear gratuitous advice that an unidentified perpetrator is liable for support if she continues the pregnancy to term. Under the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest.

772, 784 (CA7 1980); *Planned Parenthood Assn. of Kansas City* v. *Ashcroft*, 655 F. 2d 848, 868 (CA8 1981); *Women's Medical Center of Providence, Inc.* v. *Roberts*, 530 F. Supp. 1136, 1152–1154 (RI 1982).

The requirements of §§ 3205(a)(1)(ii) and (iii) that the woman be informed by the physician of "detrimental physical and psychological effects" and of all "particular medical risks" compound the problem of medical attendance, increase the patient's anxiety, and intrude upon the physician's exercise of proper professional judgment. This type of compelled information is the antithesis of informed consent. That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose. Pennsylvania, like Akron, "has gone far beyond merely describing the general subject matter relevant to informed consent." *Akron*, 462 U. S., at 445. In addition, the Commonwealth would require the physician to recite its litany "regardless of whether in his judgment the information is relevant to [the patient's] personal decision." *Ibid.* These statutory defects cannot be saved by any facts that might be forthcoming at a subsequent hearing. Section 3205's informational requirements therefore are facially unconstitutional.[11]

Appellants assert, however, that even if this be so, the remedy is to allow the remainder of § 3205 to be severed and become effective. We rule otherwise. The radical dissection necessary for this would leave § 3205 with little resemblance to that intended by the Pennsylvania Legislature. We rejected a similar suggestion as to the ordinance in

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[11] In their argument against this conclusion, appellants claim that the informational requirements must be held constitutional in the light of this Court's summary affirmance in *Franklin* v. *Fitzpatrick*, 428 U. S. 901 (1976), of the judgment in *Planned Parenthood Assn.* v. *Fitzpatrick*, 401 F. Supp. 554 (ED Pa. 1975). That litigation concerned the Commonwealth's 1974 Abortion Control Act. Its informed-consent provision, however, did not contain such plainly unconstitutional informational requests as those in the current Act, or any physician-only counseling or 24-hour waiting-period requirements. The summary affirmance also preceded the decision in *Akron* and, to the extent, if any at all, it might be considered to be inconsistent with *Akron*, the latter, of course, controls.

Akron, 462 U.S, at 445, n. 37, despite the presence there of a broad severability clause. We reach the same conclusion here, where no such clause is present, and reject the plea for severance. See *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312–313 (1936).

2. Sections 3214(a) and (h) (reporting) and § 3211(a) (determination of viability). Section 3214(a)(8), part of the general reporting section, incorporates § 3211(a). Section 3211(a) requires the physician to report the basis for his determination "that a child is not viable." It applies only after the first trimester. The report required by §§ 3214(a) and (h) is detailed and must include, among other things, identification of the performing and referring physicians and of the facility or agency; information as to the woman's political subdivision and State of residence, age, race, marital status, and number of prior pregnancies; the date of her last menstrual period and the probable gestational age; the basis for any judgment that a medical emergency existed; the basis for any determination of nonviability; and the method of payment for the abortion. The report is to be signed by the attending physician. § 3214(b).

Despite the fact that § 3214(e)(2) provides that such reports "shall not be deemed public records," within the meaning of the Commonwealth's "Right-to-Know Law," Pa. Stat. Ann., Tit. 65, § 66.1 *et seq.* (Purdon 1959 and Supp. 1985), each report "shall be made available for public inspection and copying within 15 days of receipt in a form which will not lead to the disclosure of the identity of any person filing a report." Similarly, the report of complications, required by § 3214(h), "shall be open to public inspection and copying." A willful failure to file a report required under § 3214 is "unprofessional conduct" and the noncomplying physician's license "shall be subject to suspension or revocation." § 3214(i)(1).

The scope of the information required and its availability to the public belie any assertions by the Commonwealth that it is advancing any legitimate interest. In *Planned Parent-*

hood of Central Missouri. v. *Danforth*, 428 U. S., at 80, we recognized that recordkeeping and reporting provisions "that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." But the reports required under the Act before us today go well beyond the health-related interests that served to justify the Missouri reports under consideration in *Danforth*. Pennsylvania would require, as Missouri did not, information as to method of payment, as to the woman's personal history, and as to the bases for medical judgments. The Missouri reports were to be used "only for statistical purposes." See *id.*, at 87. They were to be maintained in confidence, with the sole exception of public health officers. In *Akron*, the Court explained its holding in *Danforth* when it said: "The decisive factor was that the State met its burden of demonstrating that these regulations furthered important health-related state concerns." 462 U. S., at 430.

The required Pennsylvania reports, on the other hand, while claimed not to be "public," are available nonetheless to the public for copying. Moreover, there is no limitation on the use to which the Commonwealth or the public copiers may put them. The elements that proved persuasive for the ruling in *Danforth* are absent here. The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity. JUSTICE STEVENS, in his opinion concurring in the judgment in *Bellotti* v. *Baird*, 443 U. S. 622 (1979), aptly observed:

> "It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties." *Id.*, at 655.

A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly. Although the statute does not specifically require the reporting

of the woman's name, the amount of information about her and the circumstances under which she had an abortion are so detailed that identification is likely. Identification is the obvious purpose of these extreme reporting requirements.[12] The "impermissible limits" that *Danforth* mentioned and that Missouri approached, see 428 U. S., at 81, have been exceeded here.

We note, as we reach this conclusion, that the Court consistently has refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities. See, *e. g.*, *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965) (invalidating Post Office requirement that addressee affirmatively request delivery of "communist" materials in order to receive them); *Talley* v. *California*, 362 U. S. 60, 64–65 (1960) (striking down municipal ban on unsigned handbills); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 462–465 (1958) (invalidating compelled disclosure of NAACP membership list). Pennsylvania's reporting requirements raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy. Thus, they pose an unacceptable

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[12] Appellees advise us, see Brief for Appellees 38–39, that they sought in the District Court a preliminary injunction against the requirement that the facility identification report and the quarterly statistical report be made available for public inspection and copying, and that on June 17, 1985, after full hearing, the District Court entered a preliminary injunction against the enforcement of these public-disclosure requirements. Appellees assert that the record of that hearing shows a continuous pattern of violence and harassment directed against the patients and staff of abortion clinics; that the District Court concluded that this would be increased by the public disclosure of facility names and quarterly statistical reports; and that public disclosure would impose a burden on the woman's right to an abortion by heightening her fear and anxiety, and by discouraging her physician from offering an abortion because, by so doing, he would avoid pressure from anti-abortion forces. That record, of course, is not now before us. We need place no reliance upon it and we draw no conclusion from it.

danger of deterring the exercise of that right, and must be invalidated.

3. Section 3210(b) (degree of care for postviability abortions) and § 3210(c) (second-physician requirement when the fetus is possibly viable). Section 3210(b)[13] sets forth two independent requirements for a postviability abortion. First, it demands the exercise of that degree of care "which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted." Second, "the abortion technique employed shall be that which would provide the best opportunity for the unborn child to be aborted alive unless," in the physician's good-faith judgment, that technique "would present a significantly greater medical risk to the life or health of the pregnant woman." An intentional, knowing, or reckless violation of this standard is a felony of the third degree, and subjects the violator to the possibility of imprisonment for not more than seven years and to a fine of not more than $15,000. See 18 Pa. Cons. Stat. §§ 1101(2) and 1103(3) (1982).

The Court of Appeals ruled that § 3210(b) was unconstitutional because it required a "trade-off" between the woman's health and fetal survival, and failed to require that maternal

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[13] Section 3210(b) reads:

"Every person who performs or induces an abortion after an unborn child has been determined to be viable shall exercise that degree of professional skill, care and diligence which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique and the physician reports the basis for his judgment. The potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother. Any person who intentionally, knowingly or recklessly violates the provisions of this subsection commits a felony of the third degree."

health be the physician's paramount consideration. 737 F. 2d, at 300, citing *Colautti* v. *Franklin*, 439 U. S. 379, 397–401 (1979) (where Pennsylvania's 1974 Abortion Control Act was reviewed). In *Colautti*, this Court recognized the undesirability of any "'trade-off' between the woman's health and additional percentage points of fetal survival." *Id.*, at 400.

Appellants do not take any real issue with this proposition. See Brief for Appellants 84–86. They argue instead, as did the District Court, see 552 F. Supp., at 806–807, that the statute's words "significantly greater medical risk" for the life or health of the woman do not mean some additional risk (in which case unconstitutionality apparently is conceded) but only a "meaningfully increased" risk. That interpretation, said the District Court, renders the statute constitutional. *Id.*, at 807. The Court of Appeals disagreed, pointing out that such a reading is inconsistent with the statutory language and with the legislative intent reflected in that language; that the adverb "significantly" modifies the risk imposed on the woman; that the adverb is "patently not surplusage"; and that the language of the statute "is not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus." 737 F. 2d, at 300. We agree with the Court of Appeals and therefore find the statute to be facially invalid.[14]

Section 3210(c)[15] requires that a second physician be present during an abortion performed when viability is possi-

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[14] This makes it unnecessary for us to consider appellees' further argument that § 3210(b) is void for vagueness.

[15] Section 3210(c) reads:

"Any person who intends to perform an abortion the method chosen for which, in his good faith judgment, does not preclude the possibility of the child surviving the abortion, shall arrange for the attendance, in the same room in which the abortion is to be completed, of a second physician. Immediately after the complete expulsion or extraction of the child, the second physician shall take control of the child and shall provide immediate medical care for the child, taking all reasonable steps necessary, in his

ble. The second physician is to "take control of the child and . . . provide immediate medical care for the child, taking all reasonable steps necessary, in his judgment, to preserve the child's life and health." Violation of this requirement is a felony of the third degree.

In *Planned Parenthood Assn. of Kansas City, Missouri, Inc.* v. *Ashcroft*, 462 U. S. 476 (1983), the Court, by a 5–4 vote, but not by a controlling single opinion, ruled that a Missouri statute requiring the presence of a second physician during an abortion performed after viability was constitutional. JUSTICE POWELL, joined by THE CHIEF JUSTICE, concluded that the State had a compelling interest in protecting the life of a viable fetus and that the second physician's presence provided assurance that the State's interest was protected more fully than with only one physician in attendance. *Id.*, at 482–486.[16] JUSTICE POWELL recognized that, to pass constitutional muster, the statute must contain an exception for the situation where the health of the mother was endangered by delay in the arrival of the second physician. Recognizing that there was "no clearly expressed exception" on the face of the Missouri statute for the emergency situation, JUSTICE POWELL found the exception implicit in the statutory requirement that action be taken to preserve the fetus "provided it does not pose an increased risk to the life or health of the woman." *Id.*, at 485, n. 8.

Like the Missouri statute, § 3210(c) of the Pennsylvania statute contains no express exception for an emergency situation. While the Missouri statute, in the view of JUSTICE POWELL, was worded sufficiently to imply an emergency exception, Pennsylvania's statute contains no such comforting

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judgment, to preserve the child's life and health. Any person who intentionally, knowingly or recklessly violates the provisions of this subsection commits a felony of the third degree."

[16] JUSTICE O'CONNOR, joined by JUSTICES WHITE and REHNQUIST, stated somewhat categorically that the second-physician requirement was constitutional. 462 U. S., at 505.

or helpful language and evinces no intent to protect a woman whose life may be at risk. Section 3210(a)[17] provides only a defense to criminal liability for a physician who concluded, in good faith, that a fetus was nonviable "or that the abortion was necessary to preserve maternal life or health." It does not relate to the second-physician requirement and its words are not words of emergency.

It is clear that the Pennsylvania Legislature knows how to provide a medical-emergency exception when it chooses to do so. It defined "[m]edical emergency" in general terms in § 3203, and it specifically provided a medical-emergency exception with respect to informational requirements, § 3205(b); for parental consent, § 3206; for post-first-trimester hospitalization, § 3209; and for a public official's issuance of an order for an abortion without the express voluntary consent of the woman, § 3215(f). We necessarily conclude that the legislature's failure to provide a medical-emergency exception in § 3210(c) was intentional. All the factors are here for chilling the performance of a late abortion, which, more than one performed at an earlier date, perhaps tends to be under emergency conditions.

V

Constitutional rights do not always have easily ascertainable boundaries, and controversy over the meaning of our Nation's most majestic guarantees frequently has been turbulent. As judges, however, we are sworn to uphold the law even when its content gives rise to bitter dispute. See *Cooper* v. *Aaron*, 358 U. S. 1 (1958). We recognized at the very

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[17] Section 3210(a) reads:

"Any person who intentionally, knowingly or recklessly performs or induces an abortion when the fetus is viable commits a felony of the third degree. It shall be a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgment, that the unborn child was not viable at the time the abortion was performed or induced or that the abortion was necessary to preserve maternal life or health."

beginning of our opinion in *Roe*, 410 U. S., at 116, that abortion raises moral and spiritual questions over which honorable persons can disagree sincerely and profoundly. But those disagreements did not then and do not now relieve us of our duty to apply the Constitution faithfully.

Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. See, *e. g.*, *Carey* v. *Population Services International*, 431 U. S. 678 (1977); *Moore* v. *East Cleveland*, 431 U. S. 494 (1977); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). See also *Whalen* v. *Roe*, 429 U. S. 589, 598–600 (1977). That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

The Court of Appeals correctly invalidated the specified provisions of Pennsylvania's 1982 Abortion Control Act. Its judgment is affirmed.

It is so ordered.

JUSTICE STEVENS, concurring.

The scope of the individual interest in liberty that is given protection by the Due Process Clause of the Fourteenth Amendment is a matter about which conscientious judges have long disagreed. Although I believe that that interest is significantly broader than JUSTICE WHITE does,[1] I have al-

[1] Compare, *e. g.*, his opinion for the Court in *Meachum* v. *Fano*, 427 U. S. 215 (1976), with my dissent in that case, *id.*, at 229.

ways had the highest respect for his views on this subject.[2] In this case, although our ultimate conclusions differ, it may be useful to emphasize some of our areas of agreement in order to ensure that the clarity of certain fundamental propositions not be obscured by his forceful rhetoric.

Let me begin with a reference to *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), the case holding that a State may not totally forbid the use of birth control devices. Although the Court's opinion relied on a "right of marital privacy" within the "penumbra" of the Bill of Rights, *id.*, at 481–486, JUSTICE WHITE's concurring opinion went right to the heart of the issue. He wrote:

> "It would be unduly repetitious, and belaboring the obvious, to expound on the impact of this statute on the liberty guaranteed by the Fourteenth Amendment against arbitrary or capricious denials or on the nature of this liberty. Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right 'to marry, establish a home and bring up children,' *Meyer* v. *Nebraska*, 262 U. S. 390, 399, and 'the liberty . . . to direct the upbringing and education of children,' *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535, and that these are among 'the basic civil rights of man.' *Skinner* v. *Oklahoma*, 316 U. S. 535, 541. These decisions affirm that there is a 'realm of family life which the state cannot enter' without substantial justification. *Prince* v. *Massachusetts*, 321 U. S. 158, 166. Surely the right invoked in this case, to be free of regulation of the intimacies of the marriage relationship, 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrange-

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[2] See, *e. g.*, Stevens, Judicial Restraint, 22 San Diego L. Rev. 437, 449–450 (1985).

> ments.' *Kovacs* v. *Cooper*, 336 U. S. 77, 95 (opinion of Frankfurter, J.)." *Id.*, at 502–503 (WHITE, J., concurring in the judgment).

He concluded that the statute could not be constitutionally applied to married persons, explaining:

> "I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law." *Id.*, at 507.

That conclusion relied in part on the fact that the statute involved "sensitive areas of liberty"[3] and in part on the absence of any colorable justification for applying the statute to married couples.

In *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972), JUSTICE WHITE concluded that a similar Massachusetts statute was invalid as applied to a person whom the record did not identify as either married or unmarried, *id.*, at 464–465, and in *Carey* v. *Population Services International*, 431 U. S. 678 (1977), he subscribed to this explanation of the holdings in *Griswold* and *Eisenstadt:*

> "The fatal fallacy in [the appellants'] argument is that it overlooks the underlying premise of those decisions that the Constitution protects 'the right of the individual

[3] "The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under the cases of this Court, require 'strict scrutiny,' *Skinner* v. *Oklahoma*, 316 U. S. 535, 541, and 'must be viewed in the light of less drastic means for achieving the same basic purpose.' *Shelton* v. *Tucker*, 364 U. S. 479, 488. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' *Bates* v. *Little Rock*, 361 U. S. 516, 524. See also *McLaughlin* v. *Florida*, 379 U. S. 184. But such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause. *Zemel* v. *Rusk*, 381 U. S. 1." 381 U. S., at 503–504.

> . . . to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child.' [*Eisenstadt* v. *Baird*, 405 U. S.] at 453. *Griswold* did state that by 'forbidding the *use* of contraceptives rather than regulating their manufacture or sale,' the Connecticut statute there had 'a maximum destructive impact' on privacy rights. 381 U. S., at 485. This intrusion into 'the sacred precincts of marital bedrooms' made that statute particularly 'repulsive.' *Id.*, at 485–486. But subsequent decisions have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on that element. *Eisenstadt* v. *Baird*, holding that the protection is not limited to married couples, characterized the protected right as the '*decision* whether to bear or beget a child.' 405 U. S., at 453 (emphasis added). Similarly, *Roe* v. *Wade*, held that the Constitution protects 'a woman's *decision* whether or not to terminate her pregnancy.' 410 U. S., at 153 (emphasis added). See also *Whalen* v. *Roe*, [429 U. S. 589,] 599–600, and n. 26. These decisions put *Griswold* in proper perspective. *Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." 431 U. S., at 687; *id.*, at 702 (WHITE, J., concurring in pertinent part and concurring in result).

Thus, the aspect of liberty at stake in this case is the freedom from unwarranted governmental intrusion into individual decisions in matters of childbearing. As JUSTICE WHITE explained in *Griswold*, that aspect of liberty comes to this Court with a momentum for respect that is lacking when appeal is made to liberties which derive merely from shifting economic arrangements.

Like the birth control statutes involved in *Griswold* and *Baird*, the abortion statutes involved in *Roe* v. *Wade*, 410 U. S. 113 (1973), and in the case before us today apply equally to decisions made by married persons and by unmarried persons. Consistently with his views in those cases, JUSTICE WHITE agrees that "a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause." *Post*, at 790. His agreement with that "indisputable" proposition, *ibid.*, is not qualified or limited to decisions made by pregnant women who are married and, indeed, it would be a strange form of liberty if it were so limited.

Up to this point in JUSTICE WHITE's analysis, his opinion is fully consistent with the accepted teachings of the Court and with the major premises of *Roe* v. *Wade*. For reasons that are not entirely clear, however, JUSTICE WHITE abruptly announces that the interest in "liberty" that is implicated by a decision not to bear a child that is made a few days after conception is *less* fundamental than a comparable decision made before conception. *Post*, at 791–792. There may, of course, be a significant difference in the strength of the countervailing state interest, but I fail to see how a decision on childbearing becomes *less* important the day after conception than the day before. Indeed, if one decision is more "fundamental" to the individual's freedom than the other, surely it is the postconception decision that is the more serious. Thus, it is difficult for me to understand how JUSTICE WHITE reaches the conclusion that restraints upon this aspect of a woman's liberty do not "call into play anything more than the most minimal judicial scrutiny." *Post*, at 790.[4]

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[4] At times JUSTICE WHITE's rhetoric conflicts with his own analysis. For instance, his emphasis on the lack of a decision by "the people . . . in 1787, 1791, 1868, or any time since," *post*, at 797, stands in sharp contrast to his earlier, forthright rejection of "the simplistic view that constitutional interpretation can possibly be limited to 'the plain meaning' of the Constitution's text or to the subjective intention of the Framers." *Post*, at 789. Similarly, his statement that an abortion decision should be sub-

If JUSTICE WHITE were correct in regarding the post-conception decision of the question whether to bear a child as a relatively unimportant, second-class sort of interest, I might agree with his view that the individual should be required to conform her decision to the will of the majority. But if that decision commands the respect that is traditionally associated with the "sensitive areas of liberty" protected by the Constitution, as JUSTICE WHITE characterized reproductive decisions in *Griswold*, 381 U. S., at 503, no individual should be compelled to surrender the freedom to make that decision for herself simply because her "value preferences" are not shared by the majority.[5] In a sense, the basic question is whether the "abortion decision" should be made by the individual or by the majority "in the unrestrained im-

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ject to "the will of the people," *post*, at 796, does not take us very far in determining *which* people—the majorities in state legislatures or the individuals confronted with unwanted pregnancies. In view of his agreement that the decision about abortion is "a species of liberty" protected by the Constitution, moreover, *post*, at 790, and in view of the fact that "liberty" plays a rather prominent role in our Constitution, his suggestion that the Court's evaluation of that interest represents the imposition of "extraconstitutional value preferences," *post*, at 794, seems to me inexplicable. This characterization of the Court's analysis as "extraconstitutional" also does not reflect JUSTICE WHITE's simultaneous recognition that "[t]he Constitution . . . is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it." *Post*, at 789. Finally, I fail to see how the fact that "men and women of good will and high commitment to constitutional government," *post*, at 793, are on both sides of the abortion issue helps to resolve the difficult constitutional question before us; I take it that the disputants in most constitutional controversies in our free society can be similarly characterized.

[5] "What a person is, what he wants, the determination of his life plan, of his concept of the good, are the most intimate expressions of self-determination, and by asserting a person's responsibility for the results of this self-determination we give substance to the concept of liberty." C. Fried, Right and Wrong, 146–147 (1978).

See also Fried, Correspondence, 6 Phil. & Pub. Aff. 288–289 (1977) (the concept of privacy embodies the "moral fact that a person belongs to himself and not others nor to society as a whole").

position of its own, extraconstitutional value preferences." *Post*, at 794. But surely JUSTICE WHITE is quite wrong in suggesting that the Court is imposing value preferences on anyone else. *Ibid.*[6]

JUSTICE WHITE is also surely wrong in suggesting that the governmental interest in protecting fetal life is equally compelling during the entire period from the moment of conception until the moment of birth. *Post*, at 795. Again, I recognize that a powerful theological argument can be made for that position, but I believe our jurisdiction is limited to the evaluation of secular state interests.[7] I should think it obvious that the State's interest in the protection of an embryo—even if that interest is defined as "protecting those who will be citizens," *ibid.*—increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day. The development of a fetus—and pregnancy itself—are not static conditions, and the assertion that the government's interest is static simply ignores this reality.

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[6] JUSTICE WHITE's characterization of the governmental interest as "protecting those who will be citizens if their lives are not ended in the womb," *post*, at 795, reveals that his opinion may be influenced as much by his own value preferences as by his view about the proper allocation of decisionmaking responsibilities between the individual and the State. For if federal judges must allow the State to make the abortion decision, presumably the State is free to decide that a woman may *never* abort, may *sometimes* abort, or, as in the People's Republic of China, must *always* abort if her family is already too large. In contrast, our cases represent a consistent view that the individual is primarily responsible for reproductive decisions, whether the State seeks to prohibit reproduction, *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942), or to require it, *Roe* v. *Wade*, 410 U. S. 113 (1973).

[7] The responsibility for nurturing the soul of the newly born, as well as the unborn, rests with individual parents, not with the State. No matter how important a sacrament such as baptism may be, a State surely could not punish a mother for refusing to baptize her child.

Nor is it an answer to argue that life itself is not a static condition, and that "there is no nonarbitrary line separating a fetus from a child, or indeed, an adult human being," *post*, at 792. For, unless the religious view that a fetus is a "person" is adopted—a view JUSTICE WHITE refuses to embrace, *ibid.*—there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures.[8] And if distinctions may be drawn between a fetus and a human being in terms of the state interest in their protection—even though the fetus represents one of "those who will be citizens"—it seems to me quite odd to argue that distinctions may not also be drawn between the state interest in protecting the freshly fertilized egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth. Recognition of this distinction is supported not only by logic, but also by history[9] and by our shared experiences.

Turning to JUSTICE WHITE's comments on *stare decisis*, he is of course correct in pointing out that the Court "has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution." *Post*, at 787. But JUSTICE WHITE has not disavowed the "fundamental premises" on which the decision in *Roe* v. *Wade* rests. He has not disavowed the Court's prior approach to the interpretation of the word "liberty" or, more narrowly, the line of cases that culminated in the unequivocal holding, applied to unmarried persons and married persons alike, "that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by

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[8] No Member of this Court has ever suggested that a fetus is a "person" within the meaning of the Fourteenth Amendment.

[9] See *Roe* v. *Wade*, *supra*, at 129–147.

the State." *Carey*, 431 U. S., at 687; *id.*, at 702 (WHITE, J., concurring in pertinent part).[10]

Nor does the fact that the doctrine of *stare decisis* is not an absolute bar to the reexamination of past interpretations of the Constitution mean that the values underlying that doctrine may be summarily put to one side. There is a strong public interest in stability, and in the orderly conduct of our

[10] He has, however, suggested that the concept of "liberty" is limited by two basic "definitions" of the values at stake. *Post*, at 790–791. Like JUSTICE WHITE, I share Justice Harlan's concern about "judges . . . roaming at large in the constitutional field." *Ibid.*; see also Stevens, 22 San Diego L. Rev., at 449–450. But I am convinced that JUSTICE WHITE's use of "definitions" is an inadequate substitute for the difficult process of analysis and judgment that the guarantee of liberty requires, a process nowhere better expressed than by Justice Harlan:

"Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

. . . . .

"Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no 'mechanical yardstick,' no 'mechanical answer.' The decison of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take 'its place in relation to what went before and further [cut] a channel for what is to come.' *Irvine* v. *California*, 347 U. S. 128, 147 (dissenting opinion)." *Poe* v. *Ullman*, 367 U. S. 497, 542–544 (1961) (Harlan, J., dissenting).

affairs, that is served by a consistent course of constitutional adjudication. Acceptance of the fundamental premises that underlie the decision in *Roe* v. *Wade*, as well as the application of those premises in that case, places the primary responsibility for decision in matters of childbearing squarely in the private sector of our society.[11] The majority remains free to preach the evils of birth control and abortion and to persuade others to make correct decisions while the individual faced with the reality of a difficult choice having serious and personal consequences of major importance to her own future—perhaps to the salvation of her own immortal soul—remains free to seek and to obtain sympathetic guidance from those who share her own value preferences.

In the final analysis, the holding in *Roe* v. *Wade* presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny. Arguably a very primitive society would have been protected from evil by a rule against eating apples; a majority familiar with Adam's experience might favor such a rule. But the lawmakers who placed a special premium on the protection of

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[11] "These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases." *Fitzgerald* v. *Porter Memorial Hospital*, 523 F. 2d 716, 719–720 (CA7 1975) (footnotes omitted), cert. denied, 425 U. S. 916 (1976).

individual liberty have recognized that certain values are more important than the will of a transient majority.[12]

CHIEF JUSTICE BURGER, dissenting.

I agree with much of JUSTICE WHITE's and JUSTICE O'CONNOR's dissents. In my concurrence in the companion case to *Roe* v. *Wade*, 410 U. S. 113, in 1973, I noted:

> "I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand." *Doe* v. *Bolton*, 410 U. S. 179, 208 (1973).

Later, in *Maher* v. *Roe*, 432 U. S. 464, 481 (1977), I stated my view that

> "[t]he Court's holdings in *Roe* . . . and *Doe* v. *Bolton* . . . simply require that a State not create an absolute barrier to a woman's decision to have an abortion."

I based my concurring statements in *Roe* and *Maher* on the principle expressed in the Court's opinion in *Roe* that the right to an abortion "is not unqualified and must be considered against important state interests in regulation." 410 U. S., at 154–155. In short, every Member of the *Roe* Court rejected the idea of abortion on demand. The Court's opinion today, however, plainly undermines that important

[12] "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943).

principle, and I regretfully conclude that some of the concerns of the dissenting Justices in *Roe*, as well as the concerns I expressed in my separate opinion, have now been realized.

The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent. In *Roe*, the Court emphasized

> "that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . ." *Id.*, at 162.

Yet today the Court astonishingly goes so far as to say that the State may not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure which she is about to undergo and the availability of state-funded alternatives if she elects not to run those risks. Can anyone doubt that the State could impose a similar requirement with respect to other medical procedures? Can anyone doubt that doctors routinely give similar information concerning risks in countless procedures having far less impact on life and health, both physical and emotional than an abortion, and risk a malpractice lawsuit if they fail to do so?

Yet the Court concludes that the State cannot impose this simple information-dispensing requirement in the abortion context where the decision is fraught with serious physical, psychological, and moral concerns of the highest order. Can it possibly be that the Court is saying that the Constitution *forbids* the communication of such critical information to a woman?* We have apparently already passed the point at

*The Court's astounding rationale for this holding is that such information might have the effect of "discouraging abortion," *ante*, at 762, as though abortion is something to be advocated and encouraged. This is at odds not only with *Roe* but with our subsequent abortion decisions as well. As I stated in my opinion for the Court in *H. L.* v. *Matheson*, 450 U. S. 398 (1981), upholding a Utah statute requiring that a doctor notify the parents of a minor seeking an abortion: "The Constitution does not compel a state

which abortion is available merely on demand. If the statute at issue here is to be invalidated, the "demand" will not even have to be the result of an informed choice.

The Court in *Roe* further recognized that the State "has still *another* important and legitimate interest" which is "separate and distinct" from the interest in protecting maternal health, *i. e.*, an interest in "protecting the potentiality of human life." *Ibid.* The point at which these interests become "compelling" under *Roe* is at viability of the fetus. *Id.*, at 163. Today, however, the Court abandons that standard and renders the solemnly stated concerns of the 1973 *Roe* opinion for the interests of the states mere shallow rhetoric. The statute at issue in this case requires that a second physician be present during an abortion performed after viability, so that the second physician can "take control of the child and . . . provide immediate medical care . . . taking all reasonable steps necessary, in his judgment, to preserve the child's life and health." 18 Pa. Cons. Stat. § 3210(c) (1982).

Essentially this provision simply states that a viable fetus is to be cared for, not destroyed. No governmental power exists to say that a viable fetus should not have every protection required to preserve its life. Undoubtedly the Pennsylvania Legislature added the second-physician requirement on the mistaken assumption that this Court meant what it said in *Roe* concerning the "compelling interest" of the states in potential life after viability.

The Court's opinion today is but the most recent indication of the distance traveled since *Roe*. Perhaps the first important road marker was the Court's holding in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976), in which the Court held (over the dissent of JUSTICE WHITE

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to fine-tune its statutes so as to encourage or faciliate abortions. To the contrary, state action 'encouraging childbirth except in the most urgent circumstances' is 'rationally related to the legitimate governmental objective of protecting potential life.'" *Id.*, at 413 (quoting *Harris* v. *McRae*, 448 U. S. 297, 325 (1980)).

joined by JUSTICE REHNQUIST and myself) that the State may not require that minors seeking an abortion first obtain parental consent. Parents, not judges or social workers, have the inherent right and responsibility to advise their children in matters of this sensitivity and consequence. Can one imagine a surgeon performing an amputation or even an appendectomy on a 14-year-old girl without the consent of a parent or guardian except in an emergency situation?

Yet today the Court goes beyond *Danforth* by remanding for further consideration of the provisions of Pennsylvania's statute requiring that a minor seeking an abortion without parental consent petition the appropriate court for authorization. Even if I were to agree that the Constitution requires that the states may not provide that a minor receive parental consent before undergoing an abortion, I would certainly hold that judicial approval may be required. This is in keeping with the longstanding common-law principle that courts may function *in loco parentis* when parents are unavailable or neglectful, even though courts are not very satisfactory substitutes when the issue is whether a 12-, 14-, or 16-year-old unmarried girl should have an abortion. In my view, no remand is necessary on this point because the statutory provision in question is constitutional.

In discovering constitutional infirmities in state regulations of abortion that are in accord with our history and tradition, we may have lured judges into "roaming at large in the constitutional field." *Griswold* v. *Connecticut*, 381 U. S. 479, 502 (1965) (Harlan, J., concurring). The soundness of our holdings must be tested by the decisions that purport to follow them. If *Danforth* and today's holding really mean what they seem to say, I agree we should reexamine *Roe*.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

Today the Court carries forward the "difficult and continuing venture in substantive due process," *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976)

(WHITE, J., dissenting), that began with the decision in *Roe* v. *Wade*, 410 U. S. 113 (1973), and has led the Court further and further afield in the 13 years since that decision was handed down. I was in dissent in *Roe* v. *Wade* and am in dissent today. In Part I below, I state why I continue to believe that this venture has been fundamentally misguided since its inception. In Part II, I submit that even accepting *Roe* v. *Wade*, the concerns underlying that decision by no means command or justify the results reached today. Indeed, in my view, our precedents in this area, applied in a manner consistent with sound principles of constitutional adjudication, require reversal of the Court of Appeals on the ground that the provisions before us are facially constitutional.[1]

I

The rule of *stare decisis* is essential if case-by-case judicial decisionmaking is to be reconciled with the principle of the

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[1] I shall, for the most part, leave to one side the Court's somewhat extraordinary procedural rulings. I do not strongly disagree with the Court's decision to read a finality requirement into 28 U. S. C. § 1254(2), although I would have thought it incumbent on the Court to explain why the Court of Appeals' judgment as to the statutory provisions before us today, which represents a definitive ruling on their constitutionality, is not sufficiently "final" to satisfy the jurisdictional statute as interpreted by the Court.

As for the Court's ruling that it is permissible for an appellate court to resolve an appeal from the grant or the denial of a preliminary injunction by issuing a final judgment as to the constitutionality of a statute, I do not disagree that this may, in rare cases, be an appropriate course of action where the constitutional issues are clear. I would stress that this is by no means the preferred course of action in the run of cases, and I assume that the majority's opinion is not to the contrary. I do disagree quite strongly with the majority's application of this principle here, as I believe, contrary to the majority, that it is quite evident that the statute before us is constitutional on its face. I also believe, as will become evident, that at least one of the Court's rulings is exceedingly inappropriate in view of the preliminary posture of this case even if the majority's legal premises are accepted.

rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results. But *stare decisis* is not the only constraint upon judicial decisionmaking. Cases—like this one—that involve our assumed power to set aside on grounds of unconstitutionality a state or federal statute representing the democratically expressed will of the people call other considerations into play. Because the Constitution itself is ordained and established by the people of the United States, constitutional adjudication by this Court does not, in theory at any rate, frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own choosing. But decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken.

The Court has therefore adhered to the rule that *stare decisis* is not rigidly applied in cases involving constitutional issues, see *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 543 (1962) (opinion of Harlan, J.), and has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution. *Stare decisis* did not stand in the way of the Justices who, in the late 1930's, swept away constitutional doctrines that had placed unwarranted restrictions on the power of the State and Federal Governments to enact social and economic legislation, see *United States* v. *Darby*, 312 U. S. 100 (1941); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937). Nor did *stare decisis* deter a different set of Justices, some 15 years

later, from rejecting the theretofore prevailing view that the Fourteenth Amendment permitted the States to maintain the system of racial segregation. *Brown* v. *Board of Education*, 347 U. S. 483 (1954). In both instances, history has been far kinder to those who departed from precedent than to those who would have blindly followed the rule of *stare decisis*. And only last Term, the author of today's majority opinion reminded us once again that "when it has become apparent that a prior decision has departed from a proper understanding" of the Constitution, that decision must be overruled. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 557 (1985).

In my view, the time has come to recognize that *Roe* v. *Wade*, no less than the cases overruled by the Court in the decisions I have just cited, "departs from a proper understanding" of the Constitution and to overrule it. I do not claim that the arguments in support of this proposition are new ones or that they were not considered by the Court in *Roe* or in the cases that succeeded it. Cf. *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 419–420 (1983). But if an argument that a constitutional decision is erroneous must be novel in order to justify overruling that precedent, the Court's decisions in *Lochner* v. *New York*, 198 U. S. 45 (1905), and *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), would remain the law, for the doctrines announced in those decisions were nowhere more eloquently or incisively criticized than in the dissenting opinions of Justices Holmes (in *Lochner*) and Harlan (in both cases). That the flaws in an opinion were evident at the time it was handed down is hardly a reason for adhering to it.

A

Roe v. *Wade* posits that a woman has a fundamental right to terminate her pregnancy, and that this right may be restricted only in the service of two compelling state interests: the interest in maternal health (which becomes compelling

only at the stage in pregnancy at which an abortion becomes more hazardous than carrying the pregnancy to term) and the interest in protecting the life of the fetus (which becomes compelling only at the point of viability). A reader of the Constitution might be surprised to find that it encompassed these detailed rules, for the text obviously contains no references to abortion, nor, indeed, to pregnancy or reproduction generally; and, of course, it is highly doubtful that the authors of any of the provisions of the Constitution believed that they were giving protection to abortion. As its prior cases clearly show, however, this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the "plain meaning" of the Constitution's text or to the subjective intention of the Framers. The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it. In particular, the Due Process Clause of the Fourteenth Amendment, which forbids the deprivation of "life, liberty, or property without due process of law," has been read by the majority of the Court to be broad enough to provide substantive protection against state infringement of a broad range of individual interests. See *Moore* v. *East Cleveland*, 431 U. S. 494, 541–552 (1977) (WHITE, J., dissenting).

In most instances, the substantive protection afforded the liberty or property of an individual by the Fourteenth Amendment is extremely limited: State action impinging on individual interests need only be rational to survive scrutiny under the Due Process Clause, and the determination of rationality is to be made with a heavy dose of deference to the policy choices of the legislature. Only "fundamental" rights are entitled to the added protection provided by strict judicial scrutiny of legislation that impinges upon them. See *id.*, at 499 (opinion of POWELL, J.); *id.*, at 537 (Stewart, J., joined by

REHNQUIST, J., dissenting); *id.*, at 547–549 (WHITE, J., dissenting). I can certainly agree with the proposition—which I deem indisputable—that a woman's ability to choose an abortion is a species of "liberty" that is subject to the general protections of the Due Process Clause. I cannot agree, however, that this liberty is so "fundamental" that restrictions upon it call into play anything more than the most minimal judicial scrutiny.

Fundamental liberties and interests are most clearly present when the Constitution provides specific textual recognition of their existence and importance. Thus, the Court is on relatively firm ground when it deems certain of the liberties set forth in the Bill of Rights to be fundamental and therefore finds them incorporated in the Fourteenth Amendment's guarantee that no State may deprive any person of liberty without due process of law. When the Court ventures further and defines as "fundamental" liberties that are nowhere mentioned in the Constitution (or that are present only in the so-called "penumbras" of specifically enumerated rights), it must, of necessity, act with more caution, lest it open itself to the accusation that, in the name of identifying constitutional principles to which the people have consented in framing their Constitution, the Court has done nothing more than impose its own controversial choices of value upon the people.

Attempts to articulate the constraints that must operate upon the Court when it employs the Due Process Clause to protect liberties not specifically enumerated in the text of the Constitution have produced varying definitions of "fundamental liberties." One approach has been to limit the class of fundamental liberties to those interests that are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [they] were sacrificed." *Palko* v. *Connecticut*, 302 U. S. 319, 325, 326 (1937); see *Moore* v. *East Cleveland*, 431 U. S., at 537 (Stewart, J., joined by REHNQUIST, J., dissenting). Another, broader approach is

to define fundamental liberties as those that are "deeply rooted in this Nation's history and tradition." *Id.*, at 503 (opinion of POWELL, J.); see also *Griswold* v. *Connecticut*, 381 U. S. 479, 501 (1965) (Harlan, J., concurring). These distillations of the possible approaches to the identification of unenumerated fundamental rights are not and do not purport to be precise legal tests or "mechanical yardstick[s]," *Poe* v. *Ullman*, 367 U. S. 497, 544 (1961) (Harlan, J., dissenting). Their utility lies in their effort to identify some source of constitutional value that reflects not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government—"*the balance struck by this country*," *id.*, at 542 (emphasis added)—and they seek to achieve this end through locating fundamental rights either in the traditions and consensus of our society as a whole or in the logical implications of a system that recognizes both individual liberty and democratic order. Whether either of these approaches can, as Justice Harlan hoped, prevent "judges from roaming at large in the constitutional field," *Griswold*, *supra*, at 502, is debatable. What for me is not subject to debate, however, is that either of the basic definitions of fundamental liberties, taken seriously, indicates the illegitimacy of the Court's decision in *Roe* v. *Wade*.

The Court has justified the recognition of a woman's fundamental right to terminate her pregnancy by invoking decisions upholding claims of personal autonomy in connection with the conduct of family life, the rearing of children, marital privacy, and the use of contraceptives, and the preservation of the individual's capacity to procreate. See *Carey* v. *Population Services International*, 431 U. S. 678 (1977); *Moore* v. *East Cleveland*, *supra*; *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Griswold* v. *Connecticut*, *supra*; *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). Even if each of these cases was correctly decided

and could be properly grounded in rights that are "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition," the issues in the cases cited differ from those at stake where abortion is concerned. As the Court appropriately recognized in *Roe* v. *Wade*, "[t]he pregnant woman cannot be isolated in her privacy," 410 U. S., at 159; the termination of a pregnancy typically involves the destruction of another entity: the fetus. However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being. Given that the continued existence and development—that is to say, the *life*—of such an entity are so directly at stake in the woman's decision whether or not to terminate her pregnancy, that decision must be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.[2] Accordingly, the

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[2] That the abortion decision, like the decisions protected in *Griswold*, *Eisenstadt*, and *Carey*, concerns childbearing (or, more generally, family life) in no sense necessitates a holding that the liberty to choose abortion is "fundamental." That the decision involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place. This difference does not go merely to the weight of the state interest in regulating abortion; it affects as well the characterization of the liberty interest itself. For if the liberty to make certain decisions with respect to contraception without governmental constraint is "fundamental," it is not only because those decisions are "serious" and "important" to the individual, see *ante*, at 776 (STEVENS, J., concurring), but also because some value of privacy or individual autonomy that is somehow implicit in the scheme of ordered liberties established by the Constitution supports a judgment that such decisions are none of government's business. The

decisions cited by the Court both in *Roe* and in its opinion today as precedent for the fundamental nature of the liberty to choose abortion do not, even if all are accepted as valid, dictate the Court's classification.

If the woman's liberty to choose an abortion is fundamental, then, it is not because any of our precedents (aside from *Roe* itself) command or justify that result; it can only be because protection for this unique choice is itself "implicit in the concept of ordered liberty" or, perhaps, "deeply rooted in this Nation's history and tradition." It seems clear to me that it is neither. The Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people, as does the continuing and deep division of the people themselves over the question of abortion. As for the notion that choice in the matter of abortion is implicit in the concept of ordered liberty, it seems apparent to me that a free, egalitarian, and democratic society does not presuppose any particular rule or set of rules with respect to abortion. And again, the fact that many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy strengthens my own conviction that the values animating the Constitution do not compel rec-

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same cannot be said where, as here, the individual is not "isolated in her privacy."

My point can be illustrated by drawing on a related area in which fundamental liberty interests have been found: childrearing. The Court's decisions in *Moore* v. *East Cleveland*, *Pierce* v. *Society of Sisters*, and *Meyer* v. *Nebraska* can be read for the proposition that parents have a fundamental liberty to make decisions with respect to the upbringing of their children. But no one would suggest that this fundamental liberty extends to assaults committed upon children by their parents. It is not the case that parents have a fundamental liberty to engage in such activities and that the State may intrude to prevent them only because it has a compelling interest in the well-being of children; rather, such activities, by their very nature, should be viewed as outside the scope of the fundamental liberty interest.

ognition of the abortion liberty as fundamental. In so denominating that liberty, the Court engages not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences.[3]

B

A second, equally basic error infects the Court's decision in *Roe* v. *Wade*. The detailed set of rules governing state restrictions on abortion that the Court first articulated in *Roe* and has since refined and elaborated presupposes not only that the woman's liberty to choose an abortion is fundamental, but also that the State's countervailing interest in protecting fetal life (or, as the Court would have it, "potential human life," 410 U. S., at 159) becomes "compelling" only at the point at which the fetus is viable. As JUSTICE O'CONNOR pointed out three years ago in her dissent in *Akron* v. *Akron Center for Reproductive Health*, 462 U. S. 416, 461 (1983), the Court's choice of viability as the point at which the State's interest becomes compelling is entirely arbitrary. The Court's "explanation" for the line it has drawn is that the State's interest becomes compelling at viability "because the fetus then presumably has the capacity of meaningful life outside the mother's womb." 410 U. S., at 163. As one critic

[3] JUSTICE STEVENS asserts, *ante*, at 778, that I am "quite wrong in suggesting that the Court is imposing value preferences on anyone else" when it denominates the liberty to choose abortion as "fundamental" (in contradistinction to such other, nonfundamental liberties as the liberty to use dangerous drugs or to operate a business without governmental interference) and thereby disempowers state electoral majorities from legislating in this area. I can only respond that I cannot conceive of a definition of the phrase "imposing value preferences" that does not encompass the Court's action.

JUSTICE STEVENS also suggests that it is the legislative majority that has engaged in "the unrestrained imposition of its own, extraconstitutional value preferences" when a state legislature restricts the availability of abortion. *Ibid.* But a legislature, unlike a court, has the inherent power to do so unless its choices are constitutionally *forbidden*, which, in my view, is not the case here.

of *Roe* has observed, this argument "mistakes a definition for a syllogism." Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L. J. 920, 924 (1973).

The governmental interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability.[4]

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[4] Contrary to JUSTICE STEVENS' suggestion, *ante*, at 778, this is no more a "theological" position than is the Court's own judgment that viability is the point at which the state interest becomes compelling. (Interestingly, JUSTICE STEVENS omits any real effort to defend this judgment.) The point is that the specific interest the Court has recognized as compelling after the point of viability—that is, the interest in protecting "potential human life"—is present as well before viability, and the point of viability seems to bear no discernible relationship to the strength of that interest. Thus, there is no basis for concluding that the essential character of the state interest becomes transformed at the point of viability.

Further, it is self-evident that neither the legislative decision to assert a state interest in fetal life before viability nor the judicial decision to recognize that interest as compelling constitutes an impermissible "religious" decision merely because it coincides with the belief of one or more religions. Certainly the fact that the prohibition of murder coincides with one of the Ten Commandments does not render a State's interest in its murder statutes less than compelling, nor are legislative and judicial decisions concerning the use of the death penalty tainted by their correspondence to varying religious views on that subject. The simple, and perhaps unfortunate, fact of the matter is that in determining whether to assert an interest in fetal life, a State cannot avoid taking a position that will correspond to some religious beliefs and contradict others. The same is true to some extent with respect to the choice this Court faces in characterizing an asserted state

C

Both the characterization of the abortion liberty as fundamental and the denigration of the State's interest in preserving the lives of nonviable fetuses are essential to the detailed set of constitutional rules devised by the Court to limit the States' power to regulate abortion. If either or both of these facets of *Roe* v. *Wade* were rejected, a broad range of limitations on abortion (including outright prohibition) that are now unavailable to the States would again become constitutional possibilities.

In my view, such a state of affairs would be highly desirable from the standpoint of the Constitution. Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted.[5] *Roe* v. *Wade* implies that the people

interest in fetal life, for denying that such an interest is a "compelling" one necessarily entails a negative resolution of the "religious" issue of the humanity of the fetus, whereas accepting the State's interest as compelling reflects at least tolerance for a state decision that is congruent with the equally "religious" position that human life begins at conception. Faced with such a decision, the most appropriate course of action for the Court is to defer to a legislative resolution of the issue: in other words, if a state legislature asserts an interest in protecting fetal life, I can see no satisfactory basis for *denying* that it is compelling.

[5] JUSTICE STEVENS, see *ante*, at 776–777, n. 4, finds a contradiction between my recognition that constitutional analysis requires more than mere textual analysis or a search for the specific intent of the Framers, *supra*, at 789, and my assertion that it is ultimately the will of the people that is the source of whatever values are incorporated in the Constitution. The fallacy of JUSTICE STEVENS' argument is glaring. The rejection of what has been characterized as "clause-bound" interpretivism, J. Ely, Democracy and Distrust 12 (1980), does not necessarily carry with it a rejection of the notion that constitutional adjudication is a search for values and principles that are implicit (and explicit) in the structure of rights and institutions that the people have themselves created. The implications of those values for the resolution of particular issues will in many if not most cases not have been explicitly considered when the values themselves were

have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never—not in 1787, 1791, 1868, or at any time since—done any such thing. I would return the issue to the people by overruling *Roe* v. *Wade*.

II

As it has evolved in the decisions of this Court, the freedom recognized by the Court in *Roe* v. *Wade* and its progeny is essentially a negative one, based not on the notion that abortion is a good in itself, but only on the view that the legitimate goals that may be served by state coercion of private choices regarding abortion are, at least under some circumstances, outweighed by the damage to individual autonomy and privacy that such coercion entails. In other words, the evil of abortion does not justify the evil of forbidding it. Cf. *Stanley* v. *Georgia*, 394 U. S. 557 (1969). But precisely because *Roe* v. *Wade* is not premised on the notion that abortion is itself desirable (either as a matter of constitutional entitlement or of social policy), the decision does not command the States to fund or encourage abortion, or even to approve

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chosen—indeed, there will be some cases in which those who framed the provisions incorporating certain principles into the Constitution will be found to have been incorrect in their assessment of the consequences of their decision. See, *e. g.*, *Brown* v. *Board of Education*, 347 U. S. 483 (1953). Nonetheless, the hallmark of a correct decision of constitutional law is that it rests on principles selected by the people through their Constitution, and not merely on the personal philosophies, be they libertarian or authoritarian, of the judges of the majority. While constitutional adjudication involves judgments of value, it remains the case that some values are indeed "extraconstitutional," in that they have no roots in the Constitution that the people have chosen. The Court's decision in *Lochner* v. *New York*, 198 U. S. 45 (1905), was wrong because it rested on the Court's belief that the liberty to engage in a trade or occupation without governmental regulation was somehow fundamental—an assessment of value that was unsupported by the Constitution. I believe that *Roe* v. *Wade*—and today's decision as well—rests on similarly extraconstitutional assessments of the value of the liberty to choose an abortion.

of it. Rather, we have recognized that the States may legitimately adopt a policy of encouraging normal childbirth rather than abortion so long as the measures through which that policy is implemented do not amount to direct compulsion of the woman's choice regarding abortion. *Harris* v. *McRae*, 448 U. S. 297 (1980); *Maher* v. *Roe*, 432 U. S. 464 (1977); *Beal* v. *Doe*, 432 U. S. 438 (1977). The provisions before the Court today quite obviously represent the State's effort to implement such a policy.

The majority's opinion evinces no deference toward the State's legitimate policy. Rather, the majority makes it clear from the outset that it simply disapproves of any attempt by Pennsylvania to legislate in this area. The history of the state legislature's decade-long effort to pass a constitutional abortion statute is recounted as if it were evidence of some sinister conspiracy. See *ante*, at 751–752. In fact, of course, the legislature's past failure to predict the evolution of the right first recognized in *Roe* v. *Wade* is understandable and is in itself no ground for condemnation. Moreover, the legislature's willingness to pursue permissible policies through means that go to the limits allowed by existing precedents is no sign of *mens rea*. The majority, however, seems to find it necessary to respond by changing the rules to invalidate what before would have seemed permissible. The result is a decision that finds no justification in the Court's previous holdings, departs from sound principles of constitutional and statutory interpretation, and unduly limits the State's power to implement the legitimate (and in some circumstances compelling) policy of encouraging normal childbirth in preference to abortion.

A

The Court begins by striking down statutory provisions designed to ensure that the woman's choice of an abortion is fully informed—that is, that she is aware not only of the reasons for having an abortion, but also of the risks associated with an abortion and the availability of assistance that might

make the alternative of normal childbirth more attractive than it might otherwise appear. At first blush, the Court's action seems extraordinary: after all, *Roe* v. *Wade* purports to be about freedom of choice, and statutory provisions requiring that a woman seeking an abortion be afforded information regarding her decision not only do not limit her ability to choose abortion, but also would appear to enhance her freedom of choice by helping to ensure that her decision whether or not to terminate her pregnancy is an informed one. Indeed, maximization of the patient's freedom of choice—not restriction of his or her liberty—is generally perceived to be the principal value justifying the imposition of disclosure requirements upon physicians:

> "The root premise is the concept, fundamental in American jurisprudence, that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . .' True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible." *Canterbury* v. *Spence*, 150 U. S. App. D. C. 263, 271, 464 F. 2d 772, 780 (1972).

One searches the majority's opinion in vain for a convincing reason why the apparently laudable policy of promoting informed consent becomes unconstitutional when the subject is abortion. The majority purports to find support in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983). But *Akron* is not controlling. The informed-

consent provisions struck down in that case, as characterized by the majority, required the physician to advance tendentious statements concerning the unanswerable question of when human life begins, to offer merely speculative descriptions of the anatomical features of the fetus carried by the woman seeking the abortion, and to recite a "parade of horribles" suggesting that abortion is "a particularly dangerous procedure." *Id.*, at 444–445. I have no quarrel with the general proposition, for which I read *Akron* to stand, that a campaign of state-promulgated disinformation cannot be justified in the name of "informed consent" or "freedom of choice." But the Pennsylvania statute before us cannot be accused of sharing the flaws of the ordinance at issue in *Akron*. As the majority concedes, the statute does not, on its face, require that the patient be given any information that is false or unverifiable. Moreover, it is unquestionable that all of the information required would be relevant in many cases to a woman's decision whether or not to obtain an abortion.

Why, then, is the statute unconstitutional? The majority's argument, while primarily rhetorical, appears to offer three answers. First, the information that must be provided will in some cases be irrelevant to the woman's decision. This is true. Its pertinence to the question of the statute's constitutionality, however, is beyond me. Legislators are ordinarily entitled to proceed on the basis of rational generalizations about the subject matter of legislation, and the existence of particular cases in which a feature of a statute performs no function (or is even counterproductive) ordinarily does not render the statute unconstitutional or even constitutionally suspect. Only where the statute is subject to heightened scrutiny by virtue of its impingement on some fundamental right or its employment of a suspect classification does the imprecision of the "fit" between the statute's ends and means become potentially damning. Here, there is nothing to trigger such scrutiny, for the statute does not di-

rectly infringe the allegedly fundamental right at issue—the woman's right to choose an abortion. Indeed, I fail to see how providing a woman with accurate information—whether relevant or irrelevant—could ever be deemed to impair *any* constitutionally protected interest (even if, as the majority hypothesizes, the information may upset her). Thus, the majority's observation that the statute may require the provision of irrelevant information in some cases is itself an irrelevancy.

Second, the majority appears to reason that the informed-consent provisions are invalid because the information they require may increase the woman's "anxiety" about the procedure and even "influence" her in her choice. Again, both observations are undoubtedly true; but they by no means cast the constitutionality of the provisions into question. It is in the very nature of informed-consent provisions that they may produce some anxiety in the patient and influence her in her choice. This is in fact their reason for existence, and—provided that the information required is accurate and non-misleading—it is an entirely salutary reason. If information may reasonably affect the patient's choice, the patient should have that information; and, as one authority has observed, "the greater the likelihood that particular information will influence [the patient's] decision, the more essential the information arguably becomes for securing her informed consent." Appleton, Doctors, Patients and the Constitution, 63 Wash. U. L. Q. 183, 211 (1985). That the result of the provision of information may be that some women will forgo abortions by no means suggests that providing the information is unconstitutional, for the ostensible objective of *Roe* v. *Wade* is not maximizing the number of abortions, but maximizing choice. Moreover, our decisions in *Maher*, *Beal*, and *Harris* v. *McRae* all indicate that the State may encourage women to make their choice in favor of childbirth rather than abortion, and the provision of accurate information regarding abortion

and its alternatives is a reasonable and fair means of achieving that objective.

Third, the majority concludes that the informed-consent provisions are invalid because they "intrud[e] upon the discretion of the pregnant woman's physician," *ante*, at 762, violate "the privacy of the informed-consent dialogue between the woman and her physician," *ibid.*, and "officially structur[e]" that dialogue, *ante*, at 763. The provisions thus constitute "state medicine" that "infringes upon [the physician's] professional responsibilities." *Ibid.* This is nonsensical. I can concede that the Constitution extends its protection to certain zones of personal autonomy and privacy, see *Griswold* v. *Connecticut*, 381 U. S., at 502 (WHITE, J., concurring in judgment), and I can understand, if not share, the notion that that protection may extend to a woman's decision regarding abortion. But I cannot concede the possibility that the Constitution provides more than minimal protection for the manner in which a physician practices his or her profession or for the "dialogues" in which he or she chooses to participate in the course of treating patients. I had thought it clear that regulation of the practice of medicine, like regulation of other professions and of economic affairs generally, was a matter peculiarly within the competence of legislatures, and that such regulation was subject to review only for rationality. See, *e. g.*, *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483 (1955).

Were the Court serious about the need for strict scrutiny of regulations that infringe on the "judgment" of medical professionals, "structure" their relations with their patients, and amount to "state medicine," there is no telling how many state and federal statutes (not to mention principles of state tort law) governing the practice of medicine might be condemned. And of course, there would be no reason why a concern for professional freedom could be confined to the medical profession: nothing in the Constitution indicates a preference for the liberty of doctors over that of lawyers,

accountants, bakers, or brickmakers. Accordingly, if the State may not "structure" the dialogue between doctor and patient, it should also follow that the State may not, for example, require attorneys to disclose to their clients information concerning the risks of representing the client in a particular proceeding. Of course, we upheld such disclosure requirements only last Term. See *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. 626 (1985).

The rationale for state efforts to regulate the practice of a profession or vocation is simple: the government is entitled not to trust members of a profession to police themselves, and accordingly the legislature may for the most part impose such restrictions on the practice of a profession or business as it may find necessary to the protection of the public. This is precisely the rationale for infringing the professional freedom of doctors by imposing disclosure requirements upon them: "Respect for the patient's right of self-determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves." *Canterbury* v. *Spence*, 150 U. S. App. D. C., at 275, 464 F. 2d, at 784. Unless one is willing to recast entirely the law with respect to the legitimacy of state regulation of professional conduct, the obvious rationality of the policy of promoting informed patient choice on the subject of abortion must defeat any claim that the disclosure requirements imposed by Pennsylvania are invalid because they infringe on "professional freedom" or on the "physician-patient relationship."

I do not really believe that the Court's invocation of professional freedom signals a retreat from the principle that the Constitution is largely unconcerned with the substantive aspects of governmental regulation of professional and business relations. Clearly, the majority is uninterested in undermining the edifice of post-New Deal constitutional law by extending its holding to cases that do not concern the issue of abortion. But if one assumes, as I do, that the majority

is unwilling to commit itself to the implications of that part of its rhetoric which smacks of economic due process rights for physicians, it becomes obvious that the talk of "infringement of professional responsibility" is mere window dressing for a holding that must stand or fall on other grounds. And because the informed-consent provisions do not infringe the essential right at issue—the right of the woman to choose to have an abortion—the majority's conclusion that the provisions are unconstitutional is without foundation.

B

The majority's decision to strike down the reporting requirements of the statute is equally extraordinary. The requirements obviously serve legitimate purposes. The information contained in the reports is highly relevant to the State's efforts to enforce § 3210(a) of the statute, which forbids abortion of viable fetuses except when necessary to the mother's health. The information concerning complications plainly serves the legitimate goal of advancing the state of medical knowledge concerning maternal and fetal health. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S., at 80. Given that the subject of abortion is a matter of considerable public interest and debate (constrained to some extent, of course, by the pre-emptive effect of this Court's ill-conceived constitutional decisions), the collection and dissemination of demographic information concerning abortions is clearly a legitimate goal of public policy. Moreover, there is little reason to believe that the required reports, though fairly detailed, would impose an undue burden on physicians and impede the ability of their patients to obtain abortions, as all of the information required would necessarily be readily available to a physician who had performed an abortion. Accordingly, under this Court's prior decisions in this area, the reporting requirements are constitutional. *Planned Parenthood Assn. of Kansas City, Missouri, Inc.* v. *Ashcroft*, 462 U. S. 476, 486–490 (1983) (opinion of POW-

ELL, J.); *id.*, at 505 (opinion of O'CONNOR, J.); *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, at 79–81.

Nonetheless, the majority strikes down the reporting requirements because it finds that notwithstanding the explicit statutory command that the reports be made public only in a manner ensuring anonymity, "the amount of information about [the patient] and the circumstances under which she had an abortion are so detailed that identification is likely," *ante*, at 767, and that "[i]dentification is the obvious purpose of these extreme reporting requirements," *ibid.* Where these "findings" come from is mysterious, to say the least. The Court of Appeals did not make any such findings on the record before it, and the District Court expressly found that "the requirements of confidentiality in § 3214(e) regarding the identity of both patient and physician prevent any invasion of privacy which could present a legally significant burden on the abortion decision." 552 F. Supp. 791, 804 (ED Pa. 1982). Rather than pointing to anything in the record that demonstrates that the District Court's conclusion is erroneous, the majority resorts to the handy, but mistaken, solution of substituting its own view of the facts and strikes down the statute.

I can accept the proposition that a statute whose purpose and effect are to allow harassment and intimidation of citizens for their constitutionally protected conduct is unconstitutional, but the majority's action in striking down the Pennsylvania statute on this basis is procedurally and substantively indefensible. First, it reflects a complete disregard for the principle, embodied in Federal Rule of Civil Procedure 52(a), that an appellate court must defer to a trial court's findings of facts unless those findings are clearly erroneous. The Rule is expressly applicable to findings of fact that constitute the grounds for a district court's action granting or refusing a preliminary injunction, and, of course, the Rule limits this Court to the same degree as it does any other

federal appellate court, see *United States* v. *General Dynamics Corp.*, 415 U. S. 486 (1974).

Second, the majority has seriously erred in purporting to make a final determination of fact, conclusive of the constitutionality of the statute, on a motion for preliminary injunction. In so doing, the Court overlooks the principle that although a district court's findings of fact on a motion for a preliminary injunction are entitled to deference on appeal from the grant or denial of preliminary relief, "the findings of fact . . . made by a court granting a preliminary injunction are *not* binding at trial on the merits" because "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *University of Texas* v. *Camenisch*, 451 U. S. 390, 395 (1981) (emphasis added). What *Camenisch* stated to be true customarily is also true in this case: the record on which the motion for preliminary injunction was decided in the trial court consisted solely of affidavits and a stipulation of undisputed facts, none of which provides a sufficient basis for a conclusive finding on the complex question of the motive and effect of the reporting requirements and the adequacy of the statute's protection of the anonymity of doctors and patients. Issuing what amounts to a final declaratory judgment on the constitutionality of the statute under these circumstances is highly inappropriate.

Finally, in addition to being procedurally flawed, the majority's holding is substantively suspect. The information contained in the reports identifies the patient on the basis of age, race, marital status, and "political subdivision" of residence; the remainder of the information included in the reports concerns the medical aspects of the abortion. It is implausible that a particular patient could be identified on the basis of the combination of the general identifying information and the specific medical information in these reports by anyone who did not already know (at a minimum) that the woman had been pregnant and obtained an abortion.

Accordingly, the provisions pose little or no threat to the woman's privacy.

In sum, there is no basis here even for a preliminary injunction against the reporting provisions of the statute, much less for a final determination that the provisions are unconstitutional.

C

The majority resorts to linguistic nit-picking in striking down the provision requiring physicians aborting viable fetuses to use the method of abortion most likely to result in fetal survival unless that method would pose a "significantly greater medical risk to the life or health of the pregnant woman" than would other available methods. The majority concludes that the statute's use of the word "significantly" indicates that the statute represents an unlawful "trade-off" between the woman's health and the chance of fetal survival. Not only is this conclusion based on a wholly unreasonable interpretation of the statute, but the statute would also be constitutional even if it meant what the majority says it means.

The majority adopts the Court of Appeals' view that the statute's use of the term "significantly" renders it "'not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus.'" *Ante*, at 769 (quoting 737 F. 2d 283, 300 (CA3 1984)). The term "significant" in this context, however, is most naturally read as synonymous with the terms "meaningful," "cognizable," "appreciable," or "nonnegligible." That is, the statute requires only that the risk be a real and identifiable one. Surely, if the State's interest in preserving the life of a viable fetus is, as *Roe* purported to recognize, a compelling one, the State is at the very least entitled to demand that that interest not be subordinated to a purported maternal health risk that is in fact wholly insubstantial. The statute, on its face, demands no more than this of a doctor performing an abortion of a viable fetus.

Even if the Pennsylvania statute is properly interpreted as requiring a pregnant woman seeking abortion of a viable fetus to endure a method of abortion chosen to protect the health of the fetus despite the existence of an alternative that in some substantial degree is more protective of her own health, I am not convinced that the statute is unconstitutional. The Court seems to read its earlier opinion in *Colautti* v. *Franklin*, 439 U. S. 379 (1979), as incorporating a *holding* that trade-offs between the health of the pregnant woman and the survival of her viable fetus are constitutionally impermissible under *Roe* v. *Wade*. Of course, *Colautti* held no such thing: the Court there stated only that it did not address the "serious ethical and constitutional difficulties" that such a trade-off would present. 439 U. S., at 400.[6] Nothing in *Colautti* or any of the Court's previous abortion decisions compels the *per se* "trade-off" rule the Court adopts today.

The Court's ruling in this respect is not even *consistent* with its decision in *Roe* v. *Wade*. In *Roe*, the Court conceded that the State's interest in preserving the life of a viable fetus is a compelling one, and the Court has never disavowed that concession. The Court now holds that this compelling interest cannot justify *any* regulation that imposes a quantifiable medical risk upon the pregnant woman who seeks to abort a viable fetus: if attempting to save the fetus imposes any additional risk of injury to the woman, she must be permitted to kill it. This holding hardly accords with the usual understanding of the term "compelling interest," which we have used to describe those governmental interests that are so weighty as to justify substantial and ordinarily impermissible impositions on the individual—impositions that, I had thought, could include the infliction of

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[6] Interestingly, the Court's statement seems to have assumed that the Court would have had the same authority over "ethical questions" as "constitutional issues" had it chosen to reach them—an illuminating revelation of the state of the Court's jurisprudence in this area.

some degree of risk of physical harm. The most obvious illustration of this principle may be found in the opinion of the elder Justice Harlan in *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29 (1905): "The liberty secured by the Fourteenth Amendment . . . consists, in part, in the right of a person 'to live and work where he will,' *Allgeyer* v. *Louisiana*, 165 U. S. 578; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, . . . to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense." The actual holding of *Jacobson* provides another illustration, more pertinent to this particular case: the Court there sustained a regulation requiring all adult citizens of Cambridge, Massachusetts, to be vaccinated against smallpox, notwithstanding that exposure to vaccination carried with it a statistical possibility of serious illness and even death. If, as I believe these examples demonstrate, a compelling state interest may justify the imposition of some physical danger upon an individual, and if, as the Court has held, the State has a compelling interest in the preservation of the life of a viable fetus, I find the majority's unwillingness to tolerate the imposition of *any* nonnegligible risk of injury to a pregnant woman in order to protect the life of her viable fetus in the course of an abortion baffling.

The Court's ruling today that any trade-off between the woman's health and fetal survival is impermissible is not only inconsistent with *Roe*'s recognition of a compelling state interest in viable fetal life; it directly contradicts one of the essential holdings of *Roe*—that is, that the State may forbid *all* postviability abortions except when *necessary* to protect the life or health of the pregnant woman. As is evident, this holding itself involves a trade-off between maternal health and protection of the fetus, for it plainly permits the State to forbid a postviability abortion even when such an abortion may be statistically safer than carrying the pregnancy to

term, provided that the abortion is not medically necessary.[7] The trade-off contained in the Pennsylvania statute, even as interpreted by the majority, is no different in kind: the State has simply required that when an abortion of some kind is medically necessary, it shall be conducted so as to spare the fetus (to the greatest degree possible) unless a method less protective of the fetus is itself to some degree medically necessary for the woman. That this choice may involve the imposition of some risk on the woman undergoing the abortion should be no more troublesome than that a prohibition on nonnecessary postviability abortions may involve the imposition of some risk on women who are thereby forced to continue their pregnancies to term; yet for some reason, the Court concludes that whereas the trade-offs it devises are compelled by the Constitution, the essentially indistinguishable trade-off the State has attempted is foreclosed. This cannot be the law.

The framework of rights and interests devised by the Court in *Roe* v. *Wade* indicates that just as a State may prohibit a postviability abortion unless it is necessary to protect the life or health of the woman, the State may require that postviability abortions be conducted using the method most protective of the fetus unless a less protective method is necessary to protect the life or health of the woman. Under this standard, the Pennsylvania statute—which does not require the woman to accept any significant health risks to protect the fetus—is plainly constitutional.

D

The Court strikes down the statute's second-physician requirement because, in its view, the existence of a medical emergency requiring an immediate abortion to save the life of the pregnant woman would not be a defense to a prosecution

[7] Surely it cannot be argued that any abortion that is safer than delivery is medically necessary, since under such a definition an abortion would be medically necessary in all pregnancies.

under the statute. The Court does not question the proposition, established in the *Ashcroft* case, that a second-physician requirement accompanied by an exception for emergencies is a permissible means of vindicating the compelling state interest in protecting the lives of viable fetuses. Accordingly, the majority's ruling on this issue does not on its face involve a substantial departure from the Court's previous decisions.

What is disturbing about the Court's opinion on this point is not the general principle on which it rests, but the manner in which that principle is applied. The Court brushes aside the fact that the section of the statute in which the second-physician requirement is imposed states that "[i]t shall be a complete defense to *any* charge brought against a physician for violating the requirements *of this section* that he had concluded, in good faith, in his best medical judgment, . . . that the abortion was necessary to preserve maternal life or health" (emphasis added). 18 Pa. Cons. Stat. § 3210(a) (1982). This language is obviously susceptible of the construction the State advances, namely, that it is a defense to a charge of violating the second-physician requirement that the physician performing the abortion believed that performing an abortion in the absence of a second physician was necessary to the life or health of the mother.

The Court's rejection of this construction is based on its conclusion that the statutory language "does not relate to the second-physician requirement" and that "its words are not words of emergency." *Ante*, at 771. This reasoning eludes me. The defense of medical necessity "relates" to any charge that a doctor has violated one of the requirements of the section in which it appears, and the second-physician requirement is imposed by that section. The defense thus quite evidently "relates" to the second-physician requirement. True, the "words" of the defense are not "words of emergency," but words of necessity. Why this should make a difference is unclear: a defense of medical necessity is fully as protective of the interests of the pregnant woman as a defense of

"emergency." The Court falls back, *ibid.*, on the notion that the legislature "knows how to provide a medical-emergency exception when it chooses to do so." No doubt. But the legislature obviously also "knows how" to provide a medical-necessity exception, and it has done so. Why this exception is insufficient is unexplained and inexplicable.

The Court's rejection of a perfectly plausible reading of the statute flies in the face of the principle—which until today I had thought applicable to abortion statutes as well as to other legislative enactments—that "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Planned Parenthood Assn. of Kansas City, Missouri, Inc.* v. *Ashcroft*, 462 U. S., at 493. The Court's reading is obviously based on an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs. Not sharing this viewpoint, I cannot accept the majority's conclusion that the statute does not provide for the equivalent of a defense of emergency.[8]

E

Finally, the majority refuses to vacate the preliminary injunction entered against the enforcement of the parental notice and consent provisions of the statute. See *ante*, at 758, n. 9. The reason offered is that the propriety of the injunction depends upon the adequacy of the rules, recently promulgated by the Pennsylvania Supreme Court, setting forth

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[8] Even if I were to accept the majority's conclusion that the medical-necessity defense of § 3210(a) is not specifically applicable to charges brought under § 3210(c), I would not strike down the statute. Under Pennsylvania criminal law, justification is a defense, see 18 Pa. Cons. Stat. § 502 (1982), and, under the general rule of justification, conduct is deemed justified if "the actor believes [it] to be necessary to avoid a harm or evil to . . . another," and "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged." § 503(a)(1). I have little doubt that a Pennsylvania court applying this statute would find noncompliance with the second-physician rule justified where necessary to save the life of the pregnant woman.

procedures by which a minor desiring an abortion may speedily and confidentially obtain either judicial approval of her decision to obtain an abortion or a judicial determination that she herself is capable of an informed consent to the procedure. The Court concludes that review of the rules is best carried out in the first instance in the District Court.

The Court's decision in *Ashcroft*, however, compels the conclusion that the Third Circuit erred in directing that the operation of the parental notice and consent provisions be enjoined pending promulgation of the required rules; accordingly, the injunction should be vacated irrespective of the adequacy of those rules. As the Court of Appeals apparently recognized, the Pennsylvania statute, on its face, is substantively identical to that upheld by the Court in *Ashcroft*; thus, the sole basis for the injunction ordered by the Court of Appeals was the absence of procedural rules implementing the statute. What the Court of Appeals failed to recognize was that this Court denied relief to the plaintiffs challenging the statute in *Ashcroft* despite the same purported defect: in that case, as in this, the State Supreme Court had not yet promulgated rules establishing the expedited procedures called for by the statute. Nonetheless, as JUSTICE POWELL's opinion explained, the plaintiffs were not entitled to any relief against enforcement of the statutory scheme, as "[t]here is no reason to believe that [the State] will not expedite any appeal consistent with the mandate in our prior opinions." 462 U. S., at 491, n. 16. Similarly, there was no reason here for the Court of Appeals to believe that Pennsylvania would not provide for the adequate, expedited procedures contemplated by the statute; thus, its entry of an injunction against enforcement of the statute was erroneous.

III

The decision today appears symptomatic of the Court's own insecurity over its handiwork in *Roe* v. *Wade* and the cases following that decision. Aware that in *Roe* it essen-

tially created something out of nothing and that there are many in this country who hold that decision to be basically illegitimate, the Court responds defensively. Perceiving, in a statute implementing the State's legitimate policy of preferring childbirth to abortion, a threat to or criticism of the decision in *Roe* v. *Wade*, the majority indiscriminately strikes down statutory provisions that in no way contravene the right recognized in *Roe*. I do not share the warped point of view of the majority, nor can I follow the tortuous path the majority treads in proceeding to strike down the statute before us. I dissent.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, dissenting.

This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 452 (1983) (O'CONNOR, J., dissenting). Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but—except when it comes to abortion—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it. See *Heckler* v. *Chaney*, 470 U. S. 821, 838 (1985); *id.*, at 839–840, n. 2 (BRENNAN, J., concurring) (differences over the validity of the death penalty under the Eighth Amendment should not influence the Court's consideration of a question of statutory administrative law). That the Court's unworkable scheme for constitutionalizing the regulation of abortion has had this institutionally debilitating effect should not be surprising, however, since the Court is not suited to the expansive role it

has claimed for itself in the series of cases that began with *Roe* v. *Wade*, 410 U. S. 113 (1973).

The Court today holds that "[t]he Court of Appeals correctly invalidated the specified provisions of Pennsylvania's 1982 Abortion Control Act." *Ante*, at 772. In so doing, the Court prematurely decides serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness. The constitutionality of the challenged provisions was not properly before the Court of Appeals, and is not properly before this Court. There has been no trial on the merits, and appellants have had no opportunity to develop facts that might have a bearing on the constitutionality of the statute. The only question properly before the Court is whether or not a preliminary injunction should have been issued to restrain enforcement of the challenged provisions pending trial on the merits. This Court's decisions in *Akron* v. *Akron Center for Reproductive Health*, *supra*, *Planned Parenthood Assn. of Kansas City, Missouri, Inc.* v. *Ashcroft*, 462 U. S. 476 (1983), and *Simopoulos* v. *Virginia*, 462 U. S. 506 (1983), do not establish a likelihood that appellees would succeed on the merits of their constitutional claims sufficient to warrant overturning the District Court's denial of a preliminary injunction. Under the approach to abortion regulation outlined in my dissenting opinion in *Akron*, to which I adhere, it is even clearer that no preliminary injunction should have issued. I therefore dissent.

I

The only issue before the District Court in this case was whether to grant appellees' motion for a preliminary injunction against enforcement of Pennsylvania's Abortion Control Act. The limited record before the District Court consisted of affidavits submitted by appellees, the parties' memoranda of law, the Act itself, including the findings of the Pennsylvania Legislature, and a stipulation of uncontested facts. As

the District Judge noted, this stipulation "was entered into solely for the purpose of the motion for preliminary injunction." 552 F. Supp. 791, 794, n. 1 (ED Pa. 1982). Indeed, the parties expressly provided that the stipulation should be "without prejudice to any party's right to controvert any facts or to prove any additional facts at any later proceeding in this action." App. 9a–10a. In light of the stipulation of uncontested facts, no testimony or evidence was submitted at the hearing on the motion for a preliminary injunction.

In these circumstances, the District Judge's consideration of the motion before him was governed by the black-letter law recapitulated in *University of Texas* v. *Camenisch*, 451 U. S. 390, 395 (1981):

> "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.
>
> "Should an expedited decision on the merits be appropriate, Rule 65(a)(2) of the Federal Rules of Civil Procedure provides a means of securing one. That Rule permits a court to 'order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.' Before such an order may issue, however, the courts have commonly required that 'the parties should normally receive clear and unambiguous notice [of

the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases'" (citations omitted).

The District Judge scrupulously adhered to these settled principles. He granted the preliminary injunction as to one provision of the Act, and denied preliminary relief as to all the other challenged provisions. Having seen no occasion to issue a Rule 65 order, he properly refrained from rendering final judgment on the merits by declaratory judgment or otherwise. That the District Judge understood the preliminary nature of the proceedings, and ruled accordingly, is incontrovertible:

"I have applied the traditional criteria applicable to a motion for preliminary injunction: likelihood of success on the merits, irreparable harm if the relief is not granted, possibility of harm to the non-moving pa. and where relevant, harm to the public. Given the importance of the right involved in this litigation, I have assumed that if the plaintiffs were able to show likelihood of success on the merits, then the irreparable harm requirement would be met. I conclude that in only one instance, the 24-hour waiting period, did the plaintiffs carry their burden of demonstrating likelihood of success on the merits.

. . . . .

"My adjudication is limited to the plaintiffs' request for a *preliminary* injunction. It is circumscribed by the record produced by the parties and the arguments advanced in the briefs on this motion. After applying the criteria for a preliminary injunction, I conclude that the only portion of the Act which the plaintiffs have demonstrated should be preliminarily enjoined is the 24-hour waiting period. In all other respects, the plaintiffs have failed to show a right to a preliminary injunction pending

the outcome of the trial on the merits." 552 F. Supp., at 811 (emphasis in original).

The District Judge correctly discerned that "[t]he traditional standard for granting a preliminary injunction requires a plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931 (1975). Unsurprisingly, the likelihood of success on the merits emerged, in the District Judge's view, as the most important factor in determining whether an injunction should issue in this case. In sum, when the District Judge denied appellees' motion for a preliminary injunction, he faithfully applied uncontroversial criteria for ruling on such motions and rendered a decision that "was not in any sense intended as a final decision as to the constitutionality of the challenged statute." *Brown* v. *Chote*, 411 U. S. 452, 456 (1973).

When the appeal was taken to the Court of Appeals for the Third Circuit, that court's review should have been limited to determining whether the District Court had abused its discretion in denying *preliminary* relief. *Doran*, *supra*, at 931–932; *Brown*, *supra*, at 457. If the Court of Appeals concluded that the District Court had committed legal errors that infected its assessment of the likelihood that appellees would succeed on the merits, the Court of Appeals should then have addressed the remaining factors that make up the preliminary injunction inquiry. If it concluded that denial of the preliminary injunction was an abuse of discretion, it should have entered judgment providing for entry of a preliminary injunction. What it should *not* have done, and what it did do, was to issue a final, binding declaration on the merits of appellees' constitutional claims.

The Court concedes that a court of appeals should ordinarily review the denial of a preliminary injunction under an abuse of discretion standard, and it concedes that a court of appeals should ordinarily confine itself to assessing the "probability that the plaintiffs would succeed on the merits."

Ante, at 755. But the Court purports to find an exception to this rule in the decisions in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952), and *Smith* v. *Vulcan Iron Works*, 165 U. S. 518 (1897). It asserts that these cases indicate that "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Ante*, at 757. The Court then announces that the requirement that appellate review proceed under the deferential abuse of discretion standard is "a rule of orderly judicial administration, not a limit on judicial power." *Ibid.* Postulating that the Court of Appeals had a "full record before it on the issues now before us," *ibid.*, the Court concludes that this "full record," and the fact that this Court's decisions in *Akron*, *Ashcroft*, and *Simopoulos* were handed down during the pendency of the appeal, justified the Court of Appeals "in proceeding to plenary review of those issues." *Ibid.*

This analysis mischaracterizes the proceedings in the District Court and is unsupported by precedent or logic. No one doubts that the legal premises on which the District Judge proceeded were reviewable. But the fact is that the District Judge did not make the final, definitive "ruling" on the merits the Court imputes to him. The only "ruling" the Court of Appeals had before it with respect to the merits was a determination of "likelihood of success" based on facts which were stipulated *only* for purposes of the preliminary injunction motion, and on arguments framed with a view toward only those facts. Nor was there a "full record" upon which the Court of Appeals could decide the merits. The Court falls into precisely the error pointed out in *Camenisch*, 451 U. S., at 394, where this Court unanimously rejected the proposition that determinations on the propriety of preliminary relief are "tantamount to decisions on the underlying merits," because that view "improperly equates 'likelihood of

success' with 'success,' and what is more important, . . . ignores the significant procedural differences between preliminary and permanent injunctions."

The Court of Appeals was convinced that the District Judge, in reliance on the decisions of the Courts of Appeals that were later reviewed in *Akron* and *Ashcroft*, had taken a view of the applicable law which this Court's decisions in those cases demonstrated to be erroneous. Citing *Apple Computer, Inc.* v. *Franklin Computer Corp.*, 714 F. 2d 1240, 1242 (CA3 1983), cert. dism'd under this Court's Rule 53, 464 U. S. 1033 (1984), the Court of Appeals stated that "[t]he customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law." 737 F. 2d 283, 290 (1984). *Apple Computer*, in turn, relied on Judge Friendly's opinion for the Second Circuit in *Donovan* v. *Bierwirth*, 680 F. 2d 263, 269 (1982), cert. denied, 459 U. S. 1069 (1982): "Despite oft repeated statements that the issuance of a preliminary injunction rests in the discretion of the trial judge whose decisions will be reversed only for 'abuse', a court of appeals must reverse if the district court has proceeded on the basis of an erroneous view of the applicable law, or of the standards governing the granting or denial of interlocutory relief" (citations omitted).

Donovan's reasoning, however, goes only to the *standard* of appellate review, not to the *extent* of the issues to be reviewed. Whether or not *Donovan*'s approach is sound, it is clear that a district court does not have discretion to rule on the basis of a misapprehension of controlling law. But even assuming *arguendo* that, where a court of appeals detects such an error, it may then engage in *de novo* review of the determination whether a preliminary injunction should issue, see 680 F. 2d, at 270, such discretion does not ordinarily extend to deciding the merits of the controversy with finality. Judge Friendly did no such thing in *Donovan*, *id.*,

at 276, nor did the Third Circuit in *Apple Computer*, see 714 F. 2d, at 1242.

What is at issue here is a matter of legal principle. As JUSTICE BLACKMUN has observed on a previous occasion: "The distinction between the preliminary and final injunction stages of a proceeding is more than mere formalism. The time pressures involved in a request for a preliminary injunction require courts to make determinations without the aid of full briefing or factual development, and make all such determinations necessarily provisional." *Firefighters* v. *Stotts*, 467 U. S. 561, 603–604, n. 7 (1984) (dissenting opinion). The holding of the Court today thus comes at the expense of the basic principle underlying the framework set out in *Camenisch* for ruling on a motion for a preliminary injunction: that fairness to the parties and reliable adjudication of disputes require final, binding rulings on the merits of a controversy to be made only after each side has had an opportunity to establish its version of the disputed facts or to establish that the facts are not in dispute.

Equally neglected by the Court is a second principle, closely related to the first:

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel* v. *Helvering*, 312 U. S. 552, 556 (1941).

See also *Singleton* v. *Wulff*, 428 U. S. 106, 120–121 (1976); cf. *Fountain* v. *Filson*, 336 U. S. 681, 683 (1949) *(per curiam)* (reversing a summary judgment order "made on appeal on a

new issue as to which the opposite party had no opportunity to present a defense before the trial court"). The cases on which the Court relies simply do not support the short shrift the Court gives these basic principles.

In *Youngstown Sheet & Tube Co.*, President Truman, invoking an immediate threat to the national defense precipitated by a threatened nationwide strike in the steel industry, ordered the Secretary of Commerce to seize the steel mills and keep them running. 343 U. S., at 583. The steel companies sought a declaratory judgment, a preliminary injunction, and a permanent injunction against the seizure, on the grounds that the President had no authority to order it. *Ibid.* Although the District Court had before it only "motions for temporary injunctions" when it ruled, 103 F. Supp. 569, 572 (DC 1952), "in the light of the facts presented, the District Court saw no reason for delaying decision of the constitutional validity of the orders." *Youngstown Sheet & Tube Co., supra*, at 585. Indeed, the District Court had "com[e] to a fixed conclusion . . . that defendant's acts are illegal. . . . Nothing that could be submitted at such trial on the facts would alter the legal conclusion I have reached." 103 F. Supp., at 576.

Thus, the District Court's preliminary injunction in *Youngstown Sheet & Tube Co.* rested on what amounted to a declaratory judgment that the orders were constitutionally invalid. That in itself was a pronounced departure from normal practice, although one that this Court found proper in the highly unusual circumstances presented in *Youngstown Sheet & Tube Co.*, where time was manifestly of the essence,* and there was no contention that the Government had been deprived of an opportunity to present facts that could have

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*The extraordinary importance of prompt resolution of the steel companies' claims is shown by the fact that this Court granted certiorari before judgment in the Court of Appeals three days after the District Court ruled, and set the case for argument nine days later, "[d]eeming it best that the issues raised be promptly decided by this Court." 343 U. S., at 584.

altered the resolution of the constitutional question. To the contrary, when "[p]laintiffs moved for a preliminary injunction before answer or hearing, [d]efendant opposed the motion, filing uncontroverted affidavits of Government officials describing the facts underlying the President's order." 343 U. S., at 678 (Vinson, C. J., dissenting).

Neither of the foregoing justifications for the District Court's unusual decision to reach the merits in *Youngstown Sheet & Tube* is present here. No emergency remotely comparable to the one in *Youngstown Sheet & Tube* confronted the Court of Appeals, which granted appellees' motion to enjoin enforcement of the entire Act pending appeal, and withheld judgment until after this Court had ruled in *Akron* and its companion cases. 737 F. 2d, at 290. Appellants conceded in the Court of Appeals that several provisions of the Abortion Act were unconstitutional in the wake of those decisions, but appellants did not concede that the provisions on which the Court of Appeals dispositively ruled were unconstitutional. Nor is there any suggestion that appellants conceded in the Court of Appeals that there were no factual issues that could have a bearing on the constitutionality of these provisions. Consequently, even if a preliminary injunction should have issued, the proper course would have been to remand for final determination of the merits.

Indeed, since *Youngstown Sheet & Tube Co.* was decided this Court has expressly reaffirmed that "a state statute should not be declared unconstitutional by a district court if a preliminary injunction is granted a plaintiff to protect his interests during the ensuing litigation." *Withrow* v. *Larkin*, 421 U. S. 35, 43 (1975). See *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310 (1940). If it is improper for a district court to enter such a declaratory judgment when it grants a preliminary injunction, then *a fortiori* it is improper for a court of appeals to do so when the district court has only appraised the likelihood of success on the merits. What happened here is even more extreme: the Court of Appeals, re-

viewing the *denial* of a preliminary injunction, held in the first instance that nothing that could be submitted at a trial on the merits would alter *its* conclusion that "most of the provisions attacked by appellants are unconstitutional as a matter of law." 737 F. 2d, at 287. Nothing in *Youngstown Sheet & Tube Co.* remotely suggests that it was proper for the Court of Appeals to take this extraordinary step. "*Camenisch* makes clear that a determination of a party's entitlement to a preliminary injunction is a separate issue from the determination of the merits of the party's underlying legal claim, and that a reviewing court should not confuse the two." *Stotts*, 467 U. S., at 603 (BLACKMUN, J., dissenting).

The Court strays even further afield when it invokes *Smith* v. *Vulcan Iron Works* in defense of the Court of Appeals' decision to reach and resolve the merits despite the fact that the District Court had not done so and without giving the parties "the benefit . . . of a full opportunity to present their cases." *Camenisch*, 451 U. S., at 396. The trial court in *Smith*, "upon a bill in equity for the infringement of a patent for an invention . . . entered an interlocutory decree, *adjudging that the patent was valid and had been infringed*, granting an injunction, and referring the case to a master to take an account of profits and damages." 165 U. S., at 518 (emphasis added). The defendant challenged the trial court's alleged "error in holding that the patent was valid, and that it had been infringed." *Ibid.* The Circuit Court of Appeals reversed the decree, rejecting the plaintiff's contention that it could rule only on "whether an injunction should be awarded." *Ibid.* This Court held that under the plain language of the statute conferring jurisdiction on the Circuit Court of Appeals, an appeal was authorized "from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues an injunction," and consequently the statute conferred "authority to consider and decide the case upon its merits." *Id.*, at 525. The trial court, of course, had already done precisely that, deciding the issue

of liability after the parties had joined issue on the merits, while referring the matter of damages to a master. Reliance on *Smith* in this case is therefore misplaced, for, to repeat, the District Court did not decide—and could not properly have decided—the merits of appellees' constitutional claims when it refused to grant a preliminary injunction.

The Court also seeks comfort in an analogy to the rule that a federal court need not abstain, pending state-court review, from reviewing a constitutional challenge to the validity of a state statute that is not fairly subject to an interpretation that will avoid the constitutional question. *Zwickler* v. *Koota*, 389 U. S. 241, 251, and n. 14 (1967). When a federal district court declines to abstain, however, it does not in so doing decide the merits of the constitutional question even if the parties have not had a full opportunity to air them. The court simply proceeds to decide the case in accordance with the normal procedural requirements that safeguard the parties' rights to be heard. A refusal to abstain therefore infringes neither the principle that final judgment should follow a full opportunity to be heard on the factual and legal merits of the case, nor the principle that "parties shall come to issue in the trial forum vested with authority to determine questions of fact." *Hormel*, 312 U. S., at 556. The same cannot be said of what the Court of Appeals did here.

Whatever the exceptions which would justify a district court in finally resolving an issue on the merits at the preliminary injunction stage, no such exception was applicable here. Nor is this a case in which the court of appeals was justified in resolving an issue not passed on in the district court because proper resolution was beyond any doubt or grave injustice might result from failure to do so. See *Singleton* v. *Wulff*, 428 U. S., at 121. The Court of Appeals not only decided to stand in the shoes of the District Court by ruling on an issue not passed upon below—it ruled on an issue on which, absent extraordinary circumstances, the District Court could not have ruled without "'clear and unambiguous

notice'" that would "'afford the parties a full opportunity to present their respective cases.'" *Camenisch, supra*, at 395. The Court attempts to veil the impropriety of its decision to affirm on the merits despite the procedural posture of this case by implying that the challenged provisions are patently unconstitutional. But this claim too is unsupported in this Court's decisions concerning state regulation of abortion.

The discretionary exception the Court fashions today will also prove vexatious to administer. Parties now face the risk that a final ruling on the merits will be entered against them by a court of appeals when an appeal is taken from the grant or denial of a motion for a preliminary injunction, although the district court made only an initial assessment of the likelihood that the moving party would succeed on the merits. It is predictable that parties will respond by attempting to turn preliminary injunction proceedings into contests over summary judgment or full-scale trials on the merits. That tendency will make the preliminary injunction less useful in serving its intended function of preserving the status quo pending final judgment on the merits, while making litigation more expensive, less reliable, and less fair. If this case did not involve state regulation of abortion, it may be doubted that the Court would entertain, let alone adopt, such a departure from its precedents.

II

In this Court, appellants argue that the judgment of the Court of Appeals should be vacated and the District Court's denial of a preliminary injunction sustained. Appellants have stated that they "intend to present to the District Court a complete factual record which . . . could affect the disposition of this case," and have indicated some of the specific factual propositions they would seek to establish. Brief for Appellants 44–48. At oral argument, counsel for appellants reiterated that, with the exception of the second-physician requirement, "there are additional justifications by way of

facts that we can offer" as to each of the challenged provisions. Tr. of Oral Arg. 13. These assertions alone would justify vacating the judgment of the Court of Appeals insofar as that court did more than direct the entry of a preliminary injunction. In *Singleton* v. *Wulff*, *supra*, at 120, for example, this Court reversed the Court of Appeals' decision to reach the merits of that case, even though this Court had "no idea what evidence, if any, petitioner would, or could, offer in defense of this statute," because it was clear that "petitioner has had no opportunity to proffer such evidence." I would apply that reasoning here even if I were not persuaded that as to several of the challenged provisions additional factual development—for example, facts concerning the costs associated with the reporting and informed consent provisions, and the extent of the problems Pennsylvania was seeking to correct—could affect the decision on the merits. Appellants should not have to prove that they are entitled to an opportunity to be heard.

Since it rendered "what amounts to a final declaratory judgment on the constitutionality of the statute," *ante*, at 806 (WHITE, J., dissenting), the Court of Appeals necessarily believed that in light of *Akron* and its companion cases appellees had established a sufficient likelihood of success on the merits to warrant issuance of a preliminary injunction. Pennsylvania contends that this ruling is erroneous even under the supervening decisions of this Court. In the alternative, Pennsylvania suggests that the facial constitutionality of the challenged provisions of its Abortion Act may be sustained on this record.

I agree with much of what JUSTICE WHITE has written in Part II of his dissenting opinion, and the arguments he has framed might well suffice to show that the provisions at issue are facially constitutional. Nonetheless, I believe the proper course is to decide this case as the Court of Appeals should have decided it, lest appellees suffer the very prejudice the Court sees fit to inflict on appellants. For me, then, the

question is not one of "success" but of the "likelihood of success." In addition, because Pennsylvania has not asked the Court to reconsider or overrule *Roe* v. *Wade*, 410 U. S. 113 (1973), I do not address that question.

I do, however, remain of the views expressed in my dissent in *Akron*, 462 U. S., at 459–466. The State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist "throughout pregnancy." *Id.*, at 461 (O'CONNOR, J., dissenting). Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests, with heightened scrutiny reserved for instances in which the State has imposed an "undue burden" on the abortion decision. *Id.*, at 461–463 (O'CONNOR, J., dissenting). An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree." *Id.*, at 464 (O'CONNOR, J., dissenting). And if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes "necessary to apply an exacting standard of review," *id.*, at 467 (O'CONNOR, J., dissenting), the possibility remains that the statute will withstand the stricter scrutiny. See *id.*, at 473–474 (O'CONNOR, J., dissenting); *Ashcroft*, 462 U. S., at 505 (O'CONNOR, J., concurring in judgment in part and dissenting in part).

These principles for evaluating state regulation of abortion were not newly minted in my dissenting opinion in *Akron*. Apart from *Roe*'s outmoded trimester framework, the "unduly burdensome" standard had been articulated and applied with fair consistency by this Court in cases such as *Harris* v. *McRae*, 448 U. S. 297, 314 (1980), *Maher* v. *Roe*, 432 U. S. 464, 473 (1977), *Beal* v. *Doe*, 432 U. S. 438, 446 (1977), and *Bellotti* v. *Baird*, 428 U. S. 132, 147 (1976). In *Akron* and

Ashcroft the Court, in my view, distorted and misapplied this standard, see *Akron*, 462 U. S., at 452–453 (O'CONNOR, J., dissenting), but made no clean break with precedent and indeed "follow[ed] this approach" in assessing some of the regulations before it in those cases. *Id.*, at 463 (O'CONNOR, J., dissenting).

The Court today goes well beyond mere distortion of the "unduly burdensome" standard. By holding that each of the challenged provisions is facially unconstitutional as a matter of law, and that no conceivable facts appellants might offer could alter this result, the Court appears to adopt as its new test a *per se* rule under which any regulation touching on abortion must be invalidated if it poses "an unacceptable danger of deterring the exercise of that right." *Ante*, at 767. Under this prophylactic test, it seems that the mere possibility that some women will be less likely to choose to have an abortion by virtue of the presence of a particular state regulation suffices to invalidate it. Simultaneously, the Court strains to discover "the anti-abortion character of the statute," *ante*, at 764, and, as JUSTICE WHITE points out, invents an unprecedented canon of construction under which "in cases involving abortion, a permissible reading of a statute is to be avoided at all costs." *Ante*, at 812 (dissenting). I shall not belabor the dangerous extravagance of this dual approach, because I hope it represents merely a temporary aberration rather than a portent of lasting change in settled principles of constitutional law. Suffice it to say that I dispute not only the wisdom but also the legitimacy of the Court's attempt to discredit and pre-empt state abortion regulation regardless of the interests it serves and the impact it has.

Under the "unduly burdensome" test, the District Judge's conclusion that appellees were not entitled to a preliminary injunction was clearly correct. Indeed, the District Judge applied essentially that test, after suggesting that no "meaningful distinction can be made between the plaintiffs' 'legally

significant burden' and defendants' 'undue burden.'" 552 F. Supp., at 796. I begin, as does the Court, with the Act's informed consent provisions.

The Court condemns some specific features of the informed consent provisions of § 3205, and issues a blanket condemnation of the provisions in their entirety as irrelevant or distressing in some cases and as intruding on the relationship between the woman and her physician. JUSTICE WHITE convincingly argues that none of the Court's general criticisms is appropriate, since the information is clearly relevant in many cases and is calculated to inform rather than intimidate, and since all informed consent requirements must, from the very rationale for their existence, intrude to some extent on the physician's discretion to be the sole judge of what his or her patient needs to know. The "parade of horribles" the Court invalidated in *Akron*, 462 U. S., at 445, is missing here. For example, § 3205(a)(iii) requires that the woman be informed, "when medically accurate", of the risks associated with a particular abortion procedure, and § 3205(a)(v) requires the physician to inform the woman of "[t]he medical risks associated with carrying her child to term." This is the kind of balanced information I would have thought all could agree is relevant to a woman's informed consent.

I do not dismiss the possibility that requiring the physician or counselor to read aloud the State's printed materials if the woman wishes access to them but cannot read raises First Amendment concerns. Even the requirement that women who can read be informed of the availability of those materials, and furnished with them on request, may create some possibility that the physician or counselor is being required to "communicate [the State's] ideology." *Akron*, *supra*, at 472, n. 16 (O'CONNOR, J., dissenting); see *Wooley* v. *Maynard*, 430 U. S. 705 (1977). Since the Court of Appeals did not reach appellees' First Amendment claim, and since appellees do not raise it here, I need not decide whether this potential problem would be sufficiently serious to warrant issuance of a

preliminary injunction as to those portions of § 3205 that incorporate the printed information provisions of § 3208. I note, however, that this is one of many points on which fuller factual development, including the actual contents of the printed materials, could affect resolution of the merits.

The Court singles out for specific criticism the required description, in the printed materials, of fetal characteristics at 2-week intervals. These materials, of course, will be shown to the woman only if she chooses to inspect them. If the materials were sufficiently inflammatory and inaccurate the fact that the woman must ask to see them would not necessarily preclude finding an undue burden, but there is no indication that this is true of the description of fetal characteristics the statute contemplates. Accordingly, I think it unlikely that appellees could succeed in making the threshold showing of an undue burden on this point, and the information is certainly rationally related to the State's interests in ensuring informed consent and in protecting potential human life. Similarly, I see little chance that appellees can establish that the abortion decision is unduly burdened by § 3205's requirements that the woman be informed of the availability of medical assistance benefits and of the father's legal responsibility. Here again, the information is indisputably relevant in many cases and would not appear to place a severe limitation on the abortion decision.

The Court's rationale for striking down the reporting requirements of § 3214, as JUSTICE WHITE shows, rests on an unsupported finding of fact by this Court to the effect that "[i]dentification is the obvious purpose of these extreme reporting requirements." *Ante*, at 767 (opinion of the Court). The Court's "finding," which is contrary to the preliminary finding of the District Judge that the statute's confidentiality requirements protected against any invasion of privacy that could burden the abortion decision, see 552 F. Supp., at 804, is simply another consequence of the Court's determination to prevent the parties from developing the facts. I do not

know whether JUSTICE WHITE is correct in stating that "the provisions pose little or no threat to the woman's privacy," *ante*, at 807 (dissenting), and I would leave that determination for the District Court, which can hear evidence on this point before making its findings. I do not, however, see a substantial threat of identification on the face of the statute, which does not require disclosure of the woman's identity to anyone, and which provides that reports shall be disclosed to the public only in "a form which will not lead to the disclosure of the identity of any person filing a report." § 3214(e)(2). I therefore conclude that the District Judge correctly ruled that appellees are unlikely to succeed in establishing an undue burden on the abortion decision stemming from the possibility of identification.

I fully agree with JUSTICE WHITE that the Court has misconstrued the intended meaning of § 3210(b)'s requirement that physicians employ the abortion method that is most likely to save the fetus unless, in the physician's good-faith judgment, that method "would present a significantly greater risk to the life or health of the pregnant woman." Since § 3210(b) can fairly be read to require "only that the risk be a real and identifiable one," *ante*, at 807 (WHITE, J., dissenting), there is little possibility that a woman's abortion decision will be unduly burdened by risks falling below that threshold. Accordingly, § 3210(b) should not be preliminarily enjoined, and I express no opinion as to the point at which a "trade-off" between the health of the woman and the survival of the fetus would rise to the level of an undue burden.

Since appellants and appellees agree that no further fact-finding is needed concerning appellees' challenge to § 3210(c)'s second-physician requirement, I am willing to assume that the merits of that challenge are properly before us. I have nothing to add to JUSTICE WHITE'S demonstration that this provision is constitutional under *Ashcroft* because the Act effectively provides for an exception making this requirement inapplicable in emergency situations. I likewise agree

with JUSTICE WHITE that the preliminary injunction entered against enforcement of the Act's parental notice and consent provisions should be vacated, since, as in *Ashcroft*, there is no reason here to believe that the State will not provide for the expedited procedures called for by its statute. See *Ashcroft*, 462 U. S., at 491, n. 16 (opinion of POWELL, J.). I add only that the Court's explanation for its refusal to follow *Ashcroft*—that the new rules "should be considered by the District Court in the first instance," *ante*, at 758, n. 9—does not square with its insistence on resolving the rest of this case without giving the District Court an opportunity to do so.

In my view, today's decision makes bad constitutional law and bad procedural law. The "'undesired and uncomfortable straitjacket'" in this case, *ante*, at 762, is not the one the Court purports to discover in Pennsylvania's statute; it is the one the Court has tailored for the 50 States. I respectfully dissent.

UNITED STATES *v.* MOTTAZ

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85-546. Argued April 22, 1986—Decided June 11, 1986

Respondent inherited interests in three Indian allotments, title to which was held in trust by the United States. In 1954, the Government sold the allotments to the United States Forest Service despite the lack of express consent from every person who held an interest in the allotments. In 1967, respondent expressed an interest to the Bureau of Indian Affairs in selling her inherited Indian lands, and the BIA provided her with a list of her allotment interests but did not mention the three allotments that had already been sold. In response to a specific inquiry in 1981, BIA informed respondent that the allotments had been sold. Respondent then filed suit against the United States in Federal District Court, claiming jurisdiction under, *inter alia*, the General Allotment Act of 1887 and the Tucker Act, and alleging that the sale of her interests was void. She sought damages equal to the current fair market value of her interests. The District Court ruled that her claims were barred by the general 6-year statute of limitations governing actions against the United States. The Court of Appeals reversed, holding that that statute does not bar claims of title to Indian allotments but that since the statute of limitations question depended on resolving several preliminary issues the case would be remanded to the District Court. The Court of Appeals denied the Government's petition for a rehearing wherein the Government claimed that the suit was barred, not by the general statute of limitations, but by the 12-year limitations period of the Quiet Title Act of 1972.

Held: Respondent's suit is "a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest," within the meaning of the Quiet Title Act, and therefore is barred by that Act's 12-year limitations period. Pp. 841-851.

(a) The relief respondent seeks confirms this characterization of her suit. What she seeks is a declaration that she alone possesses valid title to the interests in question and that the title the United States asserts is defective, and an order requiring the United States to pay her the value of her interests today in order properly to transfer title. The provision of the Quiet Title Act that it "does not apply to trust or restricted Indian lands" operates solely to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for

Indians. Thus, when the United States claims an interest in real property based on its status as trust or restricted Indian lands, the Quiet Title Act does not waive the United States' immunity. But when an Indian plaintiff challenges the United States' assertion of title in its own behalf, the Act applies. The limitations period is a central condition of the consent given by the Act. By 1967, at the very latest, respondent was on notice that the Government did not recognize her title to the allotments in question; this satisfied the provision of the Quiet Title Act that for purposes of the 12-year limitations period that commences on the date upon which the action accrued, an action shall be deemed to have accrued on the date the plaintiff "should have known" of the United States' claim. Pp. 841–844.

(b) Respondent cannot avoid the Quiet Title Act limitations period by using the General Allotment Act for a quiet title action against the Government. The General Allotment Act grants federal district courts jurisdiction over suits seeking the issuance of an allotment and suits involving an Indian's interests and rights in his allotment after he has acquired it. The Act's structure suggests that it waives the Government's immunity only with respect to the former class of suits. That federal courts may have general subject-matter jurisdiction over claims to quiet title to allotments brought by Indians does not therefore mean that the United States has waived its immunity in cases where an Indian challenges the United States' claim of title in its own right. To permit suits against the United States under the General Allotment Act would not only permit plaintiffs to avoid the Quiet Title Act's 12-year limitations period but also could disrupt ongoing federal programs. Pp. 844–848.

(c) Respondent's action does not fall within the scope of the Tucker Act, and thus her appeal to the Court of Appeals was proper. Pp. 848–851.

753 F. 2d 71, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Edwin S. Kneedler argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Wallace*, and *Davia C. Shilton*.

Derck Amerman argued the cause for respondent. With him on the brief was *Leonard A. Zolna, Jr.**

**John C. Christie, Jr.*, *J. William Hayton*, *Stephen J. Landes*, and *Lucinda O. McConathy* filed a brief for The American Land Title Association as *amicus curiae* urging reversal.

JUSTICE BLACKMUN delivered the opinion of the Court.

The question presented by this case is whether respondent's suit against the United States is time barred. In 1954, the Government sold respondent's interests in three Indian allotments to the United States Forest Service for inclusion in the Chippewa National Forest in Minnesota. Respondent claims that the sale was void. We hold that respondent's suit is an action "to adjudicate a disputed title to real property in which the United States claims an interest," within the meaning of the Quiet Title Act of 1972, 28 U. S. C. § 2409a(a), and therefore is barred by that Act's 12-year period of limitations. See 28 U. S. C. § 2409a(f).

I

In 1905, pursuant to the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.* (1982 ed. and Supp. II), and the Nelson Act of 1889, 25 Stat. 642, three Chippewa Indian ancestors of respondent Florence Blacketter Mottaz each received an 80-acre allotment on the Leech Lake Reservation in Cass County, Minn.[1] Title to each of these allotments was held in trust by the United States. Respondent eventually inherited a one-fifth interest in one of the allotments and a one-thirtieth interest in each of the other two.

In the early 1950's, some holders of fractional interests in Leech Lake allotments petitioned the Department of the Interior to permit them to sell their lands.[2] On April 30, 1953,

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Briefs of *amici curiae* urging affirmance were filed for the Navajo Tribe of Indians by *Paul E. Frye;* and for Katherine Nichols et al. by *Kim Jerome Gottschalk.*

[1] For a general discussion of the allotment program, see F. Cohen, Handbook of Federal Indian Law 612–632 (1982).

[2] By the Act of May 14, 1948, ch. 293, 62 Stat. 236, 25 U. S. C. § 483, the Secretary of the Interior "is authorized in his discretion, and upon application of the Indians owners . . . to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians."

the Department's Office of Indian Affairs sent respondent two forms, captioned "Consent to Sale of Inherited Lands." App. 42, 43.[3] Accompanying the forms was a letter which read in part:

> "As stated before, some of the owners have requested the sale of this land. Both land and timber, if any, have been appraised; and as soon as we get the consent to sell, an effort will be made to obtain a buyer by advertising for sale bids. This land will not be sold unless the high bid is equal to, or more than, the appraised value. If no reply is received from you within ten (10) days, it will be assumed that you have no objection to the sale." *Id.*, at 15.

The consent forms indicated that one of the allotments was appraised at $420.50 and the other at $605.75. Respondent neither replied to the letter nor returned the consent forms. In 1954, despite the lack of express consent from every person who held an interest in any of the three allotments, the Government sold them to the United States Forest Service.

Respondent visited the regional office of the Bureau of Indian Affairs in May 1967 and expressed an interest in selling her inherited Indian lands. Later that month, the realty officer sent her a letter informing her of her allotment interests. The letter did not mention the Leech Lake allotments. *Id.*, at 17. Respondent in 1981 again requested a list of her interests. In its reply, the Bureau set forth the allotments currently held in trust for her and, in addition, noted that she once had held interests in the Leech Lake allotments which had been sold by the Secretary as part of the so-called "Secretarial Transfer" program. *Id.*, at 44–45.[4]

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[3] No contemporaneous document concerning the third allotment appears in the record.

[4] In the late 1970's, the Bureau sought to identify potential land claims that might be affected by the statute of limitations set forth in 28 U. S. C. § 2415 (1982 ed. and Supp. II), which pertains, among other things, to certain contract and tort actions brought by the United States on behalf of

II

In 1981, respondent filed suit against the United States in the Federal District Court for the District of Minnesota. She claimed jurisdiction under 25 U. S. C. § 345, 28 U. S. C. §§ 1331, 1346, 1353, and 2415, and the Fifth Amendment. App. 7. She alleged that the sales of her three Leech Lake allotments "made without [her] consent or permission . . . were, therefore, illegal sales and transfers and are void." *Id.*, at 8. In addition, respondent raised four other claims regarding the sale: that the United States had breached its fiduciary duty in selling lands held in trust for her without first obtaining her consent; that the United States had acted negligently in selling her lands; that she had been deprived of property without due process; and that her property had been taken for public use without just compensation. *Id.*, at 10. Respondent also sought to represent both a nationwide and a Minnesota-based class of similarly situated Indian claimants. *Id.*, at 8–9.

Respondent originally sought either "[d]amages in a monetary sum equal to the current fair market value of each parcel illegally transferred" or "rescission of the illegal sale or transfer and the vesting of title of each individual parcel in the names of the appropriate descendants, heirs and assigns." *Id.*, at 10. After a preliminary hearing, she voluntarily dismissed, without prejudice, her claim requesting rescission. *Id.*, at 12.

The District Court ruled that respondent's claims were barred by 28 U. S. C. § 2401(a), the general statute of limitations governing actions against the United States. That sec-

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Indians. (In 1982, § 2415 was amended to apply, as well, to contract and tort claims brought by individual Indians and tribes.) The Bureau identified as "Secretarial transfers" those sales made without the consent of all the heirs. See H. R. Rep. No. 97-954, p. 7 (1982); see generally *County of Oneida* v. *Oneida Indian Nation*, 470 U. S. 226, 242–243 (1985) (discussing § 2415 claims).

tion provides, in pertinent part, that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The court held that respondent's cause of action first accrued when she learned of the sale of the lands. Since respondent's deposition "clearly reveal[ed] that she had knowledge of the sale in 1954," App. to Pet. for Cert. 10a, her suit, filed 27 years after the sale, was barred.[5]

The Court of Appeals reversed and remanded. 753 F. 2d 71 (CA8 1985). While it recognized that respondent's complaint was somewhat opaque, it rejected the Government's claim that respondent was seeking, not simply to establish title to the allotments, but also to obtain damages for alleged negligence and breach of fiduciary duty: the complaint "must be read as raising the one essential claim that her land was sold without her consent, that she did not receive payment for her land, and that accordingly the sale was void and she retains title to the land." *Id.*, at 75. The claim for damages equal to the current fair market value of the land "must be construed as equivalent to a claim for return of the land itself." *Ibid.*

The Court of Appeals ruled that such a claim could not be time barred. This Court in *Ewert* v. *Bluejacket*, 259 U. S. 129 (1922), had held that the sale of an allotment to a Government agent in violation of federal law is "'void and confers no

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[5] The District Court also rejected respondent's arguments that § 2401(a) does not apply to suits by Indians for breach of fiduciary duties, and that § 2415's special provisions dealing with Indian land claims override the general statute of limitations established by § 2401(a). With respect to the former claim, the court stated: "By its very terms 28 U. S. C. § 2401(a) applies to '*every civil action commenced against the United States*. . . .'" App. to Pet. for Cert. 10a (emphasis in District Court opinion). With respect to the latter claim, the court held that § 2415 "applies to actions brought *on behalf of* a recognized tribe or individual Indian" by the United States (emphasis in original). App. to Pet. for Cert. 10a. It does not, however, "permit claims *against* the United States." *Id.*, at 10a–11a (emphasis in original).

right upon the wrongdoer,'" *id.*, at 138, quoting *Waskey* v. *Hammer*, 223 U. S. 85, 94 (1912), and had refused to apply principles of laches to bar the Indians' claim against Ewert. Although *Ewert* v. *Bluejacket* did not consider whether federal statutes of limitations apply to land claims brought by Indian allottees, the Court of Appeals found that § 2401(a) "does not bar claims of title to allotments because *Ewert* is based on the principle that, if the underlying sale of land is void, the concept that a cause of action 'accrues' at some point is inapplicable because the allottee simply retains title all along." 753 F. 2d, at 74.

Thus, the Court of Appeals concluded that the statute of limitations question depended on the resolution of several preliminary issues. It therefore remanded the case to the District Court to determine whether the Secretary lacked the authority in 1954 to sell respondent's lands without her consent, and, if such a sale would have been unauthorized, whether respondent either had consented or had actually received payment following the sale, in which case her consent could be inferred. If respondent proved on remand that the sale was illegal, then, "[i]n light of the land's inclusion within the Chippewa National Forest and the thirty years which have passed since the sale, . . . she may force the government to pay her the fair market value of the land rather than to simply return the land itself." *Id.*, at 75.

The Government petitioned for rehearing and rehearing en banc. In its petition, the Government claimed, apparently for the first time, that respondent's suit to recover land currently held by the United States was barred, not by the general 6-year statute of limitations in § 2401(a), but rather by the 12-year limitations period established by the Quiet Title Act. 2 Record 16. In addition, the Government argued that the Court of Appeals' holding that respondent could compel the United States to pay her the fair market value of her property involved relief "of the type typically provided by the Tucker Act," *ibid.*, but a Tucker Act claim would

clearly be barred by the 6-year statute of limitations. The Court of Appeals denied the Government's petition. App. to Pet. for Cert. 13a. Because of the importance of the issue, we granted certiorari to consider whether respondent's claim was barred under either § 2401(a) or § 2409a(f), the limitations provision governing Quiet Title Act claims. 474 U. S. 994 (1985).

III

When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction. *United States* v. *Sherwood*, 312 U. S. 584, 586 (1941). In particular, "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity." *Block* v. *North Dakota*, 461 U. S. 273, 287 (1983). Neither the District Court nor the Court of Appeals discussed the precise source of its jurisdiction, and the parties at various times before this Court have identified the jurisdictional basis of respondent's suit as the Quiet Title Act, 28 U. S. C. §§ 1346(f) and 2409a; the Allotment Acts, 25 U. S. C. § 345 and 28 U. S. C. § 1353; and the Tucker Act, 28 U. S. C. § 1346(a)(2). Thus, we must decide which, if any, of these statutes conferred jurisdiction on the District Court and the Court of Appeals, and then determine whether respondent's suit was brought within the relevant limitations period.

A

In *Block* v. *North Dakota*, 461 U. S., at 286, this Court held that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." Here, respondent contests the United States' claim that it acquired title to the allotments in 1954. We think that respondent's suit falls within the scope of the Quiet Title Act, 28 U. S. C. § 2409a(a), which governs "civil action[s] . . . to adjudicate a disputed title to real property in which the United States

claims an interest." Respondent's description of her claim clearly brings it within the Act's scope:

> "At no time in this proceeding did respondent drop her claim for title. To the contrary, the claim for title is the essence and bottom line of respondent's case. Her position is simply that the land remains in the name of Mottaz and the other heirs of the property despite what some pieces of paper executed by petitioner without her consent and without a court hearing purport to do." Brief for Respondent 3.

See also 753 F. 2d, at 74, 75. The relief respondent seeks confirms this characterization of her suit. Respondent does not seek recovery of her share of the proceeds realized by the United States from the 1954 sale but allegedly never distributed. A claim for monetary damages in that amount would involve a concession that title had passed to the United States Forest Service in 1954 and that the sole issue was whether respondent was fairly compensated for the taking of her interests in the allotments. Rather, respondent demands damages in the amount of the *current* fair market value of her interests. What respondent seeks is a declaration that she alone possesses valid title to her interests in the allotments and that the title asserted by the United States is defective, and an order requiring the United States to pay her the value of her interest today in order properly to transfer title.

Nonetheless, respondent claims that her suit is not governed by the Quiet Title Act because, by its own terms, that Act "does not apply to trust or restricted Indian lands," § 2409a(a), such as the lands in which she asserts an interest. Respondent misconstrues this exclusion, which operates solely to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians. See, *e. g.*, S. Rep. No. 92–575, p. 6 (1971); H. R. Rep. No. 92–1559, p. 13 (1972); Dispute of Titles on Public Lands, Hearing on S. 216, S. 579, and S. 721

before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., 19 (1971). Thus, when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity.[6] Here, however, the United States claims an interest in the Leech Lake lands, not on behalf of Indian beneficiaries of a trust, but rather on behalf of the United States Forest Service and the Chippewa National Forest. Thus, the Act provides the United States' consent to suit concerning its claim to these lands, provided, of course, that the plaintiff challenging the Government's title meets the conditions attached to the United States' waiver of immunity.

The limitations period is a central condition of the consent given by the Act. See, *e. g.*, *Block*, 461 U. S., at 283–285; H. R. Rep. No. 92–1559, *supra*, at 5, 7–8. The Act provides:

> "Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it is accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U. S. C. § 2409a(f).

The District Court expressly found that respondent knew of the sale in 1954. Moreover, the list of interests provided to respondent by the Bureau of Indian Affairs in 1967 did not include any of the three Leech Lake allotments. Thus, by

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[6] In urging that such an exemption be included in the Quiet Title Act, the Solicitor for the Department of the Interior noted that excluding suits against the United States seeking title to lands held by the United States in trust for Indians was necessary to prevent abridgment of "solemn obligations" and "specific commitments" that the Federal Government had made to the Indians regarding Indian lands. A unilateral waiver of the Federal Government's immunity would subject those lands to suit without the Indians' consent. See H. R. Rep. No. 92–1559, p. 13 (1972).

1967, at the very latest, respondent was on notice that the Government did not recognize her title to the allotments. Whether respondent actually knew that the allotments had been included within the Chippewa National Forest and thus were claimed by the United States, her undisputed knowledge that the Government no longer recognized *her* as having a valid claim to the allotments satisfies the "should have known" prong of § 2409a(f)'s accrual test.[7] Her claim is therefore barred.

B

Respondent, however, seeks to avoid the carefully crafted limitations of the Quiet Title Act by characterizing her suit as a claim for an allotment under the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.* (1982 ed. and Supp. II). That Act grants jurisdiction to the district courts over suits "involving the right . . . to any allotment." 25 U. S. C. § 345.[8] Respondent claims that the

[7] Our finding that respondent's cause of action accrued more than 12 years prior to her filing suit does *not* rest on the fact that the letter sent by the Government in 1953 informed respondent that the failure to reply within 10 days would be deemed a consent to the sale. That letter expressly noted that the land would be sold only if a bid of at least its appraised value were received. App. 15. It therefore was entirely possible that no sale would occur even if respondent expressly had consented to the sale. Respondent's cause of action accrued only because she in fact knew that a sale had been completed and knew, or should have known, that the Government was the purchaser.

[8] Title 25 U. S. C. § 345 reads in full:

"All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment

general 6-year statute of limitations governing all civil actions against the Government, 28 U. S. C. § 2401(a), does not apply to cases brought under the General Allotment Act, and that her claim therefore cannot be time barred. We need not reach the question whether § 2401(a) applies to claims brought under § 345 of the General Allotment Act, and, if it does, when a cause of action begins to run, since we conclude that respondent cannot use § 345 for a quiet title action against the Government.

Section 345 grants federal district courts jurisdiction over two types of cases: (i) proceedings "involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty," and (ii) proceedings "in relation to" the claimed right of a person of Indian descent to land that was once allotted. Section 345 thus contemplates two types of suits involving allotments: suits seeking the issuance of an allotment, see, *e. g.*, *Arenas* v. *United States*, 322 U. S. 419 (1944), and suits involving "'the interests and rights of the Indian in his allotment or patent after he has acquired it,'" *Scholder* v. *United States*, 428 F. 2d 1123, 1129 (CA9), cert. denied, 400 U. S. 942 (1970), quoting *United States* v. *Pierce*, 235 F. 2d 885, 889 (CA9 1956).

The structure of § 345 strongly suggests, however, that § 345 itself waives the Government's immunity only with respect to the former class of cases: those seeking an original

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of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases."

A corresponding provision governing district court jurisdiction appears in 28 U. S. C. § 1353. Respondent invoked jurisdiction under both § 345 and § 1353 in her complaint. App. 7.

allotment. In those suits, § 345 provides that "the parties thereto *shall be* the claimant as plaintiff and the United States as party defendant" (emphasis added), while, as to the latter class of cases, no mention of the United States' participation is made.[9] Accordingly, in *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972), this Court held that, to the extent that § 345 involves a waiver of federal immunity, as opposed to a grant of subject-matter jurisdiction to the district courts, that section "authorizes, and provides governmental consent for, only actions *for* allotments." 406 U. S., at 142 (emphasis added). See also *Naganab* v. *Hitchcock*, 202 U. S. 473 (1906) (sovereign immunity precludes suit against United States regarding disposition of Indian lands).

That federal courts may have general subject-matter jurisdiction over claims to quiet title to allotments brought by Indians, see n. 9, *supra*, does not therefore mean that the United States has waived its immunity in cases where an Indian challenges the United States' claim of title in its own right. As the Court already has noted, Congress intended the Quiet Title Act "to provide the exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Block*, 461 U. S., at 286. In *Block*, the State of North Dakota sued the federal officers responsible for supervising a riverbed within the State which both the State and the Federal Government claimed to own and

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[9] In fact, § 345 has been used by Indians to sue parties other than the United States to quiet title to land originally given under various allotment schemes. See, *e. g.*, *Begay* v. *Albers*, 721 F. 2d 1274 (CA10 1983); *Vicenti* v. *United States*, 470 F. 2d 845 (CA10 1972), cert. dism'd, 414 U. S. 1057 (1973) (plaintiffs sought recovery of title from private parties; suit against the United States for damages held barred by sovereign immunity). To hold that in *all* cases brought under § 345 the United States must be named as a party defendant would restrict the access to federal courts afforded Indians raising claims or defenses involving their land entitlements because the United States would obviously not be a proper party in many private disputes that relate to land claims originally granted by various Allotment Acts.

sought an injunction barring them from exercising privileges of ownership over the bed. The Court held that such an "officer's suit" was precluded since it would circumvent the "carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest." *Id.*, at 284–285. To permit challenges to the Government's claim of title to be brought under other jurisdictional provisions might mean that "the QTA's 12-year statute of limitations, the one point on which the Executive Branch was most insistent, could be avoided, and, contrary to the wish of Congress, an unlimited number of suits involving stale claims might be instituted." *Id.*, at 285. Moreover, to permit officer's suits might thwart Congress' determination that the Government be given the option of paying just compensation and thereby keeping land even after an adverse judgment, see § 2409a(b), in order to avoid disruption of ongoing federal activities involving the disputed property. 461 U. S., at 285.

To permit suits against the United States under the General Allotment Act poses similar dangers. Not only could it permit plaintiffs to avoid the Quiet Title Act's 12-year statute of limitations, but it could also seriously disrupt ongoing federal programs. The remedial clause of the General Allotment Act provides that a judgment in favor of an Indian claimant "shall have the same effect . . . as if such allotment had been allowed and approved by [the Secretary of the Interior]." 25 U. S. C. § 345. Thus, if plaintiffs were permitted to sue under the General Allotment Act, they would be entitled to actual possession of the challenged property. This would pose precisely the threat to ongoing federal activities on the property that the Quiet Title Act was intended to avoid. That the plaintiff in this case claims the right to elect a remedy that would not require the Government to relinquish its possession of the disputed lands is irrelevant: the Quiet Title Act expressly gives that choice to the Government, not the claimant. 28 U. S. C. § 2409a(b). In light of Congress' purposes in enacting the Quiet Title Act, we can-

not conclude that Congress intended to permit persons in respondent's position to avoid that Act's strictures.[10]

C

At oral argument, respondent claimed that her case is based solely on the General Allotment Act. See Tr. of Oral Arg. 23, 26. Nevertheless, at various times during this litigation, both parties have identified the Tucker Act as providing a source of federal jurisdiction over respondent's claims. Although respondent and the Government apparently agree that a suit based on the Tucker Act would be barred by the general 6-year statute of limitations, 28 U. S. C. § 2401(a), we must address the possibility that the District Court's jurisdiction rested on the Tucker Act because, if it did, the Court of Appeals for the Eighth Circuit may have lacked jurisdiction over respondent's appeal.[11]

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[10] The Indian Claims Limitation Act of 1982, 96 Stat. 1976, which amended 28 U. S. C. § 2415(a), essentially tolls—for a time—the general 6-year statute of limitations for many damages actions that may be brought *by* the Federal Government on behalf of Indians. Respondent claims that § 2415 also shows that Congress did not intend the general 6-year statute of limitations for damages actions brought *against* the Federal Government, 28 U. S. C. § 2401, to apply to her claim. But § 2415 is expressly inapplicable to actions "to establish the title to, or right of possession of, real or personal property." 28 U. S. C. § 2415(c). In *County of Oneida* v. *Oneida Indian Nation*, 470 U. S., at 240–241, the Court concluded that Indian land claims not subject to any federal limitations period were presumptively exempt from state statutes of limitations as well. Respondent's claim, however, is based on a particular federal statute—the Quiet Title Act—that contains its own limitations period.

[11] Under 28 U. S. C. § 1295(a)(2), the Court of Appeals for the Federal Circuit possesses exclusive jurisdiction over an appeal from a district court's decision

"if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal

Prior to the passage of the Quiet Title Act, adverse claimants had resorted to the Tucker Act to circumvent the Government's immunity from quiet title suits. Rather than seeking a declaration that they owned the property at issue, such claimants would concede that the Government possessed title and then would seek compensation for the Government's having taken the property from them. See *Block*, 461 U. S., at 280–281; H. R. Rep. No. 92–1559, at 9, 12. In

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revenue shall be governed by sections 1291, 1292, and 1294 of this title [the provisions granting jurisdiction to the regional courts of appeals]."

Thus, if the District Court's jurisdiction here depended on the Tucker Act, § 1346(a)(2), then the Eighth Circuit lacked jurisdiction over respondent's appeal, and we would have to vacate its judgment and remand the case with directions to transfer the appeal pursuant to 28 U. S. C. § 1631 to the Federal Circuit. See, *e. g.*, *Ballam* v. *United States*, 474 U. S. 898 (1986); *Pacyna* v. *Marsh*, 474 U. S. 1078 (1986).

In light of our conclusion that the District Court's jurisdiction was not based on the Tucker Act, but instead rested on § 1346(f) (Quiet Title Act claims), we need not reach the difficult and unsettled question of how an appeal raising both issues committed to the Federal Circuit's jurisdiction and issues outside its jurisdiction is to be treated. See, *e. g.*, S. Rep. No. 97–275, pp. 19–20 (1981); H. R. Rep. No. 97–312, p. 41 (1981); Court of Appeals for the Federal Circuit—1981, Hearings on H. R. 2405 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 1st Sess., 90 (1981) (testimony of James W. Geriak); Cihlar & Goldstein, A Dialogue About the Potential Issues in the Patent Jurisdiction of the Court of Appeals for the Federal Circuit, 10 APLA Q. J. 284 (1982); Drabiak, Jurisdiction of the New Court of Appeals for the Federal Circuit, 73 Ill. B. J. 218 (1984); Newman, Tails and Dogs: Patent and Antitrust Appeals in the Court of Appeals for the Federal Circuit, 10 APLA Q. J. 237 (1982) (all discussing the issue in the context of patent appeals that also raise antitrust claims).

In particular, we express no opinion on the question whether, since § 1295(a)(2) explicitly disclaims Federal Circuit jurisdiction over claims based on § 1346(f), and the Federal Circuit is a court of limited jurisdiction, see H. R. Rep. No. 97–312, *supra*, at 39, an appeal in a case raising both Tucker Act and Quiet Title Act claims would have to be bifurcated and sent in part to the regional circuit and in part to the Federal Circuit. Cf. S. Rep. No. 97–275, *supra*, at 20.

light of the Quiet Title Act's explicit statement that § 2409a(a) does not "apply to or affect actions which may be or could have been brought under sections 1346 . . . [or] 1491 . . . of this title,"[12] we cannot conclude that Tucker Act-based suits, like the officer's suit at issue in *Block*, are clearly precluded by the passage of the Quiet Title Act.

But regardless of whether other claimants may invoke the district courts' Tucker Act jurisdiction to hear their claims, it is clear that respondent has not brought a case falling within the scope of the Tucker Act. In *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479, 480 (1915), Justice Holmes, writing for a unanimous Court, stated that "the plaintiff is absolute master of what jurisdiction he will appeal to," and noted that "[j]urisdiction generally depends upon the case made and relief demanded by the plaintiff." Thus, since the "essential features," *id.*, at 481, of Healy's case involved allegations of patent infringement and a request for the relief characteristically provided by patent law, Healy could invoke federal patent law jurisdiction despite the fact that the measure of damages was fixed by contract.

Respondent now invokes federal jurisdiction only under the General Allocation Act and its jurisdictional counterpart. Moreover, the case she has made, and the relief she seeks, do not fit within the scope of the Tucker Act. A Tucker Act-based lands suit would seek damages equal to just compensation for an already completed taking of the claimant's land. See, *e. g.*, *Block*, 461 U. S., at 280–281; H. R. Rep. No. 92–1559, at 7, 9, 12–13. As we have noted, however, respondent is not seeking whatever compensation she allegedly

[12] The broad reference to "sectio[n] 1346" is somewhat opaque. Section 1346(f), in fact, grants the district courts "exclusive original jurisdiction of civil actions under section 2409a." The exclusion in § 2409a therefore cannot be read to include all suits that can be brought under § 1346. We think, however, that the exclusion of suits brought under § 1491—the Tucker Act provision granting the Claims Court jurisdiction—supports finding a similar exclusion of suits brought under § 1346(a)(2)—the analogous district court provision.

was denied in 1954. Rather, she claims she still owns her interests in the allotments, and she seeks to force the Government to buy those interests. She claims, in essence, that no legally cognizable taking has yet occurred. See Brief for Respondent 3–4. Respondent and the Court of Appeals view payment rather than return of the land as an appropriate remedy because respondent's allotments now lie within the Chippewa National Forest. But neither views this payment as representing damages for the Government's past acts, the essence of a Tucker Act claim for monetary relief. See, *e. g.*, *United States* v. *Mitchell*, 463 U. S. 206 (1983). Since this Indian respondent's claim was not based on the Tucker Act, her appeal to the Court of Appeals for the Eighth Circuit was proper.

IV

Federal law rightly provides Indians with a range of special protections. But even for Indian plaintiffs, "[a] waiver of sovereign immunity 'cannot be lightly implied but must be unequivocally expressed.'" *United States* v. *Mitchell*, 445 U. S. 535, 538 (1980), quoting *United States* v. *King*, 395 U. S. 1, 4 (1969). Congress has consented to a suit challenging the Federal Government's title to real property only if the action is brought within the 12-year period set by the Quiet Title Act. The limitations provision of the Quiet Title Act reflects a clear congressional judgment that the national public interest requires barring stale challenges to the United States' claim to real property, whatever the merits of those challenges. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

REED *v.* CAMPBELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF RICKER

APPEAL FROM THE COURT OF APPEALS OF TEXAS, EIGHTH SUPREME JUDICIAL DISTRICT

No. 85-755. Argued April 30, 1986—Decided June 11, 1986

Appellant's father died intestate at a time when § 42 of the Texas Probate Code prohibited an illegitimate child from inheriting from its father unless its parents had subsequently married. *Trimble* v. *Gordon*, 430 U. S. 762, decided four months after the father's death, held that a total statutory disinheritance, from the paternal estate, of children born out of wedlock and not legitimated by the subsequent marriage of their parents, is unconstitutional. Thereafter, appellant filed a claim to a share in her father's estate, but it was denied by a Texas trial court. The Texas Court of Appeals affirmed, holding that *Trimble* does not apply retroactively.

Held: The interest, protected by the Fourteenth Amendment, in avoiding unjustified discrimination against children born out of wedlock, requires that appellant's claim to a share in her father's estate be protected by the full applicability of *Trimble*. There is no justification for the State's rejection of the claim. At the time appellant filed her claim, *Trimble* had been decided, and her father's estate remained open. Neither the date of the father's death nor the date appellant's claim was filed should have prevented the applicability of *Trimble*. Those dates, either separately or in combination, had no impact on the State's interest in orderly administration of the estate. Pp. 854-857.

682 S. W. 2d 697, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

R. Stephen McNally argued the cause and filed briefs for appellant.

Paul McCollum argued the cause for appellee. With him on the brief were *Kathleen M. McCulloch* and *Fletcher N. Baldwin, Jr.*

JUSTICE STEVENS delivered the opinion of the Court.

Prince Ricker, appellant's father, died intestate on December 22, 1976. At that time, § 38 of the Texas Probate Code

provided that a decedent's estate should descend to "his children and their descendants,"[1] but § 42 prohibited an illegitimate child from inheriting from her father unless her parents had subsequently married.[2] In *Trimble* v. *Gordon*, 430 U. S. 762 (1977)—decided four months after Ricker's death—we held that a total statutory disinheritance, from the paternal estate, of children born out of wedlock and not legitimated by the subsequent marriage of their parents is unconstitutional. In this case, the Texas Court of Appeals held that § 42 of the Texas Probate Code nevertheless prevented appellant from sharing in her father's estate because *Trimble* does not apply retroactively.[3] The Texas Supreme Court refused appellant's application of error, noting "no reversible error." We noted probable jurisdiction, 474 U. S. 1018 (1985), and now reverse.

I

Only a few facts need be stated. In November 1957, Prince Ricker and appellant's mother participated in a ceremonial marriage, but it was invalid because Ricker's divorce from his first wife was not final. Appellant was born a year later. Ricker was lawfully married three times, once before and twice after his liaison with appellant's mother. He was

[1] See Tex. Prob. Code Ann. § 38(a) (Vernon 1980) ("Where any person having title to any estate, . . . shall die intestate, leaving no husband or wife, it shall descend and pass in parcenary to his kindred, male and female, in the following course: 1. To his children and their descendants . . .").

[2] See Tex. Prob. Code Ann. § 42 (Vernon 1956) ("For the purpose of inheritance to, through, and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit *from his mother and from his maternal kindred*, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him") (emphasis added).

[3] "Under the rule of *Winn* v. *Lackey*, [618 S. W. 2d 910 (Tex. Civ. App. 1981)] and the out-of-state cases cited therein, the equal protection argument fails as *Trimble* v. *Gordon*, 430 U. S. 762 . . . (1977), has not been applied retroactively where the father died before the case came down and suit was filed afterwards." 682 S. W. 2d 697, 700 (Tex. App. 1984).

survived by five legitimate children (two from his first and three from his third marriage) and by appellant.

Shortly after Ricker's death in 1976, his oldest daughter was appointed administratrix of his estate. The estate was still open in February 1978, when appellant formally notified the administratrix and the Probate Court of her claim to a one-sixth share of the estate. In due course, she filed a formal complaint; a jury found that Ricker was her father but the trial court concluded that he was never validly married to her mother and denied her claim.

In the Court of Appeals, appellant contended that she was entitled to inherit even if she was illegitimate because § 42 was unconstitutional, and also that she was entitled to be legitimated on various theories. The appellate court rejected all her arguments.[4]

II

Although the question presented in this case is framed in terms of "retroactivity," its answer is governed by a rather clear distinction that has emerged from our cases considering the constitutionality of statutory provisions that impose special burdens on illegitimate children. In these cases, we have unambiguously concluded that a State may not justify discriminatory treatment of illegitimates in order to express its disapproval of their parents' misconduct.[5] We have,

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[4] In her jurisdictional statement, appellant raised several questions that relate to the legitimation issue. Because we hold that she is entitled to relief on her principal claim, and because the legitimation questions appear not to have been properly presented as federal questions, see appellant's brief before the Texas Court of Appeals (presenting only the *Trimble* question as a federal constitutional issue), we do not reach the legitimation issue.

[5] "It is true, of course, that the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society. The Court recognized in *Weber* [v. *Aetna Casualty & Surety Co.*, 406 U. S. 164

however, also recognized that there is a permissible basis for some "distinctions made in part on the basis of legitimacy";[6] specifically, we have upheld statutory provisions that have an evident and substantial relation to the State's interest in providing for the orderly and just distribution of a decedent's property at death. *Lalli* v. *Lalli*, 439 U. S. 259 (1978).[7]

The state interest in the orderly disposition of decedents' estates may justify the imposition of special requirements upon an illegitimate child who asserts a right to inherit from her father, and, of course, it justifies the enforcement of generally applicable limitations on the time and the manner in which claims may be asserted. After an estate has been finally distributed, the interest in finality may provide an additional, valid justification for barring the belated assertion of claims, even though they may be meritorious and even though mistakes of law or fact may have occurred during the

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(1972)] that visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons

"'is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.' 406 U. S., at 175. (Footnote omitted.)" *Mathews* v. *Lucas*, 427 U. S. 495, 505 (1976).

[6] *Ibid.*

[7] "The presence in this case of the State's interest in the orderly disposition of a decedent's property at death distinguishes it from others in which that justification for an illegitimacy-based classification was absent. *E. g.*, *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974); *Gomez* v. *Perez*, 409 U. S. 535 (1973); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 170 (1972); *Levy* v. *Louisiana*, 391 U. S. 68 (1968)." 439 U. S., at 268, n. 6 (opinion of POWELL, J.).

Although the dissenters did not believe the state interest was sufficient to support the particular statute before the Court in that case, they agreed with the basic proposition that this state interest may justify some differential treatment—"New York might require illegitimates to prove paternity by an elevated standard of proof," *id.*, at 279 (BRENNAN, J., dissenting).

probate process. We find no such justification for the State's rejection of appellant's claim in this case.

The Texas courts have relied on *Trimble* v. *Gordon*, 430 U. S. 762 (1977), as a basis for holding § 42 invalid in cases that were pending on April 26, 1977—the date *Trimble* was decided. See *Winn* v. *Lackey*, 618 S. W. 2d 910 (Tex. Civ. App. 1981); *Lovejoy* v. *Lillie*, 569 S. W. 2d 501 (Texas Civ. App. 1978). Although the administration of Prince Ricker's estate was in progress on that date, the court refused to apply *Trimble* because appellant's claim was not asserted until later. Thus, the test applied by the Texas court resulted in the denial of appellant's claim because of the conjunction of two facts: (1) her father died before April 26, 1977, and (2) her claim was filed after April 26, 1977.

There is nothing in the record to explain why these two facts, either separately or in combination, should have prevented the applicability of *Trimble*, and the allowance of appellant's claim, at the time when the trial court was required to make a decision. At that time, the governing law had been established: *Trimble* had been decided, and it was clear that § 42 was invalid. The state interest in the orderly administration of Prince Ricker's estate would have been served equally well regardless of how the merits of the claim were resolved. In this case, then, neither the date of his death nor the date the claim was filed had any impact on the relevant state interest in orderly administration; their conjunction similarly had no impact on that state interest.

The interest in equal treatment protected by the Fourteenth Amendment to the Constitution—more specifically, the interest in avoiding unjustified discrimination against children born out of wedlock, see *Mathews* v. *Lucas*, 427 U. S. 495, 505 (1976)—should therefore have been given controlling effect. That interest requires that appellant's claim to a share in her father's estate be protected by the full applicability of *Trimble* to her claim.[8]

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[8] In addition to concluding that *Trimble* did not apply, the Texas Court of Appeals stated that "[e]ven if the plaintiff could claim under section 42(b)

The judgment of the Texas Court of Appeals is therefore reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

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as amended, her exclusion from the inheritance under that statute does not deny her constitutional equal protection since a rational state basis supports that legislation." 682 S. W. 2d, at 700. We read that statement, not as an alternative ground for the court's judgment, but as the rejection of an alternative ground for appellant's recovery. To read it as assuming that the amended statute defeated appellant's claim, even if *Trimble* applied, would, in the context of this case and the amended statute's requirements, raise serious due process questions.

EAST RIVER STEAMSHIP CORP. ET AL. *v.* TRANSAMERICA DELAVAL INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-1726. Argued January 21, 1986—Decided June 16, 1986

A shipbuilder contracted with respondent to design, manufacture, and supervise the installation of turbines that would be the main propulsion units for four oil-transporting supertankers constructed by the shipbuilder. After each ship was completed, it was chartered to one of the petitioners. When the ships were put into service, the turbines on all four ships malfunctioned due to design and manufacturing defects. Only the products themselves were damaged. Petitioners filed a five-count admiralty complaint in Federal District Court against respondent, alleging tortious conduct based on a products-liability theory and seeking damages for the cost of repairing the ships and for income lost while they were out of service. The District Court granted summary judgment for respondent. The Court of Appeals affirmed, holding that petitioners' dissatisfaction with product quality did not state a claim cognizable in tort.

Held:

1. The fourth count should have been dismissed on the ground that the petitioner who chartered the ship referred to in that count lacked standing to bring the claim. P. 863.

2. The torts alleged in the other counts clearly fall within admiralty jurisdiction. Pp. 863–864.

3. Admiralty law, which already recognizes a general theory of liability for negligence, also incorporates principles of products liability, including strict liability. Pp. 864–866.

4. But whether stated in negligence or strict liability, no products-liability claim lies in admiralty when a commercial party alleges injury only to the product itself resulting in purely economic loss. Such a claim is most naturally understood as a warranty claim. Pp. 866–876.

752 F. 2d 903, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Thomas E. Durkin, Jr., argued the cause for petitioners. With him on the briefs were *Clarkson S. Fisher, Jr.*, and *George J. Koelzer*.

Robert E. Smith, argued the cause for respondent. With him on the brief were *Norman L. Greene, Barry M. Okun, Maria Echaveste*, and *Waldron Kraemer*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In this admiralty case, we must decide whether a cause of action in tort is stated when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss. The case requires us to consider preliminarily whether admiralty law, which already recognizes a general theory of liability for negligence, also incorporates principles of products liability, including strict liability. Then, charting a course between products liability and contract law, we must determine whether injury to a product itself is the kind of harm that should be protected by products liability or left entirely to the law of contracts.

I

In 1969, Seatrain Shipbuilding Corp. (Shipbuilding), a wholly owned subsidiary of Seatrain Lines, Inc. (Seatrain), announced it would build the four oil-transporting supertankers in issue—the T. T. *Stuyvesant*, T. T. *Williamsburgh*, T. T. *Brooklyn*, and T. T. *Bay Ridge*. Each tanker was constructed pursuant to a contract in which a separate wholly owned subsidiary of Seatrain engaged Shipbuilding. Shipbuilding in turn contracted with respondent, now known as Transamerica Delaval, Inc. (Delaval), to design, manufacture, and supervise the installation of turbines (costing $1.4 million each, see App. 163) that would be the main propulsion units for the 225,000-ton, $125 million, *ibid.*, supertankers. When each ship was completed, its title was transferred from the contracting subsidiary to a trust company (as trustee for

*Briefs of *amici curiae* urging affirmance were filed for Pott Industries, Inc., by *W. Stanley Walch*, and *James W. Erwin*; and for the Product Liability Advisory Council, Inc., et al. by *Herbert Rubin, Michael Hoenig, David B. Hamm, William H. Crabtree*, and *Edward P. Good*.

an owner), which in turn chartered the ship to one of the petitioners, also subsidiaries of Seatrain. Queensway Tankers, Inc., chartered the *Stuyvesant;* Kingsway Tankers, Inc., chartered the *Williamsburgh;* East River Steamship Corp. chartered the *Brooklyn;* and Richmond Tankers, Inc., chartered the *Bay Ridge*. Each petitioner operated under a bareboat charter, by which it took full control of the ship for 20 or 22 years as though it owned it, with the obligation afterwards to return the ship to the real owner. See G. Gilmore & C. Black, Admiralty §§4–1, 4–22 (2d ed. 1975). Each charterer assumed responsibility for the cost of any repairs to the ships. Tr. of Oral Arg. 11, 16–17, 35.

The *Stuyvesant* sailed on its maiden voyage in late July 1977. On December 11 of that year, as the ship was about to enter the Port of Valdez, Alaska, steam began to escape from the casing of the high-pressure turbine. That problem was temporarily resolved by repairs, but before long, while the ship was encountering a severe storm in the Gulf of Alaska, the high-pressure turbine malfunctioned. The ship, though lacking its normal power, was able to continue on its journey to Panama and then San Francisco. In January 1978, an examination of the high-pressure turbine revealed that the first-stage steam reversing ring virtually had disintegrated and had caused additional damage to other parts of the turbine. The damaged part was replaced with a part from the *Bay Ridge*, which was then under construction. In April 1978, the ship again was repaired, this time with a part from the *Brooklyn*. Finally, in August, the ship was permanently and satisfactorily repaired with a ring newly designed and manufactured by Delaval.

The *Brooklyn* and the *Williamsburgh* were put into service in late 1973 and late 1974, respectively. In 1978, as a result of the *Stuyvesant's* problems, they were inspected while in port. Those inspections revealed similar turbine damage. Temporary repairs were made, and newly designed parts were installed as permanent repairs that summer.

When the *Bay Ridge* was completed in early 1979, it contained the newly designed parts and thus never experienced the high-pressure turbine problems that plagued the other three ships. Nonetheless, the complaint appears to claim damages as a result of deterioration of the *Bay Ridge's* ring that was installed in the *Stuyvesant* while the *Bay Ridge* was under construction. In addition, the *Bay Ridge* experienced a unique problem. In 1980, when the ship was on its maiden voyage, the engine began to vibrate with a frequency that increased even after speed was reduced. It turned out that the astern guardian valve, located between the high-pressure and low-pressure turbines, had been installed backwards. Because of that error, steam entered the low-pressure turbine and damaged it. After repairs, the *Bay Ridge* resumed its travels.

II

The charterers' second amended complaint, filed in the United States District Court for the District of New Jersey, invokes admiralty jurisdiction. It contains five counts alleging tortious conduct on the part of respondent Delaval and seeks an aggregate of more than $8 million in damages for the cost of repairing the ships and for income lost while the ships were out of service. The first four counts, read liberally, allege that Delaval is strictly liable for the design defects in the high-pressure turbines of the *Stuyvesant*, the *Williamsburgh*, the *Brooklyn*, and the *Bay Ridge*, respectively. The fifth count alleges that Delaval, as part of the manufacturing process, negligently supervised the installation of the astern guardian valve on the *Bay Ridge*. The initial complaint also had listed Seatrain and Shipbuilding as plaintiffs and had alleged breach of contract and warranty as well as tort claims. But after Delaval interposed a statute of limitations defense, the complaint was amended and the charterers alone brought the suit in tort. The nonrenewed claims were dismissed with prejudice by the District Court. Delaval then moved

for summary judgment, contending that the charterers' actions were not cognizable in tort.

The District Court granted summary judgment for Delaval, and the Court of Appeals for the Third Circuit, sitting en banc, affirmed. *East River S.S. Corp.* v. *Delaval Turbine, Inc.*, 752 F. 2d 903 (1985). The Court of Appeals held that damage solely to a defective product is actionable in tort if the defect creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes. Disappointments over the product's quality, on the other hand, are protected by warranty law. *Id.*, at 908, 909–910. The charterers were dissatisfied with product quality: the defects involved gradual and unnoticed deterioration of the turbines' component parts, and the only risk created was that the turbines would operate at a lower capacity. *Id.*, at 909. See *Pennsylvania Glass Sand Corp.* v. *Caterpillar Tractor Co.*, 652 F. 2d 1165, 1169–1170 (CA3 1981). Therefore, neither the negligence claim nor the strict-liability claim was cognizable.

Judge Garth concurred on "grounds somewhat different," 752 F. 2d, at 910, and Judge Becker, joined by Judge Higginbotham, concurred in part and dissented in part. *Id.*, at 913. Although Judge Garth agreed with the majority's analysis on the merits, he found no strict-liability claim presented because the charterers had failed to allege unreasonable danger or demonstrable injury.

Judge Becker largely agreed with the majority's approach, but would permit recovery for a "near miss," where the risk existed but no calamity occurred. He felt that the first count, concerning the *Stuyvesant*, stated a cause of action in tort. The exposure of the ship to a severe storm when the ship was unable to operate at full power due to the defective part created an unreasonable risk of harm.

We granted certiorari to resolve a conflict among the Courts of Appeals sitting in admiralty.[1] 474 U. S. 814 (1985).

III

A

Initially, we conclude that the fourth count should have been dismissed because Richmond Tankers, Inc., the charterer of the *Bay Ridge*, lacks standing to bring a claim relating to the defective ring that was removed from the *Bay Ridge* when it was still under construction. The ring was installed in the *Stuyvesant* where it remained until April 1978, when it was removed due to disintegration. Richmond did not charter the *Bay Ridge* until May 1979, after the ship was completed with a newly designed, nondefective, high-pressure turbine. See Plaintiffs' Answers to First Set of Interrogatories of Defendants, No. 42. Richmond therefore can allege no cognizable injury. *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975). Richmond, of course, has standing to bring the claim raised in the fifth count, as the damage from the reverse installation of the astern guardian valve allegedly occurred after Richmond chartered the *Bay Ridge*.

B

The torts alleged in the first, second, third, and fifth counts clearly fall within the admiralty jurisdiction. The claims satisfy the traditional "locality" requirement—that the wrong

[1] Compare *East River S.S. Corp.* v. *Delaval Turbine, Inc.*, 752 F. 2d 903 (CA3 1985) (en banc) (this case), with *Ingram River Equipment, Inc.* v. *Pott Industries, Inc.*, 756 F. 2d 649 (CA8 1985), cert. pending, No. 85-12; *Miller Industries* v. *Caterpillar Tractor Co.*, 733 F. 2d 813 (CA11 1984); *Emerson G. M. Diesel, Inc.* v. *Alaskan Enterprise*, 732 F. 2d 1468 (CA9 1984). See also *Pan-Alaska Fisheries, Inc.* v. *Marine Constr. & Design Co.*, 565 F. 2d 1129 (CA9 1977); and *Jig The Third Corp.* v. *Puritan Marine Ins. Underwriters Corp.*, 519 F. 2d 171 (CA5 1975). Cf. *Louisiana ex rel. Guste* v. *M/V Testbank*, 752 F. 2d 1019 (CA5 1985) (en banc), cert. pending *sub nom. White* v. *M/V Testbank*, No. 84-1808.

must have occurred on the high seas or navigable waters. See, *e. g.*, *The Plymouth*, 3 Wall. 20, 35–36 (1866). The first and fifth counts allege that the injury to the *Stuyvesant's* high-pressure turbine and the *Bay Ridge's* low-pressure turbine occurred while the ships were sailing on the high seas. The damage to the *Williamsburgh* and the *Brooklyn*, alleged in the second and third counts, occurred at sea, and was discovered in port, also a maritime locale. See *Southern S.S. Co.* v. *NLRB*, 316 U. S. 31, 41 (1942).

When torts have occurred on navigable waters within the United States, the Court has imposed an additional requirement of a "maritime nexus"—that the wrong must bear "a significant relationship to traditional maritime activity." See *Executive Jet Aviation, Inc.* v. *Cleveland*, 409 U. S. 249, 268 (1972); *Foremost Ins. Co.* v. *Richardson*, 457 U. S. 668 (1982). We need not reach the question whether a maritime nexus also must be established when a tort occurs on the high seas. Were there such a requirement, it clearly was met here, for these ships were engaged in maritime commerce, a primary concern of admiralty law.

C

With admiralty jurisdiction comes the application of substantive admiralty law. See *Executive Jet Aviation*, 409 U. S., at 255. Absent a relevant statute, the general maritime law, as developed by the judiciary, applies. *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, 409 (1975); *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 160–161 (1920). Drawn from state[2] and federal sources, the general

[2] The charterers do not ask us to defer to the law of New Jersey, the forum State. Nor is application of state-law principles required here. New Jersey lacks any "pressing and significant" interest in the tort action. See *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 739 (1961). In any event, reliance on state law would not help the charterers' case, since it mandates the same conclusion reached by the District Court and the Court of Appeals: that Delaval had no tort duty to the charterers. See *Spring Motors*

maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules. See *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 630 (1959); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 373–375 (1959). This Court has developed a body of maritime tort principles, see, *e. g.*, *Kermarec*, *supra*, at 632; see generally Currie, Federalism and the Admiralty: "The Devil's Own Mess," 1960 S. Ct. Rev. 158, 164, and is now asked to incorporate products-liability concepts, long a part of the common law of torts, into the general maritime law. See *Igneri* v. *Cie. de Transports Oceaniques*, 323 F. 2d 257, 260 (CA2 1963), cert. denied, 376 U. S. 949 (1964).

The Courts of Appeals sitting in admiralty overwhelmingly have adopted concepts of products liability, based both on negligence, *Sieracki* v. *Seas Shipping Co.*, 149 F. 2d 98, 99–100 (CA3 1945), aff'd on other grounds, 328 U. S. 85 (1946), and on strict liability, *Pan-Alaska Fisheries, Inc.* v. *Marine Constr. & Design Co.*, 565 F. 2d 1129, 1135 (CA9 1977) (adopting Restatement (Second) of Torts § 402A (1965)). Indeed, the Court of Appeals for the Third Circuit previously had stated that the question whether principles of strict products liability are part of maritime law "is no longer seriously contested." *Ocean Barge Transport Co.* v. *Hess Oil Virgin Islands Corp.*, 726 F. 2d 121, 123 (1984) (citing cases).

We join the Courts of Appeals in recognizing products liability, including strict liability, as part of the general maritime law. This Court's precedents relating to injuries of maritime workers long have pointed in that direction. See *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94 (1946) (strict liability for unseaworthiness); *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 322 (1964) (strict liability for breach of implied warranty of work-

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Distributors, Inc. v. *Ford Motor Co.*, 98 N. J. 555, 579, 489 A. 2d 660, 672 (1985).

manlike service). The Court's rationale in those cases—that strict liability should be imposed on the party best able to protect persons from hazardous equipment—is equally applicable when the claims are based on products liability. Compare *Sieracki*, 328 U. S., at 93–94, with *Escola* v. *Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 462, 150 P. 2d 436, 441 (1944) (concurring opinion). And to the extent that products actions are based on negligence, they are grounded in principles already incorporated into the general maritime law. See *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S., at 632. Our incorporation of products liability into maritime law, however, is only the threshold determination to the main issue in this case.

IV

Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty. See *Seely* v. *White Motor Co.*, 63 Cal. 2d 9, 15, 403 P. 2d 145, 149 (1965). It is clear, however, that if this development were allowed to progress too far, contract law would drown in a sea of tort. See G. Gilmore, The Death of Contract 87–94 (1974). We must determine whether a commercial product injuring itself is the kind of harm against which public policy requires manufacturers to protect, independent of any contractual obligation.

A

The paradigmatic products-liability action is one where a product "reasonably certain to place life and limb in peril," distributed without reinspection, causes bodily injury. See, *e. g.*, *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 389, 111 N. E. 1051, 1053 (1916). The manufacturer is liable whether or not it is negligent because "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *Escola* v. *Coca Cola Bot-*

tling Co., 24 Cal. 2d, at 462, 150 P. 2d, at 441 (opinion concurring in judgment).

For similar reasons of safety, the manufacturer's duty of care was broadened to include protection against property damage. See *Marsh Wood Products Co.* v. *Babcock & Wilcox Co.*, 207 Wis. 209, 226, 240 N. W. 392, 399 (1932); *Genesee County Patrons Fire Relief Assn.* v. *L. Sonneborn Sons, Inc.*, 263 N. Y. 463, 469–473, 189 N. E. 551, 553–555 (1934). Such damage is considered so akin to personal injury that the two are treated alike. See *Seely* v. *White Motor Co.*, 63 Cal. 2d, at 19, 403 P. 2d, at 152.

In the traditional "property damage" cases, the defective product damages other property. In this case, there was no damage to "other" property. Rather, the first, second, and third counts allege that each supertanker's defectively designed turbine components damaged only the turbine itself. Since each turbine was supplied by Delaval as an integrated package, see App. 162–163, each is properly regarded as a single unit. "Since all but the very simplest of machines have component parts, [a contrary] holding would require a finding of 'property damage' in virtually every case where a product damages itself. Such a holding would eliminate the distinction between warranty and strict products liability." *Northern Power & Engineering Corp.* v. *Caterpillar Tractor Co.*, 623 P. 2d 324, 330 (Alaska 1981). The fifth count also alleges injury to the product itself. Before the high-pressure and low-pressure turbines could become an operational propulsion system, they were connected to piping and valves under the supervision of Delaval personnel. See App. 78, 162–163, 181. Delaval's supervisory obligations were part of its manufacturing agreement. The fifth count thus can best be read to allege that Delaval's negligent manufacture of the propulsion system—by allowing the installation in reverse of the astern guardian valve—damaged the propulsion system. Cf. *Lewis* v. *Timco, Inc.*, 736 F. 2d 163, 165–166 (CA5 1984). Obviously, damage to a product itself

has certain attributes of a products-liability claim. But the injury suffered—the failure of the product to function properly—is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain.

B

The intriguing question whether injury to a product itself may be brought in tort has spawned a variety of answers.[3] At one end of the spectrum, the case that created the majority land-based approach, *Seely* v. *White Motor Co.*, 63 Cal. 2d 9, 403 P. 2d 145 (1965) (defective truck), held that preserving a proper role for the law of warranty precludes imposing tort liability if a defective product causes purely monetary harm. See also *Jones & Laughlin Steel Corp.* v. *Johns-Manville Sales Corp.*, 626 F. 2d 280, 287, and n. 13 (CA3 1980) (citing cases).

At the other end of the spectrum is the minority land-based approach, whose progenitor, *Santor* v. *A & M Karagheusian, Inc.*, 44 N. J. 52, 66–67, 207 A. 2d 305, 312–313 (1965) (marred carpeting), held that a manufacturer's duty to make nondefective products encompassed injury to the product it-

[3] The question is not answered by the Restatement (Second) of Torts §§ 395 and 402A (1965), or by the Uniform Commercial Code, see Wade, Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?, 42 Tenn. L. Rev. 123 (1974).

Congress, which has considered adopting national products-liability legislation, also has been wrestling with the question whether economic loss should be recoverable under a products-liability theory. See 1 L. Frumer & M. Friedman, Products Liability § 4C (1986). When S. 100, 99th Cong., 1st Sess. (1985) (the Product Liability Act) was introduced, it excluded, § 2(6), recovery for commercial loss. Suggestions have been made for revising this provision. See Amendment 16, 131 Cong. Rec. 5461 (1985); Amendment 100, *id.*, at 11850, 11851. Other bills also have addressed the issue. See S. 1999, *id.*, at S18321 (Dec. 20, 1985); Amendment 1951, 132 Cong. Rec. S5764 (May 12, 1986). See also H. R. 2568, 99th Cong., 1st Sess. (1985); H. R. 4425, 99th Cong., 2d Sess. (1986).

The issue also is of concern in the area of conflict of laws. See R. Weintraub, Commentary on the Conflict of Laws § 6.29 (2d ed. 1980).

self, whether or not the defect created an unreasonable risk of harm.[4] See also *LaCrosse* v. *Schubert, Schroeder & Associates, Inc.*, 72 Wis. 2d 38, 44–45, 240 N. W. 2d 124, 127–128 (1976). The courts adopting this approach, including the majority of the Courts of Appeals sitting in admiralty that have considered the issue,[5] *e. g.*, *Emerson G. M. Diesel, Inc.* v. *Alaskan Enterprise*, 732 F. 2d 1468 (CA9 1984), find that the safety and insurance rationales behind strict liability apply equally where the losses are purely economic. These courts reject the *Seely* approach because they find it arbitrary that economic losses are recoverable if a plaintiff suffers bodily injury or property damage, but not if a product injures itself. They also find no inherent difference between economic loss and personal injury or property damage, because all are proximately caused by the defendant's conduct. Further, they believe recovery for economic loss would not lead to unlimited liability because they think a manufacturer can predict and insure against product failure. See *Emerson G. M. Diesel, Inc.* v. *Alaskan Enterprise*, 732 F. 2d, at 1474.

Between the two poles fall a number of cases that would permit a products-liability action under certain circumstances when a product injures only itself. These cases attempt to differentiate between "the disappointed users . . . and the

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[4] Interestingly, the New Jersey and California Supreme Courts have each taken what appears to be a step in the direction of the other since *Santor* and *Seely*. In *Spring Motors Distributors, Inc.* v. *Ford Motor Co.*, 98 N. J., at 579, 489 A. 2d, at 672, the New Jersey court rejected *Santor* in the commercial context. And in *J'Aire Corp.* v. *Gregory*, 24 Cal. 3d 799, 598 P. 2d 60 (1979), the California court recognized a cause of action for negligent interference with prospective economic advantage.

[5] Most of the admiralty cases concerned fishing vessels. See *Emerson G. M. Diesel, Inc.* v. *Alaskan Enterprise*, 732 F. 2d 1468, 1472 (CA9 1984) (relying on solicitude for fishermen as a reason for a more protective approach). Delaval concedes that the courts, see *Carbone* v. *Ursich*, 209 F. 2d 178, 182 (CA9 1953), and Congress, see 46 U. S. C. App. § 533 (1982 ed., Supp. II), at times have provided special protection for fishermen. This case involves no fishermen.

endangered ones," *Russell* v. *Ford Motor Co.*, 281 Ore. 587, 595, 575 P. 2d 1383, 1387 (1978), and permit only the latter to sue in tort. The determination has been said to turn on the nature of the defect, the type of risk, and the manner in which the injury arose. See *Pennsylvania Glass Sand Corp.* v. *Caterpillar Tractor Co.*, 652 F. 2d, at 1173 (relied on by the Court of Appeals in this case). The Alaska Supreme Court allows a tort action if the defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a proximate result of that danger and under dangerous circumstances. *Northern Power & Engineering Corp.* v. *Caterpillar Tractor Co.*, 623 P. 2d 324, 329 (1981).

We find the intermediate and minority land-based positions unsatisfactory. The intermediate positions, which essentially turn on the degree of risk, are too indeterminate to enable manufacturers easily to structure their business behavior. Nor do we find persuasive a distinction that rests on the manner in which the product is injured. We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. Compare *Morrow* v. *New Moon Homes, Inc.*, 548 P. 2d 279 (Alaska 1976), with *Cloud* v. *Kit Mfg. Co.*, 563 P. 2d 248, 251 (Alaska 1977). But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law. See E. Farnsworth, Contracts § 12.8, pp. 839–840 (1982).

We also decline to adopt the minority land-based view espoused by *Santor* and *Emerson*. Such cases raise legitimate questions about the theories behind restricting products liability, but we believe that the countervailing arguments are more powerful. The minority view fails to account for the

need to keep products liability and contract law in separate spheres and to maintain a realistic limitation on damages.

C

Exercising traditional discretion in admiralty, see *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 409 (1953), we adopt an approach similar to *Seely* and hold that a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself.[6]

"The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products." *Seely* v. *White Motor Co.*, 63 Cal. 2d, at 18, 403 P. 2d, at 151. When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.

The tort concern with safety is reduced when an injury is only to the product itself. When a person is injured, the "cost of an injury and the loss of time or health may be an overwhelming misfortune," and one the person is not prepared to meet. *Escola* v. *Coca Cola Bottling Co.*, 24 Cal. 2d, at 462, 150 P. 2d, at 441 (opinion concurring in judgment). In contrast, when a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased costs in performing a service. Losses like these can be in-

[6] We do not reach the issue whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic. Cf. *Ultramares Corp.* v. *Touche*, 255 N. Y. 170, 174 N. E. 441 (1931). But see *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303 (1927).

sured. See 10A G. Couch, Cyclopedia of Insurance Law §§ 42:385–42:401, 42:414–417 (2d ed. 1982); 7 E. Benedict, Admiralty, Form No. 1.16–7, p. 1–239 (7th ed. 1985); 5A J. Appleman & J. Appleman, Insurance Law and Practice § 3252 (1970). Society need not presume that a customer needs special protection. The increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified. Cf. *United States* v. *Carroll Towing Co.*, 159 F. 2d 169, 173 (CA2 1947).

Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received "insufficient product value." See J. White & R. Summers, Uniform Commercial Code 406 (2d ed. 1980). The maintenance of product value and quality is precisely the purpose of express and implied warranties.[7] See UCC § 2–313 (express warranty), § 2–314 (implied warranty of merchantability), and § 2–315 (warranty of fitness for a particular purpose). Therefore, a claim of a nonworking product can be brought as a breach-of-warranty action. Or, if the customer prefers, it can reject the product or revoke its acceptance and sue for breach of contract. See UCC §§ 2–601, 2–608, 2–612.

Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own

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[7] If the charterers' claims were brought as breach-of-warranty actions, they would not be within the admiralty jurisdiction. Since contracts relating to the construction of or supply of materials to a ship are not within the admiralty jurisdiction, see *Thames Towboat Co.* v. *The Schooner "Francis McDonald"*, 254 U. S. 242, 243 (1920); *Kossick* v. *United Fruit Co.*, 365 U. S., at 735, neither are warranty claims grounded in such contracts. See 1 E. Benedict, Admiralty § 188, p. 11–36 (7th ed. 1985). State law would govern the actions. See *North Pacific S.S. Co.* v. *Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U. S. 119, 127 (1919). In particular the Uniform Commercial Code, which has been adopted by 49 States, would apply.

agreements.[8] The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies. See UCC §§ 2–316, 2–719. In exchange, the purchaser pays less for the product. Since a commercial situation generally does not involve large disparities in bargaining power, cf. *Henningsen* v. *Bloomfield Motors, Inc.*, 32 N. J. 358, 161 A. 2d 69 (1960), we see no reason to intrude into the parties' allocation of the risk.

While giving recognition to the manufacturer's bargain, warranty law sufficiently protects the purchaser by allowing it to obtain the benefit of its bargain. See White & Summers, *supra*, ch. 10. The expectation damages available in warranty for purely economic loss give a plaintiff the full benefit of its bargain by compensating for forgone business opportunities. See Fuller & Perdue, The Reliance Interest in Contract Damages: 1, 46 Yale L. J. 52, 60–63 (1936); R. Posner, Economic Analysis of Law § 4.8 (3d ed. 1986). Recovery on a warranty theory would give the charterers their repair costs and lost profits, and would place them in the position they would have been in had the turbines functioned properly.[9] See *Hawkins* v. *McGee*, 84 N. H. 114, 146 A. 641

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[8] We recognize, of course, that warranty and products liability are not static bodies of law and may overlap. In certain situations, for example, the privity requirement of warranty has been discarded. *E. g.*, *Henningsen* v. *Bloomfield Motors, Inc.*, 32 N. J. 358, 380–384, 161 A. 2d 69, 81–84 (1960). In other circumstances, a manufacturer may be able to disclaim strict tort liability. See, *e. g.*, *Keystone Aeronautics Corp.* v. *R. J. Enstrom Corp.*, 499 F. 2d 146, 149 (CA3 1974). Nonetheless, the main currents of tort law run in different directions from those of contract and warranty, and the latter seem to us far more appropriate for commercial disputes of the kind involved here.

[9] In contrast, tort damages generally compensate the plaintiff for loss and return him to the position he occupied before the injury. Cf. *Sullivan* v. *O'Connor*, 363 Mass. 579, 584–586, 588, n. 6, 296 N. E. 2d 183, 187–188, 189, n. 6 (1973); Prosser, The Borderland of Tort and Contract, in Selected Topics on the Law of Torts 380, 424–427 (Thomas M. Cooley Lectures, Fourth Series 1953). Tort damages are analogous to reliance damages, which are awarded in contract when there is particular difficulty in mea-

(1929). Thus, both the nature of the injury and the resulting damages indicate it is more natural to think of injury to a product itself in terms of warranty.

A warranty action also has a built-in limitation on liability, whereas a tort action could subject the manufacturer to damages of an indefinite amount. The limitation in a contract action comes from the agreement of the parties and the requirement that consequential damages, such as lost profits, be a foreseeable result of the breach. See *Hadley* v. *Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). In a warranty action where the loss is purely economic, the limitation derives from the requirements of foreseeability and of privity, which is still generally enforced for such claims in a commercial setting. See UCC § 2-715; White & Summers, *supra*, at 389, 396, 406–410.

In products-liability law, where there is a duty to the public generally, foreseeability is an inadequate brake. Cf. *Kinsman Transit Co.* v. *City of Buffalo*, 388 F. 2d 821 (CA2 1968). See also Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U. Chi. L. Rev. 61, 71–72 (1982). Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product. In this case, for example, if the charterers—already one step removed from the transaction—were permitted to recover their economic losses, then the companies that subchartered the ships might claim their economic losses from the delays, and the charterers' customers also might claim their economic losses, and so on. "The law does not spread its protection so far." *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303, 309 (1927).

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suring the expectation interest. See, *e. g.*, *Security Stove & Mfg. Co.* v. *American Railways Express Co.*, 227 Mo. App. 175, 51 S. W. 2d 572 (1932).

And to the extent that courts try to limit purely economic damages in tort, they do so by relying on a far murkier line, one that negates the charterers' contention that permitting such recovery under a products-liability theory enables admiralty courts to avoid difficult line drawing. Cf. *Ultramares Corp.* v. *Touche*, 255 N. Y. 170, 174 N. E. 441 (1931); *Louisiana ex rel. Guste* v. *M/V Testbank*, 752 F. 2d 1019, 1046–1052 (CA5 1985) (en banc) (dissenting opinion), cert. pending *sub nom. White* v. *M/V Testbank*, No. 84–1808.

D

For the first three counts, the defective turbine components allegedly injured only the turbines themselves. Therefore, a strict products-liability theory of recovery is unavailable to the charterers. Any warranty claims would be subject to Delaval's limitation, both in time and scope, of its warranty liability. App. 78–79. The record indicates that Seatrain and Delaval reached a settlement agreement. Deposition of Stephen Russell, p. 32. We were informed that these charterers could not have asserted the warranty claims. See Tr. of Oral Arg. 36. Even so, the charterers should be left to the terms of their bargains, which explicitly allocated the cost of repairs.

In the charterers' agreements with the owners, the charterers took the ships in "as is" condition, after inspection, and assumed full responsibility for them, including responsibility for maintenance and repairs and for obtaining certain forms of insurance. *Id.*, at 11, 16–17, 35; App. 86, 88, 99, 101, 112, 114, 125–126, 127. In a separate agreement between each charterer and Seatrain, Seatrain agreed to guarantee certain payments and covenants by each charterer to the owner. *Id.*, at 142–156. The contractual responsibilities thus were clearly laid out. There is no reason to extricate the parties from their bargain.

Similarly, in the fifth count, alleging the reverse installation of the astern guardian valve, the only harm was to the

propulsion system itself rather than to persons or other property. Even assuming that Delaval's supervision was negligent, as we must on this summary judgment motion, Delaval owed no duty under a products-liability theory based on negligence to avoid causing purely economic loss. Cf. *Flintkote Co.* v. *Dravo Corp.*, 678 F. 2d 942 (CA11 1982); *S. M. Wilson & Co.* v. *Smith International, Inc.*, 587 F. 2d 1363 (CA9 1978). Thus, whether stated in negligence or strict liability, no products-liability claim lies in admiralty when the only injury claimed is economic loss.

While we hold that the fourth count should have been dismissed, we affirm the entry of judgment for Delaval.

It is so ordered.

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION *v.* WOLD ENGINEERING, P. C., ET AL.

CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

No. 84-1973. Argued March 24, 1986—Decided June 16, 1986

Petitioner Indian tribe brought suit against respondent corporation (hereafter respondent) in a North Dakota state court for negligence and breach of contract in connection with respondent's construction of a water-supply system on petitioner's reservation. The trial court dismissed the suit for lack of jurisdiction. The North Dakota Supreme Court held that a North Dakota statute (Chapter 27-19)—which provides that jurisdiction of the State shall be extended over all civil claims for relief that arise on an Indian reservation upon acceptance by Indian citizens—disclaimed the unconditional state court civil jurisdiction North Dakota had previously extended to tribal Indians suing non-Indians in state court, and that Chapter 27-19 barred petitioner from maintaining its suit in state court absent its waiver of sovereign immunity.

Held:

1. Because the federal statute governing state assumption of jurisdiction over Indian country, Pub. L. 280, was designed to extend the jurisdiction of the States over Indian country and to encourage state assumption of such jurisdiction, and because Congress specifically considered the issue of retrocession but did not provide for disclaimers of jurisdiction lawfully acquired other than under Pub. L. 280 prior to 1968, such disclaimers cannot be reconciled with the congressional plan embodied in Pub. L. 280 and thus are pre-empted. Pp. 884-887.

2. The conclusion that the operation of the North Dakota jurisdictional scheme in this case is inconsistent with federal law is reinforced by the fact that it imposes an undue burden on federal and tribal interests in Indian self-government and autonomy, as well as the federal interest in ensuring access to the courts. Pp. 887-893.

364 N. W. 2d 98, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 893.

Raymond Cross argued the cause for petitioner. With him on the brief were *John O. Holm* and *Christopher D. Quale.*

Gary H. Lee argued the cause and filed a brief for respondents.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioner, Three Affiliated Tribes of the Fort Berthold Reservation, sought to sue respondent, Wold Engineering, P. C. (hereafter respondent), in state court for negligence and breach of contract. The North Dakota Supreme Court held that Chapter 27–19 of the North Dakota Century Code (1974) disclaimed the unconditional state court civil jurisdiction North Dakota had previously extended to tribal Indians suing non-Indians in state court. It ruled that under Chapter 27–19, petitioner could not avail itself of state court jurisdiction unless it consented to waive its sovereign immunity and to have any civil disputes in state court to which it is a party adjudicated under state law. 364 N. W. 2d 98 (1985). The question presented is whether Chapter 27–19, as construed by the North Dakota Supreme Court, is repugnant to the Federal Constitution or is pre-empted by federal Indian law.

I

This is the second time this Court has been called upon to address this jurisdictional controversy. See *Three Affiliated Tribes* v. *Wold Engineering*, 467 U. S. 138 (1984) *(Three Tribes I)*. Because the facts and procedural history of the litigation were set forth in some detail in *Three Tribes I*, our present recitation will be brief.

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*Briefs of *amici curiae* urging reversal were filed for the Standing Rock Sioux Tribe et al. by *Reid Peyton Chambers*, *Donald J. Simon*, and *Kevin A. Griffin;* and for the Turtle Mountain Band of Chippewa Indians by *Kim Jerome Gottschalk.*

Nicholas J. Spaeth, Attorney General, and *Terry L. Adkins*, Assistant Attorney General, filed a brief for the State of North Dakota as *amicus curiae* urging affirmance.

Historically, Indian territories were generally deemed beyond the legislative and judicial jurisdiction of the state governments. See *id.*, at 142. This restriction was reflected in the federal statute which admitted North Dakota to the Union, Enabling Act of Feb. 22, 1889, § 4, cl. 2, 25 Stat. 677, and was embodied in the form of jurisdictional disclaimers in North Dakota's original Constitution. See N. D. Const., Art. XVI, § 203, cl. 2 (1889). The pre-existing federal restrictions on state jurisdiction over Indian country were largely eliminated, however, in 1953 with Congress' enactment of the Act of Aug. 15, 1953, 67 Stat. 588, as amended, 28 U. S. C. § 1360, which is commonly known as Pub. L. 280. Public Law 280 gave federal consent to the assumption of state civil and criminal jurisdiction over Indian country and provided the procedures by which such an assumption could be made. See *Three Tribes I*, *supra*, at 143. As originally enacted, Pub. L. 280 did not require the States to obtain the consent of affected Indian tribes before assuming jurisdiction over them, but Title IV of the Civil Rights Act of 1963 amended Pub. L. 280 to require that all subsequent assertions of jurisdiction be preceded by tribal consent. Pub. L. 90–284, §§ 401, 402, 406, 82 Stat. 78–80, codified at 25 U. S. C. §§ 1321, 1322, 1326.

As this Court explained in *Three Tribes I:*

> "Even before North Dakota moved to amend its Constitution and assume full jurisdiction under Pub. L. 280, the North Dakota Supreme Court had taken an *expansive* view of the scope of state-court jurisdiction over Indians in Indian country. In 1957, the court held [in *Vermillion* v. *Spotted Elk*, 85 N. W. 2d 432 (1957)] that the existing jurisdictional disclaimers in the Enabling Act and the State's Constitution foreclosed civil jurisdiction over Indian country only in cases involving interests in Indian lands themselves." 467 U. S., at 143–144.

Although *Vermillion* v. *Spotted Elk*, 85 N. W. 2d 432 (1957), was decided after the enactment of Pub. L. 280, the North

Dakota Supreme Court made clear that it was confirming pre-existing jurisdiction rather than establishing a previously unavailable jurisdictional category. *Id.*, at 435–436. See also *Three Tribes I*, *supra*, at 150, n. 9.

That part of *Vermillion* that recognized jurisdiction over non-Indians' claims against Indians impermissibly intruded on tribal self-government and thus could not be sustained. 467 U. S., at 148. See also *Fisher* v. *District Court*, 424 U. S. 382 (1976); *Williams* v. *Lee*, 358 U. S. 217 (1959). But, as this Court in *Three Tribes I* affirmed, North Dakota's recognition of jurisdiction over the claims of Indian plaintiffs against non-Indian defendants was lawful because such jurisdiction did not interfere with the right of tribal Indians to govern themselves and was not subject to Pub. L. 280's procedural requirements since the jurisdiction was lawfully assumed prior to that enactment. See 467 U. S., at 148–149, 151, n. 11.

In 1958, North Dakota amended its Constitution to authorize its legislature to provide by statute for the acceptance of jurisdiction over Indian country, see N. D. Const., Art. XIII, § 1, cl. 2, and in 1963, the North Dakota Legislature enacted Chapter 27–19. That Chapter provides, in pertinent part:

> "In accordance with the provisions of Public Law 280 . . . and [the amended] North Dakota constitution, jurisdiction of the state of North Dakota shall be extended over all civil claims for relief which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter. Upon acceptance the jurisdiction of the state is to the same extent that the state has jurisdiction over other civil claims for relief, and those civil laws of this state that are of general application to private property have the same force and effect within such Indian reservation or Indian country as they have elsewhere within this state." N. D. Cent. Code § 27–19–01 (Supp. 1985).

In subsequent cases, the North Dakota Supreme Court read this provision to "completely disclaim" the state jurisdiction recognized in *Vermillion* in cases in which the defendant was an Indian, absent tribal consent to jurisdiction as provided by statute. See, *e. g.*, *In re Whiteshield*, 124 N. W. 2d 694 (1963). However, until the instant suit, the court never squarely held that Chapter 27–19 also disclaimed the jurisdiction *Vermillion* lawfully recognized over cases in which an Indian sued a non-Indian in state court for a claim arising in Indian country. See *Three Tribes I*, 467 U. S., at 144–145.

Petitioner filed the instant suit against respondent in state court for negligence and breach of contract in connection with respondent's construction of a water-supply system on petitioner's reservation. At the time the suit was filed, petitioner's tribal court did not have jurisdiction over such claims. After counterclaiming for petitioner's alleged failure to make payments on the system, respondent moved to dismiss petitioner's complaint, arguing that the state court had no jurisdiction because petitioner has never consented to state court jurisdiction over the Fort Berthold Reservation under Chapter 27–19. The trial court dismissed the suit for lack of jurisdiction, and the North Dakota Supreme Court affirmed the dismissal on appeal. 321 N. W. 2d 510 (1982).

In so doing, the North Dakota Supreme Court held that any residuary jurisdiction the North Dakota courts possessed under *Vermillion* over suits by an Indian against a non-Indian arising in Indian country was "totally disclaimed" when the North Dakota Legislature, "[u]nder the authority of Public Law 280," instituted the consent requirement of Chapter 27–19. 321 N. W. 2d, at 511–512. It concluded that "we have no jurisdiction over civil causes of action arising within the exterior boundaries of an Indian reservation, unless the Indian citizens of the reservation vote to accept jurisdiction." *Id.*, at 512. The court also rejected petitioner's federal and state constitutional challenges, relying in part on the argument that the discrimination against Indian litigants

embodied in Chapter 27–19 was authorized by Pub. L. 280 and was therefore insulated, under *Washington* v. *Yakima Indian Nation*, 439 U. S. 463 (1979), from heightened scrutiny. See 321 N. W. 2d, at 512–513.

This Court granted certiorari. 461 U. S. 904 (1983). We held that federal law did not preclude the state court from asserting jurisdiction over petitioner's claim. In particular, we ruled that Pub. L. 280 neither required nor authorized North Dakota to disclaim the jurisdiction it had lawfully exercised over the claims of Indian plaintiffs against non-Indian defendants prior to the enactment of Pub. L. 280. See *Three Tribes I*, 467 U. S., at 150. Because the North Dakota Supreme Court's interpretation of Chapter 27–19 and its accompanying constitutional analysis appeared to rest on a possible misunderstanding of Pub. L. 280, this Court vacated the judgment and remanded the case to allow the North Dakota court to reconsider the jurisdictional questions in light of the proper interpretation of the governing federal statute. *Id.*, at 141.

On remand, the North Dakota Supreme Court held that Chapter 27–19 terminated any residuary jurisdiction that may have existed over claims arising in Indian country brought by tribal Indians against non-Indians in state court. 364 N. W. 2d, at 104. It further held that state law barred petitioner from maintaining its suit in state court absent its waiver of its sovereign immunity in accordance with the statutory procedures. *Id.*, at 103–104. Finally, the court rejected petitioner's due process and equal protection challenges. It stated that petitioner had not been denied a due process right to access to the courts by action of the State, reasoning that it was the Indian people who had deprived themselves of access to state jurisdiction in declining to avail themselves of the State's jurisdictional offer by waiving their sovereign immunity. See *id.*, at 106. The North Dakota court then ruled that the jurisdictional disclaimer did not violate the Equal Protection Clause because, by virtue of the

consent provision, "[t]he statute does not treat [the Tribe] less than equal, it treats them more than equal." *Id.*, at 107.

We granted certiorari to examine petitioner's claims that Chapter 27–19 violates the Federal Constitution and is pre-empted by federal Indian law. Although respondent at no time objected to our consideration of the federal pre-emption issue, and in fact briefed it on the merits, our review of the proceedings below indicates that this question was not explicitly raised before, and was not decided by the North Dakota Supreme Court. We have recognized that in such circumstances there is a "weighty presumption against review." *Heath* v. *Alabama*, 474 U. S. 82, 87 (1985). See also *Illinois* v. *Gates*, 462 U. S. 213, 218–222 (1983). We believe, however, that this presumption has been overcome in this instance by a combination of circumstances.

First, respondent's failure to raise any challenge to our consideration of the pre-emption issue, cf. *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 815–816 (1985), and its apparent willingness to have the question decided, argues for review. Second, this case has already been sent back to the North Dakota Supreme Court once, and we are reluctant to further burden that court by resolving less than all the federal questions addressed by the parties. Since we have twice had the benefit of the Supreme Court of North Dakota's reasoning on closely aligned issues, we do not believe that our consideration of the federal pre-emption issue is a disservice to that court or to the litigants, or impairs our informed decision of the issue.

Because we believe that the North Dakota law is pre-empted insofar as it is applied to disclaim pre-existing jurisdiction over suits by tribal plaintiffs against non-Indians for which there is no other forum, absent the Tribe's waiver of its sovereign immunity and consent to the application of state civil law in all cases to which it is a party, we reverse.

II

Our cases reveal a "'trend . . . away from the idea of inherent Indian sovereignty as a[n independent] bar to state jurisdiction and toward reliance on federal pre-emption.'" *Rice* v. *Rehner*, 463 U. S. 713, 718 (1983) (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 172 (1973) (footnote omitted)). Yet considerations of tribal sovereignty, and the federal interests in promoting Indian self-governance and autonomy, if not of themselves sufficient to "pre-empt" state regulation, nevertheless form an important backdrop against which the applicable treaties and federal statutes must be read. See, *e. g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 334 (1983); *Rice* v. *Rehner*, *supra*, at 718–719. Accordingly, we have formulated a comprehensive pre-emption inquiry in the Indian law context which examines not only the congressional plan, but also "the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 145 (1980). In the instant case, this pre-emption inquiry yields the conclusion that the legislative plan embodied in Pub. L. 280 forecloses North Dakota from disclaiming jurisdiction over petitioner's suit, and further, that the state interest advanced by the North Dakota jurisdictional scheme in this context is overshadowed by longstanding federal and tribal interests.

A

Public Law 280 represents the primary expression of federal policy governing the assumption by States of civil and criminal jurisdiction over the Indian Nations. The Act was the result of "comprehensive and detailed congressional scrutiny," *Kennerly* v. *District Court of Montana*, 400 U. S. 423, 424, n. 1, 427 (1971), and was intended to replace the ad hoc regulation of state jurisdiction over Indian country with general legislation, providing "for all affected States to come

within its terms." S. Rep. No. 699, 83d Cong., 1st Sess., 5 (1953). See also Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 540–544 (1975). In examining the effect of comprehensive legislation governing Indian matters such as this, "our cases have rejected a narrow focus on congressional intent to pre-empt state law as the sole touchstone. They have also rejected the proposition that pre-emption requires 'an express congressional statement to that effect.'" *New Mexico* v. *Mescalero Apache Tribe, supra,* at 334 (quoting *White Mountain Apache Tribe* v. *Bracker, supra,* at 144) (footnote omitted). See also *Rice* v. *Rehner, supra,* at 719. Rather, we have found that where a detailed federal regulatory scheme exists and where its general thrust will be impaired by incompatible state action, that state action, without more, may be ruled pre-empted by federal law. See, *e. g., Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U. S. 685 (1965).

Given the comprehensiveness of the federal regulation in this area of Indian law, our conclusion in *Three Tribes I* that Congress generally intended to authorize the assumption, not the disclaimer, of state jurisdiction over Indian country is persuasive evidence that the instant disclaimer conflicts with the federal scheme. See 467 U. S., at 150. But we need not rest upon this conclusion alone, for Congress' specific treatment of the retrocession of previously assumed jurisdiction permits no doubt that North Dakota's disclaimer is inconsistent with the requirements of Pub. L. 280.

As originally enacted, Pub. L. 280 plainly contemplated that, if States chose to extend state court jurisdiction over causes of action arising in Indian country, they would be required to honor that commitment, for the Act made no provision for States to return any jurisdiction to the United States. See F. Cohen, Handbook of Federal Indian Law 370 (1982) (hereinafter Cohen). Congress' failure to provide for the retrocession of jurisdiction assumed by the States is fully

consistent with the purposes underlying Pub. L. 280: promoting the gradual assimilation of Indians into the dominant American culture and easing the fiscal and administrative burden borne by the Federal Government by virtue of its control over Indian affairs. See Goldberg, *supra*, at 542–544. See also H. R. Rep. No. 848, 83d Cong., 1st Sess., 3, 6 (1953). Were States permitted, at their option and at any time, to retrocede all or part of the jurisdiction they had assumed and to leave Indians with no recourse for civil wrongs, the congressional plan of gradual but steady assimilation could be disrupted and the divestment of federal dominance nullified.

When Congress subsequently revisited the question of retrocession in the 1968 amendments, it provided that "[t]he United States is authorized to accept a retrocession by any State," 25 U. S. C. § 1323(a), but it specifically limited this authorization to the retrocession of jurisdiction assumed under Pub. L. 280 pursuant to the original 1953 version of the statute. See *ibid.* (permitting retrocession of jurisdiction "acquired by [the] State pursuant to the provisions of section 1162 of title 18, of the United States Code, section 1360 of title 28, of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section"). See also Exec. Order No. 11435, 3 CFR 754 (1966–1970 Comp.) (giving Secretary of the Interior discretionary authority to accept retrocession of jurisdiction by a State); Goldberg, *supra*, at 558–559. This retrocession provision apparently was added in response to Indian dissatisfaction with Pub. L. 280. See Cohen 370. In light of this congressional purpose, the fact that Congress did not provide for retrocession of jurisdiction lawfully assumed prior to the enactment of Pub. L. 280 or of jurisdiction assumed after 1968 cannot be attributed to mere oversight or inadvertence. Since Congress was motivated by a desire to shield the Indians from unwanted extensions of jurisdiction over them, there was no need to provide for

retrocession in those circumstances because the previously assumed jurisdiction over Indian country was only lawful to the extent that it was consistent with Indian tribal sovereignty and self-government, see, *e. g.*, *Williams* v. *Lee*, 358 U. S. 217 (1959), and the jurisdiction assumed after 1968 could be secured only upon the receipt of tribal consent. See 25 U. S. C. § 1321.

North Dakota may not, and indeed has not attempted to, rely on § 1323(a) as authority for its disclaimer of jurisdiction over claims such as petitioner's because it did not assume such jurisdiction under any of the provisions specified in § 1323(a), nor has the United States accepted the retrocession. We have previously enforced the procedural requirements and the jurisdictional provisions of Pub. L. 280 quite stringently, consistent with our understanding that the jurisdictional scheme embodied in that Act was the product of a wide-ranging and detailed congressional study. See, *e. g.*, *Kennerly* v. *District Court of Montana*, 400 U. S., at 427. See also *Washington* v. *Yakima Indian Nation*, 439 U. S., at 484 ("the procedural requirements of Pub. L. 280 must be strictly followed"); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S., at 180. Accordingly, we conclude that since North Dakota's disclaimer is not authorized by § 1323(a), it is barred by that section.

In sum, because Pub. L. 280 was designed to extend the jurisdiction of the States over Indian country and to encourage state assumption of such jurisdiction, and because Congress specifically considered the issue of retrocession but did not provide for disclaimers of jurisdiction lawfully acquired other than under Pub. L. 280 prior to 1968, we must conclude that such disclaimers cannot be reconciled with the congressional plan embodied in Pub. L. 280 and thus are pre-empted by it.

B

Our consideration of the State's interest in disclaiming the pre-existing, unconditional jurisdiction extended to tribal

Indians suing non-Indian defendants, and in replacing it with an extension of jurisdiction conditioned on the Tribe's waiver of its sovereign immunity and its agreement to the application of state law in all suits to which it is a party, reinforces our conclusion that Chapter 27–19 is inconsistent with federal law. Simply put, the state interest, as presently implemented, is unduly burdensome on the federal and tribal interests.

As the North Dakota Supreme Court explained, Chapter 27–19 was originally designed as a unilateral assumption of jurisdiction over Indian country, which was intended to provide a means of enforcing contracts between Indians and non-Indians and a tribunal for trying tort actions, family law matters, and "many [other] types of actions too numerous to mention." 364 N. W. 2d, at 102, and n. 5. The North Dakota Legislature added the consent provision to Chapter 27–19 as a compromise to "accommodate the will of the Indian people." *Id.*, at 103. Those Indians who opposed the assertion of state jurisdiction against them would not be subjected to it absent consent, but neither would they be permitted to enjoy state jurisdiction as plaintiffs absent consent to suit as defendants. See *id.*, at 107. Certainly, the State's interest in requiring that all its citizens bear equally the burdens and the benefits of access to the courts is readily understandable. But here, federal interests exist which override this state interest.

The federal interest in ensuring that all citizens have access to the courts is obviously a weighty one. See, *e. g.*, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 510, 513–514 (1972); *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 741, 742–744 (1983). This Court and many state courts have long recognized that Indians share this interest in access to the courts, and that tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country. See,

e. g., Three Tribes I, 467 U. S., at 148, and n. 7 (citing authority). North Dakota conditions the Tribe's access to the courts on its waiver of its tribal sovereign immunity and agreement to the application of state civil law in all state court civil actions to which it is or may be a party. These conditions apply regardless of whether, as here, the Tribe has no other effective means of securing relief for civil wrongs. As the State concedes, even if the Tribe were to have access to tribal court to resolve civil controversies with non-Indians, it would be unable to enforce those judgments in state court; thus, the Tribe cannot be said to have a meaningful alternative to state adjudication by way of access to other tribunals in such cases. See Tr. of Oral Arg. 26, 27. Cf. *Lohnes* v. *Cloud*, 254 N. W. 2d 430 (N. D. 1977). Respondent argues that the Tribe is not truly deprived of access to the courts by the North Dakota jurisdictional scheme because the Tribe could have unrestricted access to the State's courts by "merely" consenting to the statutory conditions. We conclude, however, that those statutory conditions may be met only at an unacceptably high price to tribal sovereignty and thus operate to effectively bar the Tribe from the courts.

The North Dakota jurisdictional scheme requires the Tribe to accept a potentially severe intrusion on the Indians' ability to govern themselves according to their own laws in order to regain their access to the state courts. The statute provides that "[t]he civil jurisdiction herein accepted and assumed [upon Indian consent] shall include but shall not be limited to the determination of parentage of children, termination of parental rights, commitments by county courts, guardianship, marriage contracts, and obligations for the support of spouse, children, or other dependents." N. D. Cent. Code § 27-19-08 (Supp. 1985). Although these subjects clearly encompass areas of traditional tribal control, see *Fisher* v. *District Court*, 424 U. S., at 388-389; *United States* v. *Quiver*, 241 U. S. 602 (1916), the North Dakota statute contemplates that state civil law will control in these areas. See

§ 27–19–01. Respondent argues that Chapter 27–19 safeguards tribal self-government by also providing that any tribal ordinance or custom "shall, if not inconsistent with the applicable civil law of this state, be given full force and effect in the determination of civil claims for relief pursuant to this section." § 27–19–09. This provision plainly provides that state law will generally control, however, and will merely be supplemented by nonconflicting Indian ordinances or customs, even in cases that arise on the reservation, that involve only Indians, and that concern subjects which are within the jurisdiction of the tribal court.

This result simply cannot be reconciled with Congress' jealous regard for Indian self-governance. See, *e. g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S., at 334–335, and n. 17 ("both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes"). See also *Fisher* v. *District Court*, *supra*, at 388–389. "A tribe's power to prescribe the conduct of tribal members has never been doubted, and our cases establish that 'absent governing Acts of Congress,' a State may not act in a manner that 'infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.'" *New Mexico* v. *Mescalero Apache Tribe*, *supra*, at 332 (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S., at 171–172).

Chapter 27–19's requirement that the Tribe consent to suit in *all* civil causes of action before it may again gain access to state court as a plaintiff also serves to defeat the Tribe's federally conferred immunity from suit. The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance. See, *e. g.*, *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49 (1978). Of course, because of the peculiar "quasi-sovereign" status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy. *United States* v. *United States Fidelity & Guaranty Co.*, 309

U. S. 506, 513 (1940). Cf. also *McClanahan* v. *Arizona State Tax Comm'n, supra,* at 173. And this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition. See *Santa Clara Pueblo* v. *Martinez, supra,* at 58. Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.

To be sure, not all conditions imposed on access to state courts which potentially affect tribal immunity, and thus tribal self-government, are objectionable. For instance, even petitioner concedes that its tribal immunity does not extend to protection from the normal processes of the state court in which it has filed suit. See Tr. of Oral Arg. 7, 10–11 ("The Three Affiliated Tribes believe it would be proper in the interest of justice that they would be subject to discovery proceedings and to proceedings that would insure a fair trial to the non-Indian defendants"). Petitioner also concedes that a non-Indian defendant may assert a counterclaim arising out of the same transaction or occurrence that is the subject of the principal suit as a setoff or recoupment. See *id.,* at 6–7, 9. It is clear, however, that the extent of the waiver presently required by Chapter 27–19 is unduly intrusive on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws. By requiring that the Tribe open itself up to the coercive jurisdiction of state courts for *all* matters occurring on the reservation, the statute invites a potentially severe impairment of the authority of the tribal government, its courts, and its laws. See, *e. g., Fisher* v. *District Court, supra,* at 387–388.*

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*The extent to which respondent's counterclaim may be used not only to defeat or reduce petitioner's recovery, but also to fix the Tribe's affirmative liability has been the subject of some discussion in this case. See, *e. g.,* Tr. of Oral Arg. 6–11. We have no occasion to resolve this issue because the case comes to us before trial and we do not know the extent of the counterclaim asserted by respondent.

Public Law 280 certainly does not constitute a "governing Act of Congress" which validates this type of interference with tribal immunity and self-government. We have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity, nor found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance. As we explained in *Bryan* v. *Itasca County*, 426 U. S. 373, 387–388 (1976):

> "Today's congressional policy toward reservation Indians may less clearly than in 1953 favor their assimilation, but Pub. L. 280 was plainly not meant to effect total assimilation . . . . [N]othing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations,' *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975) . . . . The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, and § 4(c), 28 U. S. C. § 1360(c), providing for the 'full force and effect' of any tribal ordinances or customs 'heretofore or hereafter adopted by an Indian tribe . . . if not inconsistent with any applicable civil law of the State,' contemplates the continuing vitality of tribal government." (Footnote omitted.)

Certainly, the 1968 amendments to Pub. L. 280 pointedly illustrate the continuing congressional concern over tribal sovereignty. The impetus for the addition of a consent requirement in the 1968 amendments was congressional dissatisfaction with the involuntary extension of state jurisdiction over Indians who did not feel they were ready to accept such jurisdiction, or who felt threatened by it. See, *e. g.*, S. Rep. No. 721, 90th Cong., 1st Sess., 32 (1967) (views of Sen. Ervin) ("Tribes have been critical of Public Law 280 because it authorizes the unilateral application of State law to

all tribes without their consent and regardless of their needs or special circumstances. Moreover, it appears that tribal laws were unnecessarily preempted . . ."); Rights of Members of Indian Tribes: Hearing on H. R. 15419 and Related Bills before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 2d Sess., 25 (1968) (referring to tribal consent requirement as a way to ensure that Indians are not "subjected" to state courts' jurisdiction before they are ready).

In sum, the State's interest is overly broad and overly intrusive when examined against the backdrop of the federal and tribal interests implicated in this case. See *Rice* v. *Rehner*, 463 U. S., at 719. The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted. Our examination of the state, tribal, and federal interests implicated in this case, then, reinforces our conclusion that North Dakota's disclaimer of jurisdiction over suits such as this cannot be reconciled with the congressional plan embodied in Pub. L. 280.

The judgment of the North Dakota Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

North Dakota law provides that in order for an Indian tribe such as petitioner to avail itself of the jurisdiction of North Dakota courts as a plaintiff, it must also accept the jurisdiction of those courts when it is properly named as a defendant

in them. This Court holds that such a rule—which would commend itself to most people as eminently fair—is pre-empted by federal law. To support this conclusion the Court advances two arguments: first, pre-emption by Pub. L. 280, and, second, the "overshadowing" of the state interest by "longstanding federal and tribal interests." *Ante*, at 884. Neither by themselves nor in the rather awkward juxtaposition in which the Court places them are these arguments persuasive.

The Court's argument based on Pub. L. 280 consists of two assertions: (1) Pub. L. 280 pre-empts Chapter 27–19's disclaimer of pre-existing jurisdiction because the federal statute establishes a "comprehensive" legislative plan to govern Indian matters, and Chapter 27–19's disclaimer is incompatible with the plan's general purpose to authorize the assumption of state jurisdiction over Indian country, *ante*, at 884–885; and (2) the initial failure of Pub. L. 280 to authorize a disclaimer of jurisdiction, combined with the subsequent authorization of such disclaimer in the 1968 amendments with respect to jurisdiction assumed pursuant to Pub. L. 280, evidence a congressional intent to forbid the disclaimer of jurisdiction assumed prior to the passage of Pub. L. 280. *Ante*, at 885–887.

The Court provides no support for its assertion that Pub. L. 280 establishes a "comprehensive" federal scheme that pre-empts any state law that may inhibit the accomplishment of its general purpose. The Court's citation to *Kennerly* v. *District Court of Montana*, 400 U. S. 423, 427 (1971) *(per curiam)*, is unhelpful; the Court there was describing the "comprehensive and detailed" scrutiny that Congress appeared to give in deciding whether or not to eliminate federal barriers to state jurisdiction over Indian matters, and not the nature of Pub. L. 280. In addition, the brevity of Pub. L. 280, its 1968 amendments, and the relevant legislative history belie the Court's assertion that these statutes establish a "comprehensive" plan like statutes that occupy a given field

of regulation. Cf. *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 248 (1984). Public Law 280 does little more than make a general pronouncement that certain federal barriers to state jurisdiction have been eliminated. See Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 590. Nor does the legislative history, the 1968 amendments, or their legislative history provide any additions that transform the general pronouncement into a "comprehensive" plan. See S. Rep. No. 699, 83d Cong., 1st Sess. (1953); Pub. L. 90–284, Title IV, §§ 402, 403, 82 Stat. 79; S. Rep. No. 721, 90th Cong., 1st Sess. (1967).

There is also nothing inconsistent between the State's disclaimer of pre-existing jurisdiction and the purpose of Pub. L. 280. Congress stated that Pub. L. 280 was designed to accomplish two general purposes:

> "First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such." S. Rep. No. 699, *supra*, at 3.

The statute's elimination of certain federal barriers to the assertion of state jurisdiction over Indian country was an important means of furthering these goals. But the statute's complete silence on the disclaimer of state jurisdiction cannot reasonably be taken to imply an intent to forbid such disclaimer. This is especially true with respect to jurisdiction lawfully assumed before the passage of Pub. L. 280, since disclaimer of such jurisdiction would certainly have been entirely proper before passage of the Act.

Nor can any congressional intent to forbid the disclaimer of jurisdiction asserted prior to the passage of Pub. L. 280 be reasonably inferred from the subsequent authorization of such disclaimer with respect to jurisdiction asserted pursuant to Pub. L. 280. This Court has long recognized that federal law has a "generally interstitial character," *Richards* v. *United States*, 369 U. S. 1, 7 (1962), in the sense that Congress generally enacts legislation against the background of existing state law. See, *e. g.*, *Burks* v. *Lasker*, 441 U. S.

471, 478 (1979), citing P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 470–471 (2d ed. 1973). An appreciation for this traditional understanding of the nature of state power does not render superfluous the congressional authorization of disclaimer in the 1968 amendments to Pub. L. 280. See Pub. L. 90–284, Title IV, §§ 402, 403, 82 Stat. 79. Since the 1968 amendments were generally designed to impose a limitation on the ability of state legislatures to assert jurisdiction over Indian country, Congress could reasonably have intended the provision authorizing the disclaimer of previously asserted jurisdiction to encourage such disclaimer with a concomitant retention of a more limited form of jurisdiction. That the disclaimer provision referred only to jurisdiction asserted pursuant to Pub. L. 280 says nothing about congressional intent as to jurisdiction lawfully asserted in some other way. Given the traditional powers of state government, it is unreasonable to interpret such silence as evidence of an intent to forbid the States to disclaim jurisdiction asserted in another way. I find the Court's pre-emption analysis to be quite unconvincing.

I think the Court's reasoning supporting its conclusion that federal and tribal interests "overshadow" the State's interest in fair play for litigants fares no better than its reasoning about Pub. L. 280. The requirement that a tribe consent to the general civil jurisdiction of state courts as a *quid pro quo* for access to those courts as a plaintiff seems entirely fair and evenhanded to me. Nothing in Pub. L. 280 or any other federal statute requires a State to accept jurisdiction over Indian country in the first place. Nor has such an obligation been created as a matter of federal case law dealing with the Indians. To the contrary, all the cases and statutes with which I am familiar speak only to the limitations on the *assertion* of jurisdiction over these matters. Thus, because Congress and this Court have left the States free to bar access entirely by simply not asserting jurisdiction over Indian

country at all, I do not see how any "federal interest" precludes them from establishing conditions on the assertion of jurisdiction, and thereby on access to state courts, as North Dakota has done here: the employment of the North Dakota courts in matters in which the tribe has an interest shall not be solely at the option of the tribe.

I think there is nothing in Pub. L. 280 nor in federal Indian policy that prohibits North Dakota from applying its statute in the manner in which it did in this case, and I therefore dissent from the Court's contrary conclusion.

ATTORNEY GENERAL OF NEW YORK *v.* SOTO-LOPEZ ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84-1803. Argued January 15, 1986—Decided June 17, 1986

The New York Constitution and Civil Service Law grant a civil service employment preference, in the form of points added to examination scores, to New York residents who are honorably discharged veterans of the Armed Forces, served during time of war, and were New York residents when they entered military service. Appellee Army veterans, long-time New York residents, passed the New York City civil service examinations but were denied the veterans' preference because they were not New York residents when they joined the Army. They then brought an action in Federal District Court, alleging that the requirement that they have been New York residents when they joined the military violated the Equal Protection Clause of the Fourteenth Amendment and their constitutional right to travel. The District Court dismissed the complaint. The Court of Appeals reversed.

Held: The judgment is affirmed.

755 F. 2d 266, affirmed.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE POWELL, concluded that the prior resident requirement of the New York civil service veterans' preference laws violates appellees' constitutionally protected right to travel and to equal protection of the law. Pp. 901-912.

(a) The right to travel includes the freedom to enter and reside in any State, and a state law implicates that right when it actually deters such travel, when impeding travel is its primary objective, or when, as here, it uses a classification that penalizes the exercise of that right. When the latter is involved, heightened scrutiny of the law is required to determine its constitutionality, and the State must come forward with a compelling justification. Pp. 901-906.

(b) New York has not met its burden of proving that it has selected a means of pursuing a compelling state interest that does not impinge unnecessarily on constitutionally protected interests. The justifications offered in support of the prior residence requirement—encouraging New York residents to join the Armed Forces, helping war veterans reestablish themselves, inducing veterans to return to New York, and employing a "uniquely valuable class of public servants" who possess

useful experience acquired through military service—fail to withstand heightened scrutiny. New York could accomplish these purposes without penalizing the right to travel by awarding special credits to all qualified veterans. Pp. 907–911.

CHIEF JUSTICE BURGER concluded that the New York prior residence requirement is invalid because it fails to meet the rational-basis test under the Equal Protection Clause. *Zobel* v. *Williams*, 457 U. S. 55; *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612. Pp. 912–916.

JUSTICE WHITE concluded that the New York prior residence requirement denies equal protection of the laws because the classification it employs is irrational. P. 916.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which MARSHALL, BLACKMUN, and POWELL, JJ., joined. BURGER, C. J., *post*, p. 912, and WHITE, J., *post*, p. 916, filed opinions concurring in the judgment. STEVENS, J., filed a dissenting opinion, *post*, p. 916. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST and STEVENS, JJ., joined, *post*, p. 918.

Robert Hermann, Solicitor General of New York, argued the cause for appellant. With him on the brief were *Robert Abrams*, Attorney General, *pro se*, *O. Peter Sherwood*, Deputy Solicitor General, and *Christopher Keith Hall*, Assistant Attorney General.

Kenneth Kimerling argued the cause for appellees. With him on the brief was *Juan Cartagena*.*

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE POWELL join.

The question presented by this appeal is whether a preference in civil service employment opportunities offered by the State of New York solely to resident veterans who lived in the State at the time they entered military service violates the constitutional rights of resident veterans who lived outside the State when they entered military service.

**M. Carolyn Cox* and *Barton F. Stichman* filed a brief for Vietnam Veterans of America as *amicus curiae* urging affirmance.

I

The State of New York, through its Constitution, N. Y. Const., Art. V, § 6, and its Civil Service Law, N. Y. Civ. Serv. Law § 85 (McKinney 1983 and Supp. 1986), grants a civil service employment preference, in the form of points added to examination scores, to New York residents who are honorably discharged veterans of the United States Armed Forces, who served during time of war, and who were residents of New York when they entered military service.[1] This preference may be exercised only once, either for original hiring or for one promotion. N. Y. Const., Art. V, § 6.

Appellees, Eduardo Soto-Lopez and Eliezer Baez-Hernandez, are veterans of the United States Army and long-time residents of New York. Both men claim to have met all the eligibility criteria for the New York State civil service preference except New York residence when they entered the Army. Both Soto-Lopez and Baez-Hernandez

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[1] New York Constitution, Art. V, § 6, provides:

"Appointments and promotions in the civil service of the state and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state and was a resident at the time of his entrance into the armed forces of the United States and was honorably discharged or released under honorable circumstances from such service, shall be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual performance of duty in any war . . . he shall be entitled to receive ten points additional credit in a competitive examination for original appointment and five points additional credit in an examination for promotion. . . . No such member shall receive the additional credit granted by this section after he has received one appointment, either original entrance or promotion, from an eligible list on which he was allowed the additional credit granted by this section."

New York Civ. Serv. Law § 85 essentially restates the substance of the constitutional provision and defines the relevant terms.

passed New York City civil service examinations, but were denied the veterans' preference by the New York City Civil Service Commission because they were residents of Puerto Rico at the time they joined the military. Appellees sued the city in Federal District Court, alleging that the requirement of residence when they joined the military violated the Equal Protection Clause of the Fourteenth Amendment and the constitutionally protected right to travel. The Attorney General of the State of New York intervened as a defendant.

The District Court dismissed appellees' complaint, holding that this Court's summary affirmance in *August* v. *Bronstein*, 417 U. S. 901 (1974), aff'g 369 F. Supp. 190 (SDNY), a case in which a three-judge panel upheld against equal protection and right to travel challenges the same sections of the New York State Constitution and Civil Service Law at issue in the instant action, compelled that result. The Court of Appeals for the Second Circuit reversed. *Soto-Lopez* v. *New York City Civil Service Comm'n*, 755 F. 2d 266 (1985). It concluded that *August, supra*, had implicitly been overruled by our more recent decision in *Zobel* v. *Williams*, 457 U. S. 55 (1982), and held that the prior residence requirement of the New York civil service preference offends both the Equal Protection Clause and the right to travel. The Court of Appeals remanded with various instructions, including the direction that the District Court permanently enjoin the defendants from denying bonus points to otherwise qualified veterans who were not residents of New York at the time they entered the military service. We noted probable jurisdiction of this appeal of the Attorney General of New York. 473 U. S. 903 (1985). We affirm.

II

"'[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.'" *Dunn* v. *Blumstein*, 405 U. S. 330, 338 (1972) (quoting *United States* v. *Guest*, 383 U. S. 745, 758 (1966)). See,

e. g., *Passenger Cases*, 7 How. 283, 492 (1849) (Taney, C. J., dissenting); *Crandall* v. *Nevada*, 6 Wall. 35, 43–44 (1868); *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869); *Edwards* v. *California*, 314 U. S. 160 (1941); *Kent* v. *Dulles*, 357 U. S. 116, 126 (1958); *Shapiro* v. *Thompson*, 394 U. S. 618, 629–631, 634 (1969); *Oregon* v. *Mitchell*, 400 U. S. 112, 237 (1970) (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 285–286 (Stewart, J., concurring in part and dissenting in part, with whom BURGER, C. J., and BLACKMUN, J., joined); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 254 (1974). And, it is clear that the freedom to travel includes the "'freedom to enter and abide in any State in the Union.'" *Dunn*, *supra*, at 338 (quoting *Mitchell*, *supra*, at 285).

The textual source of the constitutional right to travel, or, more precisely, the right of free interstate migration, though, has proved elusive. It has been variously assigned to the Privileges and Immunities Clause of Art. IV, see, *e. g.*, *Zobel*, *supra*, at 71 (O'CONNOR, J., concurring in judgment), to the Commerce Clause, see *Edwards* v. *California*, 314 U. S. 160, 173–174 (1941), and to the Privileges and Immunities Clause of the Fourteenth Amendment, see, *e. g.*, *id.*, at 177–178 (Douglas, J., concurring). The right has also been inferred from the federal structure of government adopted by our Constitution. *Zobel*, *supra*, at 67 (BRENNAN, J., concurring); *Shapiro*, *supra*, at 631; *United States* v. *Guest*, *supra*, at 757–758. However, in light of the unquestioned historic acceptance of the principle of free interstate migration, and of the important role that principle has played in transforming many States into a single Nation, we have not felt impelled to locate this right definitively in any particular constitutional provision.[2] *Shapiro*, *supra*, at 630.

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[2] As was observed in *Zobel* v. *Williams*, 457 U. S., at 67 (BRENNAN, J., concurring):

"[*It*] is clear from our cases [that] the right to travel achieves its most forceful expression in the context of equal protection analysis. But if, finding no citable passage in the Constitution to assign as its source, some

Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases. See, *e. g.*, *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612, 618, n. 6 (1985); *Zobel*, *supra*, at 60, n. 6; *Jones* v. *Helms*, 452 U. S. 412, 418 (1981); *Memorial Hospital* v. *Maricopa County*, *supra*; *Dunn*, *supra*; *Shapiro*, *supra*; *United States* v. *Guest*, *supra*, at 757–759.

A state law implicates the right to travel when it actually deters such travel, see, *e. g.*, *Crandall* v. *Nevada*, *supra*, at 46; see also *Shapiro*, *supra*, at 629, when impeding travel is its primary objective, see *Zobel*, *supra*, at 62, n. 9; *Shapiro*, *supra*, at 628–631, or when it uses "'any classification which serves to penalize the exercise of that right.'" *Dunn*, *supra*, at 340 (quoting *Shapiro*, *supra*, at 634). Our right-to-migrate cases have principally involved the latter, indirect manner of burdening the right. More particularly, our recent cases have dealt with state laws that, by classifying residents according to the time they established residence, resulted in the unequal distribution of rights and benefits among otherwise qualified bona fide residents.[3] *Hooper*,

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might be led to question the independent vitality of the principle of free interstate migration, I find its unmistakable essence in that document that transformed a loose confederation of States into one Nation."

[3] We have always carefully distinguished between bona fide residence requirements, which seek to differentiate between residents and nonresidents, and residence requirements, such as durational, fixed date, and fixed point residence requirements, which treat established residents differently based on the time they migrated into the State. See, *e. g.*, *Martinez* v. *Bynum*, 461 U. S. 321, 325–330 (1983); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 255, 267 (1974); *Dunn* v. *Blumstein*, 405 U. S. 330, 343 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618, 636, 638, n. 21 (1969). As we explained in *Martinez:*

"A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement . . . [generally] does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. A bona fide residence requirement simply requires that

supra; Zobel, supra; Sosna v. *Iowa*, 419 U. S. 393 (1975); *Memorial Hospital, supra; Dunn, supra; Shapiro, supra.*

Because the creation of different classes of residents raises equal protection concerns, we have also relied upon the Equal Protection Clause in these cases. Whenever a state law infringes a constitutionally protected right, we undertake intensified equal protection scrutiny of that law. See, *e. g.*, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 440 (1985); *Martinez* v. *Bynum*, 461 U. S. 321, 328, n. 7 (1983); *Plyler* v. *Doe*, 457 U. S. 202, 216–217, and n. 15 (1982); *Memorial Hospital, supra*, at 258, 262; *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 16, and n. 39, 30–32, 40 (1973); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 101 (1972); *Dunn, supra*, at 335, 342; *Shapiro, supra*, at 634. Thus, in several cases, we asked expressly whether the distinction drawn by the State between older and newer residents burdens the right to migrate. Where we found such a burden, we required the State to come forward with a compelling justification. See, *e. g.*, *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 450 (1974). In other cases, where we concluded that the contested classifications did not survive even rational-basis scrutiny, we had no occasion to inquire whether enhanced scrutiny was appropriate. *Hooper, supra; Zobel* v. *Williams*, 457 U. S. 55 (1982). The analysis in all of these cases, however, is informed by the same guiding principle—the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents.[4] *Hooper,*

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the person *does* establish residence before demanding the services that are restricted to residents." 461 U. S., at 328–329.

[4] Of course, regardless of the label we place on our analysis—right to migrate or equal protection—once we find a burden on the right to migrate the standard of review is the same. Laws which burden that right must

supra, at 618, n. 6; *Zobel*, *supra*, at 60, n. 6; *Memorial Hospital*, *supra*, at 261; *Shapiro*, *supra*, at 629–631.

New York's eligibility requirements for its civil service preference conditions a benefit on New York residence at a particular past time in an individual's life. It favors those veterans who were New York residents at a past fixed point over those who were not New York residents at the same point in their lives. Our cases have established that similar methods of favoring "prior" residents over "newer" ones, such as limiting a benefit to those who resided in the State by a fixed past date, *Hooper*, *supra;* granting incrementally greater benefits for each year of residence, *Zobel*, *supra;* and conditioning eligibility for certain benefits on completion of a fixed period of residence, see, *e. g.*, *Memorial Hospital*, *supra; Dunn* v. *Blumstein*, *supra; Shapiro*, *supra*, warrant careful judicial review.[5] But, our cases have also established that only where a State's law "'operates to penalize those persons . . . who have exercised their constitutional right of interstate migration'" is heightened scrutiny triggered. *Memorial Hospital*, *supra*, at 258, quoting *Oregon*

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be necessary to further a compelling state interest. See, *e. g.*, *Memorial Hospital*, *supra; Dunn*, *supra; Shapiro*, *supra*.

[5] We have cautioned, however, that not all waiting periods are impermissible. See, *e. g.*, *Memorial Hospital*, *supra*, at 258–259; *Shapiro*, *supra*, at 638, n. 21. Indeed, in *Sosna* v. *Iowa*, 419 U. S. 393 (1975), we upheld a 1-year residency condition for maintaining an action for divorce. We noted the State's strong, traditional interest in setting the terms of and procedures for marriage and divorce. Weighing the fact that appellant's access to the desired state procedure was only temporarily delayed, against the State's important interest, we concluded that her right to migrate was not violated.

We have also sustained domicile requirements, which incorporated 1-year waiting periods, for resident tuition at state universities. *Starns* v. *Malkerson*, 401 U. S. 985 (1971), summarily aff'g 326 F. Supp. 234 (Minn. 1970) (three-judge court); *Sturgis* v. *Washington*, 414 U. S. 1057 (1973), summarily aff'g 368 F. Supp. 38 (WD Wash.) (three-judge court). See also *Vlandis* v. *Kline*, 412 U. S. 441, 452–454 (1973).

v. *Mitchell*, 400 U. S., at 238 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.).

Our task in this case, then, is first to determine whether New York's restriction of its civil service preference to veterans who entered the Armed Forces while residing in New York operates to penalize those persons who have exercised their right to migrate. If we find that it does, appellees must prevail unless New York can demonstrate that its classification is necessary to accomplish a compelling state interest. *Memorial Hospital*, *supra*, at 262; *Dunn*, *supra*, at 342; *Shapiro*, *supra*, at 634.[6]

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[6] In his concurrence, THE CHIEF JUSTICE takes the Court to task for asking in the first instance what is the appropriate standard of review to employ in evaluating New York's laws. THE CHIEF JUSTICE argues that we should initially run the laws through a rational-basis analysis and then, if they survive that level of scrutiny, ask whether a higher level is appropriate.

We disagree. The logical first question to ask when presented with an equal protection claim, and the one we usually ask first, is what level of review is appropriate. See, *e. g.*, *Dunn*, *supra*, at 335 ("In considering laws challenged under the Equal Protection Clause . . . [f]irst . . . we must determine what standard of review is appropriate"). See also, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); *Mississippi University for Women* v. *Hogan*, 458 U. S. 718 (1982); *Plyler* v. *Doe*, 457 U. S. 202 (1982); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974); *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1 (1973); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). It is well established that where a law classifies by race, alienage, or national origin, and where a law classifies in such a way as to infringe constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required. See, *e. g.*, *Cleburne*, *supra*, at 440; *Martinez*, 461 U. S., at 328, n. 7; *Plyler* v. *Doe*, *supra*, at 216–217, and n. 15; *Memorial Hospital*, *supra*, at 258, 262; *San Antonio Independent School District*, *supra*, at 16, and nn. 39, 30–32, 40; *Mosley*, *supra*, at 101; *Dunn*, 405 U. S., at 335, 342; *Shapiro*, *supra*, at 634. In the instant case, appellees contend not only that the laws in question treat them differently from another class of state residents, they also maintain that by treating them differently, the laws burden their constitutionally protected right to travel. Therefore, in order to ascertain the ap-

III

A

In previous cases, we have held that even temporary deprivations of very important benefits and rights can operate to penalize migration. For example, in *Shapiro* and in *Memorial Hospital*, we found that recently arrived indigent residents were deprived of life's necessities by durational residence requirements for welfare assistance and for free, nonemergency medical care, respectively, which were available to other poor residents. In *Dunn*, we held that new residents were denied a basic right by a durational residence requirement for establishing eligibility to vote. The fact that these deprivations were temporary did not offset the Court's conclusions that they were so severe and worked such serious inequities among otherwise qualified residents that they effectively penalized new residents for the exercise of their rights to migrate.

More recently, in *Hooper* v. *Bernalillo*, 472 U. S. 612 (1985), and *Zobel* v. *Williams*, 457 U. S. 55 (1982), we struck down state laws that created permanent distinctions among residents based on the length or timing of their residence in the State. At issue in *Hooper* was a New Mexico statute that granted a tax exemption to Vietnam veterans who resided in the State before May 8, 1976. *Zobel* concerned an Alaska statute granting residents one state mineral income dividend unit for each year of residence subsequent to 1959. Because we employed rational-basis equal protection analysis in those cases, we did not face directly the question whether

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propriate level of scrutiny, we must, as an initial matter, determine whether or not the State's laws actually burden appellees' right to travel.

It is true, as THE CHIEF JUSTICE suggests, that in *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612 (1985), and *Zobel* v. *Williams*, 457 U. S. 55 (1982), the Court did not follow this same logical sequence of analysis. We think that the better approach is that which the Court has employed in other equal protection cases—to inquire first as to the proper level of scrutiny and then to apply it.

the contested laws operated to penalize interstate migration. Nonetheless, the conclusion that they did penalize migration may be inferred from our determination that "the Constitution will not tolerate a state benefit program that 'creates fixed, permanent distinctions . . . between . . . classes of concededly bona fide residents, based on how long they have been in the State.'" *Hooper*, *supra*, at 623 (quoting *Zobel*, *supra*, at 59). See also *Zobel*, *supra*, at 64.

Soto-Lopez and Baez-Hernandez have been denied a significant benefit that is granted to all veterans similarly situated except for State of residence at the time of their entry into the military. While the benefit sought here may not rise to the same level of importance as the necessities of life and the right to vote, it is unquestionably substantial. The award of bonus points can mean the difference between winning or losing civil service employment, with its attendant job security, decent pay, and good benefits.[7] Brief for Appellees 27–28. See also *Guardians Assn. of New York City*

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[7] In *Andrade* v. *Nadel*, 477 F. Supp. 1275, 1279 (SDNY 1979), the Deputy Director of the New York City Department of Personnel testified:

"[O]n most civil service examinations, there is a pronounced 'bunching' (*i. e.*, a large percentage of the test takers obtain very similar scores). [I]t can be assumed that rescission of the five or 10 point veterans' preference in the case of most of 1,300 employee [veterans receiving probationary appointments in New York City in a specific year would] result in their receiving a list number that has not yet been reached for appointment, and . . . consequently [in their losing] their jobs."

Appellees contend that this "bunching" phenomenon adversely affected their employment opportunities with the City of New York. For example, after passing a New York City civil service examination, Baez-Hernandez was preliminarily awarded 10 veterans' bonus points—5 for veteran status, and 5 for his service-related disability, bringing his total score to 87.3. Based on this adjusted score, he received an appointment with the city in June 1981. The award of the 10 bonus points was rescinded two days later, however, and the appointment withdrawn when it was discovered that Baez-Hernandez was not a New York resident at the time of his entry into the Army. *Soto-Lopez* v. *New York City Civil Service Comm'n*, 755 F. 2d 266, 268–269 (CA2 1985).

Police Dept., Inc. v. *Civil Service Comm'n*, 630 F. 2d 79, 85 (CA2 1980), cert. denied, 452 U. S. 940 (1981); *Andrade* v. *Nadel*, 477 F. Supp. 1275, 1279 (SDNY 1979). Furthermore, appellees have been *permanently* deprived of the veterans' credits that they seek. As the Court of Appeals observed: "The veteran's ability to satisfy the New York residence requirement is . . . fixed. He either was a New York resident at the time of his initial induction or he was not; he cannot earn a change in status." 755 F. 2d, at 275. Such a permanent deprivation of a significant benefit, based only on the fact of nonresidence at a past point in time, clearly operates to penalize appellees for exercising their rights to migrate.

B

New York offers four interests in justification of its fixed point residence requirement: (1) the encouragement of New York residents to join the Armed Services; (2) the compensation of residents for service in time of war by helping these veterans reestablish themselves upon coming home; (3) the inducement of veterans to return to New York after wartime service; and (4) the employment of a "uniquely valuable class of public servants" who possess useful experience acquired through their military service. Brief for Appellant 15. All four justifications fail to withstand heightened scrutiny on a common ground—each of the State's asserted interests could be promoted fully by granting bonus points to *all* otherwise qualified veterans. New York residents would still be encouraged to join the services. Veterans who served in time of war would be compensated. And, both former New Yorkers and prior residents of other States would be drawn to New York after serving the Nation, thus providing the State with an even larger pool of potentially valuable public servants.

As we held in *Dunn:* "[I]f there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a State may not choose

the way of greater interference. If it acts at all, it must choose 'less drastic means.'" 405 U. S., at 343 (quoting *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960)). See also *Memorial Hospital*, 415 U. S., at 263. Because New York could accomplish its purposes without penalizing the right to migrate by awarding special credits to all qualified veterans, the State is not free to promote its interests through a preference system that incorporates a prior residence requirement.

Two of New York's asserted interests have additional weaknesses. First, the availability of the preference to *inductees* as well as *enlistees* undercuts the State's contention that one of the most important purposes of the veterans' credit is to encourage residents to *enlist* in the services. Second, the fact that eligibility for bonus points is not limited to the period immediately following a veteran's return from war casts doubt on New York's asserted purpose of easing the transition from wartime military conditions to civilian life,[8] for, presumably a veteran of the Korean War could take a civil service examination and receive the bonus points tomorrow, 30 years after his homecoming. Cf. *Hooper*, 472 U. S., at 621. The State's failure to limit the credit to enlistees recently returned to New York from war strongly suggests that the State's principal interest is simply in rewarding its residents for service to their country.

Compensating veterans for their past sacrifices by providing them with advantages over nonveteran citizens is a longstanding policy of our Federal and State Governments. See, *e. g.*, *Hooper*, *supra*; *Regan* v. *Taxation with Representation of Washington*, 461 U. S. 540, 551 (1983); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279, n. 25

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[8] Moreover, it is difficult to understand why veterans who joined the military as New York residents would have so much more trouble effecting this transition than other veterans that New York is justified in reserving "the benefits [it] bestows for national military service" for only one class of resident veterans. *Hooper* v. *Bernalillo County Assessor*, 472 U. S., at 621.

(1979). Nonetheless, this policy, even if deemed compelling, does not support a distinction between resident veterans based on their residence when they joined the military. Members of the Armed Forces serve the Nation as a whole. While a service person's home State doubtlessly derives indirect benefit from his or her service, the State benefits equally from the contributions to our national security made by other service personnel. "Permissible discriminations between persons" must be correlated to "their *relevant* characteristics." *Zobel*, 457 U. S., at 70 (BRENNAN, J., concurring). Because prior residence has only a tenuous relation, if any, to the benefit New York receives from all Armed Forces personnel, the goal of rewarding military service offers no support for New York's fixed point residence requirement.

IV

In sum, the provisions of New York's Constitution, Art. V, § 6, and Civil Service Law § 85, which limit the award of a civil service employment preference to resident veterans who lived in New York at the time they entered the Armed Forces effectively penalize otherwise qualified resident veterans who do not meet the prior residence requirement for their exercise of the right to migrate. The State has not met its heavy burden of proving that it has selected a means of pursuing a compelling state interest which does not impinge unnecessarily on constitutionally protected interests. Consequently, we conclude that New York's veterans' preference violates appellees' constitutionally protected rights to migrate and to equal protection of the law.

Once veterans establish bona fide residence in a State, they "become the State's 'own' and may not be discriminated against solely on the basis of [the date of] their arrival in the State." *Hooper, supra*, at 623. See also *Vlandis* v. *Kline*, 412 U. S. 441, 449–450, and n. 6 (1973); *Shapiro*, 394 U. S., at 632–633; *Passenger Cases*, 7 How., at 492 (Taney, C. J., dissenting). For as long as New York chooses to offer its

resident veterans a civil service employment preference, the Constitution requires that it do so without regard to residence at the time of entry into the services.[9] Accordingly, the judgment of the Court of Appeals is

Affirmed.

CHIEF JUSTICE BURGER, concurring in the judgment.

In this case the Court of Appeals held that New York's civil service veterans' preference violated both equal protection and the right to travel, relying on *Zobel* v. *Williams*, 457 U. S. 55 (1982). Shortly after the Court of Appeals' decision was issued, we struck down New Mexico's property tax veterans' preference in *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612 (1985). Both *Zobel* and *Hooper* held that the classifications used by the States to award preferences to certain citizens failed to pass a rational-basis test *under theEqual Protection Clause*. As a result, we had no occasion to reach the issues whether the classifications would survive heightened scrutiny or whether the right to travel was violated. See *Hooper*, *supra*, at 618, and n. 6; *Zobel*, *supra*, at 60–61, and n. 6.

The classification held invalid on equal protection grounds in *Hooper* was remarkably similar to the one at issue here; *Hooper*, therefore would appear to be controlling. The plurality opinion, however, instead *begins* the analysis by addressing the "right to migrate." *Ante*, at 901–905. Moreover, heightened scrutiny is employed without first determining whether the challenged New York classification would survive even rational-basis analysis. *Ante*, at 907–909. But as we observed in *Zobel*, *supra*, at 60, n. 6, and reiterated only last Term in *Hooper*, *supra*, at 618, n. 6, "[r]ight to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." This follows because "[i]n reality, right to

[9] Our summary affirmance in *August* v. *Bronstein*, 417 U. S. 901 (1974), is hereby overruled.

travel analysis refers to little more than a particular application of equal protection analysis." *Zobel, supra*, at 60, n. 6.

I believe the appropriate framework for reviewing New York's preference scheme is the one dictated by *Zobel* and followed in *Hooper*—both very recent cases. Because "[t]his case involves a distinction between residents based on when they first established residence in the State," just as in *Hooper*, "we [must] subject this case to equal protection analysis." *Hooper*, 472 U. S., at 618, n. 6. The first question is whether the law survives rational-basis analysis under the Equal Protection Clause. "[I]f the statutory scheme cannot pass even the minimum rationality test, our inquiry ends." *Id.*, at 618. Under *Hooper*, it seems clear that New York's provision is invalid on equal protection grounds.

The State proffers four justifications for the challenged classification. First, it claims that the preference system encourages New York residents to enlist during times of war. This justification rests entirely on the State's characterization of the preference as being *prospective* and self-executing in nature. But plainly the preference is granted only *retrospectively* following definitive action by the legislature; legislative action is necessary to fix both the period when "war" is deemed to have commenced and when that war has ended.

In many cases a New York resident entering military service will have no idea whether he or she will be entitled to the preference following a successful tour of duty and honorable discharge. For example, the beginning of the Vietnam era was established by legislation as a "time of war" some three years *after* hostilities commenced. The legislature in 1973 later declared the "end" of that "war" (which was never declared a "war" by Congress) for purposes of the preference as March 29, 1973, but in 1983 it amended that finding to expand coverage retroactively again until May 7, 1975. See Brief for Appellant 9–10. The same happened in the Korean Con-

flict, and indeed, the provision at issue was adopted after the end of World War II with the clear intent to grant the benefit retroactively to veterans of that war. *Id.*, at 7–8.

Moreover, the preference applies to *all* servicemen entering the military during the legislatively defined period, regardless whether they enlisted voluntarily or were inducted as a result of the draft. Providing a "bonus" to draftees is hardly a boon intended or necessary to "encourage" them to enlist. Hence, this "encouragement to enlist" sharply "differs from the local 'bounty' laws enacted during the Civil War era, through which States paid residents cash bonuses for enlisting." *Hooper*, 472 U. S., at 622, n. 12.

Second, the State argues that the preference provides partial compensation to residents for service during time of war. But our holding in *Hooper* clearly rejected any such retroactive rewards targeting only past residents. While we acknowledged that a "State may award certain benefits to all its bona fide veterans," *id.*, at 620, just as in that case "it is difficult to grasp how [New York] residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefits a State bestows for national military service." *Id.*, at 621.

Third, the State contends that it is permissible to encourage past-resident veterans to settle in New York after their military service ends. While such a preference might indeed encourage such veterans to return, it simultaneously has the effect of *discouraging* other veterans from settling in New York who are aware that civil service appointments will be hard to obtain. As we observed in *Zobel* and reiterated in *Hooper*, *supra*, at 619–620, "[t]he separation of residents into classes hardly seems a likely way to persuade new [residents] that the State welcomes them and wants them to stay." *Zobel*, 457 U. S., at 62, n. 9. Moreover, *Hooper* made it clear that a "selective incentive" such as New York provides here "would encounter the same constitutional barrier faced

by the [New Mexico] statute's distinction between past and newly arrived residents." *Hooper, supra*, at 619, n. 8.

Finally, the State asserts that the preference is targeted at a very special group of veterans who have both knowledge of local affairs and valuable skills learned in the military, and who therefore would make exceptional civil servants. But these "special attributes" are undeniably possessed by *all* veterans who are currently residents of New York.

Indeed, the irrationality of the New York scheme is highlighted by appellee Baez-Hernandez' experiences. The current provision would grant a civil service hiring preference to a serviceman entering the military while a resident of New York even if he was a resident only for a day. But Baez-Hernandez, who was a resident of New York for over 10 years before applying for a civil service position—and who therefore has considerably more "local knowledge" than many returning veterans—can never receive the preference. Moreover, Baez-Hernandez was a resident of New York for two years when he was called from reserve status to active duty, where he remained until he was discharged as partially disabled. He therefore served "in time of war" *after* obtaining New York residency. Yet he still cannot qualify despite his being endowed with all the desired "special attributes."

Just as in *Hooper*, "[s]tripped of its asserted justifications, the [New York] statute suffers from the same constitutional flaw as the Alaska statute in *Zobel*." 472 U. S., at 622. Given our reasons for granting review, our admonition in *Hooper* need only be reiterated briefly to demonstrate the invalidity of the New York scheme under equal protection, rational-basis analysis:

> "The State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated

against solely on the basis of their arrival in the State after [a fixed date]." *Id.*, at 623.

Appellees Soto-Lopez and Baez-Hernandez, by establishing bona fide residence in New York, have become the State's "own" and must be treated accordingly with regard to any veterans' preference. "Neither the Equal Protection Clause, nor this Court's precedents, permit the State to prefer established resident veterans over newcomers in the retroactive apportionment of an economic benefit." *Id.*, at 623.

I would affirm the judgment of the Court of Appeals based on our reasoning and holdings in *Hooper* and *Zobel*, rather than adding dicta concerning the right to travel.

JUSTICE WHITE, concurring in the judgment.

I agree with JUSTICE O'CONNOR that the right to travel is not sufficiently implicated in this case to require heightened scrutiny. Hence, I differ with JUSTICE BRENNAN in this respect. But I agree with THE CHIEF JUSTICE that the New York statute at issue denies equal protection of the laws because the classification it employs is irrational. I therefore concur in the judgment.

JUSTICE STEVENS, dissenting.

JUSTICE O'CONNOR has explained why the Court's decision is erroneous. I add these comments to explain why I do not feel constrained by the decision in *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612 (1985), to join the Court's judgment.

A governmental decision to grant a special privilege to a minority group is less objectionable than a decision to impose a special burden on a minority.[1] In a democracy the majority will seldom treat itself unfairly. In equal protection anal-

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[1] Cf. *Wygant* v. *Jackson Board of Education*, *ante*, at 316–317 (STEVENS, J., dissenting).

ysis, it is therefore appropriate to give some attention to the relative dimensions of favored and disfavored classes.[2]

The New Mexico statute that the Court held invalid in *Hooper* gave a tax exemption to any Vietnam veteran who resided in New Mexico prior to May 8, 1976. The New York statute challenged in this case grants a preference only to those Vietnam veterans who were residents of the State when they joined the Armed Forces. The favored class in this case is therefore drawn more narrowly than the class that excluded Mr. Hooper. Despite the fact that the reasoning of the *Hooper* opinion might seem to cover this case as well, this distinction allows me to conclude otherwise for two reasons.

First, in its *Hooper* opinion the Court itself was careful to reserve the question of the constitutionality of the New York statute in particular, and of the class of statutes that condition eligibility for a veteran's preference on residence at the time of enlistment in general.[3] If the Court believed the reasoning of *Hooper* to be controlling in this case, it had only to omit its footnote in *Hooper* and to affirm rather than note jurisdiction in this case, as it subsequently did. The Court cannot both leave a question open in order to make its *Hooper*

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[2] See *Hooper* v. *Bernalillo County Assessor*, 472 U. S., at 629–630 (STEVENS, J., dissenting); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 281 (1979) (STEVENS, J., concurring). Cf. *Craig* v. *Boren*, 429 U. S. 190, 213–214 (1976) (STEVENS, J., concurring).

[3] "Veterans' benefit statutes, which condition eligibility on state residence at the time of induction into the military, have survived challenges under the Equal Protection Clause before *Zobel* was decided. See, *e. g.*, . . . *August* v. *Bronstein*, 369 F. Supp. 190 (SDNY), summarily aff'd, 417 U. S. 901 (1974) . . . .

". . . [We note that] the Second Circuit recently has ruled that such a statute could not pass muster under the Equal Protection Clause in light of the Court's holding in *Zobel* [v. *Williams*, 457 U. S. 55 (1982)]. *Soto-Lopez* v. *New York City Civil Service Comm'n*, 755 F. 2d 266 (1985), appeal docketed, No. 84–1803. Given the circumstances presented in this case, we need not consider here the constitutionality of these statutes." *Hooper* v. *Bernalillo County Assessor*, 472 U. S., at 621–622, n. 11.

decision acceptable to a majority of its Members and at the same time claim that the *Hooper* holding has resolved the open question.

Second, and of greater importance, each additional condition of eligibility that further narrows the size of the preferred class places greater stress on the logic that undergirds the Court's holding. If a State should grant a special bonus to fighter pilots who are residents at the time of enlistment, to those who fought in the Battle of Midway, or perhaps just to the few who received the Congressional Medal of Honor—would it violate the Equal Protection Clause to deny bonuses to comparable veterans who moved into the State after the end of the war? I think not, even though the reasoning in the opinions supporting the judgment would apply to each of those cases as well as it does to *Hooper* and to this case. As the class narrows, a judge is surely not bound to apply that flawed reasoning in each successive case instead of using each new extension to explain why the Court is marching in the wrong direction.

I respectfully dissent.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST and JUSTICE STEVENS join, dissenting.

The Court today holds unconstitutional the preference in public employment opportunities New York offers to resident war-time veterans who resided in New York when they entered military service. Because I believe that New York's veterans' preference scheme is not constitutionally offensive under the Equal Protection Clause, does not penalize some free-floating "right to migrate," and does not violate the Privileges and Immunities Clause of Art. IV, §2, of the Constitution, I dissent.

I

The plurality's constitutional analysis runs generally as follows: because the classification imposed by New York's limited, one-time veterans' civil service preference "penalizes" appellees' constitutional "right to migrate," the preference

program must be subjected to heightened scrutiny, which it does not survive because it is insufficiently narrowly tailored to serve its asserted purposes. On the strength of this reasoning, the plurality concludes that the preference program violates both appellees' constitutional "right to migrate" and their right to equal protection of the law, see *ante*, at 911, although it does not make clear how much of its analysis is necessary or sufficient to find a violation of the "right to migrate" independently of an Equal Protection Clause violation.

In pursuing this new dual analysis, the plurality simply rejects the equal protection approach the Court has previously employed in similar cases, see, *e. g.*, *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612 (1985), without bothering to explain why its novel use of both "right to migrate" analysis and strict equal protection scrutiny is more appropriate, necessary or doctrinally coherent. Cf. *Jones* v. *Helms*, 452 U. S. 412, 426–427 (1981) (WHITE, J., concurring). Indeed, the plurality does not even feel "impelled to locate ['the right to migrate'] definitively in any particular constitutional provision," despite the fact that its ruling rests in major part on its determination that the preference scheme penalizes that right. See *ante*, at 902, 907–911, and n. 4. The plurality's refusal to amplify its opinion further is even more remarkable given that the Court is overturning the very provisions of New York's Constitution and its Civil Service Law which it upheld against the same challenges just 12 years ago. See *August* v. *Bronstein*, 369 F. Supp. 190 (SDNY), summarily aff'd, 417 U. S. 901 (1974).

THE CHIEF JUSTICE finds it unnecessary to address the proper analytical role of the "right to travel" in this case because he believes that the New York scheme cannot survive rational basis scrutiny purely as a matter of equal protection law. See *ante*, at 913, 916. Yet THE CHIEF JUSTICE's position depends in part on the assumption that New York's desire "to reward citizens for past contributions . . . is not a legitimate state purpose," *Zobel* v. *Williams*, 457 U. S. 55, 63 (1982). See *ante*, at 914. This assumption is not re-

quired by anything in the Equal Protection Clause; rather, "a full reading of *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), and *Vlandis* v. *Kline*, 412 U. S. 441 (1973), reveals [that] the Court has rejected this objective only when its implementation would abridge an interest in interstate travel or migration." *Zobel* v. *Williams*, *supra*, at 72 (O'CONNOR, J., concurring in judgment).

It is unfortunate that the Court has once again failed to articulate and justify by reference to textual sources a single constitutional principle or analysis upon which it can rely in deciding cases such as this. I adhere to my belief that the Privileges and Immunities Clause of Art. IV, § 2, of the Constitution supplies the relevant basis for analysis in evaluating claims like appellees', where the principal allegation is that the state scheme impermissibly distinguishes between state residents, allegedly imposing a relative burden on those who have more recently exercised their right to establish residence in the State. See *Zobel* v. *Williams*, 457 U. S., at 74–75 (O'CONNOR, J., concurring in judgment). I also continue to believe that a State's desire to compensate its citizens for their prior contributions is "neither inherently invidious nor irrational," either under the Court's "right to migrate" or under some undefined, substantive component of the Equal Protection Clause. *Id.*, at 72. This case presents one of those instances in which the recognition of state citizens' past sacrifices constitutes a valid state interest that does not infringe any constitutionally protected interest, including the fundamental right to settle in another State which is protected by the Privileges and Immunities Clause of Art. IV, § 2. See *id.*, at 72, n. 1.

II

In my view, the New York veterans' preference scheme weathers constitutional scrutiny under any of the theories propounded by the Court. The plurality acknowledges that heightened scrutiny is appropriate only if the statutory classification "penalize[s]," "actually deters" or is primarily

intended to "imped[e]" the exercise of the right to travel. See *ante*, at 903. In finding that the New York preference program imposes a "penalty" on appellees' right to migrate, the plurality likens the New York scheme to the permanent state property tax exemption for veterans struck down in *Hooper* v. *Bernalillo County Assessor*, *supra*, and the durational residency requirements for essential governmental services invalidated in *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974), and *Shapiro* v. *Thompson*, *supra*.

This Court in *Memorial Hospital* acknowledged that *Shapiro* left unclear the amount of impact on the right to travel which is necessary to give rise to application of heightened scrutiny. See *Memorial Hospital* v. *Maricopa County*, *supra*, at 256–259. As the plurality implicitly recognizes, see *ante*, at 907–909, it is fair to infer that something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied. I believe that, as the three-judge panel in *August* v. *Bronstein* put it, "the limited preference granted under the . . . New York law can[not] realistically be held to infringe or penalize the right to travel." 369 F. Supp., at 194.

The New York law certainly does not directly restrict or burden appellees' freedom to move to New York and to establish residence there by imposing discriminatory fees, taxes, or other direct restraints. Cf. *The Passenger Cases*, 7 How. 283 (1849). The New York preference program does not permanently deprive appellees of the right to participate in some fundamental or even "significant" activity, for "public employment is not a constitutional right . . . and the States have wide discretion in framing employee qualifications." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 273 (1979). See also *Sosna* v. *Iowa*, 419 U. S. 393, 406 (1975). Cf. *Dunn* v. *Blumstein*, 405 U. S. 330, 336–337, 341 (1972). Nor does the program indirectly penalize migration by depriving the newcomers of fundamental rights or essential governmental services until they have re-

sided in the State for a set period of time. Cf. *Memorial Hospital* v. *Maricopa County, supra; Dunn* v. *Blumstein, supra; Shapiro* v. *Thompson, supra.*

Finally, the New York scheme does not effectively penalize those who exercise their fundamental right to settle in the State of their choice by requiring newcomers to accept a status inferior to that of all oldtime residents of New York upon their arrival. Cf. *Zobel* v. *Williams, supra,* at 74 (O'CONNOR, J., concurring in judgment). Those veterans who were not New York residents when they joined the United States Armed Forces, who subsequently move to New York, and who endeavor to secure civil service employment are treated exactly the same as the vast majority of New York citizens; they are in no sense regarded as "second-class citizens" when compared with the vast majority of New Yorkers or even the majority of the candidates against whom they must compete in obtaining civil employment. Cf. *Hicklin* v. *Orbeck,* 437 U. S. 518 (1978). To the extent that persons such as appellees labor under any practical disability, it is a disability that they share in equal measure with countless other New York residents, including New York residents who joined the Armed Forces from New York but are ineligible for the veterans' preference for other reasons.

The only persons who arguably have an advantage based on their prior residency in New York in relation to persons in appellees' position are a discrete group of veterans who joined the Armed Forces while New York residents, who served during wartime, who returned to New York, and who elected to seek public employment. Even that group does not enjoy an unqualified advantage over appellees based on their prior residence. New York's veterans' preference scheme requires that veterans satisfy a number of preconditions, of which prior residency is only one, before they qualify for the preference. Moreover, the preference only increases the possibility of securing a civil service appointment; it does not guarantee it. Those newly arrived veterans who

achieve a sufficiently high score on the exam may not be disadvantaged at all by the preference program; conversely, the chances of those who receive a very low score may not be affected by the fact that their competitors received bonus points. Finally, the bonus program is a one-time benefit. Veterans who join the service in New York, who satisfy the other statutory requirements, and who achieve a sufficiently high score on the exam to bring them within range of securing employment may only use the bonus points on one examination for appointment and in one job for promotion. Thus, persons such as appellees are not forced to labor under a "continuous disability" by comparison even to this discrete group of New York citizens. *Zobel* v. *Williams*, 457 U. S., at 75 (O'CONNOR, J., concurring in judgment).

Certainly the New York veterans' preference program imposes a less direct burden on a less "significant" interest than many resident-preference programs that this Court has upheld without difficulty. For example, this Court has summarily affirmed certain state residency requirements for state college tuition rates, *Sturgis* v. *Washington*, 414 U. S. 1057 (1973), and a limited eligibility statute in New York for scholarship assistance, *Spatt* v. *New York*, 414 U. S. 1058 (1973), even though those requirements constituted a potentially prohibitive burden on access to "important" educational opportunities. *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 31–32 (1973). The Court has also upheld a 1-year durational residence requirement for eligibility to obtain a divorce in state courts, *Sosna* v. *Iowa*, *supra*, even though the right to terminate a marriage has been deemed in some sense "fundamental." See *Boddie* v. *Connecticut*, 401 U. S. 371 (1971).

In sum, finding that this scheme in theory or practical effect constitutes a "penalty" on appellees' fundamental right to settle in New York or on their "right to migrate" seems to me ephemeral, and completely unnecessary to safeguard the constitutional purpose of "maintaining a Union rather than a

mere 'league of States.'" *Zobel* v. *Williams*, *supra*, at 73 (O'CONNOR, J., concurring in judgment). See also *ante*, at 902 ("right to migrate" plays role of "transforming many States into a single Nation"). Thus, heightened scrutiny, either under the "right to migrate" or the Equal Protection Clause, see *ante*, at 904–905, n. 4, is inappropriate.

Under rational basis review, New York's program plainly passes constitutional muster. New York contends that its veterans' employment preference serves as an expression of gratitude to veterans who entered the service as New York residents. Even the plurality acknowledges the legitimacy of this state purpose. See *ante*, at 910. Indeed, it is difficult to impeach this interest, for "[o]ur country has a long-standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan* v. *Taxation with Representation of Washington*, 461 U. S. 540, 551 (1983). See also *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 261. As JUSTICE STEVENS has explained, "the simple interest in expressing the majority's gratitude for services that often entail hardship, hazard, and separation from family and friends, and that may be vital to the continued security of our Nation, is itself an adequate justification for providing veterans with a tangible token of appreciation." *Hooper* v. *Bernalillo County Assessor*, 472 U. S., at 626 (dissenting). In sum, this state interest could hardly be deemed inherently invidious or irrational. Nor, as demonstrated by the above discussion, could it be said to be constitutionally offensive because its implementation has burdened a fundamental right to travel.

I have difficulty believing that the veterans' preference scheme employed by New York does not rationally relate to this legitimate state interest. I had certainly thought a State could award a medal to all New York veterans of designated wars, or that it could erect memorials in honor of certain residents returning from particular armed conflicts; it is

hardly irrational to employ a means which gives certain returning wartime veterans a more tangible and useful expression of gratitude by way of employment preferences. I also find it hard to credit the idea that the Equal Protection Clause requires New York to reward the sacrifices of all those who joined the Armed Forces from other States and came to reside in New York if it wishes to reward the service of those who represented New York in the Armed Forces. Certainly those veterans who represented other States in the military aided New York by aiding the Nation, and suffered in equal measure with New York veterans, but that is not the issue. New York is not expressing gratitude for the prior resident's service to, and sacrifice for, the Nation as much as it is attempting to say "thank you" to those who personified New York's sacrifice and effort to "do its part" in supporting this Nation's war efforts. The prior residence of the individual seeking the statutory benefit clearly is a "relevant characteristic" to this legitimate and longstanding state interest and is one which has a manifest relation to the furtherance of that interest.

Whether this issue is tested under the "right to migrate," the Equal Protection Clause, or the Privileges and Immunities Clause of Art. IV, §2, something more than the minimal effect on the right to travel or migrate that exists in this case must be required to trigger heightened scrutiny or the plurality's right to travel analysis will swallow all the traditional deference shown to state economic and social regulation. The modest scheme at issue here does not penalize in a constitutional sense veterans who joined the Armed Forces in other States for choosing to eventually settle in New York, and does not deny them equal protection. I would reverse the judgment of the Court of Appeals for the Second Circuit.

LYNG, SECRETARY OF AGRICULTURE, ET AL. *v.* PAYNE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84-1948. Argued March 24, 1986—Decided June 17, 1986

Under the Consolidated Farm and Rural Development Act, the Secretary of Agriculture has authority to make emergency loans to farmers who suffer economic losses as a result of a natural disaster. Pursuant to a rule of the Farmers Home Administration (FmHA), the Secretary required loan applicants suffering from disasters occurring between December 26, 1972, and April 20, 1973, to file their applications by April 2, 1974. That rule embodied the command of Pub. L. 93-237 to keep such loan programs open at least until that date. During this period, loans were available on terms far more generous than under later versions of the authorizing statute. In 1976, a class action was instituted in Federal District Court, in which respondents represented farmers who had been eligible for loans during this period as the result of a Florida flood occurring in early April 1973, but who, because of lack of notice, had not been aware of their eligibility. It was alleged, *inter alia*, that the FmHA's failure to publicize the program more fully violated its own regulations, and an injunction was sought to require the FmHA to reopen the loan program. The District Court granted the requested relief, finding that the FmHA, in violation of one of its own regulations, had failed to give adequate notice of the availability of loans, and requiring the agency to reopen the program for the period from April 15, 1981, to June 15, 1981. The Court of Appeals affirmed on different grounds, holding that the FmHA had failed to comply with another regulation that required it to notify the public through the news media of the program's generous terms. After an earlier remand from this Court, the Court of Appeals adhered to its prior views and reinstated its decision, observing that petitioner Government officials' liability was premised on the FmHA's failure to follow its own regulations.

Held:

1. The lower courts erred in holding that the Secretary's conduct violated the notice procedures relevant to the implementation of Pub. L. 93-237. Accordingly, even assuming *arguendo* that reopening the loan program would have been an appropriate remedy had the relevant regulations been violated, awarding that relief was clearly improper in light of the FmHA's compliance with its own procedures. The agency's appli-

cable regulations provided for press releases to inform the news media of the "provisions of P. L. No. 93-237." Public Law 93-237 itself said nothing about the availability of the generous terms of the loan program, but merely stated that loans with respect to disasters occurring prior to April 20, 1973, would be administered under Pub. L. 92-385, and thus the statement in the FmHA's news releases that "loan applications will be taken under the terms of a new law (P. L. 93-237) enacted January 2, 1974," was no less informative than were the "provisions" of the Act the release was endeavoring to describe. And in light of the history of Pub. L. 93-237 and the regulatory history, the District Court's remedy cannot be supported on the theory that the FmHA violated its earlier notice requirements. Pp. 935-942.

2. Nor can the injunctive relief be supported on the theory that inadequate notice of the loan program deprived the respondents of property without due process of law. Even assuming that respondents had a legitimate claim of entitlement protected by due process, the notice published by the Secretary in the Federal Register after the enactment of Pub. L. 93-237, which notice set out in detail the terms and conditions of the loan program, as well as the notice afforded by the Secretary in full compliance with his own procedures, was more than ample to satisfy any due process concerns. Pp. 942-943.

751 F. 2d 1191, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 943.

Bruce N. Kuhlik argued the cause for petitioners. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller, Robert E. Kopp*, and *Richard A. Olderman*.

Theodore L. Tripp, Jr., argued the cause and filed a brief for respondents.

JUSTICE O'CONNOR delivered the opinion of the Court.

Federal law vests in the Secretary of Agriculture the authority to make emergency loans to farmers who suffer economic losses as a result of a natural disaster. See Consolidated Farm and Rural Development Act (Act), §§ 321-330, 75 Stat. 311, as amended, 7 U. S. C. §§ 1961-1971.

Pursuant to an agency rule, the Secretary required loan applicants suffering from disasters occurring between December 26, 1972, and April 20, 1973, to file their applications by April 2, 1974. 39 Fed. Reg. 7569 (1974) (later codified at 7 CFR § 1832.82(a) (1975)). That rule embodied a statutory command to keep the loan program open at least until that date. Pub. L. 93-237, 87 Stat. 1025. The question presented is whether a federal court has the remedial authority to reopen this long-terminated loan program on the basis of its finding that the Secretary, in alleged violation of another rule, failed adequately to notify affected farmers of the program's availability and terms.

I

In early April 1973 torrential rains struck 13 counties in the northern part of Florida. Initial estimates, which were later sharply reduced, projected that resulting crop and property losses would be in excess of $3 million. In light of the scope of these anticipated losses, on May 26, 1973, President Nixon declared the region a major disaster area. 38 Fed. Reg. 14800 (1973). See Disaster Relief Act of 1970, Pub. L. 91-606, 84 Stat. 1744 (repealed or transferred 1974). As a result of this declaration, the Secretary of Agriculture came under a statutory obligation to "make loans" to qualifying individuals in the region. 7 U. S. C. § 1961(b) (1970 ed., Supp. III).

At the time of the declaration, the federal disaster relief program, like much of the rest of the Federal Government, had become embroiled in a budgetary dispute between the Executive and Legislative Branches. In 1972, Congress had passed Pub. L. 92-385, 86 Stat. 554, which authorized emergency loans under terms far more generous than those available under later versions of the Act. Under the 1972 law as implemented by the Secretary, loans carried a 1% interest rate and were not conditioned upon the unavailability of alternative sources of credit. In addition, the Secretary was

directed to forgive outright up to $5,000 of the principal of the loan. On December 27, 1972, as part of a larger, administrationwide effort to control what were viewed as excessive congressional appropriations, the Secretary directed that regional Farmers Home Administration (FmHA) officials effectively cease processing loan applications. See generally *Berends* v. *Butz*, 357 F. Supp. 143 (Minn. 1973); Impoundment of Appropriated Funds by the President: Joint Hearings before the Ad Hoc Subcommittee on Impoundment of Funds of the Senate Committee on Government Operations of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., 532 (1973). Aware that the "forgiveness features and low interest rates provided for by Public Law 92-385" had contributed to the unilateral executive decision to curtail the program, Congress attempted to resolve the crisis by repealing those provisions. S. Rep. No. 93-85, p. 1 (1973). Public Law 93-24, 87 Stat. 24, which became effective on April 20, 1973, set the interest rate on emergency loans at 5%, limited the availability of loans to those unable to obtain credit from other sources, and eliminated entirely the provision that had previously allowed for cancellation of a portion of the principal. A grandfather clause provided that the terms of the earlier act, Pub. L. 92-385, would remain applicable to disasters designated between January 1 and December 27, 1972.

Left unclear, however, was the status of disasters occurring during the 4-month period between December 27, 1972, and April 20, 1973, the effective date of Pub. L. 93-24. Congress resolved this uncertainty by passing Pub. L. 93-237, the provision at the center of this case. Section 4 of the new Act provided that, "[n]otwithstanding the provisions of Public Law 93-24," loans "with respect to natural disasters which occurred" during this interim period would be governed by the more generous terms of Pub. L. 92-385. In addition, § 10(c) provided that the deadline for applying for a loan would be extended 90 days beyond the date of the enactment

of Pub. L. 93–237. This 90-day extension supplanted the established regulatory policy of the Secretary to accept loan applications for crop losses only if filed within nine months of the formal disaster declaration. (For physical losses the deadline was 60 days.) According to the Conference Report, the purpose of the extension was to make sure that the FmHA's "administratively set deadlines" took into account the confusion among farmers concerning the numerous changes in federal disaster relief law in the recent past. S. Conf. Rep. No. 93–363, p. 6 (1973). The bill was signed into law on January 2, 1974. Thus, the congressionally mandated 90-day period for loans under Pub. L. 93–237 expired on April 2, 1974.

The Florida flood coincided with this period of confusion in the administration of federal disaster relief. Between May 26, 1973 (the date the disaster was declared), and January 2, 1974 (the date Pub. L. 93–237 became law), the loan program was administered pursuant to the terms of Pub. L. 93–24. Accordingly, during this initial loan period, farmers had nine months, or until February 26, 1974, to submit applications for emergency loans. At the time of the May 26, 1973, Presidential disaster declaration, and throughout the initial loan period, FmHA rules required the agency to follow certain procedures designed to notify potential borrowers of the availability of disaster relief. 7 CFR § 1832.3(a)(1) (1973). In addition to a general obligation to "make such public announcements as appear appropriate," the regulations required the FmHA County Supervisor to inform various local officials and "agricultural lenders" of "the assistance available under [the] program." *Ibid.*[1] It is undisputed that during the initial loan period no applications were filed.

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[1] Title 7 CFR § 1832.3 (1973) provides in pertinent part:

"(a) [W]here there is a Presidential major disaster declaration, the National Office will notify the State Director and the Finance Office of the name of the counties . . . eligible for Federal assistance under the declaration, and the period during which [emergency] loans will be made based on

On February 15, 1974, approximately six weeks after the enactment of Pub. L. 93–237, the FmHA issued instructions to its staff concerning the implementation of the new emergency loan program. App. to Pet. for Cert. 48a. Shortly thereafter, the Secretary published these instructions without material change in the Federal Register.[2] 39 Fed. Reg. 7569 (1974) (later codified at 7 CFR §§ 1832.81–1832.92 (1975)). The Federal Register publication set out in detail the terms and conditions of the new program, including the 1% interest rate, the $5,000 forgiveness provision, and the absence of any requirement that the applicant demonstrate the unavailability of other credit. 39 Fed. Reg. 7571 (1974). The regulation also specified that "the termination date for acceptance of applications . . . will be April 2, 1974." *Id.*, at 7570.

Also included in the staff instructions were directions that "State Directors and County Supervisors . . . inform the news media, including newspapers, radio, and television in the affected counties of the provisions of P. L. 93–237." App. to Pet. for Cert. 49a (later published as § 1832.82(a) of the "Special Emergency Loan Policies . . . Implementing Applicable Provisions of Public Law 93–237," 39 Fed. Reg. 7569 (1974)). Attached to the instructions was a suggested news

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the major disaster. The State Director will notify the appropriate County Supervisors immediately, and instruct them to make [emergency] loans available . . . . The State Director will also notify the State USDA Defense Board Chairman and will make such public announcements as appear appropriate.

"(1) Immediately upon receiving notice about counties under his jurisdiction, the County Supervisor will notify the appropriate County USDA Defense Board Chairman and make such public announcements as appear appropriate about the availability of [loans]. Also, the County Supervisor will explain to other agricultural lenders in the area the assistance available under this program."

[2] Pursuant to 5 U. S. C. §§ 553(b)(B) and (d)(3), the agency dispensed with notice and comment, explaining that any delay in implementing the provisions of Pub. L. 93–237 would be contrary to the public interest. 39 Fed. Reg. 7569 (1974).

release.[3] App. to Pet. for Cert. 50a–51a. The release explained that farmers who had not yet received an emergency loan could apply for such a loan at the local FmHA office. Although not setting out the details of the new program, the model release did state that "loan applications will be taken under the terms of a new law (P. L. 93–237) enacted January 2, 1974." *Id.*, at 51a. Consistent with these instructions, the State FmHA director forwarded the sample news release to local agency offices. Those offices in turn sent copies to the local media, and, on at least two occasions, the releases were carried in newspapers in the north Florida disaster area. Record, Defendants' Exhibits 10–12. During this second loan period, that is, the period between the enactment of Pub. L. 93–237 and the expiration of the 90-day deadline on April 2, 1974, no more than four farmers from the Florida disaster area applied for emergency loans.

On August 19, 1976, respondent Payne, a north Florida farmer, instituted the present action in the United States District Court for the Middle District of Florida. Although he had received actual notice of the special 1974 emergency loan program, he sought to represent a class of approximately 2,500 farmers who had been eligible for loans under that program but, because of lack of notice, had not been aware of their eligibility. Contending that the FmHA's failure to publicize the program more fully violated the agency's own regulations and deprived them of property without due process of law, respondents sought an injunction directing the FmHA to reopen the loan program under the terms prevailing during the period "up to and including April 2, 1974." Complaint 6.

The District Court certified the class and granted the requested relief.[4] In a variety of different ways, the court

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[3] The publicity directions, but not the model news release, were later published in the Federal Register, *id.*, at 7570, and the Code of Federal Regulations, 7 CFR § 1832.82(a) (1975).

[4] The District Court also directed the FmHA to give appropriate notice of the loan program. The Secretary concedes that compelling notice was

found, the FmHA had failed to give adequate notice of the availability of loans. Most of the notice deficiencies specifically found by the court occurred during the initial loan period. It found, for example, that a number of farmers had left a June 1973 meeting with the incorrect impression that they were ineligible for loans, that FmHA officials knew of this misimpression, and that they failed to correct it. The court also found that press releases describing the terms of both the initial and new loan programs were incomplete. Finally, the court determined that, in violation of the specific requirements of 7 CFR § 1832.3(a)(1) (1973), the FmHA had failed to notify various state and county officials of the availability of emergency loans. The District Court did not allude to the specific notice requirements promulgated by the agency in connection with the implementation of Pub. L. 93-237. See 39 Fed. Reg. 7569 (1974) (§ 1832.82(a)). Apparently assuming, however, that the earlier notice requirements contained in 7 CFR § 1832.3(a)(1) (1973) continued to apply during the new loan period, the court held that the agency's failure to adhere to these requirements required it to reopen the *new* loan program for a 60-day period extending from April 15, 1981, to June 15, 1981. In particular, the court premised the remedy on the FmHA's failure "to make such public announcements as appear appropriate." *Ibid.*

The Court of Appeals for the Eleventh Circuit affirmed, but on different grounds. *Payne* v. *Block*, 714 F. 2d 1510 (1983). It accepted the District Court's various findings concerning the FmHA's failure to comply with the notice requirements set out in 7 CFR § 1832.3(a)(1) (1973). Those findings, however, "pertain[ed] only peripherally" to its decision to affirm. *Id.*, at 1519. Regardless of any violations of 7 CFR § 1832.3(a)(1), the court concluded, the FmHA had failed to comply with its self-imposed obligation to notify the

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within the remedial authority of the court if, in fact, adequate notice had not been given previously. The issue is, in any event, moot since all members of respondent class now clearly have notice of the provisions of Pub. L. 93-237.

public of the new loan program. The agency had announced in the Federal Register that it would "inform the news media . . . of the provisions of P. L. 93–237." 39 Fed. Reg. 7570 (1974) (§ 1832.82(a)). This it had not done, the court believed, because the news releases announcing the new loan program had failed to explain its generous terms. In view of the established proposition that agencies are duty-bound to adhere to their own procedures, the court held, the most appropriate remedy for the violation was an injunction directing the agency to reopen the loan program. In reaching this conclusion, the Court of Appeals rejected the Government's argument that the April 2, 1974, application deadline was required by an Act of Congress and, therefore, beyond the authority of the District Court to expand. In the court's view, Pub. L. 93–237 had merely required the FmHA to extend its administratively set deadline for 90 days. Nothing in the Act, however, divested the agency of discretion to extend it further.

The Secretary sought review in this Court, and we granted the petition for certiorari, vacated the judgment below, and remanded for reconsideration in light of our decision in *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U. S. 51 (1984). *Block* v. *Payne*, 469 U. S. 807 (1984). In *Community Health Services*, the Court held that, even assuming that principles of equitable estoppel ever applied against the Government, "a private party surely cannot prevail [on that theory] without at least demonstrating that the traditional elements of estoppel are present." 467 U. S., at 61. The Court of Appeals, observing that petitioners' liability was premised not on a theory of equitable estoppel but on the agency's failure to follow its own regulations, adhered to its prior views and reinstated its decision. *Block* v. *Payne*, 751 F. 2d 1191 (1985).

Because the decision below exposes the Federal Government to substantial potential liability and because its reasoning implicates important questions about a federal court's

remedial powers, we again granted certiorari. *Block* v. *Payne*, 474 U. S. 815 (1985). We now reverse.

II

The Secretary's principal argument in this Court is that the remedy granted below shares all of the essential characteristics of an equitable estoppel against the Government and, accordingly, should be analyzed on those terms. We acknowledge that the practical effect of the injunction requiring the reopening of the loan program is to estop the FmHA from relying on the validly promulgated regulatory deadline as a basis for refusing to process further loan applications.[5] And we readily agree that, had respondents sought relief on an equitable estoppel theory, they could not prevail. As we observed only recently, even assuming that the Government is ever subject to estoppel, a "private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U. S., at 61. An essential element of any estoppel is detrimental reliance on the adverse party's misrepresentations, *id.*, at 59 (citing 3 J. Pomeroy, Equity Jurisprudence § 805, p. 192 (S. Symons ed. 1941)); and neither the named plaintiffs, much less the 2,500 members of the class they represent, have sought to demonstrate such reliance. Moreover, the only misconduct specifically found by the District Court was the failure to give effective notice of information that, at least with respect to the second loan period, was concededly published in the Federal Register. Our cases leave no doubt that "failure to fully publicize the rights . . . accorded" by an Act of Congress does not "give rise to an estoppel against the Government." *INS*

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[5] The Secretary has abandoned his claim that the statute itself expressly disabled the Secretary from extending the deadline beyond April 2, 1974. See S. Conf. Rep. No. 93-363, p. 6 (1973) (describing Pub. L. No. 93-237 as requiring the Secretary to "extend" the "administratively set deadlin[e]" by 90 days).

v. *Hibi*, 414 U. S. 5, 8–9 (1973) *(per curiam)*. See also *Heckler* v. *Community Health Services of Crawford County, Inc.*, *supra*, at 63 ("[T]hose who deal with the Government are expected to know the law"); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380, 384 (1947).

As the Court of Appeals correctly observed, however, respondents' inability to satisfy the stringent requirements of common-law estoppel does not independently decide the case. Indeed, beginning with their initial complaint and throughout the course of the litigation, respondents have never sought to rely on estoppel as a basis for recovery. Their theory instead, and the theory on which the lower courts granted the injunction, is that the Administrative Procedure Act (APA), 5 U. S. C. § 551 *et seq.*, authorizes this kind of relief to remedy the FmHA's alleged failure to comply with its duly promulgated notice regulations. It may well be that some of the same concerns that limit the application of equitable estoppel against the Government bear on the appropriateness of awarding other remedies that have a close substantive resemblance to an estoppel. We reject, however, petitioners' suggestion that any remedy that can be analogized to an equitable estoppel is necessarily invalid, regardless of the source of the cause of action, unless the plaintiff succeeds in proving all the elements of common-law estoppel. Cf. *Honda* v. *Clark*, 386 U. S. 484, 494–495 (1967). Indeed, any other rule has the potential for divesting the courts of the remedial authority specifically envisioned by Congress under the APA. If, for example, a farmer had filed a loan application prior to the expiration of the loan deadline and a court determined that the denial of the application after the deadline's expiration was "arbitrary, capricious [and] not in accordance with law," 5 U. S. C. § 706(2)(A), the appropriate remedy under the APA would be to direct that the application be granted or reconsidered. Although this would, in a sense, estop the Government from applying the deadline, we have never suggested that the applicant would be under an

obligation to satisfy the requirements of proving an equitable estoppel to obtain the relief specifically available under the APA.

The question before us then is not whether the Secretary should be estopped from applying the deadline, but whether the relief afforded by the District Court was appropriate under the APA. Respondents contend that the notice regulations, having been promulgated pursuant to the Secretary's delegated rulemaking authority, had the force and effect of law and therefore were binding on the agency. To remedy this noncompliance, they suggest, the District Court had the authority under 5 U. S. C. § 706 to "compe[l] 'action unlawfully withheld' [notice] and 'set aside agency action' [application of the deadline] found to be 'without observance of procedures required by law.'" Brief for Respondents 21 (quoting 5 U. S. C. § 706) (bracketed material in original).

To prevail on this theory, respondents must clear at least three substantial hurdles. At the outset, not all agency publications are of binding force, *Schweiker* v. *Hansen*, 450 U. S. 785, 789 (1981); and it remains to be shown that the notice provisions, which began life as unpublished staff instructions, are the kind of agency law the violation of which is remediable at all. Second, an agency's power is no greater than that delegated to it by Congress. Thus, even assuming that Pub. L. 93-237 left the Secretary some discretion to extend the 90-day deadline beyond April 2, 1974, it would hardly be an abuse of that discretion to refuse to do so many years after the disaster had receded if such an extension would be inconsistent with the intent of Congress. Finally, the "agency action" respondents seek to have set aside is the "application of the deadline." Yet, with the exception of respondent Payne, who clearly has no standing,[*] there is no

[*] Because Payne had actual notice of the new loan program and actually applied for a loan, the Secretary argued in the Court of Appeals that Payne lacked standing to complain that the publicity was inadequate. The Court of Appeals granted a limited remand, and the District Court entered an

allegation that any member of the class has ever applied for a loan. Although the APA includes "failure to act" in its definition of reviewable agency action, 5 U. S. C. § 551(13), it is far from clear that relief under the APA is appropriate when the allegedly aggrieved party has failed entirely to present its claim to the agency. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 328 (1976).

We need not, however, definitively resolve any of these issues. Nor need we confront the Secretary's broader contention that it is in all instances inappropriate for a court, reviewing for agency compliance with the APA, to set aside one validly promulgated regulation to remedy an alleged violation of another entirely independent one. An essential predicate of the relief granted below is that the FmHA in fact failed to comply with its own rules. As we now explain, the Court of Appeals' conclusion that the FmHA violated its self-imposed obligation to give notice of the loan program is insupportable.

The Court of Appeals relied exclusively on the FmHA's purported violation of § 1832.82(a), the new notice provision, to uphold the injunction directing the Secretary to reopen the loan program. Although the agency did issue press releases, the court reasoned, its failure to describe the generous terms of the new program breached its regulatory obligation to "'inform the news media . . . of the *provisions* of P. L. No. 93-237.'" 714 F. 2d, at 1520, quoting 39 Fed. Reg. 7570 (1974) (emphasis supplied by Court of Appeals).

This reasoning is demonstrably incorrect. Public Law 93-237 itself said nothing at all about the availability of a reduced interest rate, the possibility of partial forgiveness of the loan principal, or the elimination of the requirement that credit be unavailable from other sources. It merely stated that "[n]otwithstanding the provisions of Public Law 93-24," loans with respect to disasters occurring prior to April 20, 1973, would

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amended final judgment naming as class representative another class member who allegedly had not received notice of the program. App. to Pet. for Cert. 46a-47a.

be administered under Pub. L. 92–385. Thus, the statement in the news release that "loan applications will be taken under the terms of a new law (P. L. 93–237) enacted January 2, 1974," though not a model of clarity, was no less informative than were the "provisions" of the Act the release was endeavoring to describe. App. to Pet. for Cert. 51a; 7 CFR § 1832.82(a) (1975).

Moreover, the Court of Appeals' holding runs roughshod over the established proposition that an agency's construction of its own regulations is entitled to substantial deference. *United States* v. *Larionoff*, 431 U. S. 864, 872 (1977); *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965). The publicity directive that was later codified at 7 CFR § 1832.82(a) (1975) was originally issued as a staff instruction designed to describe the procedures for implementing Pub. L. 93–237. App. to Pet. for Cert. 48a–49a. Accompanying the instruction was a sample press release identical in all pertinent respects to those sent to the media in the area of the Florida disaster. *Id.*, at 50a–51a. Because the suggested release obviously reflected the agency's contemporaneous understanding of the scope of the publicity directive, it is logically untenable to suggest that the agency violated the directive by issuing press releases modeled explicitly on the sample.

The Court of Appeals specifically disclaimed any reliance on 7 CFR § 1832.3(a)(1) (1973), the Secretary's previous publicity directive, to support its affirmance of the District Court's judgment. As they are entitled to do, however, respondents now defend that judgment on the alternative theory that the agency's violation of this earlier notice provision warranted the remedy of an injunction reopening the loan program. We find this theory no more supportable than that relied on by the Court of Appeals. As an initial matter, any violations of this regulation that occurred during the first loan period are plainly irrelevant. Starting with their complaint, and throughout the course of this lengthy litigation, respondents have sought to have the loan program reopened

under the more generous terms available under Pub. L. 93–237. And such was the relief granted by the District Court. App. to Pet. for Cert. 45a. As a simple matter of causation, any failure to inform respondents about the old loan program cannot support the remedy of requiring the FmHA to process loan applications under the "terms and benefits" available under the new one. *Ibid.*

Nor do we believe that any noncompliance with the terms of 7 CFR § 1832.3 during the second loan period would justify the District Court's remedy.[7] Although the District Court did find that this provision had been violated during the initial loan period, it is far from clear from the face of its opinion that it found any such violations during the second period. Even assuming such findings, however, we agree with the conclusion of the Court of Appeals for the Ninth Circuit that the notice provisions of 7 CFR § 1832.3 were no longer applicable during the period after the enactment of Pub. L. 93–237, at least with respect to disasters declared prior to the date the new law came into force. See *Emergency Disaster Loan Assn., Inc.* v. *Block*, 653 F. 2d 1267, 1270 (1981).

By its terms, § 1832.3(a) requires only notice of the loan program in place at the time of the Presidential disaster declaration. See also § 1832.92 (1975) (describing § 1832.3 as

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[7] JUSTICE STEVENS makes much of the fact that the new regulation was not issued until February 27, 1974, several weeks after Pub. L. 93–237 was signed into law. In his view, this delay violated the command of § 1832.3(a) to provide notice "immediately." This reasoning is flawed in several respects. First, it entirely ignores our conclusion that, by its terms, § 1832.3 was simply inapplicable to the new loan program. Second, even if somehow applicable, § 1832.3 requires the State Director to provide "immediat[e]" notification to County Supervisors only *after* he himself has received notice from the "National Office"; and it is undisputed that the Secretary did not issue staff instructions until February 15, 1974. Finally, it is far from clear that a time lag of a mere few weeks between the enactment of a new law and the issuance of implementing regulations fails to qualify as "immediate" action within the meaning of the pertinent regulation.

setting out procedures for reporting natural disaster designations). Accordingly, its plain language casts serious doubt on respondents' assumption that it was also intended to serve as means of giving notice of midcourse changes in the terms of the loan program long after the disaster had been declared.

Any ambiguity about the regulation's reach is dispelled by the history of Pub. L. 93–237 itself. As the Court of Appeals recognized, Congress was acutely aware of confusion in the administration of the Nation's disaster relief laws when it enacted Pub. L. 93–237. 714 F. 2d, at 1516–1517. S. Conf. Rep. No. 93–363, p. 6 (1973). A central objective of the new Act was to correct this confusion by clarifying the credit terms available during this period and by requiring the Secretary to extend the application deadline to compensate for prior "uncertain[ties]" in the law. *Ibid.* Consistent with that objective, the Secretary announced in the Federal Register the new procedures the agency would follow to "implemen[t] applicable provisions of Public Law 93–237." 39 Fed. Reg. 7569 (1974). These procedures, which included the notice provision later codified at 7 CFR § 1832.82(a), were designed to "supplemen[t] and modif[y]" the procedures that had been in place under the old regime, including 7 CFR § 1832.3(a). While this language is ambiguous, the regulatory history strongly suggests that in adopting notice procedures specifically geared to the new law, the Secretary intended for those procedures to be the principal mechanism for spreading the word about Pub. L. 93–237 in areas in which a disaster had already been declared. Aware of Congress' belief that prior efforts to implement the old program had failed, this history suggests, the Secretary sought to take a different tack to assure effective implementation of the new one—notification of the media pursuant to § 1832.82.

This interpretation is confirmed by § 1832.92, also adopted as part of the FmHA's efforts to implement Pub. L. 93–237. 39 Fed. Reg. 7575 (1974). There, the Secretary specifically provided that for any "new" disaster designations, notice

should be given pursuant to § 1832.3. There is no mention whatever of § 1832.3 in the balance of the regulations dealing with disasters that had already been declared at the time the regulation was published. A fair inference from this omission is that for disasters, such as the Florida flood, that had already been declared at the time of the enactment of Pub. L. 93–237, the Secretary intended that § 1832.82(a), rather than § 1832.3, provide the appropriate mechanism for notifying affected farmers about the new loan program. Accordingly, any failure to follow the old notice provisions during the second loan period was entirely consistent with the Secretary's intended approach and provides no permissible basis for ordering the new program reopened.

III

We conclude, therefore, that the lower courts erred in holding that the Secretary's conduct violated the only notice procedures relevant to the implementation of Pub. L. 93–237. Accordingly, even assuming, *arguendo*, that reopening the loan program would have been an appropriate remedy had the relevant regulations been violated, awarding that relief was clearly improper in light of the FmHA's compliance with its own procedures. Nor can the relief be supported on the theory, not addressed by either court below, that inadequate notice of the loan program deprived respondents of property without due process of law. We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment. *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 320, n. 8 (1985). Even on the assumption that they do, however, the notice published in the Federal Register, as well as that afforded by the Secretary in full compliance with his own procedures, was more than ample to satisfy any due process concerns. See 44 U. S. C. § 1507 (Publication in

Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it").

Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE STEVENS, dissenting.

When Congress enacts a generous program to provide relief for the victims of a natural disaster, the Secretary of Agriculture has a duty to implement that program in the spirit which motivated its enactment even if he believes a more parsimonious policy will serve the national interest. On January 2, 1974, Congress enacted such a program to benefit, among others, the Florida farmers who had suffered serious losses as the result of a disaster that the President had declared on May 26, 1973. Pub. L. 93-237. On the date the statute was enacted, as well as the date of the disaster and the date of the President's declaration, regulations were in place that required the Department to give appropriate notice to the State Director, the appropriate county officials, the agricultural lenders in the area, and the public. See 7 CFR § 1832.3(a) (1973). *Ante*, at 930-931, n. 1. The regulations plainly stated that effective notice should be given "immediately."

The District Court found—and the Court does not disagree—that the Secretary failed to comply with § 1832.3(a). For several weeks after the enactment of the statute, the Secretary took no public action. On February 27, he promulgated a new announcement—which was explicitly intended to "supplement" the existing notice regulations—requiring that advice be given to the news media. Pursuant to that announcement, an ambiguous and uninformative news release was prepared and distributed. The Court nevertheless holds that (1) the release complied with the supplementary regulation issued on February 27 and (2) the supplementary regulation somehow superseded the specific § 1832.3(a) notice provisions which were already in place when the

statute was enacted. These holdings, I submit, misread the regulations and are not faithful to the intent of the Congress that enacted the governing statute.

Before explaining in greater detail why I agree with the District Court and the Court of Appeals' findings concerning the Secretary's flagrant violation of the notice regulations, I shall briefly comment on the timeliness of the action and the Court's correct rejection of the Government's primary challenge to the propriety of that remedy.

I

This litigation was commenced on August 19, 1976. In the Court of Appeals, the Secretary contended that the action was not timely because the emergency loan program authorized by Pub. L. 93-237 expired on April 2, 1974. The Court of Appeals held, however, that "where, as here, exigent circumstances beyond the farmers' control precluded intended beneficiaries from applying for loans, the agency had the power to extend the loan period and the District Court was within its power in ordering the agency to do so. To hold otherwise would allow the FmHA to totally fail to provide notice to congressionally intended potential beneficiaries and avoid being called to task for such conduct." *Payne* v. *Block*, 714 F. 2d 1510, 1517 (CA11 1983).[1] In this Court, the Secretary has abandoned his claim that he had no power to extend the deadline for loan applications. *Ante*, at 935, n. 5.

The Secretary has argued, however, that the remedy ordered by the District Court was improper because it rested on an equitable estoppel theory. The Court today correctly—and unanimously—rejects this argument, thus answering the central question of law that prompted it to grant

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[1] In a footnote, the Court of Appeals added:

"We emphasize that Congress had previously invoked, and 'expected' FmHA would invoke, a similar reopening remedy in 93-237 when potential beneficiaries of the program were confused as to the program's terms." 714 F. 2d, at 1517, n. 26.

certiorari in a way that completely repudiates the submission of the Solicitor General.[2] Thus, neither the doctrine of estoppel nor the passage of time since the emergency loan program's administrative deadline was authorized has any bearing on the question that controls the outcome of the case. That question is whether the Secretary provided the intended beneficiaries of the emergency loan program with the notice that was required by law. The question is best answered after briefly describing the historical context in which it arose.

II

In 1972 and 1973, the Secretary of Agriculture took the position that he was not obligated to implement emergency loan programs authorized by Congress if he thought it was unwise

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[2] The only "Question Presented" by the Solicitor General in the Government's certiorari petition was the following: "Whether the Secretary of Agriculture *may be equitably estopped* from enforcing a valid regulation establishing a deadline for filing of applications for Farmers Home Administration emergency loans on the ground that the agency's news release announcing the availability of loans did not specify the generous terms of the program." Pet. for Cert. I (emphasis added).

To its credit, in rejecting the Government's equitable estoppel argument, the Court belatedly acknowledges that it unnecessarily prolonged this litigation by vacating the first judgment entered by the Court of Appeals in 1983 and remanding for further consideration in the light of our decision in *Heckler* v. *Community Health Services, Inc.*, 467 U. S. 51 (1984). See *Block* v. *Payne*, 469 U. S. 807 (1984).

In light of the possible incongruity of considering this challenge 13 years after the natural disaster that triggered the loan obligations, moreover, it is important to emphasize that there has been no suggestion of dilatoriness by respondents. For unexplained reasons, the case took five years before it reached trial. Since then, it has been the Government that has prolonged the proceedings every step of the way—by appealing to the Court of Appeals; by asking this Court to dispose of the case in light of an equitable estoppel case; and by seeking certiorari again after the Court of Appeals correctly noted the inapplicability of the estoppel doctrine. Thus, the unusual length of time between the original program and our consideration of it is irrelevant; to the extent that it is relevant, the Government bears the responsibility for almost all of the delay.

to do so.[3] His position was consistent with administration policy concerning other programs authorized by Congress at that time. See *Train* v. *City of New York*, 420 U. S. 35 (1975); *Berends* v. *Butz*, 357 F. Supp. 143 (Minn. 1973). As a consequence of this fundamental disagreement between the Secretary and Congress, two legislative measures were adopted that provide the background for this case. First, in response to the Secretary's view that the then existing emergency loan programs were too generous, Congress made three important changes in the programs effective on April 20, 1973. It increased the interest rates from one per cent to five per cent; it denied eligibility to farmers who could obtain credit elsewhere; and it discontinued the practice of forgiving $5,000 of the principal indebtedness. Thus, after April 20, 1973, the emergency loans were considerably less attractive than they had been before.

Second, after several months of uncertainty as to whether the old or the new terms applied to disasters during the period in which this case arose, Congress adopted Pub. L. 93-237 for the specific purpose of making the earlier, more generous loan terms available to a specific class of farmers, including those in northern Florida, who suffered severe crop losses as a result of a specific disaster. Thus, the respondent farmers had two opportunities to apply for emergency loans—between May 26, 1973, and January 2, 1974, at the higher rate, and between January 2, 1974, and April 2, 1974, at the more favorable rate.

Throughout this period—and for several years thereafter—the Secretary's regulations provided a detailed procedure for giving notice "immediately" to the appropriate County Supervisors and requiring the State Directors to

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[3] See Impoundment of Appropriated Funds by the President: Joint Hearings before the Ad Hoc Subcommittee on Impoundment of Funds of the Senate Committee on Government Operations and the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., 532 (1973) (testimony of Secretary Butz).

make "such public announcements as appear appropriate."[4] The District Court found, and the Court of Appeals agreed, that the Secretary not only failed to comply with this provision, but actually disseminated a good deal of misinformation. Thus, for example, the State Director advised the County Supervisors, in information intended for public release, that applications had to be filed prior to July 30, 1973—which was correct for loans relating to physical damage—but totally omitted any reference to the fact that the deadline for production loss loans was several months later. In my opinion, however, the more important violations were those that occurred during the second application period—after January 2, 1974, when Congress authorized loans at an interest rate of one per cent and on terms that it is difficult to believe any informed and eligible farmer would have refused.

III

The notice regulations that were in effect during the first application period remained in effect during the 90 days after the enactment of Pub. L. 93-237 on January 2, 1974.[5] Not-

[4] At all relevant times the Code of Federal Regulations contained the following provisions:

"(a) . . . The State Director [of the FmHA] will notify the appropriate County Supervisors immediately and instruct them to make EM loans available under § 1832.13. His notification will be confirmed by State requirements issued as soon as possible. The State Director will also notify the State USDA Defense Board Chairman and will make such public announcements as appear appropriate.

"(1) Immediately upon receiving notice about the counties under his jurisdiction, the County Supervisor will notify the appropriate County USDA Defense Board Chairman and make such public announcements as appear appropriate about the availability of EM loans under § 1832.13. Also, the County Supervisor will explain to other agricultural lenders in the area the assistance available under this program." 7 CFR § 1832.3(a)(1) (1973).

[5] Although the majority concludes that the regulation did not apply to Pub. L. 93-237, it does not contest that the § 1832.3 regulation, detailing the required procedure for administering emergency loans, remained in effect during the pertinent period.

withstanding the dramatic change in the loan terms authorized by that Act, no notice of any kind was published in the Federal Register—or anywhere else—until February 27, 1974, when two-thirds of the reopened application period had already expired. This complete silence for a period of almost two months was unquestionably a plain violation of the regulations' command—if the regulations were, in fact, applicable—that the "State Director will notify the appropriate County Supervisors *immediately* . . . and will make such public announcements as appear appropriate." 7 CFR § 1832.3(a)(1) (1973) (emphasis added).

On February 27, 1974, the Secretary did publish the conditions of the new program in the Federal Register, and also supplemented the existing notice regulation with the publication of staff instructions that State Directors and County Supervisors should inform the news media of the provisions of Pub. L. 93–237. See 39 Fed. Reg. 7569–7571.

It is thus perfectly clear that the Secretary did not comply with the § 1832.3(a) notice regulations that were in effect when Pub. L. 93–237 was enacted. The Court does not disagree with this conclusion. Rather, it takes the remarkable position that the failure to follow those notice provisions is irrelevant because the Secretary did comply with the instructions promulgated in February. This reasoning is severely flawed.

First, the Court's conclusion does not accord with the language and structure of the February 27 notice provisions. Nothing in these new staff instructions stated or implied that they were intended to replace or to withdraw any of the preexisting notice procedures. Instead, the published notice explicitly stated that the publication of the new provisions "supplements and modifies" the existing regulations, including § 1832.3(a). 39 Fed. Reg. 7569 (1974). "Supplementing" and "modifying" are hardly words that suggest the kind of wholesale obliteration envisioned by the majority.[6]

[6] Indeed, as the Court points out, *ante*, at 941–942, another of the requirements promulgated on February 27 specifically referred to the

Second, under the Court's own logic, § 1832.3(a) should have been fully applicable for the first two months of the second loan period. If, as the Court suggests, it was the February 27 Federal Register publication that superseded the existing regulations with respect to Pub. L. 93–237, then presumably the earlier regulations were fully in force until then. Yet the Court flatly states that § 1832 simply was inapplicable in the second loan period—even for the significant amount of time in which the "superseding" regulation was not in place.

Finally, the Court's analysis conflicts with the obvious purpose of Congress in passing Pub. L. 93–237. If the new instructions are given the construction that the Court accepts today, they enabled the Secretary to defy or ignore the will of Congress just as effectively as when he simply refused to make emergency loans on the terms authorized by Congress. Given the fact that regulations requiring adequate notice were in effect at the time Congress adopted a special statute to benefit the victims of specific disasters already declared by the President, surely the Secretary had a duty to comply with the pre-existing regulations during the 90-day period specified in the Act. To conclude otherwise, as the Court does, has an anomalous result. Under the Court's analysis, Congress, in liberalizing and extending the loan program, also created some kind of Bermuda Triangle that made blatant violations of the longstanding § 1832.3(a) notice requirements mysteriously disappear and have no legal effect. Indeed, the incongruous consequence of the Court's reasoning is that, if Congress had never passed the new statute, the Secretary would have continued to be bound by the extensive

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§ 1832.3 requirements. See 39 Fed. Reg. 7575 (1974), codified at 7 CFR § 1832.92 (1975) ("Instructions for handling new designations will be forthcoming. In the meantime, natural disasters should be reported and designation requests submitted in accordance with the procedure set forth in § 1832.3"). Far from "confirm[ing]" that the § 1832.3 requirements were now *inapplicable* to already designated disasters, that regulation supports a view that the new regulations were intended merely to supplement the pre-existing § 1832.3 requirements.

§ 1832.3 notice provisions in January and February 1974. For those months would have been within the original loan period. By extending the period and making the terms more favorable, however, Congress somehow vitiated—or permitted the Secretary to vitiate—those notice provisions for the months and program in question.

Thus, the majority's conclusion that § 1832.3(a) did not apply to the Secretary's administration of Pub. L. 93–237 is erroneous.

I also disagree with the majority's conclusion that the Secretary's efforts satisfied the February 27 notice requirements, which were later codified at 7 CFR § 1832.82 (1975). Those duly promulgated requirements unequivocally stated a mandatory obligation: "State Directors and County Supervisors will inform the news media including newspapers, radio, and television in the affected counties of the provisions of P. L. 93–237." 39 Fed. Reg. 7570 (1974). The Secretary does not argue that the single publication of the emergency loan terms in the Federal Register itself constituted compliance with this duty. His claim of compliance during the second application period also rests on the preparation and distribution of a news release. That release, however, did not disclose the loan terms that were authorized by Pub. L. 93–237. Indeed, the only reference to the new statute, the "provisions" of which the Department had a mandatory obligation to explain, was the following: "These loan applications will be taken under the terms of a new law (P. L. 93–237) enacted January 2, 1974." App. to Pet. for Cert. 57a.

An instruction to inform the news media "of the provisions of P. L. 93–237" surely should be construed to require that the news media be informed of the loan terms that the statute authorized.[7] Such a construction would reflect, not an inter-

[7] Because Pub. L. 93–237 authorized the generous terms by reference to the earlier statute in which they were spelled out in detail rather than by repeating them in the text of Pub. L. 93–237 itself, the Court states that

pretation that "runs roughshod over the established proposition that an agency's construction of its own regulations is entitled to substantial deference," *ante*, at 939, but a simple adherence to the regulation's "plain language." Cf. *Young* v. *Community Nutrition Institute*, *post*, p. 974. It is therefore clear that the new § 1832.82 requirements also were not followed.

In short, the Secretary followed neither the pre-existing § 1832.3 requirements nor the newly promulgated § 1832.82 requirements. The effect was predictable. Although thousands of farmers were eligible for the program, no more than four received loans. As a result, although Congress had shown its intense commitment to this program by repeatedly legislating and by honing the program in an attempt to overcome executive intransigence, the sustained congressional efforts went for naught.[8]

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the press release "though not a model of clarity, was no less informative than were the 'provisions' of the Act the release was endeavoring to describe." *Ante*, at 939. This is a disturbingly cavalier approach to the duty to give appropriate notice to the farmers that Congress was trying to help. Moreover, it is not even accurate because the release did not mention the fact that the program that had been available under prior legislation was again being made available. Without either a mention of the actual terms or the fact that the earlier program was being revived, the press release was virtually meaningless, and certainly less informative than the statute itself.

[8] In view of the majority's statement that the "Court of Appeals specifically disclaimed any reliance on 7 CFR § 1832.3(a)(1) (1973) . . . to support its affirmance of the District Court's judgment," *ante*, at 939, it bears emphasis that the Court of Appeals disclaimed such reliance only because it found the violation of § 1832.82 so patent:

"FmHA failed to comply with federal regulations specifically designed to transmit notice of available emergency loan programs to the *public*. FmHA made no loans during the initial application period and only a handful during the renewed period. . . .

"In light of FmHA's failure to comply with specific prescriptions for notice, we find it unnecessary to determine whether FmHA provided 'such public announcements as appear appropriate' or whether in fact such a requirement is judicially reviewable. We do note, however, the paucity of

IV

In my opinion, the Court's holding allows an executive agency far too much discretion to disregard the plain intent of Congress. The Secretary did not implement the program authorized by Pub. L. 93–237 in the spirit in which it was enacted. "As conceived and passed in both Houses, the legislation was intended to provide a firm commitment of substantial sums within a relatively limited period of time in an effort to achieve an early solution of what was deemed an urgent problem. We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the seemingly limitless power to withhold funds from allotment and obligation." *Train* v. *City of New York*, 420 U. S., at 45–46. The failure to advise the farmers of the congressionally mandated loan provisions was merely a variant of the theme repudiated in *Train*.

I would affirm the judgment of the Court of Appeals.

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public announcement during both the initial and reopened application periods. Especially is this continual dearth of public notice noteworthy where the state director testified that he and his staff were 'flabbergasted' at the lack of response to the emergency loan program. . . .

. . . . .

"Our review of the record convinces us that the district court was not clearly erroneous in its six pages of findings of fact and that it was correct in its ultimate conclusion of insufficient notice." *Payne* v. *Block*, 714 F. 2d 1510, 1519–1520 (CA11 1983) (footnote omitted).

NANTAHALA POWER & LIGHT CO. ET AL. *v.* THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

No. 85-568. Argued April 21, 1986—Decided June 17, 1986

Appellants Nantahala Power & Light Co. and Tapoco, Inc., are wholly owned subsidiaries of appellant Aluminum Co. of America (Alcoa). Each owns hydroelectric powerplants on the Little Tennessee River, which the Tennessee Valley Authority operates in exchange for providing them jointly with a fixed supply of low-cost "entitlement power." In addition, Nantahala buys a variable amount of high-cost "purchased power" from the TVA's power grid. Tapoco sells all its power to an Alcoa plant in Tennessee, and Nantahala serves public customers in North Carolina. For the purpose of calculating the rate to be charged Nantahala's retail customers, the North Carolina Utilities Commission (NCUC) issued an order allocating entitlement and purchased power between Tapoco and Nantahala that differs from the allocation of entitlement power between them ordered by the Federal Energy Regulatory Commission (FERC) in a wholesale ratemaking proceeding. The NCUC's order resulted from Nantahala's request to raise its intrastate retail rates. The North Carolina Supreme Court affirmed that order.

Held: NCUC's allocation of entitlement and purchase power is pre-empted by federal law. Pp. 962-972.

(a) FERC has exclusive jurisdiction over the rates to be charged Nantahala's interstate wholesale customers. Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. Rather, a State must give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority. The "filed rate" doctrine, under which interstate power rates filed with or fixed by FERC must be given binding effect by state utility commissions in determining intrastate rates, is not limited to "rates" *per se*. Here, FERC's decision directly affected Nantahala's wholesale rates by determining the amount of low-cost power that it may include in its source of power, and FERC required Nantahala's wholesale rates to be filed in accordance with that allocation. FERC's allocation of entitlement power is therefore presumptively entitled to more than the negligible weight given it by NCUC. Pp. 962-967.

(b) NCUC's decision that Nantahala should have included more of the low-cost, FERC-regulated power than it in fact can under FERC's order, runs directly counter to that order and therefore cannot withstand its pre-emptive force. Moreover, NCUC's order impermissibly interferes with the scheme of federal regulation. Since Congress intended FERC's allocation of power in wholesale interstate ratemakings to pre-empt any inconsistent state ratemakings, it is FERC's order rather than NCUC's that must be given effect. Pp. 967–972.

313 N. C. 614, 332 S. E. 2d 397, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which all other Members joined, except POWELL and STEVENS, JJ., who took no part in the consideration or decision of the case.

Rex E. Lee argued the cause for appellants. With him on the briefs were *David W. Carpenter, Ronald D. Jones, David R. Poe, M. Reamy Ancarrow, Edward S. Finley, Jr.,* and *William D. Johnson.*

Deputy Solicitor General Cohen argued the cause for the United States as *amicus curiae* urging reversal. On the brief for the United States et al. were *Solicitor General Fried, William H. Satterfield,* and *Jerome M. Feit.*

William T. Crisp argued the cause for appellees. With him on the brief were *Lacy H. Thornburg,* Attorney General of North Carolina, *pro se, Richard L. Griffin,* Assistant Attorney General, *James D. Little,* and *Robert F. Page.**

JUSTICE O'CONNOR delivered the opinion of the Court.

The Nantahala Power & Light Company (Nantahala) and Tapoco, Inc. (Tapoco), are both wholly owned subsidiaries of the Aluminum Company of America (Alcoa). Tapoco and

*Briefs of *amici curiae* urging reversal were filed for the State of Tennessee by *W. J. Michael Cody,* Attorney General, *Jim G. Creecy,* Associate Chief Deputy Attorney General, and *Charles L. Lewis,* Deputy Attorney General; for the Edison Electric Institute by *Robert L. Baum* and *Richard M. Merriman;* and for the New England Electric System by *Frederic E. Greenman.*

Briefs of *amici curiae* urging affirmance were filed for the North Carolina Utilities Commission by *Wilson B. Partin, Jr.;* and for the Town of Highlands by *James N. Horwood.*

Nantahala each own hydroelectric powerplants on the Little Tennessee River. Almost all of the power that they produce goes to the Tennessee Valley Authority (TVA). In exchange for allowing TVA to pour into its grid the variable quantity of power produced by Tapoco's and Nantahala's facilities, Tapoco and Nantahala jointly receive a fixed supply of low-cost "entitlement power" from TVA. In addition, Nantahala buys a variable amount of high-cost "purchased power" from the TVA grid. Tapoco sells all its power to Alcoa; Nantahala serves public customers.

For the purposes of calculating the rate to be charged Nantahala's retail customers, all of whom are in North Carolina, the Utilities Commission of North Carolina (NCUC) chose an allocation of entitlement and purchased power between Tapoco and Nantahala that differs from the allocation of entitlement power between Tapoco and Nantahala adopted by the Federal Energy Regulatory Commission (FERC) in a wholesale ratemaking proceeding. The North Carolina Supreme Court upheld NCUC's allocation. We noted probable jurisdiction to decide whether NCUC's allocation may stand in light of FERC's ruling. 474 U. S. 1018 (1985). We hold that NCUC's allocation of entitlement and purchased power is pre-empted by federal law.

I

A

This case involves a number of agreements, all of which concern the power grid of TVA. Under the New Fontana Agreement (NFA), to which TVA, Tapoco, and Nantahala are parties, TVA operates all of Tapoco's hydroelectric facilities and 8 of the 11 dams owned by Nantahala. The facilities operated by TVA produce an amount of power that varies in magnitude with the fullness of the harnessed streams. The NFA gives TVA the right to pour all that power into the TVA grid. In exchange, TVA provides jointly to Tapoco and Nantahala a constant annual allocation of low-cost "enti-

tlement power" of 1.8 billion kilowatt-hours per year. The NFA is on file with FERC as a rate schedule. *Nantahala Power & Light Co.*, 19 FERC ¶61,152, p. 61,274 (1982).

Under the 1971 Apportionment Agreement (AA), to which Tapoco and Nantahala are parties, Tapoco is entitled to 1.44 billion kilowatt-hours per year of the entitlement power, and Nantahala is entitled to the remaining 0.36 billion kilowatt-hours per year. The AA therefore allocates 80% of the entitlement power to Tapoco and 20% of the entitlement power to Nantahala. The AA was filed with FERC in 1980 as an appendix to a proposed wholesale rate schedule filed with FERC. *Id.*, at 61,275.

Under a Purchase Agreement to which TVA and Nantahala are parties, Nantahala may purchase additional power from the TVA grid. This "purchased power" is generated in part by nonhydroelectric plants, which is generally a more expensive way to produce electricity than the hydroelectric generation used to produce the entitlement power. As a result, purchased power is about three times as expensive to generate as is entitlement power. Tapoco does not itself purchase additional power from TVA, although Alcoa purchases some high-cost power directly from TVA and uses some of Tapoco's equipment to obtain that power.

Tapoco's only customer is an Alcoa plant in Alcoa, Tennessee, while Nantahala serves various wholesale and retail customers in North Carolina. Tapoco's sales to Alcoa and Nantahala's sales to its wholesale customers are governed by FERC-filed rates, while Nantahala's rates to its retail customers are set by NCUC.

B

In 1976, Nantahala filed a proposed wholesale rate increase with FERC, which has exclusive jurisdiction over interstate wholesale power rates. 16 U. S. C. §824(b). See also §§824d, 824e. FERC is to determine a "just and reasonable" rate for such power, §824d(a), and Congress has speci-

fied various procedures for, and limitations on, the filing of such proposed and approved rates, §§ 824d(c), (d), (e).

In 1978, the town of Highlands (Highlands), a wholesale customer of Nantahala, filed a complaint with FERC. See § 824e(a). This complaint alleged that Alcoa, Tapoco, and Nantahala had violated the Federal Power Act by diverting, to Alcoa's private use, hydroelectric power and facilities dedicated to the public service. The Attorney General of North Carolina intervened in support of Highlands' position on behalf of Nantahala's customers. Because both the proceedings concerning the proposed wholesale rate increase and the proceedings concerning the Highlands complaint eventually involved allegations that Nantahala's costs had been unreasonably increased by misuse of the corporate form, FERC consolidated the two proceedings and resolved them in an opinion issued in May 1982. 19 FERC ¶ 61,152.

Highlands asked FERC to treat the commonly owned Tapoco and Nantahala as a single entity for ratemaking purposes, and to "roll in" their separate costs into the same rate base:

> "Highlands contends that because Nantahala and Tapoco have commingled their assets and liabilities under the NFA, it is not possible to derive a rational method of apportioning costs and benefits on any basis other than a rolled-in cost of service. The town asks [FERC] to pierce the corporate veil between the two utilities and treat them as one entity for ratemaking purposes, to set aside the [AA], to develop Nantahala's rates on a rolled-in cost of service basis, and to order Alcoa and Tapoco to establish an interconnection with Highlands." *Id.*, at 61,275.

FERC acknowledged that corporate entities may be disregarded when used to subvert clear legislative intent. See *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432, 437 (1946) *(per curiam)*. See also *General Telephone Co.* v. *United States*, 449 F. 2d 846, 855 (CA5 1971). Nonetheless,

FERC declined to pierce the corporate veil. The particular history of Tapoco and Nantahala, as well as their current separation of customers and management, led FERC to conclude that it could not "find that Alcoa has used the separate corporate identities of Nantahala and Tapoco to frustrate the purposes of the Federal Power Act, or that the two companies operate as an integrated system." 19 FERC, at 61,277.

FERC concluded that the NFA was "the result of arms' length bargaining." *Id.*, at 61,278. FERC found that the AA, in contrast, was unfair to Nantahala. In the AA, Nantahala relinquished certain benefits it had received under an earlier agreement apportioning the entitlement power, but apparently obtained no compensation for that relinquishment. FERC concluded that "the most equitable division of entitlements would give Nantahala that portion of the NFA entitlements which is proportionate to the utility's actual contribution of power turned over to TVA." This portion was 22.5% in FERC's estimation, rather than the 20% of the entitlements power allocated to Nantahala by the AA. *Id.*, at 61,280. FERC stated that its decision did not "reform" the AA, but would "provide entitlements to Nantahala which will result in just and reasonable rates to its wholesale customers." *Ibid.* FERC therefore required Nantahala to file revised rates in accordance with its decision, and to refund any excess amounts collected.

In September 1982, FERC denied rehearing on its May opinion. Nantahala attempted to introduce new evidence that FERC's decision should take fuller account of differences in the kind of power best suited to Nantahala and Tapoco. (Nantahala serves residential customers and therefore needs a continuous, predictable power supply. Tapoco's industrial customer—Alcoa—requires a certain minimum amount of power at a given time to operate its facilities efficiently, but can periodically cease operations if sufficient power is not available.) FERC refused to consider Nantahala's new submission of evidence:

> "In determining just and reasonable rates . . . , [FERC] did not choose to reform the [AA] and was not concerned with the mechanics of how entitlements of energy from TVA are allocated to each party, as long as each party receives its fair share of energy based on that party's contribution of actual energy turned over to TVA. . . . Our concern is that each party receive its proper entitlement. Nantahala entered into a[n] [AA] which we find unfair. As a result, the company had to make purchases from TVA which otherwise would not have had to be made. Nantahala must bear the consequences of its acts and refund rates collected to recover the cost of the excess purchases." *Nantahala Power & Light Co.*, 20 FERC ¶61,430, p. 61,871 (1982).

FERC's decision was upheld on appeal to the United States Court of Appeals for the Fourth Circuit. *Nantahala Power & Light Co.* v. *FERC*, 727 F. 2d 1342, 1348 (1984).

FERC's decision has a direct bearing on this case, but the decision before us is an opinion of the North Carolina Supreme Court that affirmed a NCUC order. That order resulted from Nantahala's request to raise its intrastate retail rates, over which NCUC has exclusive jurisdiction. The Attorney General of North Carolina intervened on behalf of Nantahala's retail customers. Some of Nantahala's wholesale customers also intervened.

In contrast to FERC, NCUC decided that Nantahala and Tapoco were a "single, integrated electric system," and that, "for purposes of setting Nantahala's rates in this proceeding, the Nantahala and Tapoco systems should be treated as one entity with respect to all matters affecting the determination of Nantahala's reasonable cost of service applicable to its North Carolina retail operations." App. to Juris. Statement 182a.

NCUC concluded that there were extensive "concealed benefits" to Tapoco from the AA and that "extensive injustice" to Nantahala thereby resulted. *Id.*, at 183a–197a.

Similarly, NCUC found a number of concealed benefits to Tapoco and injustices to Nantahala resulting from the NFA. NCUC concluded that it was therefore appropriate to "reject [Tapoco's and Nantahala's] proposed allocation methodology in that said methodology in all material respects is based upon the New Fontana Agreement and the Tapoco-Nantahala Apportionment Agreement." *Id.*, at 205a. See also *id.*, at 215a.

NCUC instead adopted the roll-in methodology proposed by the intervenors, which pooled various sources of power available to Tapoco and Nantahala and then allocated the pooled power according to demand. NCUC included in the pool all of the power generated by the Tapoco- or Nantahala-owned facilities operated by TVA, despite the fact that the NFA gave Tapoco and Nantahala the right only to the lesser amount of entitlements power. NCUC included Nantahala's purchased power in the pool, but excluded the power that Alcoa purchased directly from TVA. After accounting for assumed transmission and other losses, NCUC calculated the pool available to the Tapoco-Nantahala system to be 1.85 billion kilowatt-hours. *Id.*, at 220a.

NCUC then calculated Nantahala's demand (from both wholesale and retail customers) to be approximately 0.45 billion kilowatt-hours. Dividing Nantahala's demand of 0.45 billion kilowatt-hours by the 1.85 billion kilowatt-hours of supply available in the Tapoco-Nantahala pool produces a ratio of approximately 24.5%. NCUC used this ratio as Nantahala's share of the total costs of the Tapoco-Nantahala system. *Id.*, at 220a–221a.

NCUC did not differentially allocate costs from various sources of power to Tapoco and Nantahala. Approximately 24.5% of the cost of each source of power was therefore allocated to Nantahala, with approximately 75.5% remaining for Tapoco. Among the sources of power, of course, was the entitlements power. Under the NCUC order, therefore, Nantahala must calculate its costs for purposes of retail

ratemaking in North Carolina as if it received 24.5% of the entitlement power, though the FERC order requires it to calculate its costs for purposes of wholesale ratemaking as if it received 22.5% of the entitlement power. NCUC therefore not only expressly rejected the fairness of the NFA and the AA, but employed an allocation of entitlement power that nowhere takes into account FERC's allocation of that same power.

Appellants here challenged NCUC's allocation in the North Carolina courts. The North Carolina Court of Appeals and the North Carolina Supreme Court affirmed NCUC's decision. In an admirably thorough consideration of the myriad issues before it, the North Carolina Supreme Court concluded that NCUC had violated neither the Supremacy nor the Commerce Clause. *State ex rel. Utilities Comm'n*, 313 N. C. 614, 332 S. E. 2d 397 (1985). It acknowledged that FERC has exclusive jurisdiction over interstate wholesale rates. *Id.*, at 686–687, 332 S. E. 2d, at 440. It concluded nonetheless that NCUC, in deciding to prevent Nantahala from recovering costs based on a failure to reach a fair NFA and AA, was "well within the field of exclusive state rate making authority engendered by the 'bright line' between state and federal regulatory jurisdiction under the Federal Power Act." *Id.*, at 687–688, 332 S. E. 2d, at 441. The North Carolina Supreme Court emphasized that NCUC had not expressly required Nantahala to disobey any order entered by FERC:

> "[NCUC's] examination of the NFA and [AA] was not undertaken in an effort to either establish wholesale rates or to modify agreements filed with and approved by the FERC. In its order reducing rates [NCUC] expressly rejected the remedy of reforming these agreements to award Nantahala its just level of entitlements and nothing contained in [NCUC's] order purports to change or modify a single word of the several contracts

> or agreements involved, or the actual flow of power thereunder." *Id.*, at 688, 332 S. E. 2d, at 440–441.

The North Carolina Supreme Court also stated that the utilities' statutory pre-emption arguments rested upon a misconception that FERC had found the NFA and AA to be fair and reasonable to Nantahala, when in fact FERC had ruled that the AA was unfair. *Id.*, at 693, 332 S. E. 2d, at 444. Finally, the court determined that NCUC's actions had not placed an excessive burden on interstate commerce. *Id.*, at 710–718, 332 S. E. 2d, at 454–458.

II

A

Appellants argue that the North Carolina Supreme Court's decision is inconsistent with the "filed rate" doctrine, which in pertinent part holds that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates. Appellants assert that NCUC's allocation of Tapoco's and Nantahala's entitlement power is inconsistent with FERC's allocation, and that the North Carolina Supreme Court's affirmance of NCUC's decision is therefore inconsistent with pre-emptive federal law.

As developed for purposes of the Federal Power Act, the "filed rate" doctrine has its genesis in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 251–252 (1951). There, this Court examined the reach of ratemakings by FERC's predecessor, the Federal Power Commission (FPC). In *Montana-Dakota*, two power companies with interlocking directorates and joint corporate officers each received some of the other's power, at rates that the FPC had determined were reasonable. After separation of the two companies' management, one of the companies alleged that it had paid unreasonably high rates for the electricity that it had received and been paid unreasonably low rates for the electricity that it had provided. The complain-

ing company laid the blame for these allegedly fraudulent and unlawful rates at the door of the previously interlocking management, and brought suit in federal court.

This Court dismissed the claim. Emphasizing that Congress had given the FPC the right to determine the reasonableness of rates, the Court stated:

> "[The complaining company] cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.
>
> "We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the court can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." *Id.*, at 251–252.

The existence of the interlocking management of the two utilities, and the resulting allegations of fraud, were irrelevant: "Perhaps, in the absence of the Commission's approval, such relationship would be sufficient to raise the presumption [of fraud] under state law, but it cannot do so where the federal supervising authority has expressly approved the arrangement." *Id.*, at 253.

This Court has held that the filed rate doctrine applies not only to the federal-court review at issue in *Montana-Dakota*, but also to decisions of state courts. In this application, the doctrine is not a rule of administrative law designed to ensure that federal courts respect the decisions of federal administrative agencies, but a matter of enforcing the Supremacy Clause. In *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U. S.

571 (1981), for example, this Court overturned a state court's decision that, in calculating damages in a breach-of-contract suit, assumed that the FPC would have approved certain rates as reasonable and thus allowed the utility to charge that rate, although the rates were never in fact filed with the FPC:

> "[U]nder the filed rate doctrine, the [FPC] alone is empowered to make that judgment [of reasonableness], and until it has done so, no rate other than the one on file may be charged. . . . The court below, like the state court in [*Chicago & North Western Transp. Co.* v.] *Kalo Brick* [*& Tile Co.*, 450 U. S. 311 (1981)], has consequently usurped a function that Congress has assigned to a federal regulatory body. This the Supremacy Clause will not permit." *Id.*, at 581–582.

In *Chicago & North Western Transp. Co.* v. *Kalo Brick*, 450 U. S. 311 (1981), the Court similarly noted that the filed rate doctrine as applied to the actions of the Interstate Commerce Commission assisted in the enforcement of the supremacy of federal law:

> "The common rationale of these cases is easily stated: '[T]here can be no divided authority over interstate commerce, and . . . the acts of Congress on that subject are supreme and exclusive.' *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404, 408 (1925). Consequently, state efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity." *Id.*, at 318–319.

See also *Maryland* v. *Louisiana*, 451 U. S. 725 (1981).

Even in contexts not directly addressed by *Arkansas Louisiana Gas*, *supra*, many state courts have applied the filed rate doctrine of *Montana-Dakota* to decisions of state utility commissions and state courts that concern matters addressed in FERC ratemakings. Some state courts have examined this interplay in determining the effect of FERC-approved

wholesale power rates on retail rates for electricity. See *Narragansett Electric Co.* v. *Burke*, 119 R. I. 559, 381 A. 2d 1358 (1977), cert. denied, 435 U. S. 972 (1978); *Eastern Edison Co.* v. *Department of Public Utilities*, 388 Mass. 292, 446 N. E. 2d 684 (1983). Others have examined the effect of FERC-approved wholesale rates for natural gas upon retail gas prices. See *Public Service Co. of Colorado* v. *Public Utilities Comm'n*, 644 P. 2d 933 (Colo. 1982); *United Gas Corp.* v. *Mississippi Public Service Comm'n*, 240 Miss. 405, 127 So. 2d 404 (1961); *City of Chicago* v. *Illinois Commerce Comm'n*, 13 Ill. 2d 607, 150 N. E. 2d 776 (1958); *Citizens Gas Users Assn.* v. *Public Utility Comm'n*, 165 Ohio St. 536, 138 N. E. 2d 383 (1956). In both contexts, these courts have concluded that a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price:

> "[T]he Supreme Court has said that a reasonable rate is that rate filed with or fixed by the FPC. [Citing *Montana-Dakota*, 341 U. S. 246 (1951).] '[N]ot even a court can authorize commerce in the commodity on other terms.' *Id.*, at 251. . . . Thus the rate increase in the cost of electricity to Narragansett, filed and bonded by [the supplier], constitutes an actual operating expense and must be so viewed by the [state utility commission]." *Narragansett*, *supra*, at 566, 381 A. 2d, at 1362.

See *Eastern Edison*, *supra*, at 297–300, 446 N. E. 2d, at 687–689; *Public Service Co.*, *supra*, at 938–940; *United Gas Corp.*, *supra*, at 437–443, 127 So. 2d, at 418–420; *City of Chicago*, *supra*, at 615–616, 150 N. E. 2d, at 780–781; *Citizens Gas Users Assn.*, *supra*, at 538, 138 N. E. 2d, at 384.

Many of these cases involved purchases by closely related entities, but these courts have uniformly concluded that FERC's regulation still pre-empted review by state utility commissions of FERC-approved rates. See *Narragansett*, *supra*, at 561, 567, 381 A. 2d, at 1359, 1362–1363 (retailer was wholly owned subsidiary of wholesaler); *Eastern Edison*,

supra, at 293, 446 N. E. 2d, at 685 (same); *United Gas Corp.*, *supra*, at 437, 442, 127 So. 2d, at 418, 420 (same); *City of Chicago*, *supra*, at 609, 615–616, 150 N. E. 2d, at 777, 780–781 (retailer owned 100% of one wholesale supplier and 70% of another). These decisions are properly driven by the need to enforce the exclusive jurisdiction vested by Congress in FERC over the regulation of interstate wholesale utility rates:

> "[O]ur decisions have squarely rejected the view . . . that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *FPC* v. *Southern California Edison Co.*, 376 U. S. 205, 215–216 (1964).

No such explicit exception by Congress has been alleged here. FERC clearly has exclusive jurisdiction over the rates to be charged Nantahala's interstate wholesale customers. See 16 U. S. C. § 824(b); *New England Power Co.* v. *New Hampshire*, 455 U. S. 331, 340 (1982). Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.

Moreover, the filed rate doctrine is not limited to "rates" *per se:* "our inquiry is not at an end because the orders do not deal in terms of prices or volumes of purchases." *Northern Natural Gas Co.* v. *Kansas Corporation Comm'n*, 372 U. S.

84, 90–91 (1963). Here FERC's decision directly affects Nantahala's wholesale rates by determining the amount of low-cost power that it may obtain, and FERC required Nantahala's wholesale rate to be filed in accordance with that allocation. FERC's allocation of entitlement power is therefore presumptively entitled to more than the negligible weight given it by NCUC.

B

The North Carolina Supreme Court was well aware that "state courts which have considered the question have uniformly agreed that a utility's costs based upon a FERC-filed rate must be treated as a reasonably incurred operating expense for the purposes of setting an appropriate retail rate." 313 N. C., at 692, 332 S. E. 2d, at 443. The North Carolina court did not reject the conclusions of those courts. Rather, it held that reliance on such cases was "misplaced" in light of the fact that the *Narragansett* line of cases has not held the filed rate doctrine "to preclude state authority to determine whether these costs should be automatically passed through to retail consumers in the form of higher rates." 313 N. C., at 693–694, 332 S. E. 2d, at 444. This interpretation of the *Narragansett* line of cases is at best an oversimplification, and in any event does not save NCUC's action from preemption.

In both *Narragansett*, *supra*, and *Public Service Co.*, *supra*, the courts observed that an increase in FERC-approved wholesale rates need not lead to an increase in retail rates. Both decisions expressly stated, however, that such a divergence between wholesale and retail rates would occur only if costs *other than* those resulting from the purchases of FERC-regulated power or gas were to decrease. See *Narragansett*, 119 R. I., at 568, 381 A. 2d, at 1363 ("The commission . . . may treat the proposed rate increase as it treats other filings . . . and investigate the overall financial structure of [the power company] to determine whether the company has experienced savings *in other areas which might*

offset the increased price") (emphasis added); *Public Service Co.*, 644 P. 2d, at 941 ("[The commission] may treat the [increase] as it treats other filings for proposed rate increases . . . [and] investigate whether [either of the gas companies] has experienced *savings in other areas which might offset the increased price* for natural gas to consumers") (emphasis added).

This qualification is perfectly sensible. If, for example, the FERC-approved price of wholesale power rises slightly but a retailer's costs of transformation and transmission significantly decline, the retailer's overall costs might well decrease. A decrease in its retail rates might therefore be appropriate even though the cost of purchasing FERC-regulated power had increased. But in this case, there is no finding or indication that Nantahala's costs of obtaining purchased power have decreased, or that other costs of operation have declined dramatically. There is only NCUC's assertion that Nantahala should have obtained more of the low-cost, FERC-regulated power than Nantahala is in fact entitled to claim under FERC's order. Such a rationale runs directly counter to FERC's order, and therefore cannot withstand the pre-emptive force of FERC's decision.

The North Carolina court also stated that appellants' preemption argument "rest[s] upon the faulty premise that FERC deemed both the NFA and the [AA] to be fair and reasonable to Nantahala, when in fact it expressly ruled that the latter agreement was 'unfair' and refused to permit Nantahala to base its requested wholesale rate increase upon the costs incurred thereunder." 313 N. C., at 693, 332 S. E. 2d, at 444. While this description of FERC's decision is accurate as far as it goes, FERC did not merely determine that the NFA was a fair bargain and the AA an unfair one: FERC also set forth a new allocation of power to "provide entitlements to Nantahala which will result in just and reasonable rates." 19 FERC, at 61,280. Even though FERC later stated that it had not reformed the agreement itself, it did

require Nantahala to file new rates in accordance with the new, fair allocation of entitlement power between Tapoco and Nantahala. Indeed, FERC stated that "the [AA and an earlier apportionment agreement] clearly are contracts affecting, in some manner, rates and charges under Section 205(c) of the Federal Power Act, and should have been filed when made." *Id.*, at 61,280–61,281. FERC's allocation of entitlement power to Nantahala is therefore reflected in Nantahala's filed rates. NCUC cannot substitute its own conception of what allocation of entitlement power would have been memorialized in a fair AA simply because FERC did not approve the AA without qualification.

We acknowledge that this case does not present the typical application of the filed rate doctrine, in which a middleman faces a FERC-fixed wholesale rate charged by a power supplier. In that situation, for a state ratemaking agency to disregard a FERC-filed rate would clearly be inconsistent with the exclusive federal regulatory scheme over interstate wholesale power prices. The FERC-approved rate at which the middleman purchased power would not be fully recognized as a cost in the retail market, thereby forcing the middleman to sell power at less than its reasonable cost as determined by the federal agency.

Here, in contrast, Nantahala both owns some of the facilities that produce the relevant electricity and sells that power to its retail customers, rather than to a distributor. But FERC's regulation of wholesale power rates nonetheless has a direct effect on Nantahala's costs of producing retail power. Nantahala has, through the NFA, contracted with TVA for the latter to control 8 of Nantahala's 11 hydroelectric facilities, and that arrangement was approved by FERC in the course of rate proceedings over which FERC clearly had exclusive jurisdiction. FERC also examined the AA, a document filed in conjunction with the same proceeding, and concluded that the reasonable allocation of entitlement power was to give 77.5% of that power to Tapoco and 22.5% of that

power to Nantahala. From Nantahala's point of view, then, it is in a situation quite similar to that of a purchaser of wholesale power at FERC-approved rates: Nantahala is entitled to include only a certain, FERC-specified amount of low-cost entitlement power among the sources of power from which it can draw in providing retail power. The fact that NCUC is setting retail rates does not give it license to ignore the limitations that FERC has placed upon Nantahala's available sources of low-cost power.

The similarity between this case and the more typical application of the filed rate doctrine is apparent from the impermissible interference that enforcement of NCUC's order would create with the scheme of federal regulation. The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. See *supra*, at 964–966 (discussing *Narragansett* line of cases). Such a "trapping" of costs is prohibited. Here, Nantahala cannot fully recover its costs of purchasing at the FERC-approved rate if NCUC's order is allowed to stand.

Although the NFA and AA do not purport explicitly to set a sales price for power, FERC's decision on how Nantahala may treat these agreements in determining its wholesale rates obviously does affect Nantahala's costs directly, and thus Nantahala's wholesale rates. Entitlement power is cheap, and purchased power is dear. FERC has ordered Nantahala to set its wholesale rates in light of an allocation of 22.5% of the entitlement power given jointly to Tapoco and Nantahala by TVA (and thus to calculate its overall rates as if it needed to purchase the remainder of its power at purchased-power rates). NCUC, in contrast, has ordered

Nantahala to set its retail rates in light of an allocation of 24.5% of the entitlement power. Because purchased power is more expensive than entitlement power, NCUC's order prevents Nantahala from recovering the full costs of acquiring power under the FERC-approved scheme: Nantahala must under NCUC's order calculate its retail rates as if it received more entitlement power than it does under FERC's order, and as if it needed to procure less of the more expensive purchased power than under FERC's order. A portion of the costs incurred by Nantahala in procuring its power is therefore "trapped." Nantahala can obtain power from TVA only at a rate based on the relatively high cost of procuring power with a mere 22.5% of the low-cost entitlement power included in the mix; but under NCUC's order it can sell that power to retail customers only at a rate based on the relatively lower cost of procuring power with a 24.5% mix of cheap entitlement power.

We think FERC's failure actually to reform the AA does not materially alter this analysis. FERC ordered Nantahala to adjust its wholesale rates so that its average cost per unit of power reflected an allocation of entitlements power different from the allocation set forth in the AA. The effect of that order is, for purposes of this case, essentially the same as reformation of the agreement itself. FERC has determined that Nantahala's average cost of power obtained from TVA should be based on a particular allocation of entitlements power, and no other. By adopting a different allocation, NCUC imputes to Nantahala a different average cost of power, notwithstanding the fact that, under the AA, Nantahala unquestionably is not entitled to demand that TVA supply it with 24.5% of the entitlements power. Consequently, Nantahala is exposed to "trapped" costs. It must, under NCUC's order, pretend that it is paying less for the power it receives from TVA, under agreements not subject to NCUC's jurisdiction, than is in fact the case. Thus, NCUC's imposition of a different allocation of entitlements

power carries with it the same risk of "trapped" costs that underlies the *Narragansett* doctrine.

The validity of NCUC's decision to "roll in" the costs of Tapoco and Nantahala is not directly before us. We nonetheless agree with FERC, 20 FERC, at 61,869, that it is at least conceivable that NCUC could validly choose to treat Nantahala and Tapoco as a single system for some purposes—for example, with regard to the costs of constructing their facilities. But, in formulating rates over which it has exclusive jurisdiction, FERC ruled that the NFA and AA should be treated as allocating 22.5% of the entitlement power of the Tapoco-Nantahala system to Nantahala's customers and 77.5% of that power to Tapoco's customer. That allocation, reflected as it is in a filed rate, must be respected by NCUC. If, as a result, Nantahala needs to purchase additional power from some nonentitlement source, that need is a reasonable one.

Accordingly, the North Carolina Supreme Court erred in relying on cases treating the reasonableness of purchasing from a particular source of, rather than paying a particular rate for, FERC-approved power. See *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n*, 77 Pa. Commw. 268, 273–274, 465 A. 2d 735, 737–738 (1983); *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Comm'n*, 4 Kan. App. 2d 674, 679–680, 610 P. 2d 121, 127 (1980). Without deciding this issue, we may assume that a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower-cost power is available elsewhere, even though the higher-cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*. The North Carolina Supreme Court apparently felt that Nantahala procured an unreasonably large amount of purchased power in light of the availability of lower-cost entitlement power. But Nantahala's procurement of purchased power is *not* unreasonably large given that Nantahala could not have treated it-

self as having access to any more low-cost entitlement power than it is eligible to include under FERC's interpretation of what would be a fair allocation. No source of power besides entitlement and purchased power from TVA is said to be available to Nantahala. Purchased power sells at a *higher* price than does entitlement power, and there is no allegation that Nantahala calculated its costs to include less of the low-cost entitlement power than the amount that FERC determined Nantahala was entitled to receive. The North Carolina court's ruling that Nantahala had purchased an unreasonably large quantity of high-cost power from TVA therefore conflicts with FERC's orders in the same manner as would a refusal to recognize a FERC-approved price as a reasonable cost for purposes of retail ratemaking. See *supra*, at 964–966.

Our disposition of the case makes it unnecessary for us to reach the appellants' arguments that NCUC's decision placed an undue burden on interstate commerce in violation of the Commerce Clause. For the reasons stated in this opinion, we reverse the decision of the North Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

Reversed.

JUSTICE POWELL and JUSTICE STEVENS took no part in the consideration or decision of this case.

YOUNG, COMMISSIONER OF FOOD AND DRUG ADMINISTRATION *v.* COMMUNITY NUTRITION INSTITUTE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-664. Argued April 30, 1986—Decided June 17, 1986

The Federal Food, Drug, and Cosmetic Act (Act) provides in 21 U. S. C. § 346 that when the addition of any poisonous or deleterious substance to food is required in the production thereof or cannot be avoided by good manufacturing practice, the Secretary of Health and Human Services "shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health." The Food and Drug Administration (FDA), the Secretary's designee for enforcing the Act, has long interpreted the phrase beginning "to such extent" to modify the word "shall" rather than "the quantity therein or thereon," and therefore views the decision whether to promulgate a § 346 regulation (tolerance level) as a determination to be made by the FDA. Rather than setting a tolerance level for aflatoxin, a potent carcinogen that is unavoidably present in some foods, the FDA set an action level of 20 parts per billion (ppb) (an action level assures food producers that the FDA ordinarily will not enforce the Act's general adulteration provisions against them if the quantity of the harmful substance in food is less than a specified quantity). But in 1980, the FDA published a notice in the Federal Register that the Act would not be enforced as to a certain harvest of corn to be used for livestock and poultry feed where it contained no more than 100 ppb. Respondents, two public-interest groups and a consumer, brought suit against petitioner Commissioner of Food and Drugs in Federal District Court, alleging that the Act requires the FDA to set a tolerance level for aflatoxin before allowing the shipment of food containing the substance, that in this case the FDA had employed insufficient procedures to set the aflatoxin action level even if a tolerance level was not required, and that the FDA's decision to grant the exemption from the action level violated the Act and the FDA's own regulations. Adopting the FDA's longstanding interpretation of § 346 as giving it discretion whether to promulgate a tolerance level, the District Court, on a motion for summary judgment, ruled that the FDA need not establish a tolerance level for aflatoxin before allowing the shipment of the aflatoxin-tainted corn. The Court of Appeals

reversed, holding that the FDA's interpretation of § 346 conflicted with its plain language.

Held: In light of § 346's inherent ambiguity, the FDA's interpretation of the provision is sufficiently rational to preclude a court from substituting its judgment for that of the FDA. The legislative history is equally ambiguous and provides no support for assertions that the FDA's interpretation is insufficiently rational to warrant this Court's deference. Pp. 979–983.

244 U. S. App. D. C. 279, 757 F. 2d 354, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 984.

Paul J. Larkin, Jr., argued the cause for petitioner. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller, Leonard Schaitman, Marleigh D. Dover*, and *Thomas Scarlett*.

William B. Schultz argued the cause for respondents. With him on the brief were *Alan B. Morrison* and *Katherine A. Meyer*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari in this case to determine whether the Court of Appeals for the District of Columbia Circuit correctly concluded that the Food and Drug Administration's longstanding interpretation of 21 U. S. C. § 346 was in conflict with the plain language of that provision. 474 U. S. 1018 (1985). We hold that, in light of the inherent ambiguity of the statutory provision and the reasonableness of the Food

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*Briefs of *amici curiae* urging reversal were filed for the State of South Carolina by *Philip C. Olsson, T. Travis Medlock*, Attorney General, and *Brooks Shealy*, Assistant Attorney General; for the American Feed Industry Association by *David F. Weeda;* for the Grocery Manufacturers of America, Inc., by *Peter Barton Hutt;* for the National Food Processors Association by *H. Edward Dunkelberger, Jr.;* and for the National Peanut Council, Inc., by *James M. Goldberg*.

and Drug Administration's interpretation thereof, the Court of Appeals erred. We therefore reverse.

I

A

The Food and Drug Administration (FDA) enforces the Federal Food, Drug, and Cosmetic Act (Act) as the designee of the Secretary of Health and Human Services. 21 U. S. C. § 371(a). See also 21 CFR § 5.10 (1986). The Act seeks to ensure the purity of the Nation's food supply, and accordingly bans "adulterated" food from interstate commerce. 21 U. S. C. § 331(a). Title 21 U. S. C. § 342(a) deems food to be "adulterated"

> "(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2)(A) if it bears or contains any added poisonous or added deleterious substance (other than [exceptions not relevant here]) which is unsafe within the meaning of section 346a(a) of this title . . . ."

As this provision makes clear, food containing a poisonous or deleterious substance in a quantity that ordinarily renders the food injurious to health is adulterated. If the harmful substance in the food is an added substance, then the food is deemed adulterated, even without direct proof that the food may be injurious to health, if the added substance is "unsafe" under 21 U. S. C. § 346.

Section 346 states:

> "Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2)(A) of section 342(a) of this

> title; but when such substance is so required or cannot be so avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2)(A) of section 342(a) of this title. While such a regulation is in effect . . . food shall not, by reason of bearing or containing any added amount of such substance, be considered to be adulterated . . . ."

Any quantity of added poisonous or added deleterious substances is therefore "unsafe," *unless* the substance is required in food production or cannot be avoided by good manufacturing practice. For these latter substances, "the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health." It is this provision that is the heart of the dispute in this case.

The parties do not dispute that, since the enactment of the Act in 1938, the FDA has interpreted this provision to give it the discretion to decide whether to promulgate a § 346 regulation, which is known in the administrative vernacular as a "tolerance level." Tolerance levels are set through a fairly elaborate process, similar to formal rulemaking, with evidentiary hearings. See 21 U. S. C. § 371(e). On some occasions, the FDA has instead set "action levels" through a less formal process. In setting an action level, the FDA essentially assures food producers that it ordinarily will not enforce the general adulteration provisions of the Act against them if the quantity of the harmful added substance in their food is less than the quantity specified by the action level.

B

The substance at issue in this case is aflatoxin, which is produced by a fungal mold that grows in some foods. Aflatoxin, a potent carcinogen, is indisputedly "poisonous" or

"deleterious" under §§ 342 and 346. The parties also agree that, although aflatoxin is naturally and unavoidably present in some foods, it is to be treated as "added" to food under § 346. As a "poisonous or deleterious substance added to any food," then, aflatoxin is a substance falling under the aegis of § 346, and therefore is at least potentially the subject of a tolerance level.

The FDA has not, however, set a § 346 tolerance level for aflatoxin. It has instead established an action level for aflatoxin of 20 parts per billion (ppb). In 1980, however, the FDA stated in a notice published in the Federal Register:

> "The agency has determined that it will not recommend regulatory action for violation of the Federal Food, Drug, and Cosmetic Act with respect to the interstate shipment of corn from the 1980 crop harvested in North Carolina, South Carolina, and Virginia and which contains no more than 100 ppb aflatoxin . . . ." 46 Fed. Reg. 7448 (1981).

The notice further specified that such corn was to be used only as feed for mature, nonlactating livestock and mature poultry. *Id.*, at 7447.

In connection with this notice, two public-interest groups and a consumer (respondents here) brought suit against the Commissioner of the FDA (petitioner here) in the United States District Court for the District of Columbia. Respondents alleged that the Act requires the FDA to set a tolerance level for aflatoxin before allowing the shipment in interstate commerce of food containing aflatoxin; that the FDA had employed insufficiently elaborate procedures to set its aflatoxin action level even if a tolerance level was not required; and that the FDA's decision to grant the 1980 exemption from the action level independently violated the Act and the FDA's own regulations.

On a motion for summary judgment, the District Court deferred to the FDA's interpretation of § 346, and therefore ruled that the FDA need not establish a tolerance level for

aflatoxin before allowing the shipment of aflatoxin-tainted corn in interstate commerce. The District Court also ruled against respondents on their other claims.

The Court of Appeals reversed the District Court's conclusion as to the proper interpretation of § 346. 244 U. S. App. D. C. 279, 757 F. 2d 354 (1985). The Court of Appeals determined that Congress had spoken directly and unambiguously to the precise question at issue:

> "The presence of the critical word 'shall' plainly suggests a directive to the Secretary to establish a tolerance, if a food with an unavoidable . . . deleterious substance is to be considered unadulterated.
>
> . . . . .
>
> "It is . . . clear from the structure of the sentence at issue here that the phrase relied upon by the Secretary simply does not modify the pivotal word 'shall.'" *Id.*, at 282, 283, 757 F. 2d, at 357, 358.

After examining the entirety of § 346, the Court of Appeals also concluded that, since tolerance levels make food with added harmful substances unadulterated, tolerance levels were necessary before food could be judged unadulterated. *Id.*, at 283, 757 F. 2d, at 358.

The Court of Appeals considered none of the other issues before the District Court, and therefore only the § 346 issue is before this Court.

II

The FDA's longstanding interpretation of the statute that it administers is that the phrase "to such extent as he finds necessary for the protection of public health" in § 346 modifies the word "shall." The FDA therefore interprets the statute to state that the FDA shall promulgate regulations to the extent that it believes the regulations necessary to protect the public health. Whether regulations are necessary to protect the public health is, under this interpretation, a determination to be made by the FDA.

Respondents, in contrast, argue that the phrase "to such extent" modifies the phrase "the quantity therein or thereon" in § 346, not the word "shall." Since respondents therefore view the word "shall" as unqualified, they interpret § 346 to require the promulgation of tolerance levels for added, but unavoidable, harmful substances. The FDA under this interpretation of § 346 has discretion in setting the particular tolerance level, but not in deciding whether to set a tolerance level at all.

Our analysis must begin with *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). We there stated:

> "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.*, at 842–844.

While we agree with the Court of Appeals that Congress in § 346 was speaking directly to the precise question at issue in this case, we cannot agree with the Court of Appeals that Congress unambiguously expressed its intent through its choice of statutory language. The Court of Appeals' reading of the statute may seem to some to be the more natural interpretation, but the phrasing of § 346 admits of either respondents' or petitioner's reading of the statute. As enemies of

the dangling participle well know, the English language does not always force a writer to specify which of two possible objects is the one to which a modifying phrase relates. A Congress more precise or more prescient than the one that enacted § 346 might, if it wished petitioner's position to prevail, have placed "to such extent as he finds necessary for the protection of public health" as an appositive phrase immediately after "shall" rather than as a free-floating phrase after "the quantity therein or thereon." A Congress equally fastidious and foresighted, but intending respondents' position to prevail, might have substituted the phrase "to the quantity" for the phrase "to such extent as." But the Congress that actually enacted § 346 took neither tack. In the absence of such improvements, the wording of § 346 must remain ambiguous.

The FDA has therefore advanced an interpretation of an ambiguous statutory provision.

> "This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency]. *Train, Inc.* v. *NRDC*, 421 U. S. 60, 75, 87 (1975) . . . ." *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 125 (1985).

We find the FDA's interpretation of § 346 to be sufficiently rational to preclude a court from substituting its judgment for that of the FDA.

To read § 346 as does the FDA is hardly to endorse an absurd result. Like any other administrative agency, the FDA has been delegated broad discretion by Congress in any number of areas. To interpret Congress' statutory language to give the FDA discretion to decide whether toler-

ance levels are necessary to protect the public health is therefore sensible.

Nor does any other portion of § 346 prohibit the FDA from allowing the shipment of aflatoxin-tainted food without a tolerance level, despite the Court of Appeals' conclusion to the contrary. The Court of Appeals stated:

> "Since the existence of a regulation operates to render the food legally unadulterated, the statute, in our view, plainly requires the establishment by regulation of tolerances before aflatoxin-tainted corn may lawfully be shipped in interstate commerce." 244 U. S. App. D. C., at 283, 757 F. 2d, at 358.

The premise of the Court of Appeals is of course correct: the Act does provide that when a tolerance level has been set and a food contains an added harmful substance in a quantity below the tolerance level, the food is legally not adulterated. But one cannot logically draw from this premise, or from the Act, the Court of Appeals' conclusion that food containing substances *not* subject to a tolerance level *must be* deemed adulterated. The presence of a certain premise (*i. e.*, tolerance levels) may imply the absence of a particular conclusion (*i. e.*, adulteration) without the absence of the premise implying the presence of the conclusion. For example, the presence of independent and adequate state-law grounds in the decision of a state supreme court means this Court has no jurisdiction over the case, but the absence of independent and adequate state grounds does not mean that this Court necessarily has jurisdiction. The Act is silent on what specifically to do about food containing an unavoidable, harmful, added substance for which there is no tolerance level; we must therefore assume that Congress intended the general provisions of § 342(a) to apply in such a case. Section 342(a) thus remains available to the FDA to prevent the shipment of any food "[i]f it bears or contains any poisonous or deleterious substance which may render it injurious to health." See generally *United States* v. *Lexington Mill & Elevator Co.*,

232 U. S. 399, 411 (1914) (discussing proper interpretation of the language that became § 342(a)).

The legislative history of the Act provides no single view about whether Congress intended § 346 to be mandatory or permissive with respect to tolerance levels. Compare, *e. g.*, Confidential House Committee Print 2, on Interstate and Foreign Commerce, 75th Cong., 1st Sess., S. 5, § 406(a), reprinted in 5 Legislative History of the Federal Food, Drug, and Cosmetic Act and its Amendments 767, 792 (Dept. of Health, Education, and Welfare 1979) (changing, without explanation, words "is authorized to" to "shall" in relevant provision), with H. R. Rep. No. 2139, 75th Cong., 3d Sess. 6 (1938) (stating that, under the Act, "the establishment of tolerances is *authorized*") (emphasis added). A clearer indication of Congress' intentions with regard to tolerance levels occurred in 1954, when Congress condemned the cumbersomeness of the tolerance-level procedure as applied to pesticides. Congress fashioned a more streamlined procedure for those and other deliberately added substances. See 21 U. S. C. § 346a. But in revisiting § 346, Congress did *not* change the procedures governing unintentionally added substances like aflatoxin. This failure to change the scheme under which the FDA operated is significant, for a "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB* v. *Bell Aerospace, Co.*, 416 U. S. 267, 275 (1974). See *FDIC* v. *Philadelphia Gear Corp.*, *ante*, at 437; *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 457 (1978). In sum, although the legislative history is not unambiguous, it certainly is no support for assertions that the FDA's interpretation of § 346 is insufficiently rational to warrant our deference.

Finally, we note that our interpretation of § 346 does not render that provision superfluous, even in light of Congress' decision to authorize the FDA to "promulgate regulations for the efficient enforcement of [the] Act." 21 U. S. C. § 371(a).

Section 346 gives the FDA the authority to choose whatever tolerance level is deemed "necessary for the protection of public health," and food containing a quantity of a required or unavoidable substance less than the tolerance level "shall not, by reason of bearing or containing any added amount of such substance, be considered to be adulterated." Section 346 thereby creates a specific exception to § 342(a)'s general definition of adulterated food as that containing a quantity of a substance that renders the food "ordinarily . . . injurious to health." Simply because the FDA is given the choice between employing the standard of § 346 and the standard of § 342(a) does not render § 346 superfluous.

For the reasons set forth, the judgment is reversed, and the case is remanded to the Court of Appeals for the District of Columbia Circuit for further proceedings consistent with this opinion.

Reversed.

JUSTICE STEVENS, dissenting.

The parties agree that aflatoxins are added, unavoidable contaminants of food and as such are governed by the following provision of the Federal Food, Drug, and Cosmetic Act:

> "[W]hen such substance . . . cannot be so avoided, the Secretary *shall promulgate regulations* limiting the quantity therein or thereon *to such extent* as he finds necessary for the protection of public health, and any quantity exceeding the limits *so fixed* shall also be deemed to be unsafe for purposes of the application of clause (2)(A) of section 342(a) of this title." 21 U. S. C. § 346 (emphasis added).

To one versed in the English language, the meaning of this provision is readily apparent. The plain language of the section tells us when the Secretary's duty to promulgate regulations arises—"when such substance . . . cannot be so avoided"; it tells us the purpose of the regulations—to estab-

lish a tolerance level that will enable manufacturers to know what they can lawfully produce and to enable the public to know what they can safely consume; and it tells us what standard he should employ in drafting them—"to such extent as he finds necessary for the protection of public health." For purposes of deciding this case, the parties' agreement that aflatoxins are substances that "cannot be so avoided" within the meaning of the section triggers the obligation to initiate rulemaking.

The Court's contrary conclusion reflects an absence of judgment and of judging. Before exploring either infirmity, it is worthwhile to summarize the Court's reason for reading the section to authorize, but not require, the promulgation of regulations. First, the Court declares that the qualifying language—"to such extent as he finds necessary for protection of the public health"—is a "dangling participle" that might or might not modify the words "shall promulgate regulations." *Ante*, at 981. Second, as between the two readings of this "ambiguous statutory provision," *ante*, at 981, deference dictates that the Commissioner of the Food and Drug Administration (to whom enforcement of the Act has been delegated) may take his pick.

The Court's finding of ambiguity is simply untenable. The antecedent of the qualifying language is quite clearly the phrase "limiting the quantity therein or thereon," which immediately precedes it, rather than the word "shall," which appears eight words before it. Thus, the Commissioner is to "limi[t] the quantity [of an added, unavoidable poisonous or deleterious substance] therein or thereon to such extent as he finds necessary for the protection of public health."[1] By in-

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[1] This interpretation is in accord with the Committee Report on the House bill, which became the Food, Drug, and Cosmetic Act of 1938. The Report states that "[t]he addition of poison to foods is prohibited except where such addition is necessary or cannot be avoided; and in such cases tolerances *are* provided limiting the amount of added poison to the extent necessary to safeguard the public health." H. R. Rep. No. 2139, 75th

stead reading the section to mean that "the Secretary shall promulgate regulations . . . to such extent as he finds necessary," the Court ignores the import of the words immediately following, which specify the effect of the "limits *so* fixed"—*i. e.*, fixed by "limiting the quantity [of the poisonous substance] therein or thereon to such extent as he finds necessary for the protection of public health"—which can only mean that the qualification modifies the *limits* set by regulation rather than the *duty* to regulate. In addition, the Court's construction, by skipping over the words "limiting the quantity therein or thereon," renders them superfluous and of no operative force or effect. Indeed, the Court renders the very language it construes superfluous, because reading the provision to authorize (rather than mandate) the promulgation of regulations assigns it an office already filled by the general rulemaking authority conferred later in the Food, Drug, and Cosmetic Act. See 21 U. S. C. § 371(a).[2] If Congress intended the Secretary to have unbridled authority to proceed with action levels, instead of with formal regulations, there was no need to enact this part of § 346 at all. This is plainly a case in which "the intent of Congress is clear [and] the court, as well as the agency, must give effect to the

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Cong., 3d Sess., pt. 1, p. 2 (1938) (emphasis added). By using the present tense, the Report makes clear that the qualifying language is operative when regulations *are* promulgated—to limit the amount of poison "to the extent necessary to safeguard the public health." The qualifying language thus defines the standard by which *tolerances* are to be determined and not the occasions on which *regulations* are to be promulgated.

[2] The Court does not deny that the specific language which it construes—the clause providing that "the Secretary shall promulgate regulations" setting tolerance levels—is superfluous under its view of the Act. See *ante*, at 983–984. It instead emphasizes that a later sentence in § 346 which prescribes the legal *effect* of tolerance-setting regulations remains effective. But since tolerances may be promulgated pursuant to § 371(a) as well as § 346, the Court's response merely underscores the fact that its construction of the "shall promulgate" clause to authorize rather than to require such rulemaking renders it redundant to the general rulemaking authority conferred by § 371(a).

unambiguously expressed intent of Congress." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984).[3]

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[3] Because Congress explicitly required the Commissioner to promulgate regulations for added, unavoidable contaminants, that should be "the end of the matter." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S., at 842. The Commissioner's "longstanding" practice to the contrary does not help his legal position. For even if it were true that the Commissioner has from time to time announced an "action level" to advise the industry when he intended to institute enforcement proceedings concerning certain deleterious substances, the fact that the FDA had never actually addressed in any detail the statutory authorization under which it took such action means that its plea for deference should fail for the reasons carefully stated in *SEC* v. *Sloan*, 436 U. S. 103, 117–118 (1978):

"The Commission next argues that its interpretation of the statute—that the statute authorizes successive suspension orders—has been both consistent and longstanding, dating from 1944. It is thus entitled to great deference. See *United States* v. *National Assn. of Securities Dealers*, 422 U. S. 694, 710 (1975); *Saxbe* v. *Bustos*, 419 U. S. 65, 74 (1974).

"While this undoubtedly is true as a general principle of law, it is not an argument of sufficient force in this case to overcome the clear contrary indications of the statute itself. In the first place it is not apparent from the record that on any of the occasions when a series of consecutive summary suspension orders was issued the Commission actually addressed in any detail the statutory authorization under which it took that action.

. . . . .

"[S]ince this Court can only speculate as to the Commission's reasons for reaching the conclusion that it did, the mere issuance of consecutive summary suspension orders, without a concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade' as to the existence of such authority. [*Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 287–288, n. 5 (1978)]."

As we emphasized in *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 745 (1973), "an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." Instead, "our clear duty in such a situation is to reject the administrative interpretation of the statute." *SEC* v. *Sloan*, 436 U. S., at 119.

The *Sloan* case also provides an adequate answer to the argument that Congress has revisited the statute from time to time without condemning the FDA's "action level" practice:

The task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference. A statute is not "unclear unless we think there are decent arguments for each of two competing interpretations of it." R. Dworkin, Law's Empire 352 (1986). Thus, to say that the statute is susceptible of two meanings, as does the Court, is not to say that either is acceptable. Furthermore, to say that the Commissioner's interpretation of the statute merits deference, as does the Court, is not to say that the singularly judicial role of marking the boundaries of agency choice is at an end. As Justice Frankfurter reminds us, "[t]he purpose of construction being the ascertainment of meaning, every consideration brought to bear for the solution of that problem must be devoted to that end alone." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 529 (1947). It is not "a ritual to be observed by unimaginative adherence to well-worn professional phrases." *Ibid.* "Nor can canons of construction save us from the anguish of judgment." *Id.*, at 544. The Court, correctly self-conscious of the limits of the judicial role, employs a reasoning so formulaic that it trivializes the art of judging.

I respectfully dissent.

"We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this. For here its invocation would result in a construction of the statute which not only is at odds with the language of the section in question and the pattern of the statute taken as a whole, but also is extremely far reaching in terms of the virtually untrammeled and unreviewable power it would vest in a regulatory agency." *Id.*, at 121.

Reporter's Note

Orders commencing with June 11, 1986, begin with page 1179. The preceding orders in 476 U. S., from May 5 through June 10, 1986, were reported in Parts 1 and 2, at 1101–1179. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

Rehearing Denied

No. 84–1288. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* JEFF D. ET AL., MINORS, BY AND THROUGH THEIR NEXT FRIEND, JOHNSON, ET AL., 475 U. S. 717;

No. 85–1095. AAMODT ET UX. *v.* UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL., 475 U. S. 1082;

No. 85–1407. CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL. *v.* PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, 475 U. S. 1114;

No. 85–1478. BOYCE *v.* RIDGELY ET AL., PERSONAL REPRESENTATIVES OF THE ESTATE OF BOYCE, 475 U. S. 1123;

No. 85–6431. DALE *v.* SOUTH DAKOTA, 475 U. S. 1126; and

No. 85–6499. STARADUMSKY *v.* RHODE ISLAND, 475 U. S. 1114. Petitions for rehearing denied.

No. 85–6003. HURLEY *v.* HONGISTO ET AL., 475 U. S. 1025. Motion for leave to file petition for rehearing denied.

JUNE 10, 1986

Miscellaneous Order

No. A–959. KEMP, WARDEN *v.* COLLINS. Application of the Attorney General of Georgia for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE POWELL, and by him referred to the Court, denied.

JUNE 11, 1986

Certiorari Granted. (See No. 84–495, *ante*, at 747.)

JUNE 16, 1986

Dismissal Under Rule 53

No. 85–1852. BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES *v.* BURLINGTON NORTHERN RAILROAD CO. ET AL. C. A. 7th Cir. Certiorari before judgment dismissed under this Court's Rule 53.

Appeals Dismissed

No. 84–1724. SNIDER ET AL. *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

No. 85-1459. POWELL *v.* POWELL. Appeal from Ct. App. Tex., 10th Sup. Jud. Dist., dismissed for want of substantial federal question. JUSTICE WHITE would postpone further consideration of question of jurisdiction to a hearing of the case on the merits. Reported below: 703 S. W. 2d 434.

No. 85-1754. BOBER ET AL. *v.* WALGREEN CO. ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. JUSTICE WHITE took no part in the consideration or decision of this case. Reported below: 111 Ill. 2d 120, 488 N. E. 2d 980.

Certiorari Granted—Vacated and Remanded

No. 85-279. AMERICAN PETROFINA COMPANY OF TEXAS *v.* OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION LOCAL NO. 4-23 ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643 (1986). Reported below: 759 F. 2d 512.

Miscellaneous Orders

No. ——. COMSIA *v.* MORRIS, JUDGE. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. A-925 (85-1962). RIDDICK ET AL. *v.* SCHOOL BOARD OF CITY OF NORFOLK ET AL. C. A. 4th Cir. Application for an injunction, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE MARSHALL and JUSTICE BLACKMUN would grant the application. JUSTICE STEVENS would expedite consideration of the petition for writ of certiorari and postpone action on the application pending such consideration.

No. A-934 (85-7008). LESKO *v.* PENNSYLVANIA. Sup. Ct. Pa. Application for stay of execution of sentence of death, presented to JUSTICE BRENNAN, and by him referred to the Court, is granted pending the disposition of the petition for writ of certiorari.

No. 84-1904. UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* GALIOTO. D. C. N. J. [Probable jurisdiction noted, 474 U. S. 943.] Motion of the Solicitor General for leave to file a supplemental brief after argument granted.

No. 85-1233. INTERNATIONAL PAPER CO. *v.* OUELLETTE ET AL. C. A. 2d Cir. [Certiorari granted, 475 U. S. 1081.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 85-1773. OBERLY, ATTORNEY GENERAL OF DELAWARE, ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL. Appeal from C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 85-6878. WILSON *v.* UNITED STATES. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 7, 1986, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 85-6775. IN RE AYERS. Petition for writ of mandamus denied.

No. 85-6789. IN RE HOSEY. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 85-1385. UNITED STATES *v.* GENERAL DYNAMICS CORP. ET AL. C. A. Fed. Cir. Certiorari granted. Reported below: 773 F. 2d 1224.

No. 85-1581. SOLORIO *v.* UNITED STATES. Ct. Mil. App. Certiorari granted. Reported below: 21 M. J. 251.

No. 85-1630. HEWITT ET AL. *v.* HELMS. C. A. 3d Cir. Certiorari granted. Reported below: 780 F. 2d 367.

Certiorari Denied

No. 85-372. CHRISTENSEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 755 F. 2d 705.

No. 85-1380. WOODHOUSE *v.* UNITED STATES BUREAU OF INDIAN AFFAIRS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 2d 614.

No. 85-1401. TEMPLE UNIVERSITY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 769 F. 2d 126.

No. 85-1411. MCCALLUM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 788 F. 2d 1042.

No. 85-1415. WOLFENBARGER ET AL. *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 710 P. 2d 114.

No. 85-1453. COLORADO FLYING ACADEMY, INC., ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 724 F. 2d 871.

No. 85-1483. MAIKOVSKIS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 773 F. 2d 435.

No. 85-1559. POSNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 1536.

No. 85-1560. RUBIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 780 F. 2d 533.

No. 85-1605. RHODES ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 779 F. 2d 1019.

No. 85-1651. WNEV-TV, NEW ENGLAND TELEVISION CORP. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1228, AFL-CIO. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 2d 46.

No. 85-1685. HERBERT *v.* LANDO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 781 F. 2d 298.

No. 85-1732. TAKAHASHI *v.* BOARD OF TRUSTEES OF LIVINGSTON UNION SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 848.

No. 85-1733. MCANINCH, EXECUTOR OF THE ESTATE OF MCANINCH, ET AL. *v.* TRADERS NATIONAL BANK OF KANSAS CITY. C. A. 8th Cir. Certiorari denied. Reported below: 779 F. 2d 466.

No. 85-1740. KANANEN ET UX. *v.* SUN BANK OKEECHOBEE, FKA COMMERCIAL BANK OKEECHOBEE, FLORIDA, ET AL. Dist.

Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 482 So. 2d 362.

No. 85-1746. MARGULIS *v.* MILLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1027.

No. 85-1757. AZIMA *v.* FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF MEDICAL EXAMINERS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 473 So. 2d 761.

No. 85-1764. BUCK *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 11 Kan. App. 2d ——, 713 P. 2d 494.

No. 85-1769. PROCTOR ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 781 F. 2d 752.

No. 85-1771. LECOUNT *v.* BETHLEHEM STEEL CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 785 F. 2d 312.

No. 85-1775. MACURDY *v.* DAUER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 1015.

No. 85-1776. HOLDING *v.* SOVRAN BANK. Cir. Ct. Powhatan County, Va. Certiorari denied.

No. 85-1781. FOTLAND ET AL. *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 779 F. 2d 31.

No. 85-1812. DEUTSCH *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 103 N. M. 752, 713 P. 2d 1008.

No. 85-1836. CHEHADE *v.* SHEHADE. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 137 Ill. App. 3d 692, 484 N. E. 2d 1253.

No. 85-1872. COOK *v.* PETER KIEWIT SON'S CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 775 F. 2d 1030.

No. 85-1879. MURPHY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 85-1880. KEPLINGER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 776 F. 2d 678.

No. 85-1909. MOSLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 786 F. 2d 1330.

No. 85-6388. MAGGITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 778 F. 2d 1029.

No. 85-6417. NAPUE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 85-6527. GRAY *v.* CODY, ATTORNEY GENERAL OF TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 779 F. 2d 50.

No. 85-6562. BAXTER *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 249 U. S. App. D. C. 210, 774 F. 2d 510.

No. 85-6599. HIGHIGHI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1033.

No. 85-6600. WOOD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 780 F. 2d 955.

No. 85-6633. MITCHELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 2d 248.

No. 85-6655. MORMON *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 782 F. 2d 1045.

No. 85-6664. OWENS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 782 F. 2d 862.

No. 85-6695. REMINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 1061.

No. 85-6760. WATSON *v.* MCCOTTER. C. A. 10th Cir. Certiorari denied. Reported below: 782 F. 2d 143.

No. 85-6764. LEECAN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 198 Conn. 517, 504 A. 2d 480.

No. 85-6774. JUDD *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 786 F. 2d 1174.

No. 85-6779. STEVENS *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1033.

No. 85-6784. SAMPLES *v.* KEENEY, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 317.

No. 85-6786. RICHARDSON *v.* LOUISIANA STATE PAROLE BOARD ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-6787. RUSSO *v.* HARTIGAN, ATTORNEY GENERAL OF ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 780 F. 2d 712.

No. 85-6788. PENDLETON *v.* NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 1.

No. 85-6795. YARBOROUGH *v.* YARBOROUGH. Fam. Ct. of Darlington County, S. C. Certiorari denied.

No. 85-6800. TARKOWSKI *v.* WOLFF ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 787 F. 2d 595.

No. 85-6804. LOVE *v.* YOUNG, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 781 F. 2d 1307.

No. 85-6805. GREENE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 1364.

No. 85-6808. WRIGHT *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 786 F. 2d 1159.

No. 85-6809. MARTINEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 85-6810. HERSHIPS *v.* FOUNDERS TITLE CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 315.

No. 85-6811. DIEBOLD *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 67 N. Y. 2d 761, 491 N. E. 2d 289.

No. 85-6814. SMITH *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied.

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No. 85–6924. LARSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 2d 9.

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No. 84–2023. INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE, INC., ET AL. *v.* MARINE MIDLAND BANK, N. A., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 757 F. 2d 453.

No. 85–1479. STONE & WEBSTER ENGINEERING CORP. *v.* LINDLEY ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 780 F. 2d 797.

No. 85–1316. PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1 ET AL. *v.* LITTLE ROCK SCHOOL DISTRICT ET AL.; and

No. 85–1547. ARKANSAS STATE BOARD OF EDUCATION ET AL. *v.* LITTLE ROCK SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 778 F. 2d 404.

No. 85-1593. COUGHLIN ET UX. *v.* WESTINGHOUSE BROADCASTING & CABLE, INC. C. A. 3d Cir. Certiorari denied. Reported below: 780 F. 2d 340.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

In *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 764 (1985) (BURGER, C. J., concurring in judgment), I wrote to express my agreement with JUSTICE WHITE that *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), should be reexamined. Petitioners in this petition ask this Court for such a reconsideration. I dissent from the Court's refusal to grant certiorari and give plenary attention to this important issue.

Respondent conducted an investigation into the alleged failure of Philadelphia police to enforce state liquor laws against an "after hours" bar. In the course of that investigation, they hid a camera across the street from the bar and videotaped police officers entering and leaving the bar. Respondent ultimately broadcast a videotape of petitioner leaving a bar on October 11, 1981. The videotape stated that "the only paperwork we saw [petitioner] doing was *carrying this envelope* out of the Club less than a minute after he went in." A freeze frame with a circle around an object in petitioner's hand was used to emphasize the point. The announcer went on to say that the officer had difficulty finding the proper key to start his patrol car and that he was not wearing his uniform jacket or hat, "all standard items officers on patrol are required to have." The clear implication ofthe broadcast was that petitioner had accepted a bribe. Respondent made no attempt to obtain petitioner's explanation for these events other than an "ambush" interview four months after the fact. In this "interview," a reporter for respondent approached petitioner with cameras whirling as he came off of his all-night shift and asked what he had been doing four months earlier on the night of October 11, 1981. Petitioner said "this here is harassment" and declined to answer questions at that time.

Petitioner and his wife filed a libel suit in District Court. He alleged that even a minimal investigation of the events of that evening would have revealed that he was a rookie policeman, patrolling alone for the first time on October 11, 1981; that early in his shift, he was ordered to investigate a vandalism complaint at

the bar; that after talking to the bar's steward, he returned to the patrol car and filled out his incident report book; and that he was not required to wear his jacket or hat while on patrol. Petitioner further alleged that the purported "envelope" was in fact nothing other than his incident report book. The District Court concluded that petitioner had raised a genuine issue of material fact concerning the truth of the allegedly defamatory statements and that the broadcast was capable of a defamatory interpretation. 603 F. Supp. 377 (ED Pa. 1985). Applying our decision in *New York Times Co.* v. *Sullivan*, however, the District Court concluded that petitioner had not introduced sufficient evidence of "actual malice" on the part of respondent to withstand a motion for summary judgment. The Court of Appeals affirmed, concluding that the District Court had properly evaluated petitioner's evidence of actual malice. 780 F. 2d 340 (CA3 1985). One judge concurred, observing that "[t]he *New York Times* standard makes it hard enough for a public figure to win a libel suit, even when faced, as here, with what any fair observer must agree is egregious conduct on the part of the media." *Id.*, at 349 (Becker, J.).

Petitioner has raised an important federal question that we should review. He has been accused of accepting a bribe on the basis of a cursory investigation, yet his libel suit to clear his name has been found to be constitutionally barred. The District Court observed: "An issue . . . exists as to whether [respondent], with a minimum of effort, could have discovered the truth. The Supreme Court's mandate, however, is clear: 'reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.'" 603 F. Supp., at 388 (quoting *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968)). I would grant certiorari and set this case for argument to determine whether the Court's "mandate" remains an appropriate one.

No. 85–1750. S/S SALVADOR ET AL. *v.* BERISFORD METALS CORP. C. A. 2d Cir. Motions of Inter-American Freight Conference, Star Shipping A/S, and American President Lines, Ltd., for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 779 F. 2d 841.

No. 85-6474. BUXTON *v.* TEXAS. Ct. Crim. App. Tex.; and No. 85-6773. WISEHART *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: No. 85-6474, 699 S. W. 2d 212; No. 85-6773, 484 N. E. 2d 949.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 85-1447. CABRIOLET PORSCHE + AUDI, INC. *v.* AMERICAN HONDA MOTOR CO., INC., 475 U. S. 1122;

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No. 85-882. LOVSHIN *v.* DEPARTMENT OF THE NAVY, 475 U. S. 1111. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

477/pt.1

PRELIMINARY PRINT

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OFFICIAL REPORTS

OF

THE SUPREME COURT

JUNE 18 THROUGH JUNE 25, 1986

HENRY C. LIND
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1985

WARDAIR CANADA INC. *v.* FLORIDA DEPARTMENT OF REVENUE

APPEAL FROM THE SUPREME COURT OF FLORIDA

No. 84-902. Argued March 31, 1986—Decided June 18, 1986

During the time period in question, Florida law imposed a tax on all aviation fuel sold within the State to airlines regardless of whether the fuel was used to fly within or without the State, or whether the airline engaged in a substantial or a nominal amount of business within the State. Shortly after the law was enacted, appellant, a Canadian airline that operates charter flights to and from the United States, filed a state-court action attacking the law's validity insofar as it authorized assessment of a tax on fuel used by foreign airlines exclusively in foreign commerce. Granting injunctive relief, the trial court held that an agreement between Canada and the United States expressed a "federal policy" to exempt foreign airlines from fuel taxes and precluded individual States from acting in such area. The Florida Supreme Court reversed in part, holding that the agreement did not pre-empt state sales taxes, and that the Florida tax was not invalid under the Foreign Commerce Clause of the Federal Constitution.

Held:

1. The Federal Aviation Act does not occupy the field of international aviation, and thus does not pre-empt all state regulation. Where a federal statute does not expressly declare that state law is pre-empted, and where there is no actual conflict between what federal and state law prescribe, there must be evidence of a congressional intent to pre-empt the specific field covered by the state law. In the present case, not only is there no indication that Congress wished to preclude state sales taxation

of airline fuel, but, to the contrary, the Federal Aviation Act expressly permits States to impose such taxes. Pp. 5–7.

2. The Florida tax does not violate the dormant Foreign Commerce Clause on the ground that the tax threatens the ability of the Federal Government to speak with one voice with respect to the asserted federal policy of reciprocal tax exemptions for aircraft, equipment, and supplies, including aviation fuel, that constitute the instrumentalities of international air traffic. The evidence relied upon for such contention fails to reveal any such federal policy. Moreover, the evidence shows the absence of the sort of federal governmental silence that triggers dormant Commerce Clause analysis. The numerous international documents cited, including the agreement referred to in the courts below, show that while there appears to be an international *aspiration* on the one hand to eliminate all impediments to foreign air travel—including taxation of fuel—the *law* as it presently stands acquiesces in taxation of the sale of that fuel by political subdivisions of countries. Although most of the cited bilateral agreements explicitly commit the United States to refrain from imposing *national* taxes on aviation fuel used by airlines of the other contracting party, none of the agreements explicitly interdict state or local taxes on aviation fuel used by foreign airlines in international traffic. The facts presented by this case show that the Federal Government has affirmatively decided to permit the States to impose sales taxes on aviation fuel. Pp. 7–13.

455 So. 2d 326, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 13. BLACKMUN, J., filed a dissenting opinion, *post*, p. 18.

Walter D. Hansen argued the cause and filed briefs for appellant.

Albert G. Lauber, Jr., argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried, Deputy Solicitor General Wallace, Abraham D. Sofaer*, and *Jim J. Marquez.*

Joseph C. Mellichamp III, Assistant Attorney General of Florida, argued the cause for appellee. With him on

the briefs were *Jim Smith*, Attorney General, *Mitchell D. Franks*, *William Townsend*, and *Stephen Keller*.*

JUSTICE BRENNAN delivered the opinion of the Court.

Appellant Wardair Canada Inc., a Canadian airline that operates charter flights to and from the United States, maintains in this action that the Commerce Clause[1] of the Constitution precludes Florida from applying to it a tax on aviation fuel purchased in that State. Wardair also asserts that the Florida tax must fall because it violates a "clear unequivocal directive of Congress," allegedly implicit in the Federal Aviation Act, 49 U. S. C. App. § 1301 *et seq.* (1982 ed. and Supp. II), that the Federal Government has exclusive regulatory power over foreign air commerce. Brief for Appellant v, 15.

We disagree with appellant's view and analysis of the operation of the Commerce Clause, and find that Congress has not acted to pre-empt state taxes such as that imposed by Florida. Accordingly, we affirm the judgment of the Supreme Court of Florida upholding the tax.

I

Florida has for many years taxed the sale of fuel to common carriers, including airlines, within the State. Prior to April 1, 1983, the tax was prorated on a mileage basis, so that a carrier was liable for only the portion of the otherwise payable tax that was equal to the ratio of its Florida mileage to its worldwide mileage for the previous fiscal year. Fla. Stat. § 212.08 (4) (1975). Effective April 1, 1983, the Florida

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**Robert D. Papkin* filed a brief for Aer Lingus et al. as *amici curiae* urging reversal.

Benna Ruth Solomon and *H. Bartow Farr III* filed a brief for the National Governors' Association et al. as *amici curiae* urging affirmance.

Thomas W. Lager and *Morton H. Silver* filed a brief for Air Jamaica Limited et al. as *amici curiae*.

[1] The Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3.

law was amended to repeal the mileage proration formula for airlines, and the fuel tax was established at a rate of 5% on a deemed price of $1.148 per gallon. Fla. Stat. § 212.08 (4)(a)(2) (1985).[2] Under the amended law, an airline was liable for the full amount of the fuel tax whether that fuel was used to fly within or without the State, and regardless of whether the airline engaged in a substantial or a nominal amount of business within the State. The effect of this amendment was, of course, to increase substantially the tax liability of airlines, such as foreign airlines, who fly largely outside of Florida, and who had, under the old scheme, paid little Florida tax on fuel.

Shortly after the new law was enacted, appellant filed suit in state court attacking its validity insofar as it authorized the assessment and collection of a tax on fuel used by foreign airlines exclusively in foreign commerce. Wardair argued, among other things, that the law was unconstitutional under the Commerce Clause and that it was inconsistent with the Nonscheduled Air Services Agreement, May 8, 1974, United States-Canada, Art. XII, 25 U. S. T. 787, T. I. A. S. No. 7826 (U. S.-Canadian Agreement or Agreement), a bilateral agreement between the Governments of Canada and the United States regulating air charter service between the two countries. Wardair's case was consolidated for trial with a similar suit brought by a number of other foreign airlines.

In a separate order addressing only Wardair's claims, the trial court rejected the Commerce Clause arguments but found that the U. S.-Canadian Agreement expressed a "federal policy" to exempt foreign airlines from fuel taxes. The court further found that this "policy" precluded the individual States from acting in this area and thus preventing the

[2] Florida has since substantially amended its statute which imposes taxes on aviation fuel. Those amendments, which became effective July 1, 1985, do not in any way bear on the present controversy, which concerns only appellant's tax liability from April 1, 1983, to July 1, 1985.

United States from "speaking with one voice" with respect to foreign commerce. In reaching this conclusion, the court relied largely on our decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434 (1979). The court granted appellant a permanent injunction against the Florida Department of Revenue from assessing and collecting the fuel tax from Wardair.

The case was certified to the Supreme Court of Florida, which reversed, in part, the trial court. 455 So. 2d 326 (1984). The Supreme Court first noted that the U. S.-Canadian Agreement by its terms exempted carriers only from national, as opposed to state or local (or, in the case of Canada, provincial) excise taxes, inspection fees, and other charges, and thus held that the Agreement did not pre-empt state sales taxes. Nor was the court persuaded that the Florida tax was invalid under the Foreign Commerce Clause. The court again referred to the fact that the Agreement exempted only national taxes, and "presume[d] this has been done intentionally." *Id.*, at 329. Having determined that the Federal Government had, in effect, itself elected not to prohibit the States from taxing aviation fuel, the court rejected the contention that the state tax "prevents our federal government from speaking with one voice," *ibid.*, and thus distinguished *Japan Line*. We noted probable jurisdiction, 474 U. S. 943 (1984), and now affirm.

II

Wardair suggests that by enacting the Federal Aviation Act (Act), Congress "left no room for local government participation" with respect to foreign air travel. Brief for Appellant 39. Appellant does not expressly label this a preemption argument; rather, it relies on metaphor and tells us that "in the field of foreign air commerce it is the Federal Government that calls the tune. It is the Federal Government that is the conductor of the music, deciding how it is to be played and who are the players." *Id.*, at 44. We

assume that appellant intends, by this metaphor, to persuade us that Congress has determined to "occupy the field" of international aviation, and thus to pre-empt all state regulation. The argument is without merit.

It is of course true, as appellant notes, that Congress has, through the Act, regulated aviation extensively. The agencies charged by Congress with regulatory responsibility over foreign air travel exercise power, as appellant observes, over licensing, route services, rates and fares, tariffs, safety, and other aspects of air travel. However, state law is not pre-empted whenever there is any federal regulation of an activity or industry or area of law. The Supremacy Clause, among other things, confirms that when Congress legislates within the scope of its constitutionally granted powers, that legislation may displace state law, and this Court has throughout the years employed various verbal formulations in identifying numerous varieties of pre-emption. See, *e. g.*, *Louisiana Public Service Comm'n* v. *FCC*, 476 U. S. 355, 368–369 (1986). But we have consistently emphasized that the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is to be pre-empted, and where there is no actual conflict between what federal law and state law prescribe, we have required that there be evidence of a congressional intent to pre-empt the specific field covered by the state law. *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190 (1983); *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238 (1984). In the present case, not only is there no indication that Congress wished to preclude state sales taxation of airline fuel, but, to the contrary, the Act expressly permits States to impose such taxes. Section 1113 of the Act, as added, 87 Stat. 90, and as amended, 49 U. S. C. App. § 1513, addresses the issue of "State taxation of air commerce," detailing in § 1113(a) the kinds of taxes which are prohibited and in § 1113(b) those

which are permissible. Among the permissible taxes are "sales or use taxes on the sale of goods or services." It is, of course, plausible that Congress never considered whether States should be permitted to impose sales taxes on foreign, as opposed to domestic, carriers, and therefore we do not rely on the existence of this section to answer the Commerce Clause issue raised here by appellant and considered by us below. However, this section of the Act does provide the complete response to appellant's pre-emption argument. For what § 1113(b) shows is that, to the degree that Congress considered the power of the States to tax air travel, it expressly and unequivocally permitted the States to exercise that authority. In other words, rather than prohibit state regulation in the area, Congress invited it. This is not the stuff of pre-emption.

III

In cases involving the so-called dormant Commerce Clause, both interstate and foreign, the Federal Government has not affirmatively acted, and it is the responsibility of the judiciary to determine whether action taken by state or local authorities unduly threatens the values the Commerce Clause was intended to serve. See *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945). As we have previously observed: "The few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U. S. 322, 325–326 (1979). In recognition of the importance of this conviction, we have acknowledged the self-executing nature of the Commerce Clause and held on countless occasions that, even in the absence of specific action taken by the Federal Government to disapprove of state regulation implicating interstate or foreign commerce, state

regulation that is contrary to the constitutional principle of ensuring that the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States, may be invalid under the unexercised Commerce Clause. See *H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U. S. 525 (1949); *Southern Pacific Co.* v. *Arizona, supra.* In the unique context of the foreign commerce, we have alluded to the special need for federal uniformity: "'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.' *Board of Trustees* v. *United States*, 289 U. S. 48, 59 (1933),'" *Japan Line*, 441 U. S., at 448. As in the context of cases alleging violations of the dormant Interstate Commerce Clause, the concern in these Foreign Commerce Clause cases is not with an actual conflict between state and federal law, but rather with the policy of uniformity, embodied in the Commerce Clause, which presumptively prevails when the Federal Government has remained silent.

When a state tax is challenged as violative of the dormant Interstate Commerce Clause, we have asked four questions: is the tax applied to an activity with a substantial nexus with the taxing State; is the tax fairly apportioned; does the tax discriminate against interstate commerce; is the tax fairly related to the services provided by the State. *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977). In *Japan Line, supra*, we noted that when the state tax allegedly interferes with the Federal Government's authority to regulate foreign commerce, two additional questions must be asked: "first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments." *Id.*, at 451.

In the present case, appellant concedes that Florida's tax satisfies the four-part test set out in *Complete Auto.* In

other words, it is not disputed that if this case did not involve foreign commerce, the Florida tax on the sale of aviation fuel would not contravene the Commerce Clause. Appellant also recognizes that there is no threat of multiple international taxation in this case, since the tax is imposed only upon the sale of fuel, a discrete transaction which occurs within one national jurisdiction only. Appellant and the United States as *amicus curiae* thus rely entirely on the final factor identified in *Japan Line*, and argue that the Florida tax violates the Foreign Commerce Clause because it threatens the ability of the Federal Government to "speak with one voice." Specifically, they urge that there exists a federal policy of reciprocal tax exemptions for aircraft, equipment, and supplies, including aviation fuel, that constitute the instrumentalities of international air traffic, and that this "policy" represents the statement that the "one voice" of the Federal Government wishes to make and which is threatened by the state law. We disagree. In our view, the evidence relied upon by appellant and the United States not only fails to reveal any such federal policy, but, even more fundamentally, shows also that in the context of this case we do not confront federal governmental silence of the sort that triggers dormant Commerce Clause analysis. On the contrary, the international agreements cited demonstrate that the Federal Government has affirmatively acted, rather than remained silent, with respect to the power of the States to tax aviation fuel, and thus that the case does not call for dormant Commerce Clause analysis at all. Moreover, in our view the actions taken by the Federal Government accept the authority of States to tax as Florida has here, and lend further support to the position and views advanced by appellee and relied on by the Florida Supreme Court in rejecting Wardair's arguments.

Appellant and the United States maintain that the policy of tax exemption for the instrumentalities of international air traffic is manifested by, among other things, (1) the Chicago Convention on International Civil Aviation, opened for signa-

ture, Dec. 7, 1944, 61 Stat. 1180 (Chicago Convention), an international convention to which the United States and 156 other nations, including Canada, are parties; (2) a Resolution (Resolution) adopted November 14, 1966, by the International Civil Aviation Organization (ICAO), an organization of which the United States is a member by virtue of being a party to the Chicago Convention; (3) more than 70 bilateral agreements, including the U. S.-Canadian Agreement, into which the United States has entered with various foreign countries dealing with international aviation. But what these documents show is that while there appears to be an international *aspiration* on the one hand to eliminate all impediments to foreign air travel—including taxation of fuel—the *law* as it presently stands acquiesces in taxation of the sale of that fuel by political subdivisions of countries. Thus, Article 24(a) of the Chicago Convention by its terms precludes the imposition of local taxes on fuel only when the fuel is "on board an aircraft . . . on arrival . . . and retained on board on leaving" a contracting party; it does not prohibit taxation of fuel purchased in that country. 61 Stat. 1186. We agree with *amici* National Governors' Association et al. that the negative implications of this provision support recognizing Florida's power to tax; certainly, the provision demonstrates the international community's awareness of the problem of state and local taxation of international air travel, specifically aviation fuel, and represents a decision by the parties to that Convention to address the problem by curtailing and limiting only some of the localities' power to tax, while implicitly preserving other aspects of that authority.

Nor does the Resolution provide support for appellant's contention that there is a clear national policy of exempting aviation fuel from state sales taxes. While the Resolution undeniably does endorse an international scheme whereby fuel would be exempt "'from all customs and other duties,'" which it defines as including "'import, export, excise, sales, consumption and internal duties and taxes of all kinds levied

. . . by any taxing authority within a State,'" Brief for United States as *Amicus Curiae* 12 (Sept. 17, 1985), quoting Resolution pp. 3, 4 (emphasis deleted), the Resolution is formally merely the work product of an international organization of which the United States is a member; it has not been specifically endorsed, let alone signed, entered into, agreed upon, approved, or passed by either the Executive or Legislative Branch of the Federal Government. In other words, no action has been taken to give the Resolution the force of law. While it is not argued by either appellant or by the United States as *amicus* that this Resolution in and of itself should operate to pre-empt state law, we also think it untenable to assert, as they do, that this Resolution represents a policy *of the United States*, as opposed to a policy of an organization of which the United States is one of many members.

Our reluctance in this regard is bolstered by the fact that the United States has, since the time that the Convention came into force, become a party to more than 70 bilateral aviation agreements, and in not one of these agreements has the United States agreed to deny the States the power asserted by Florida in this case. Most of these agreements explicitly commit the United States to refrain from imposing *national* taxes on aviation fuel used by airlines of the other contracting party, see Brief for United States as *Amicus Curiae* 14–17, 19, but as the United States concedes, "none of our bilateral aviation agreements explicitly interdicts state or local taxes on aviation fuel used by foreign airlines in international traffic." *Id.*, at 17. Most strikingly as it relates to the case before us, the U. S.-Canadian Agreement itself limits the tax exemption to be afforded to foreign air carriers to "national duties and charges." App. A–58. Taxation by political subdivisions of either the United States or Canada are not mentioned, an omission which must be understood as representing a policy choice by the contracting parties, especially in light of the fact that the Resolution addressed this concern eight years before the United States and Canada en-

tered into the Agreement. We note that throughout the time that the U. S.-Canadian Agreement has been in force, some American States, as well as some Canadian Provinces, have imposed taxes within their jurisdictions on aviation fuel used by Canadian and American carriers respectively in international travel. Furthermore, there was not, until recently, any challenge to the localities' legal authority to do so. Although not dispositive, this course of conduct suggests that the parties to the Agreement and those most immediately affected by it understood it to permit this sort of taxation.

What all of this makes abundantly clear is that the Federal Government has not remained silent with regard to the question of whether States should have the power to impose taxes of aviation fuel used by foreign carriers in international travel. By negative implication arising out of more than 70 agreements entered into since the Chicago Convention, the United States has at least acquiesced in state taxation of fuel used by foreign carriers in international travel. Again, in the U. S.-Canadian Agreement only "national" charges are barred, and we presume that drafters from two federalist nations understood this as representing a choice not to preclude local taxation. It would turn dormant Commerce Clause analysis entirely upside down to apply it where the Federal Government has acted, and to apply it in such a way as to *reverse* the policy that the Federal Government has elected to follow. For the dormant Commerce Clause, in both its interstate and foreign incarnations, only operates where the Federal Government has not spoken to ensure that the essential attributes of nationhood will not be jeopardized by States acting as independent economic actors. However, the Federal Government is entitled in its wisdom to act to permit the States varying degrees of regulatory authority. In our view, the facts presented by this case show that the Federal Government has affirmatively decided to permit the States to impose these sales taxes on aviation fuel. Accord-

ingly, there is no need for us to consider, and nothing in this opinion should be understood to address, whether, in the absence of these international agreements, the Foreign Commerce Clause would invalidate Florida's tax.

In *Japan Line*, 441 U. S., at 451, we explained that Foreign Commerce Clause analysis requires that a court ask whether a state tax "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" But we never suggested in that case or any other that the Foreign Commerce Clause *insists* that the Federal Government speak with any particular voice.

In light of the above, the judgment of the Supreme Court of Florida is

Affirmed.

CHIEF JUSTICE BURGER, concurring in part and concurring in the judgment.

The Court acknowledges in its discussion in Part II concerning the scope of the Federal Aviation Act that "not only is there no indication that Congress wished to preclude state sales taxation of airline fuel, but, to the contrary, the Act expressly permits States to impose such taxes." *Ante*, at 6. That being so I see no reason for the discussion in Part III.

While 49 U. S. C. App. § 1513(a) describes a number of state taxes which are prohibited, § 1513(b) expressly permits state "sales or use taxes on the sale of goods or services." The fuel tax challenged here is plainly a "sales or use ta[x] on the sale of goods" within the language of § 1513(b).

Remarkably, the Court nevertheless refuses to "rely on the existence of this section to answer the Commerce Clause issue raised here" because it believes it is "plausible that Congress never considered whether States should be permitted to impose sales taxes on *foreign*, as opposed to domestic, carriers." *Ante*, at 7 (emphasis added). Accordingly, the Court continues with an extended discussion of "the so-called dormant Commerce Clause," which applies to cases involving

areas where "the Federal Government has not affirmatively acted." *Ibid.* The plain language of § 1513(b) demonstrates, however, that there is *nothing* "dormant" here.

The conclusion the Court reaches in Part II is illuminated by the Court's curious failure to even mention any of the extensive legislative history or this Court's recent precedent concerning the enactment of § 1513, which followed our decision in *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972). In that case the Court upheld a $1-per-passenger "head tax" on all passengers boarding airplanes at the Evansville airport, after rejecting a Commerce Clause attack because the tax did not discriminate between interstate and intrastate commerce.

Congress reacted immediately to our decision by holding hearings on local taxation of air transportation. See Hearings on S. 2397 et al. before the Subcommittee on Aviation of the Senate Committee on Commerce, 92d Cong., 2d Sess., 129–198 (1972) (hereafter Senate Hearings); Hearings on H. R. 2337 et al. before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess. (1972) (hereafter House Hearings). The result of these hearings was the enactment of § 7(a) of the Airport Development Acceleration Act of 1973, see Pub. L. 93–44, § 7(a), 87 Stat. 90, which added § 1113 to the Federal Aviation Act, and which is now codified, as amended, at 49 U. S. C. App. § 1513.

We subsequently addressed the scope of § 1513(a)'s prohibition when confronted with Hawaii's state tax on the gross income of airlines operating within that State. See *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U. S. 7 (1983). Reviewing the legislative history, the Court pointed out that § 1513 was enacted out of congressional concern that "the proliferation of local taxes burdened interstate air transportation." *Id.*, at 9 (citing S. Rep. No. 93–12, pp. 17, 20–21 (1973), and H. R. Rep. No. 93–157, pp. 4–5 (1973)). We concluded unanimously that Hawaii's tax was expressly pre-

empted by the plain language of § 1513(a), 464 U. S., at 11, emphasizing that

> "when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted." *Id.*, at 12 (footnote omitted).

In the course of our discussion of § 1513(a) we addressed the Hawaii Supreme Court's "professed confusion over the 'paradox' between § 1513(a)'s prohibition on certain state taxes on air transportation and § 1513(b)'s reservation of the States' primary sources of revenue, such as property taxes, net income taxes, franchise taxes, and sales or use taxes." *Id.*, at 12, n. 6. Our resolution of this "paradox" is enlightening:

> "We find no paradox between § 1513(a) and § 1513(b). Section 1513(a) pre-empts a limited number of state taxes, including gross receipts taxes imposed on the sale of air transportation or the carriage of persons traveling in air commerce. Section 1513(b) clarifies Congress' view that the States are still free to impose on airlines and air carriers 'taxes other than those enumerated in subsection (a),' such as property taxes, net income taxes, and franchise taxes. While neither the statute nor its legislative history explains exactly why Congress chose to distinguish between gross receipts taxes imposed on airlines and the taxes reserved in § 1513(b), the statute is quite clear that Congress chose to make the distinction, and the courts are obliged to honor this congressional choice." *Ibid.*

Careful review of the legislative history indicates that it is not entirely silent as to why Congress chose to make this particular distinction. The Senate's first proposal to

limit state taxation would have prohibited *any* state tax—direct or indirect—on air transportation. S. 3611, 92d Cong., 2d Sess. (1972); see also H. R. 2337, 92d Cong., 1st Sess. (1971) (similar prohibition). The States, however, complained loudly at the hearings that this sweeping provision would prohibit even unobjectionable taxes such as landing fees, fuel taxes, and sales taxes on food provided to airline passengers. *E. g.*, House Hearings, at 91 (statement of John A. Nammack, Executive Vice President, National Association of State Aviation Officials). This broad interpretation was supported by officials from the Civil Aeronautics Board and the Federal Aviation Administration, who objected to any such broad prohibition because it would deprive local governments of funds necessary for maintenance of airports. Senate Hearings, at 138 (statement of Whitney Gillilland, Vice Chairman, CAB); *id.*, at 140–141 (statement of Ronald W. Pulling, Acting Associate Administrator for Plans, FAA). In reply, Members of Congress assured these officials that the prohibition was intended to apply only to "head taxes" and the like, and that some clarification of the bill's intent would be in order. *E. g.*, *id.*, at 138, 151, 157 (statements of Sen. Cannon). See also House Hearings, at 99 (statement of Rep. Dingell); *id.*, at 101 (statement of Rep. Harvey). The final bill enacting § 1513 therefore appears to be a compromise following careful consideration by Congress as to the permissible scope of state taxation in the area of air commerce.

Most relevant to the issue before us in this case is the fact that nowhere in that legislative history is there any indication that Congress intended to limit the applicability of § 1513(b) to state taxation of *interstate* air commerce while prohibiting taxation of *foreign* air commerce. To the contrary, Congress was fully aware that bill would cover foreign air commerce, since both the State Department and the Senate's own Legislative Council advised Congress that "air commerce" as employed in the proposed bill encompassed for-

eign and overseas air commerce. See Senate Hearings, at 136 (letter of David M. Abshire, Department of State); *id.*, at 207 (memorandum of Peter W. LeRoux, Senior Counsel, Office of Legislative Council). Moreover, Congress discussed the effect of foreign "head taxes" if similar local taxes were barred. House Hearings, at 35–37.

The language of the Act bears this out. Section 1513(a)'s prohibition refers to certain taxes "on persons traveling in air commerce . . . or on the sale of air transportation." The Act defines "air commerce" as including "interstate, overseas, or foreign air commerce." 49 U. S. C. App. § 1301(4). Similarly, "air transportation" is defined as including "interstate, overseas, or foreign air transportation." § 1301(10). Under the plain language of § 1513, therefore, the Florida tax—even in the area of foreign air commerce—is expressly authorized by Congress.

Just as we need not look beyond the plain language "when a federal statute unambiguously *forbids* the States to impose a particular kind of tax on an industry affecting interstate commerce," *Aloha Airlines*, 464 U. S., at 12 (emphasis added), we need not look beyond the plain language of a federal statute which unambiguously *authorizes* the States to impose a particular kind of tax. Section 1513(b) authorizes state sales taxes on goods used in air commerce. While Congress has not explained exactly why it made the distinction between taxes prohibited under § 1513(a) and those permitted under § 1513(b), "Congress chose to make the distinction, and the courts are obliged to honor this congressional choice." 464 U. S., at 12, n. 6.

By refusing to decide this case solely on the express language of § 1513(b) and instead entering the cloudy waters of this Court's "dormant Commerce Clause" doctrine, the Court fails to honor the choice already pointedly made by Congress following its extensive consideration of the problem of state taxation in this area.

JUSTICE BLACKMUN, dissenting.

In *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434 (1979), this Court recognized that the Commerce Clause commits to the exclusive authority of the Federal Government the regulation of those aspects of foreign commerce that by their very nature "necessitate a uniform national rule." *Id.*, at 449. In regulating commercial relations with foreign governments, "'the Federal Government must speak with one voice.'" *Ibid.*, quoting *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 285 (1976). As a result, the Court in *Japan Line* held that the imposition of California's ad valorem property tax on foreign-owned containers used exclusively in foreign commerce was unconstitutional. The tax imposed in this case by Florida on fuel is indistinguishable, for Commerce Clause purposes, from the tax imposed by California on containers in *Japan Line*. Because a State's taxation on fuel used in foreign commerce will prohibit the Federal Government from speaking with "one voice," I believe that this application of Florida's tax violates the Constitution.

The Court, however, finds *Japan Line* inapposite, asserting that "we do not confront federal governmental silence of the sort that triggers dormant Commerce Clause analysis." *Ante*, at 9. To the Court, that the Federal Government has addressed some aspects of foreign aviation taxation, but has not expressly prohibited the imposition of state and local taxes, see *ante*, at 10–11, is a sufficient basis for upholding the tax at issue here. Apparently, the Court believes that once the Federal Government has spoken at all in an area, the Commerce Clause operates to permit States to act except if such action is expressly prohibited. But we have never permitted validation of state burdens on foreign commerce through this sort of implication.

For a state regulation to be removed from the reach of the dormant Commerce Clause, the intent of the Federal Government to permit state activity "must be unmistakably

clear." *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82, 91 (1984). And the "need for a consistent and coherent foreign policy, which is the exclusive responsibility of the Federal Government," heightens the need for affirmative approval. *Id.*, at 92, n. 7. The Court's holding today is based not on the presence of this requisite "affirmative approval"; rather, the Court relies on a "negative implication arising out of more than 70 agreements" that indicate that "the United States *has at least acquiesced*" in the kind of tax imposed here (emphasis added). *Ante*, at 12. Whether or not these agreements suggest acquiescence is beside the point; what is clear is that the Federal Government has not provided the affirmative approval required to permit States to act.

The Government's efforts in the international sphere reveal an overarching and coherent policy directed at the creation of reciprocal tax exemptions in the area of foreign aviation. The Nation's aviation relations with foreign governments are implemented through a comprehensive network of treaties, bilateral executive agreements, informal arrangements, and federal statutes. Although these provisions stop short of explicitly banning state levies on aircraft fuel used in foreign travel, the indisputable pattern that emerges is one of a policy of reciprocal tax exemptions for instrumentalities of international commerce, like the containers in *Japan Line* and the fuel at issue here. The Government's inability to date to achieve full international consent to reciprocal tax exclusions neither negates nor demonstrates the absence of federal policy; it simply means that the United States has not fully succeeded, as yet, in transforming its policy into law. Indeed, the "aspiration . . . to eliminate all impediments to foreign air travel" (emphasis deleted), recognized by the Court, *ante*, at 10, is precisely the federal policy that renders the application of Florida's tax to the fuel here unconstitutional.

The decision today leaves Florida and other States free to tax foreign aviation, and will hinder the United States in

its efforts to attain reciprocal tax immunity with foreign governments. Florida's action may well undermine reciprocity agreements since other countries may react to Florida's tax with various retaliatory measures against United States carriers abroad, retaliation that "of necessity would be felt by the Nation as a whole." *Japan Line*, 441 U. S., at 453. Florida's actions may also hamper the United States' position in negotiations designed to achieve the federal policy of reciprocity because the Nation cannot speak with "one voice." In *Japan Line*, this Court made clear that a State, "by its unilateral act, cannot be permitted to place . . . impediments before this Nation's conduct of its foreign relations and its foreign trade." *Ibid.* Because the Court's decision today permits just that, I respectfully dissent.

SCHIAVONE ET AL. v. FORTUNE, AKA TIME, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-1839. Argued February 26, 1986—Decided June 18, 1986

Petitioners instituted diversity libel actions on May 9, 1983, by filing their respective complaints in the Federal District Court for the District of New Jersey. Each complaint alleged that the plaintiff was libeled in a story that appeared in the May 31, 1982, issue of Fortune magazine, and described Fortune as "a foreign corporation having its principal offices at Time and Life Building" in New York City. On May 20, the complaints were mailed to Time's registered agent in New Jersey, who received them on May 23 but refused service because Time was not named as a defendant. On July 19, 1983, each petitioner amended his complaint to name as the captioned defendant, and to refer in the body of the complaint to, "Fortune, also known as Time, Incorporated." The amended complaints were served on Time by certified mail on July 21. The District Court dismissed the complaints under the New Jersey statute of limitations, which requires a libel action to be commenced within one year of the publication of the alleged libel. The court held that, although the amended complaints adequately named Time as a defendant, the amendments did not relate back, under Federal Rule of Civil Procedure 15(c), to the filing of the original complaints because it had not been shown that Time received notice of the institution of the actions within the period provided by New Jersey law. On consolidated appeals, the Court of Appeals affirmed.

Held: The actions were properly dismissed. Pp. 27-32.

(a) Even if this Court adopted the "identity-of-interest" exception under which an amendment that substitutes a related party in a complaint after the limitations period has expired will relate back to the date the original complaint was filed, the facts of this case do not fall within that exception. Neither Fortune nor Time received notice of the filing until after the limitations period had run, and thus there was not proper notice to Fortune that could be imputed to Time. Pp. 27-29.

(b) The July 1983 amendments to the complaints did not relate back to the May 9 filing. Under Rule 15(c) relation back is dependent upon four factors, all of which must be satisfied. Notice to Time and the necessary knowledge did not come into being "within the period provided by law for commencing an action against" Time as required by Rule 15(c).

That occurred only after expiration of the applicable 1-year period. Pp. 29–32.

750 F. 2d 15, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post*, p. 32.

Morris M. Schnitzer argued the cause for petitioners. With him on the briefs were *Theodore W. Geiser* and *Thomas S. Cosma*.

Peter G. Banta argued the cause and filed a brief for respondent.

JUSTICE BLACKMUN delivered the opinion of the Court.

This case primarily concerns Rule 15(c) of the Federal Rules of Civil Procedure and its application to a less-than-precise denomination of a defendant in complaints filed in federal court near the expiration of the period of limitations. Because of an apparent conflict among the Courts of Appeals,[1] we granted certiorari. 474 U. S. 814 (1985).

I

The three petitioners instituted this diversity litigation on May 9, 1983, by filing their respective complaints in the United States District Court for the District of New Jersey. Each complaint alleged that the plaintiff was libeled in a cover story entitled "The Charges Against Reagan's Labor Secretary," which appeared in the May 31, 1982, issue of Fortune magazine. The caption of each complaint named

[1] Compare, *e. g.*, *Cooper* v. *U. S. Postal Service*, 740 F. 2d 714, 716 (CA9 1984), cert. denied, 471 U. S. 1022 (1985); *Watson* v. *Unipress, Inc.*, 733 F. 2d 1386, 1390 (CA10 1984); *Hughes* v. *United States*, 701 F. 2d 56, 58 (CA7 1982); and *Trace X Chemical, Inc.* v. *Gulf Oil Chemical Co.*, 724 F. 2d 68, 70–71 (CA8 1983), with *Kirk* v. *Cronvich*, 629 F. 2d 404, 408 (CA5 1980); *Ingram* v. *Kumar*, 585 F. 2d 566, 571–572 (CA2 1978), cert. denied, 440 U. S. 940 (1979); and *Ringrose* v. *Engelberg Huller Co.*, 692 F. 2d 403, 410 (CA6 1982) (concurring opinion).

"Fortune," without embellishment, as the defendant. See App. 8a. In its paragraph 2, each complaint described Fortune as "a foreign corporation having its principal offices at Time and Life Building, Sixth Avenue and 50th Street, New York, New York 10020." *Id.*, at 9a. "Fortune," however, is only a trademark and the name of an internal division of Time, Incorporated (Time), a New York corporation.[2]

On May 20, petitioners' counsel mailed the complaints to Time's registered agent in New Jersey. They were received on May 23. The agent refused service because Time was not named as a defendant.

On July 18, 1983, each petitioner amended his complaint to name as the captioned defendant "Fortune, also known as Time, Incorporated," and, in the body of the complaint, to refer to "Fortune, also known as Time, Incorporated," as a New York corporation with a specified registered New Jersey agent. See *id.*, at 25a, 26a. The amended complaints were served on Time by certified mail on July 21.

Time moved to dismiss the amended complaints. The District Court granted those motions. *Id.*, at 96a, 98a, 100a. It ruled that the complaints, as amended, adequately named Time as a defendant, and therefore were not to be dismissed "for failure of capacity of defendant to be sued." Supp. App. to Pet. for Cert. 18a. Under New Jersey law, however, see N. J. Stat. Ann. 2A:14–3 (West 1952), a libel action must be commenced within one year of the publication of the alleged libel.[3] Supp. App. to Pet. for Cert. 18a. State law also provides that the "'date upon which a substantial distribution occurs triggers the statute of limitations for any and all actions arising out of that publication,'" *id.*, at 19a, quoting *MacDonald* v. *Time, Inc.*, Civil No. 81–479 (DNJ Aug. 25,

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[2] No claim is made that Fortune is a separate legal entity with the capacity to be sued.

[3] The cited New Jersey statute reads:

"Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander."

1981). Supp. App. to Pet. for Cert. 19a.[4] The court found it unnecessary, for purposes of the motion, to determine the precise date the statute of limitations had begun to run.

Although Time acknowledged that the original filings were within the limitations period, it took the position that it could not be named as a party after the period had expired. Time contended that a party must be substituted within the limitations period in order for the amendment to relate back to the original filing date pursuant to Rule 15(c).[5]

The District Court concluded that the amendments to the complaints did not relate back to the filing of the original complaints because it had not been shown that Time received notice of the institution of the suits within the period provided by law for commencing an action against it. Supp. App. to Pet. for Cert. 23a. It therefore "with great reluctance" granted the motion to dismiss, noting that any dismissal of a claim based upon the statute of limitations "by its very nature is arbitrary." *Id.*, at 24a. The court also ruled that the "equities of this situation" did not demand that relief

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[4] The court noted that, despite the magazine's cover date of May 31, 1982, the record "indicate[d]" that, for purposes of determining the limitations period, publication "occurred substantially before" May 31; that subscription copies were mailed May 12 and received by subscribers May 13–19; that newsstand copies went on sale May 17; that a press release was issued May 11; and that copies of the magazine were mailed to representatives of the press on that date. Supp. App. to Pet. for Cert. 19a.

[5] Rule 15(c) provides in pertinent part:

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

be afforded to petitioners. *Ibid.* The identity of the publisher of Fortune was readily ascertainable from the magazine itself. It rejected petitioners' contention that Time deliberately misled them to believe that Fortune was a separate corporation. It observed that petitioners created the risk by filing their suits close to the end of the limitations period. *Id.*, at 25a.

Petitioners moved for reconsideration. By letter opinion filed January 12, 1984, the court adhered to its prior ruling. App. to Brief in Opposition 1a.

On appeal to the United States Court of Appeals for the Third Circuit, the three actions were consolidated. That court affirmed the orders of the District Court. 750 F. 2d 15 (1984). It ruled that the New Jersey statute of limitations ran "on May 19, 1983, at the latest," for a "substantial distribution" of the issue of May 31, 1982, had "occurred on May 19, 1982, at the latest." *Id.*, at 16. It regarded the language of Rule 15(c) as "clear and unequivocal." 750 F. 2d, at 18. It also said: "While we are sympathetic to plaintiffs' arguments, we agree with the defendant that it is not this court's role to amend procedural rules in accordance with our own policy preferences." *Ibid.* It further held that the period within which the defendant to be brought in must receive notice under Rule 15(c) does not include the time available for service of process.

II

It is clear, from what has been noted above, that the three complaints as originally drawn were filed within the limitations period; that service was attempted only after that period had expired; and that the amendment of the complaints, and the service of the complaints as so amended, also necessarily took place after the expiration of the limitations period. The District Court and the Court of Appeals so found, and we have no reason to disagree. The parties themselves do not dispute these facts. Instead, their dispute centers on

whether Time was sufficiently named as the defendant in the original complaints so that the service that was attempted after the 1-year period but within the time allowed for service was effective, and on whether, in any event, the amendment of the complaints related back to the original filing and accomplished the same result.

Petitioners argue that Rule 15(c)'s present form came into being by amendment in 1966 for the express purpose of allowing relation back of a change in the name or identity of a defendant when, although the limitations period for filing had run, the period allowed by Rule 4 for timely service had not yet expired. Brief for Petitioners 5. The Rule was effected, it is said, to ameliorate literal and rigid application of limitations periods to both claim and party amendments. It is urged that the Rules of Civil Procedure should be applied and construed to yield just determinations, that is, determinations on the merits, and that a procedural "double standard" that bars relation back for late notice to a new defendant when a like notice to the original defendant would be timely is unacceptable. Petitioners further argue that the original party named here and the party sought to be substituted had such commonality of interest that notice to one was in fact notice to the other. Therefore, it is said, where the intended defendant was misdesignated in form only, and knew or reasonably should have known that it was the true target and received the same notice it would have received had the form been flawless, "relation back should be a foregone conclusion." Brief for Petitioners 6.

Respondent, of course, takes issue with this approach. It claims that the language of Rule 15(c) is clear and that proper notice of the institution of these actions was not received by it within the period of limitations. It asserts that the equities do not support petitioners' position, and that the interpretation of Rule 15(c) urged by petitioners in effect would be an impermissible rewriting of the Rule by this Court.

III

As amended, Rule 1 of the Federal Rules of Civil Procedure states: "These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 8(f) says: "All pleadings shall be so construed as to do substantial justice." And Justice Black reminded us, more than 30 years ago, in connection with an order adopting revised Rules of this Court, that the "principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts." 346 U. S. 945, 946 (1954).

This Court, too, in the early days of the federal civil procedure rules, when Rule 15(c), see n. 5, *supra*, consisted only of what is now its first sentence, announced that the spirit and inclination of the rules favored decisions on the merits, and rejected an approach that pleading is a game of skill in which one misstep may be decisive. *Conley* v. *Gibson*, 355 U. S. 41, 48 (1957). It also said that decisions on the merits are not to be avoided on the basis of "mere technicalities." *Foman* v. *Davis*, 371 U. S. 178, 181 (1962).

Despite these worthy goals and loftily stated purposes, we conclude that the judgments of the Court of Appeals in the present cases were correct.

A

The defendant named in the caption of each of the original complaints was "Fortune," and Fortune was described in the body of the complaint as "a foreign corporation" having principal offices in the Time and Life Building in New York City. It also was alleged that Fortune was engaged in the publication of a magazine of that name. Attached to the complaint were a copy of the magazine's cover for its issue of May 31, 1982, an artist's depiction of an alleged payoff, and the text of parts of the article about which petitioners complained. The focus, as pleaded, was on Fortune.

We cannot understand why, in litigation of this asserted magnitude, Time was not named specifically as the defendant in the caption and in the body of each complaint. This was not a situation where the ascertainment of the defendant's identity was difficult for the plaintiffs. An examination of the magazine's masthead clearly would have revealed the corporate entity responsible for the publication.[6]

Petitioners nonetheless rely on Fortune's status as a division of Time to argue that institution of an action purportedly against the former constituted notice of the action to the latter, as a related entity. Some Courts of Appeals have recognized an "identity-of-interest" exception under which an amendment that substitutes a party in a complaint after the limitations period has expired will relate back to the date of the filing of the original complaint.[7] The Court of Appeals in this case rejected that approach. The object of the exception is to avoid the application of the statute of limitations when no prejudice would result to the party sought to be added.

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[6] The magazine's very issue in question, that of May 31, 1982, p. 2, recites:

"FORTUNE (ISSN 0015-8259), May 31, 1982, Vol. 105, No. 11. Issued biweekly by Time Inc., 3435 Wilshire Blvd., Los Angeles, Cal. 90010. . . . Principal offices: Time & Life Building, Rockefeller Center, New York, N. Y. 10020. . . . FORTUNE is a registered mark of Time Incorporated."

The parallel information set forth in current issues of Fortune magazine reads:

"FORTUNE (ISSN 0015-8259). Published biweekly, with three issues in October, by Time Inc., 10880 Wilshire Blvd., Los Angeles, CA 90024-4193. Time Inc. principal office: Time & Life Building, Rockefeller Center, New York, NY 10020-1393. . . . FORTUNE is a registered mark of Time Inc."

See issue of June 9, 1986, p. 2; issue of May 26, 1986, p. 4; issue of May 12, 1986, p. 4.

[7] See, *e. g.*, *Travelers Indemnity Co.* v. *United States ex rel. Construction Specialties Co.*, 382 F. 2d 103 (CA10 1967); *Montalvo* v. *Tower Life Building*, 426 F. 2d 1135 (CA5 1970); *Korn* v. *Royal Caribbean Cruise Line, Inc.*, 724 F. 2d 1397 (CA9 1984).

Even if we were to adopt the identity-of-interest exception, and even if Fortune properly could be named as a defendant, we would be compelled to reject petitioners' contention that the facts of this case fall within the exception. Timely filing of a complaint, and notice within the limitations period to the party named in the complaint, permit imputation of notice to a subsequently named and sufficiently related party. In this case, however, neither Fortune nor Time received notice of the filing until after the period of limitations had run. Thus, there was no proper notice to Fortune that could be imputed to Time. See *Hernandez Jimenez* v. *Calero Toledo*, 604 F. 2d 99, 102–103 (CA1 1979); *Norton* v. *International Harvester Co.*, 627 F. 2d 18, 20–21 (CA7 1980).

B

The complaints as they were amended, of course, meet the identification standard. While the statement, "Fortune, also known as Time, Incorporated, was and is a corporation of the state of New York," is not a model of accuracy, it does focus on Time and sufficiently describes Time as the targeted defendant. The next question, then, is whether the amendment, made in July 1983, related back to the filing on May 9, a date concededly within the period of the applicable New Jersey statute of limitations.

Central to the resolution of this issue is the language of Rule 15(c). See n. 5, *supra*. Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period. We are not concerned here with the first

factor, but we are concerned with the satisfaction of the remaining three.

The first intimation that Time had of the institution and maintenance of the three suits took place after May 19, 1983, the date the Court of Appeals said the statute ran "at the latest." 750 F. 2d, at 16. Only on May 20 did petitioners' counsel mail the complaints to Time's registered agent in New Jersey. Only on May 23 were those complaints received by the registered agent, and then refused. Only on July 19 did each petitioner amend his complaint. And only on July 21 were the amended complaints served on Time.

It seems to us inevitably to follow that notice to Time and the necessary knowledge did not come into being "within the period provided by law for commencing the action against" Time, as is so clearly required by Rule 15(c). That occurred only after the expiration of the applicable 1-year period. This is fatal, then, to petitioners' litigation.

We do not have before us a choice between a "liberal" approach toward Rule 15(c), on the one hand, and a "technical" interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says.

We are not inclined, either, to temper the plain meaning of the language by engrafting upon it an extension of the limitations period equal to the asserted reasonable time, inferred from Rule 4, for the service of a timely filed complaint. Rule 4 deals only with process. Rule 3 concerns the "commencement" of a civil action. Under Rule 15(c), the emphasis is upon "the period provided by law for commencing the action against" the defendant. An action is commenced by the filing of a complaint and, so far as Time is concerned, no complaint against it was filed on or prior to May 19, 1983.

Any possible doubt about this should have been dispelled 20 years ago by the Advisory Committee's 1966 Note about Rule 15(c). The Note specifically states that the Rule's

phrase "within the period provided by law for commencing the action" means "within the applicable limitations period":

> "An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of 'arising out of the conduct . . . set forth . . . in the original pleading,' and if, *within the applicable limitations period*, the party brought in by amendment, first, received such notice of the institution of the action—the notice need not be formal—that he would not be prejudiced in defending the action, and, second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party" (emphasis supplied). Advisory Committee's Notes on Fed. Rule Civ. Proc. 15, 28 U. S. C. App., p. 551; 39 F. R. D. 83.

Although the Advisory Committee's comments do not foreclose judicial consideration of the Rule's validity and meaning, the construction given by the Committee is "of weight." *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 444 (1946).

The commentators have accepted the literal meaning of the significant phrase in Rule 15(c) and have agreed with the Advisory Committee's Note. See 3 J. Moore, Federal Practice § 15.15[4.–2], p. 15–225 (2d ed. 1985) ("the Rule demands a showing that, within the period of limitations, the new party . . ."); 6 C. Wright & A. Miller, Federal Practice and Procedure § 1498, p. 250 (Supp. 1986) ("in order for an amendment adding a party to relate back under Rule 15(c) the party to be added must have received notice of the action before the statute of limitations has run").

The linchpin is notice, and notice within the limitations period. Of course, there is an element of arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process. See Note: Federal Rule of Civil Procedure

15(c): Relation Back of Amendments, 57 Minn. L. Rev. 83, 85, n. 8 (1972).[8]

The judgments of the Court of Appeals are affirmed.

It is so ordered.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

Certain principles are undisputed. If petitioners had filed their suits alleging that Fortune magazine libeled them on precisely the same date; had added the magic words "also known as Time, Incorporated" to the word "Fortune"; and had done everthing else exactly the same, petitioners would be entitled to proceed with their legal actions. Because petitioners committed the "fatal" error, *ante*, at 30, of identifying the defendant by its name of publication rather than its name of incorporation, however, the Court finds that they fell through a trapdoor—despite the fact that the magazine publisher's agent contemporaneously noted his understanding that the suits were directed against the magazine publisher (Time, Incorporated) fully as much as if petitioners had included the magic words.

In my view, the Court's decision represents an aberrational—and, let us hope, isolated—return to the "sporting

[8] Petitioners would garner support from Professor Clark Byse's article, Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform, 77 Harv. L. Rev. 40 (1963), cited in the Advisory Committee's Note to the 1966 amendment of Rule 15, 28 U. S. C. App., p. 550; 39 F. R. D. 83. That study was critically directed at four Federal District Court decisions concerning "relation back" in suits against Government officers. In each of the cases, however, the Government within the period of limitations was on notice of the claim.

Similarly, petitioners' reliance upon JUSTICE WHITE's footnote comment in dissent from the denial of certiorari in *Cooper* v. *United States Postal Service*, 471 U. S. 1022, 1025, n. 3 (1985), seems to us to be misplaced. JUSTICE WHITE, in fact, noted the inherent weakness of any such reliance ("Petitioner's position is somewhat weak in this regard because, while the complaint was filed within the requisite 30 days, no party was served with process within that period").

theory of justice" condemned by Roscoe Pound 80 years ago.[1] The Court's result is supported neither by the language nor purposes of the Federal Rules, or of Rule 15(c) in particular.

I

Before examining the language and the history of Rule 15(c), a preliminary comment on the facts is appropriate. In its May 31, 1982, issue, Fortune published the article in dispute. On May 9, 1983, petitioners filed their complaints. Since the New Jersey 1-year statute of limitations made it necessary to have the complaints filed by May 19, 1983, it is clear that the original complaints were filed 10 days ahead of that deadline.

Rule 4(j) of the Federal Rules of Civil Procedure also required that service of the summons and complaints be made within 120 days of the original filing—in other words, by September 6, 1983.[2] The summons and the original complaints were mailed to Time, Incorporated's registered agent on May 20, 1983, and received on May 23, 1983—well within the 120-day deadline imposed by the Rule.

The caption of the original complaints identified the defendant only as "Fortune." The description of the defendant in paragraph 2 of those complaints further explained that the petitioners intended to sue "a foreign corporation having its principal offices at Time and Life Building, Sixth Avenue and 50th Street, New York, New York 10020 engaged in the publication of a magazine called 'Fortune' which is distributed

[1] See Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 American Bar Assn. Reports 395, 404–405 (1906).

[2] Rule 4(j) states in its entirety:

"If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule."

throughout the world." App. 9a. There is no, and has never been any, suggestion that the caption confused or misled any agent of the defendant. Indeed, on the day that he received the summons and complaints, Time, Incorporated's agent forwarded them to Time, Incorporated's law department with a cover letter that stated:

> "Remarks: Discrepancy in corporate title noted. Letter from atty. indicates papers are for Time, Incorporated as publisher of Fortune. Service was made by mail pursuant to Rule 4(c) of the Federal Rules of Civil Procedure." *Id.*, at 35a.

On July 18, 1983—well in advance of the September 6 deadline for service of process—petitioners filed an amendment to the complaints and redesignated "Fortune" as "Fortune, also known as Time, Incorporated." *Id.*, at 25a–26a. Again, there is no suggestion that this redesignation did cause, or could have caused, Time, Incorporated, any prejudice in maintaining its defense on the merits of the case. Nor is there any suggestion that Time, Incorporated, would have received better notice, or earlier notice, of the institution of the action if the magic words had been added to the initial complaints. The only question is whether Rule 15(c) should be construed to render petitioners' complaints untimely even though they were filed within the statute of limitations and even though Time, Incorporated, clearly had adequate notice of the timely filed complaints.

II

The majority relies exclusively on the "plain language" of Rule 15(c).[3] Far from compelling the majority's anomalous

[3] Rule 15(c) provides:

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him,

result, the plain language of Rule 15(c) requires recognizing that there was no material difference between the notice given to Time, Incorporated, in the original complaints—from which Time, Incorporated, and its agent clearly understood that Time, Incorporated was the intended defendant—and the notice that the Court concludes would have been adequate—in which petitioners would have appended "also known as Time, Incorporated" to the word "Fortune."

According to the majority, petitioners' complaints are barred because they did not satisfy a four-pronged test articulated in Rule 15(c). *Ante*, at 29–30. The majority ignores, however, a rather critical antecedent point. The four-pronged test is utterly irrelevant unless the amendment is one "changing the party against whom a claim is asserted." In this case, the technical correction filed in July added absolutely nothing to any party's understanding of "the party against whom" the claims were asserted—not to the plaintiffs' understanding, of course, and certainly not to Time, Incorporated's understanding, as its agent's letter in May made clear.

The plain language of Rule 15(c) discloses an obvious purpose to protect parties who are not named in the original complaint from prejudice that may arise when they are subsequently "brought in by amendment." If an original complaint names Smith as the tort-feasor and the plaintiff does not decide to sue Jones until after the statute of limitations has run, there would be obvious prejudice in allowing "an

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the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

"The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant."

amendment changing the party against whom a claim is asserted" unless Jones had actual notice of the claim before the statute ran. There is also a risk of prejudice whenever the identification of the defendant is so inaccurate or ambiguous that a reading of the complaint itself would not enable the defendant himself to realize that he was the party being sued.

The misdescription in this case, however, is not remotely of the kind that the Rule's "plain language" addresses. By any standard of fair notice, the difference between the description of the publisher of Fortune in the original complaints and the description of the publisher of Fortune in the amended complaints is no more significant than a misspelling, or perhaps a reference to "Time, Inc." instead of "Time, Incorporated."

In short, I would not construe this amendment as one "changing the party" against whom petitioners' claims are asserted. Although the words "Time, Incorporated" were first added to the complaints by the amendment, that entity cannot, in my judgment, fairly be described as a party "brought in by amendment" within the meaning of Rule 15(c).

III

Even if I agreed that the change in designation from "Fortune" to "Fortune also known as Time, Incorporated" brought in a new party, and even if I were willing to disregard the undisputed evidence of the Time, Incorporated agent's contemporaneous understanding of the unadorned "Fortune" designation, I would still find the majority's "plain language" analysis unpersuasive.

The heart of the majority's analysis is that petitioners failed to satisfy the fourth factor of the test it discerns in Rule 15(c)—that "the second and third requirements must have been fulfilled within the prescribed limitations period." *Ante*, at 29. The majority thus finds petitioners' "fatal" mistake in the failure to amend within the statute of limitations period.

The language in the Rule imposing the deadline for amendments that relate back does not, however, refer to the statute of limitations. Rather, it describes "the period provided by law for commencing the action *against him*" (emphasis added). As I have noted, that period includes two components, the time for commencing the action by the filing of a complaint and the time in which the action "against him" must be implemented by the service of process. If the party is sufficiently described in the original complaint to avoid any possibility of prejudice to the defendant, I see no reason for not construing the Rule to embrace both components of the period provided by law for bringing a timely action against a particular defendant.[4]

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[4] The majority seeks to bolster its "plain language" analysis with the Advisory Committee's reference to "the applicable limitations period." *Ante*, at 31. In my view, this statement begs, rather than settles, the question. I also agree with Judge Feinberg's analysis:

"Although on its face the phrase, 'within the period provided by law for commencing the action against him,' seems to mean the applicable statute of limitations period, such a literal interpretation is unjustified in jurisdictions where timely service of process can be effected after the statute of limitations has run. In those jurisdictions, even an accurately named defendant may not receive actual notice of the action against him prior to the running of the statute of limitations. Yet there is no doubt that the action against him is timely commenced. There is no reason why a misnamed defendant is entitled to earlier notice than he would have received had the complaint named him correctly. Calling the problem raised here a 'curious but minor difficulty of interpretation . . . over the language of the rule referring to the limitations period,' Professor (now Justice) Benjamin Kaplan, reporter for the Advisory Committee on Civil Rules, implicitly criticized a district court decision refusing relation back on facts somewhat similar to these. Kaplan, [Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 410, and n. 204 (1967)]. Professor Kaplan noted the anomaly of dismissing an action, which 'against the original defendant . . . would be considered timely brought despite the delayed service.' . . .

". . . We hold that under Rule 15(c) the period within which 'the party to be brought in' must receive notice of the action includes the reasonable

This construction is confirmed by a reference to the content of the notice requirement—what the majority labels the second prong of the four-part test. *Ante*, at 29. The Rule requires that the party affected by the amendment must have "received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits." This language surely indicates that if the notice that the defendant actually receives is just as timely and just as informative as that which would have been received if no mistake had occurred, the purpose of the requirement has been satisfied. In this case, Time, Incorporated, would have known nothing different on May 23, 1983, if the complaints sent to its agent referred to "Fortune, also known as Time, Incorporated" than it knew from the complaints as sent, with their reference to "Fortune." Respondent has not even contended otherwise. Yet, for the Court, the first complaints would have been completely timely, and the second are completely barred.

IV

That the majority's reading of the "plain language" leads to bizarre results is not altogether surprising. For the majority, relying so heavily on what it views as the clarity of the language before it, ignores the mission and history of Rule 15(c).

The principal purpose of Rule 15(c) is to enable a plaintiff to correct a pleading error after the statute of limitations has run if the correction will not prejudice his adversary in any way. That purpose is defeated—and the Rule becomes largely superfluous—if it is construed to require the correction to be made before the statute has run. Moreover,

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time allowed under the federal rules for service of process." *Ingram* v. *Kumar*, 585 F. 2d 566, 571–572 (CA2 1978), cert. denied, 440 U. S. 940 (1979) (footnotes omitted).

It is curious that the majority, in relying on the Advisory Committee interpretation, ignores the reporter's almost contemporaneous understanding.

the specific liberalizing purpose of the 1966 amendment to the Rule is frustrated if the added language is construed to cut back on the number of cases in which relation back is permitted.

Prior to 1966, Rule 15(c) had included only the first sentence of the present Rule. In that form, the Rule had frequently been construed to allow relation back when there was a minor change in the designation of a party. See *Shapiro* v. *Paramount Film Distributing Corp.*, 274 F. 2d 743 (CA3 1960); 3 J. Moore, Federal Practice § 15–15[4.–1], p. 15–211 (2d ed. 1985). A group of contrary cases in which the plaintiffs had mistakenly sued the wrong Government official and not been allowed to amend their complaints after the statute had run gave rise to criticism of the Rule and the addition of the second and third sentences of its present text.[5] Ironically, it is the language added by the amendment in 1966 to broaden the category of harmless pleading errors which the Court construes today to narrow that category.[6]

V

The Court does not tell us whether it would enforce an equally harsh construction of the Rule if the scrivener's error

[5] See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 407–410 (1967).

[6] There is also irony in the way the Court gives lipservice to its duty to construe the Federal Rules of Civil Procedure in a way that will facilitate a proper decision on the merits. *Ante*, at 27. How different was the approach the Court considered appropriate in 1962:

"It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley* v. *Gibson*, 355 U. S. 41, 48. The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1." *Foman* v. *Davis*, 371 U. S. 178, 181–182.

had been a mere misspelling, or perhaps a reference to Time, Inc., instead of Time, Incorporated. More importantly, the Court does not provide a satisfactory explanation of why this case is, in fact, any different from such a case.[7] Most importantly, the decision is the product of an unnecessary and unjust construction of the language of the Rule.

The Court recognizes that "there is an element of arbitrariness here," *ante*, at 31, but finds solace in the fact that arbitrariness is no stranger to the law. *Ibid.* The Court is, of course, correct that arbitrariness sometimes arises from the application of rules and laws to the complexity of human experience. Far less understandable is the Court's willingness to aggravate, rather than alleviate, that arbitrariness, particularly when the decision to do so is demonstrably at odds with the language, purpose, and history of the Rule.

I respectfully dissent.

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[7] Indeed, if the misspelling of a name is sufficient to change the status of a legal document, then I assume that many of our much-discussed precedents had no legal force. See generally C. Wright, The Law of Federal Courts § 54, pp. 347–348, n. 5 (4th ed. 1983) (noting that the Court, and the official Reports, have continuously misspelled the parties' names in such cases as *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940) (parties' name was "Gobitas"); *Dred Scott* v. *Sandford*, 19 How. 393 (1857) (party's name was "Sanford"); *Swift* v. *Tyson*, 16 Pet. 1 (1842) (party's name was "Tysen"); and *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819) (party's name was "McCulloh")).

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. v. PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 85-521. Argued April 28, 1986—Decided June 19, 1986

In 1950, Congress amended the Social Security Act to authorize voluntary participation by States in the Social Security System with respect to old age, disability, and death benefits. Under 42 U. S. C. § 418(a) (1982 ed. and Supp. II), States may obtain coverage for employees of the State and its political subdivisions by executing an agreement (§ 418 Agreement) with the Secretary of Health and Human Services (Secretary) that is required to be "not inconsistent with the provisions of" § 418. As originally enacted, § 418(g) permitted States to terminate their § 418 Agreements upon giving at least two years' advance notice in writing to the Secretary. However, because the increasing rate of state withdrawals was threatening the integrity of the System, Congress amended § 418(g) in 1983 to provide that no § 418 Agreement "may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983." The amendment expressly prevents States from withdrawing employees from the System even if a termination notice had been filed prior to the amendment's enactment. In 1951, California and the Secretary entered into a § 418 Agreement that covered employees of the State and its political subdivisions. The Agreement recited that its provisions were "in conformity with" § 418, and included a termination clause mirroring the provisions of § 418(g) then in effect. When the 1983 amendment of § 418(g) prevented termination notices that California previously had filed from taking effect, proceedings were instituted in the Federal District Court attacking the validity of amended § 418(g). The court held that § 418(g) was unconstitutional, reasoning that the § 418 Agreement created a "contractual right" in favor of the State and its subdivisions to withdraw from the Social Security System, and that such right constituted "private property" within the meaning of the Just Compensation Clause of the Fifth Amendment. Although the court concluded that amended § 418(g) effected a taking of that property without providing the requisite just compensation, it held that a damages award would be contrary to Congress' will and accordingly simply declared § 418(g) unconstitutional.

Held: Amended § 418(g) does not effect a taking of property within the meaning of the Fifth Amendment. Pp. 51–56.

(a) In enacting the Social Security Act in 1935, Congress anticipated the need to respond to changing conditions, and therefore included § 1304, which expressly reserves to it "[t]he right to alter, amend, or repeal any provision" of the Act. The Act itself, including the original version of § 418(g), created no contractual rights, and therefore Congress had the power to amend that section. In view of the Act's purpose and structure, and of Congress' express reservation of authority to alter its provisions, courts should be extremely reluctant to construe § 418 Agreements in a manner that forecloses Congress' exercise of that authority. Pp. 51–53.

(b) The conclusion that Congress reserved the authority to amend not only § 418 but also § 418 Agreements entered into "in conformity with" § 418 is supported by precedent. Cf. *Sinking-Fund Cases*, 99 U. S. 700; *National Railroad Passenger Corp.* v. *Atchison, T. & S. F. R. Co.*, 470 U. S. 451. The language of § 1304's reservation expressly notified California that Congress retained the power to amend the law under which the Agreement was executed and by amending that law to alter the Agreement itself. Pp. 53–54.

(c) The "contractual right" at issue in this case bears little, if any, resemblance to rights held to constitute "property" within the meaning of the Fifth Amendment. The termination provision in the § 418 Agreement exactly tracked the language of the statute, conferring no right on California beyond that contained in § 418 itself. The termination provision in California's § 418 Agreement did not rise to the level of "property," and thus amended § 418 did not effect a taking within the meaning of the Fifth Amendment. Pp. 54–56.

613 F. Supp. 558, reversed and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

Assistant Attorney General Willard argued the cause for appellants. With him on the briefs were *Solicitor General Fried, Deputy Solicitor General Geller, Charles A. Rothfeld, William Kanter,* and *Douglas Letter.*

Andrew D. Hurwitz argued the cause for appellees. *Ernest F. Schulzke* filed a brief for appellees Public Agencies Opposed to Social Security Entrapment et al. *John K. Van de Kamp,* Attorney General, *N. Eugene Hill,* Assistant Attorney General, and *Charles C. Kobayashi,* Supervising

Deputy Attorney General, filed a brief for appellee State of California.*

JUSTICE POWELL delivered the opinion of the Court.

On this appeal we review a decision of the District Court for the Eastern District of California that § 103 of the Social Security Amendments Act of 1983, 97 Stat. 71, 42 U. S. C. § 418(g) (1982 ed., Supp. II), effected a taking of property within the meaning of the Fifth Amendment by preventing States from withdrawing state and local government employees from the Social Security System.

I

A

The Social Security Act of 1935, 49 Stat. 620, as amended, 42 U. S. C. § 301 *et seq.* (1982 ed. and Supp. II), established an insurance program for "persons working in industry and commerce as a long-run safeguard against the occurrence of old-age dependency." H. R. Rep. No. 1300, 81st Cong., 1st Sess., 3 (1949). From that relatively humble beginning, the coverage of the Act has been expanded to provide benefits not only to the "insured worker in his old age," *ibid.*, but also to "individuals and families when workers retire, become disabled, or die." S. Rep. No. 98–13, Vol. 2, p. 78 (1983).[1] The "basic idea" of Social Security "is that, while they are working, employees and their employers pay earmarked social security contributions (FICA taxes) . . . . Then, when earnings stop, or are reduced because of retirement in old-

**Benna Ruth Solomon* and *Andrew D. Hurwitz* filed a brief for the Council of State Governments et al. as *amici curiae* urging affirmance.

[1] According to the Senate Special Committee on Aging, the Social Security System is "much more" than a "retirement program for older workers. . . . Social security is also family security, protecting workers and their families from loss of earnings because of death, retirement, or disability." Senate Special Committee on Aging, Termination of Social Security Coverage: The Impact on State and Local Government Employees, 94th Cong., 2d Sess., 9 (Comm. Print 1976) (hereinafter Senate Report on Aging).

age, death, or disability, cash benefits are paid to partially replace the earnings that were lost." *Ibid.* The System operates on a "pay as you go" basis, with current contributions "largely paid out in current benefits," *ibid.* In the words of Congress, the System now functions "as the Nation's basic social insurance program." H. R. Rep. No. 98–25, p. 19 (1983). To ensure that this important program could evolve as economic and social conditions changed, Congress expressly reserved to itself "[t]he right to alter, amend, or repeal any provision of" the Act. 42 U. S. C. § 1304.[2]

As of 1983, more than 90% of the Nation's paid employees, a total of more than 115 million people, participated in the Social Security System. H. R. Rep. No. 98–25, at 13.[3] Participation in the System is, and has been since its inception, "basically mandatory." *Id.*, at 19. Therefore, most workers covered by the System and their employers have no choice whether or not to participate. In 1935, when the Act was adopted, Congress faced questions as to whether it could compel the States and their political subdivisions to include their employees in the System.[4] Therefore, the Act at that time excluded such employees from its coverage. See 42 U. S. C. § 410(a)(7). Responding to subsequent pressure

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[2] Congress included this provision in the original Act, and has retained it ever since. See *Flemming* v. *Nestor*, 363 U. S. 603, 610–611 (1960).

[3] "The ten percent of workers not . . . covered by social security [in 1983] include[d] most Federal civilian workers (2.4 out of 2.7 million), about 30 percent of State and local employees (approximately 3 million), and 10–15 percent of employees of nonprofit organizations (up to 1 million)." H. R. Rep. No. 98–25, at 13.

[4] As Congress explained when it was studying the reasons underlying States' decisions to withdraw employees from the System, "[t]he Social Security Act of 1935 excluded from coverage all employment for States and localities, primarily because of the question of the constitutionality of any general levy of the employer tax on States and localities." Subcommittee on Social Security of House Committee on Ways and Means, Termination of Social Security Coverage for Employees of State and Local Governments and Nonprofit Groups, 97th Cong., 2d Sess., ser. no. WMCP: 97–34, p. 20 (Comm. Print 1982) (hereinafter H. R. Comm. Print 97–34).

from States that sought Social Security coverage for their employees, in 1950 Congress enacted § 418, the provision at the heart of the controversy in this case.

Section 418 authorizes voluntary participation by States in the Social Security System.[5] Under § 418(a), States may obtain coverage for their employees and employees of their political subdivisions, enrolling all or only specified "coverage groups" of workers. 42 U. S. C. § 418(a)(1) (1982 ed., Supp. II); see § 418(b)(5) (defining coverage group).[6] States enter the System by executing "an agreement" (§ 418 Agreement) with the Secretary of Health and Human Services (Secretary).[7] While § 418 gives States some authority over the content of the Agreements, *i. e.*, States may identify the covered employees, the provisions of a § 418 Agreement are required to be "not inconsistent with the provisions of" § 418. § 418(a)(1). From its enactment in 1950 through 1983, § 418 permitted States to terminate their § 418 Agreements "[u]pon giving at least two years' advance notice in writing to the [Secretary]." § 418(g)(1). Once a State exercised its option to withdraw, it could not thereafter reenter the System. § 418(g)(3).

Following adoption of § 418, all 50 States entered into § 418 Agreements with respect to their own employees, local gov-

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[5] At the time Congress enacted the amendment challenged in this case, it explained that provision for voluntary participation by employees of state and local governments was "the result of congressional desire to extend coverage as quickly and with as little difficulty as possible to those employees who needed it most." H. R. Rep. No. 98–25, at 19.

[6] Under the Act, therefore, States decide which groups of employees will receive Social Security coverage. Section 418(d)(3) creates an exception to this rule. Where state employees already are members of a retirement program, that section requires that a majority of such employees agree to participate in the Social Security System. 42 U. S. C. § 418(d)(3) (1982 ed. and Supp. II).

[7] For purposes of conciseness, we use the term "Secretary" to refer to the federal official responsible for administration of the System both under the current and prior versions of the Social Security Act.

ernment employees, or both.[8] "By the early 1960's most States had made coverage agreements," H. R. Rep. No. 98–25, at 18, and the percentage of state and local employees enrolled in the System increased from 11% in 1951 to 70% in 1970, H. R. Comm. Print 97–34, at 25. Since 1970, "[c]overage of State and local employees has remained fairly constant at 70–72 percent." H. R. Rep. No. 98–25, at 18. As of 1983, "some 9.4 million out of the approximately 13.2 million State and local employees" participated in the Social Security System. *Id.*, at 17.

For the first 20 years of their participation, "very few" States exercised their option under § 418(g) to withdraw from the System. *Id.*, at 18. Until the mid-1970's, the number of state and local employees "leaving the system was always greatly exceeded by the number of newly-covered employees—in most years, by 50,000 or more." *Ibid.*[9] Starting in 1976, however, this trend reversed, and the "numbers of positions being terminated from coverage" began to exceed "the numbers of newly-covered positions." *Ibid.* From 1977 through 1981, "termination activity was greater than in the previous ten years," with coverage "terminated for 96,000 State and local government employees." *Ibid.* As of 1982, coverage was "terminated for 595 State entities employing 190,000 workers." *Ibid.* Finally, "for the two-year period of 1983–84, terminations [were] pending for 634 State and local entities employing 227,000 workers." *Ibid.*

After studying the trend towards termination of § 418 Agreements and the reasons for it,[10] Congress determined

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[8] As of 1983, the employees of Alaska, "the only State to withdraw from the system, and of Maine, Massachusetts, Nevada, and Ohio, which never chose to participate in the system," were not covered by Social Security. H. R. Rep. No. 98–25, at 17. Each of those States, however, was party to a § 418 Agreement that provided coverage to local government employees.

[9] During these years, "many terminations were caused by consolidation of local jurisdictions, rather than by withdrawal from the social security system." *Id.*, at 18.

[10] The Senate Special Committee on Aging found that States offered the following reasons for terminating their § 418 Agreements: employees

that the increasing rate of withdrawals was threatening the integrity of the System in a number of important respects. As an initial matter, Congress observed that the current rate of withdrawals would cost the System between $500 million and $1 billion annually. H. R. Comm. Print 97-34, at 13-14. Congress further concluded that States' ability to withdraw was "inequitable both for the employees who lose coverage and for the vast majority of the nation's workforce who continue to pay into the system." H. R. Rep. No. 98-25, at 18-19. While States terminating § 418 Agreements often did so in the course of designing benefit packages that would attract long-term workers, Congress believed that sound social policy also required protection of employees who move from job to job. *Id.*, at 19. Moreover, "the shifting of the tax burden of social security from those workers who withdraw, but who remain entitled to future benefits based on their past earnings," created resentment on the part of workers whose participation in the System was mandatory.[11] *Ibid.*

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wanted more take-home pay through a reduction in payroll deductions; state and local governments sought to cut costs by dropping Social Security coverage; news reports concerning "the projected exhaustion of social security trust funds in the 1980's" led employees to believe that benefits would cease; state and local governments believed that Social Security taxes would continue to rise, and thus viewed termination as a means "to achieve more static and budgetable expenditures"; some employees favored termination because they perceived that they would receive Social Security benefits even if they were no longer required to pay into the System; and alternative retirement plans were believed to pay higher levels of benefits. Senate Report on Aging, pp. 6-8; see also H. R. Comm. Print 97-34, at 6-7. The Committee also found that "many" decisions to withdraw from the System were made in the absence of "[i]nformation necessary for informed judgments." Senate Report on Aging, at 8.

[11] Congress regarded voluntary participation by some employees, such as those of state and local governments, as an anomaly in an otherwise mandatory program. "The fundamental principle underlying compulsory coverage for most workers is that responsibility for paying for insurance against such risks should be borne by the society as a whole to the extent possible." H. R. Comm. Print 97-34, at 4. Mandatory participation is necessary to sustain the "'pay-as-you-go' financing structure," particularly since workers retain coverage "regardless of how many times they change

Accordingly, Congress decided to amend § 418(g) by repealing the termination provision. As amended, § 418(g) provides that no § 418 Agreement "may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983." The amendment expressly prevents States from withdrawing employees from the System even if a termination notice had been filed prior to enactment of the amendment.[12]

B

On March 9, 1951, California and the Secretary entered into a § 418 Agreement, effective as of January 1, 1951, under which the parties agreed to extend Social Security coverage to employees of the State and its political subdivisions. The Agreement recited that its provisions were "in conformity with" § 418, and authorized the State to modify the Agreement to include additional groups of employees, "such modification to be consistent with the provisions of" § 418. The Agreement also included a clause that permitted the State to terminate the Agreement either in its entirety or with respect to particular coverage groups. The terms of the clause

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their jobs in a lifetime." *Ibid.* Mandatory participation ensures workers that they will obtain a minimum level of benefits in the event of a catastrophe that the worker did not foresee or plan for. *Ibid.* In the context of a mandatory system, voluntary participation for some employees was, in Congress' view, "inconsistent with the principle of equal treatment of all citizens." *Id.*, at 5.

[12] The amendment, set out in Pub. L. 98–21, § 103, 97 Stat. 71–72 provides:

"(a) [42 U. S. C. § 418(g)] is amended to read as follows:

" 'Duration of Agreement

"(g) No agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after the date of the enactment of the Social Security Amendments of 1983.'

"(b) The amendment made by subsection (a) shall apply to any agreement in effect under [§ 418] on the date of the enactment of this Act, without regard to whether a notice of termination is in effect on such date, and to any agreement or modification thereof which may become effective under such [§ 418] after that date."

exactly mirrored the statutory termination provision embodied in § 418(g).[13]

When Congress amended § 418(g) in 1983, California had filed termination notices on behalf of 71 of its political subdivisions, employing approximately 34,000 persons.[14] When the amendment prevented the termination notices from taking effect, appellees commenced the lawsuits underlying this appeal, naming as defendants the United States, and the Secretary and Undersecretary of the Department of Health and Human Services. The first lawsuit was brought by several public agencies of California, their employees and taxpayers, and by an organization calling itself Public Agencies Opposed to Social Security Entrapment. These parties alleged, among other claims, that amended § 418(g) had deprived them of their "contract rights" without just compensation in violation of the Fifth Amendment.[15] In the second lawsuit, the State of California sought to enjoin enforcement of § 418(g) as well as a declaration that the section was un-

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[13] The termination provision in California's § 418 Agreement stated:

"The State, upon giving at least two years' advance notice in writing to the [Secretary], may terminate this agreement, either in its entirety or with respect to any coverage group, effective at the end of a calendar quarter specified in the notice, provided, however, that the agreement may be terminated in its entirety only if it has been in effect not less than five years prior to receipt of such notice, and provided further that the agreement may be terminated with respect to any coverage group only if it has been in effect with respect to such coverage group for not less than five years prior to receipt of such notice." Reprinted, App. 31.

[14] If these employees were withdrawn from the System, "approximately $33.7 millio[n] would be lost to the social security trust funds in 1984." *Id.*, at 61.

[15] Plaintiffs in this lawsuit also alleged that the enactment denied them their contract rights without due process, that it constituted an attempt to regulate "'essential state and local government functions,' in violation of the Tenth Amendment," and that they were entitled to specific performance for the Government's breach of contract. *Public Agencies Opposed to Social Security Entrapment* v. *Heckler*, 613 F. Supp. 558, 565 (ED Cal. 1985).

constitutional. The State claimed that the federal defendants had acted in excess of their constitutional authority and had violated the Tenth Amendment by breaching their contract with the State and by impairing the State's "ability . . . to structure its relationships with its employees."[16] App. 26–27.

Ruling on cross-motions for summary judgment, the District Court held that § 418(g) was unconstitutional. *Public Agencies Opposed to Social Security Entrapment* v. *Heckler*, 613 F. Supp. 558 (ED Cal. 1985).[17] The court decided that the § 418 Agreement created a "contractual right" to withdraw from the Social Security System that ran in favor of both the State and its public agencies. This contractual right existed independently of the statutory termination pro-

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[16] Though the State did not press any claim that amended § 418(g) effected a taking of its property without the compensation required by the Fifth Amendment, the District Court rested its decision on that ground, finding it unnecessary to reach any of the arguments raised by the State. Therefore, none of those arguments is before us.

[17] Before reaching the merits, the District Court determined that the plaintiffs in both suits, appellees here, had standing to challenge the validity of the enactment. With respect to the first lawsuit, brought by the public agencies and certain individuals, the court concluded that the agencies alleged an injury sufficient to confer standing because they claimed that amended § 418(g) deprived them of their contractual rights as third-party beneficiaries of the State's § 418 Agreement. *Id.*, at 567–570. The individual plaintiffs had standing because they claimed that the federal defendants had denied them equal protection. *Id.*, at 571. With respect to the second suit, the court found that the State had standing because it alleged "a judicially cognizable interest in the preservation of its own sovereignty, and a diminishment of that sovereignty by the alleged interference in its employment relations with its public employees." *Id.*, at 567. While appellants suggest in this Court that none of the plaintiffs in the lawsuit brought by the public agencies was properly before the District Court, they concede, and we agree, that there is no question concerning the State's standing to bring the action. Therefore, the District Court plainly had authority to resolve this controversy, as do we.

vision, and Congress derived no authority from § 1304[18] to amend the § 418 Agreement, as opposed to § 418.

The contractual right to withdraw, reasoned the District Court, constituted "private property" within the meaning of the Just Compensation Clause of the Fifth Amendment. Amended § 418(g) effected a taking of that property without providing the requisite just compensation. In the court's view, the "only rational compensation would be reimbursement by the United States to the State or public agencies, of the amount of money they currently pay to the United States for their participation" in the Social Security Program. 613 F. Supp., at 575. Since amended § 418(g) was enacted to solve the Social Security "financial crisis," however, the District Court concluded that an order awarding this measure of damages would be "simply and clearly contrary to the will of Congress." *Ibid.* Accordingly, the District Court simply declared § 418(g) unconstitutional. *Ibid.* We noted probable jurisdiction, 474 U. S. 1004 (1985), and now reverse.

II

A

Congress' decision that American workers need a federal program of social insurance protecting them in old age and disability "has of necessity called forth a highly complicated and interrelated statutory structure." *Flemming* v. *Nestor*, 363 U. S. 603, 610 (1960). Since the Act was designed to protect future, as well as present, generations of workers, it was inevitable that amendment of its provisions would be necessary in response to evolving social and economic conditions unforeseeable in 1935. *Ibid.* Congress anticipated that it would be necessary to respond to "ever-changing conditions" with "flexibility and boldness," *ibid.*, and therefore included in the Act "a clause expressly reserving to it '[t]he

[18] Title 42 U. S. C. § 1304 provides: "The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress."

right to alter, amend, or repeal any provision' of the Act. § 1104, 49 Stat. 648, 42 U. S. C. § 1304. That provision makes express what is implicit in the institutional needs of the program." *Id.*, at 611. As appellees must concede, the Act itself, including the original version of § 418(g), created no contractual rights. Cf. *Flemming* v. *Nestor*, *supra*, at 608–611; see also *National Railroad Passenger Corporation* v. *Atchison, T & S. F. R. Co.*, 470 U. S. 451, 465–470 (1985). Therefore, there is no doubt that Congress had the power to amend the section.

In view of the purpose and structure of the Act, and of Congress' express reservation of authority to alter its provisions, courts should be extremely reluctant to construe § 418 Agreements in a manner that forecloses Congress' exercise of that authority. While the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, see *Perry* v. *United States*, 294 U. S. 330, 350–354 (1935); *Lynch* v. *United States*, 292 U. S. 571 (1934), we have declined in the context of commercial contracts to find that a "sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract. *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 148 (1982). Rather, we have emphasized that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Ibid.* Therefore, contractual arrangements, including those to which a sovereign itself is party, "remain subject to subsequent legislation" by the sovereign. *Id.*, at 147.

These principles form the backdrop against which we must consider the District Court's decision effectively to forbid Congress to amend a provision of the Social Security Act. That decision heeded none of this Court's often-repeated admonitions that contracts should be construed, if possible,

to avoid foreclosing exercise of sovereign authority. Those admonitions take on added force when the arrangement pursuant to which the Government is claimed to have surrendered a sovereign power is one that serves to implement a comprehensive social welfare program affecting millions of individuals throughout our Nation.

B

Venerable precedent supports our conclusion that Congress reserved the authority to amend not only § 418 but also Agreements entered into "in conformity with" that section. Just last Term, we considered a statute in which Congress had "'expressly reserved' its right to 'repeal, alter, or amend' the Act at any time," *National Railroad Passenger Corporation, supra*, at 456, and we noted that the "effect of these few simple words" has been settled since the *Sinking-Fund Cases*, 99 U. S. 700 (1879). 470 U. S., at 467–468, n. 22. The *Sinking-Fund Cases* involved federal statutes that governed railroads' obligations to the United States on subsidy bonds. The statutes in question expressly reserved Congress' authority to repeal, alter, or amend them, and Congress exercised that power by requiring the railroads to set aside part of their current income as a sinking fund to meet their debts to the Government as those debts came due. The railroads claimed that this amendment deprived them of property without due process and improperly interfered with their vested rights. 99 U. S., at 719. In rejecting those arguments, the Court explained that through the language of reservation, "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments as come within the just scope of legislative power." *Id.*, at 720. The effect of the Court's construction of the reservation was to authorize Congress not only to amend the statute granting the railroads' corporate charter but also to change the stipulations of a contract made under that charter subsequently to and

independently of the original statute. Whatever the limits of the reserved power, it was "safe to say" that Congress had the authority to provide by amendment whatever rules it might "have prescribed in the original charter" and terms governing the "performance of contracts already entered into." *Id.*, at 721.

This reasoning disposes of appellees' contention that Congress lacked authority to amend California's § 418 Agreement. The State accepted the Agreement under an Act that contained the language of reservation. That language expressly notified the State that Congress retained the power to amend the law under which the Agreement was executed and by amending that law to alter the Agreement itself.[19] We have no doubt that in 1950 Congress could have provided that States electing to enter the Social Security System would not have authority to terminate their participation. Therefore, amended § 418(g) falls well within the limits of Congress' reserved power to alter the law governing performance of § 418 Agreements.

C

The § 418 Agreement provided that its terms were "in conformity with" § 418. Therefore, the Agreement expressly incorporated § 418, which of course was fully subject to Congress' reserved power of amendment. Appellees nonetheless insist that the termination provision embodied in the

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[19] The language of § 418 and of California's § 418 Agreement provides further support for this conclusion. Section 418(a)(1) requires that the provisions of § 418 Agreements be "not inconsistent with the provisions of this section," 42 U. S. C. § 418(a)(1) (1982 ed., Supp. II), and the Agreement provided that it was "in conformity with" § 418. The State was thus on notice that the terms of its Agreement must mirror the provisions of the section, which could be amended under the reserved power. If Congress amended § 418 in such a manner as to render a provision of an Agreement "inconsistent" or no longer "in conformity" with the section, then the logical conclusion is that the inconsistent provision no longer was to be given legal effect.

Agreement constituted a valuable property right that was "taken" when Congress enacted amended § 418(g). In the *Sinking-Fund Cases*, the Court did observe that Congress' exercise of the reserved power "has a limit" in that Congress could not rely on that power to "take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made." 99 U. S., at 720. Similarly, other decisions have held that Congress does not have the power to repudiate its own debts, which constitute "property" to the lender, simply in order to save money. *Perry* v. *United States*, 294 U. S., at 350–351; see *Lynch* v. *United States*, 292 U. S., at 576–577.

But the "contractual right" at issue in this case bears little, if any, resemblance to rights held to constitute "property" within the meaning of the Fifth Amendment. The termination provision in the Agreement exactly tracked the language of the statute, conferring no right on the State beyond that contained in § 418 itself. The provision constituted neither a debt of the United States, see *Perry* v. *United States*, *supra*, nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium, see *Lynch* v. *United States*, *supra*. The termination clause was not unique to this Agreement; nor was it a term over which the State had any bargaining power or for which the State provided independent consideration. Rather, the provision simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare. Under these circumstances, we conclude that the termination provision in California's § 418 Agreement did not rise to the level of "property." The provision simply cannot be viewed as conferring any sort of "vested right" in the face of precedent concerning the effect of Congress' reserved power on agreements entered into under a statute containing the language of reservation. Since appellees had no property right in

the termination clause, amended § 418 did not effect a taking within the meaning of the Fifth Amendment.

III

The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this decision.

It is so ordered.

MERITOR SAVINGS BANK, FSB v. VINSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1979. Argued March 25, 1986—Decided June 19, 1986

Respondent former employee of petitioner bank brought an action against the bank and her supervisor at the bank, claiming that during her employment at the bank she had been subjected to sexual harassment by the supervisor in violation of Title VII of the Civil Rights Act of 1964, and seeking injunctive relief and damages. At the trial, the parties presented conflicting testimony about the existence of a sexual relationship between respondent and the supervisor. The District Court denied relief without resolving the conflicting testimony, holding that if respondent and the supervisor did have a sexual relationship, it was voluntary and had nothing to do with her continued employment at the bank, and that therefore respondent was not the victim of sexual harassment. The court then went on to hold that since the bank was without notice, it could not be held liable for the supervisor's alleged sexual harassment. The Court of Appeals reversed and remanded. Noting that a violation of Title VII may be predicated on either of two types of sexual harassment—(1) harassment that involves the conditioning of employment benefits on sexual favors, and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive working environment—the Court of Appeals held that since the grievance here was of the second type and the District Court had not considered whether a violation of this type had occurred, a remand was necessary. The court further held that the need for a remand was not obviated by the fact that the District Court had found that any sexual relationship between respondent and the supervisor was a voluntary one, a finding that might have been based on testimony about respondent's "dress and personal fantasies" that "had no place in the litigation." As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment by supervisory personnel, whether or not the employer knew or should have known about it.

Held:

1. A claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII. Pp. 63–69.

(a) The language of Title VII is not limited to "economic" or "tangible" discrimination. Equal Employment Opportunity Commission Guidelines fully support the view that sexual harassment leading to non-

economic injury can violate Title VII. Here, respondent's allegations were sufficient to state a claim for "hostile environment" sexual harassment. Pp. 63–67.

(b) The District Court's findings were insufficient to dispose of respondent's "hostile environment" claim. The District Court apparently erroneously believed that a sexual harassment claim will not lie absent an *economic* effect on the complainant's employment, and erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her participation in them was voluntary. Pp. 67–68.

(c) The District Court did not err in admitting evidence of respondent's sexually provocative speech and dress. While "voluntariness" in the sense of consent is no defense to a sexual harassment claim, it does not follow that such evidence is irrelevant as a matter of law in determining whether the complainant found particular sexual advances unwelcome. Pp. 68–69.

2. The Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. While common-law agency principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. In this case, however, the mere existence of a grievance procedure in the bank and the bank's policy against discrimination, coupled with respondent's failure to invoke that procedure, do not necessarily insulate the bank from liability. Pp. 69–73.

243 U. S. App. D. C. 323, 753 F. 2d 141, affirmed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 73. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 74.

F. Robert Troll, Jr., argued the cause for petitioner. With him on the briefs were *Charles H. Fleischer* and *Randall C. Smith*.

Patricia J. Barry argued the cause for respondent Vinson. With her on the brief was *Catherine A. MacKinnon*.*

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*Briefs of *amici curiae* urging reversal were filed for the United States et al. by *Solicitor General Fried, Assistant Attorneys General Reynolds*

JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents important questions concerning claims of workplace "sexual harassment" brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*

I

In 1974, respondent Mechelle Vinson met Sidney Taylor, a vice president of what is now petitioner Meritor Savings Bank (bank) and manager of one of its branch offices. When respondent asked whether she might obtain employment at the bank, Taylor gave her an application, which she completed and returned the next day; later that same day Taylor called her to say that she had been hired. With Taylor as her supervisor, respondent started as a teller-trainee, and thereafter was promoted to teller, head teller, and assistant

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and *Willard, Deputy Solicitor General Kuhl, Albert G. Lauber, Jr., John F. Cordes, John F. Daly,* and *Johnny J. Butler;* for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Garen E. Dodge;* for the Chamber of Commerce of the United States by *Dannie B. Fogleman* and *Stephen A. Bokat;* and for the Trustees of Boston University by *William Burnett Harvey* and *Michael B. Rosen.*

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey et al. by *W. Cary Edwards,* Attorney General of New Jersey, *James J. Ciancia,* Assistant Attorney General, *Susan L. Reisner* and *Lynn B. Norcia,* Deputy Attorneys General, *John Van de Kamp,* Attorney General of California, *Joseph I. Lieberman,* Attorney General of Connecticut, *Neil F. Hartigan,* Attorney General of Illinois, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Paul Bardacke,* Attorney General of New Mexico, *Robert Abrams,* Attorney General of New York, *Jeffrey L. Amestoy,* Attorney General of Vermont, and *Elisabeth S. Shuster;* for the American Federation of Labor and the Congress of Industrial Organizations et al. by *Marsha S. Berzon, Joy L. Koletsky, Laurence Gold, Winn Newman,* and *Sarah E. Burns;* for the Women's Bar Association of Massachusetts et al. by *S. Beville May;* for the Women's Bar Association of the State of New York by *Stephen N. Shulman* and *Lynda S. Mounts;* for the Women's Legal Defense Fund et al. by *Linda R. Singer, Anne E. Simon, Nadine Taub, Judith Levin,* and *Barry H. Gottfried;* for the Working Women's Institute et al. by *Laurie E. Foster;* and for Senator Paul Simon et al. by *Michael H. Salsbury.*

branch manager. She worked at the same branch for fou years, and it is undisputed that her advancement there wa based on merit alone. In September 1978, respondent not fied Taylor that she was taking sick leave for an indefinit period. On November 1, 1978, the bank discharged her fo excessive use of that leave.

Respondent brought this action against Taylor and th bank, claiming that during her four years at the bank she ha "constantly been subjected to sexual harassment" by Taylo in violation of Title VII. She sought injunctive relief, com pensatory and punitive damages against Taylor and the bank and attorney's fees.

At the 11-day bench trial, the parties presented conflic ing testimony about Taylor's behavior during respondent employment.* Respondent testified that during her pro bationary period as a teller-trainee, Taylor treated her in fatherly way and made no sexual advances. Shortly there after, however, he invited her out to dinner and, during th course of the meal, suggested that they go to a motel to hav sexual relations. At first she refused, but out of what sh described as fear of losing her job she eventually agree According to respondent, Taylor thereafter made repeate demands upon her for sexual favors, usually at the branch both during and after business hours; she estimated that ove the next several years she had intercourse with him some 4 or 50 times. In addition, respondent testified that Taylo fondled her in front of other employees, followed her into th women's restroom when she went there alone, exposed him self to her, and even forcibly raped her on several occasion These activities ceased after 1977, respondent stated, whe she started going with a steady boyfriend.

Respondent also testified that Taylor touched and fondle other women employees of the bank, and she attempted t

*Like the Court of Appeals, this Court was not provided a comple transcript of the trial. We therefore rely largely on the District Court opinion for the summary of the relevant testimony.

call witnesses to support this charge. But while some supporting testimony apparently was admitted without objection, the District Court did not allow her "to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants' cases." *Vinson* v. *Taylor*, 22 EPD ¶30,708, p. 14,693, n. 1, 23 FEP Cases 37, 38–39, n. 1 (DC 1980). Respondent did not offer such evidence in rebuttal. Finally, respondent testified that because she was afraid of Taylor she never reported his harassment to any of his supervisors and never attempted to use the bank's complaint procedure.

Taylor denied respondent's allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her, and never asked her to do so. He contended instead that respondent made her accusations in response to a business-related dispute. The bank also denied respondent's allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval.

The District Court denied relief, but did not resolve the conflicting testimony about the existence of a sexual relationship between respondent and Taylor. It found instead that

> "[i]f [respondent] and Taylor did engage in an intimate or sexual relationship during the time of [respondent's] employment with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution." *Id.*, at 14,692, 23 FEP Cases, at 42 (footnote omitted).

The court ultimately found that respondent "was not the victim of sexual harassment and was not the victim of sexual discrimination" while employed at the bank. *Ibid.*, 23 FEP Cases, at 43.

Although it concluded that respondent had not proved a violation of Title VII, the District Court nevertheless went on to address the bank's liability. After noting the bank's express policy against discrimination, and finding that neither respondent nor any other employee had ever lodged a complaint about sexual harassment by Taylor, the court ultimately concluded that "the bank was without notice and cannot be held liable for the alleged actions of Taylor." *Id.*, at 14,691, 23 FEP Cases, at 42.

The Court of Appeals for the District of Columbia Circuit reversed. 243 U. S. App. D. C. 323, 753 F. 2d 141 (1985). Relying on its earlier holding in *Bundy* v. *Jackson*, 205 U. S. App. D. C. 444, 641 F. 2d 934 (1981), decided after the trial in this case, the court stated that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. The court drew additional support for this position from the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11(a) (1985), which set out these two types of sexual harassment claims. Believing that "Vinson's grievance was clearly of the [hostile environment] type," 243 U. S. App. D. C., at 327, 753 F. 2d, at 145, and that the District Court had not considered whether a violation of this type had occurred, the court concluded that a remand was necessary.

The court further concluded that the District Court's finding that any sexual relationship between respondent and Taylor "was a voluntary one" did not obviate the need for a remand. "[U]ncertain as to precisely what the [district] court meant" by this finding, the Court of Appeals held that if the evidence otherwise showed that "Taylor made Vinson's toleration of sexual harassment a condition of her employment," her voluntariness "had no materiality whatsoever."

Id., at 328, 753 F. 2d, at 146. The court then surmised that the District Court's finding of voluntariness might have been based on "the voluminous testimony regarding respondent's dress and personal fantasies," testimony that the Court of Appeals believed "had no place in this litigation." *Id.*, at 328, n. 36, 753 F. 2d, at 146, n. 36.

As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct. The court relied chiefly on Title VII's definition of "employer" to include "any agent of such a person," 42 U. S. C. § 2000e(b), as well as on the EEOC Guidelines. The court held that a supervisor is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire, or promote, since "the mere existence—or even the appearance—of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees." 243 U. S. App. D. C., at 332, 753 F. 2d, at 150.

In accordance with the foregoing, the Court of Appeals reversed the judgment of the District Court and remanded the case for further proceedings. A subsequent suggestion for rehearing en banc was denied, with three judges dissenting. 245 U. S. App. D. C. 306, 760 F. 2d 1330 (1985). We granted certiorari, 474 U. S. 1047 (1985), and now affirm but for different reasons.

II

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e-2(a)(1). The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong. Rec. 2577-2584 (1964). The principal argument in op-

position to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. See *id.*, at 2577 (statement of Rep. Celler quoting letter from United States Department of Labor); *id.*, at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."

Respondent argues, and the Court of Appeals held, that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex. Petitioner apparently does not challenge this proposition. It contends instead that in prohibiting discrimination with respect to "compensation, terms, conditions, or privileges" of employment, Congress was concerned with what petitioner describes as "tangible loss" of "an economic character," not "purely psychological aspects of the workplace environment." Brief for Petitioner 30–31, 34. In support of this claim petitioner observes that in both the legislative history of Title VII and this Court's Title VII decisions, the focus has been on tangible, economic barriers erected by discrimination.

We reject petitioner's view. First, the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "'to strike at the entire spectrum of disparate treatment of men and women'" in employment. *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 707, n. 13 (1978), quoting *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (CA7 1971). Petitioner has pointed to nothing in the Act to suggest that Congress contemplated the limitation urged here.

Second, in 1980 the EEOC issued Guidelines specifying that "sexual harassment," as there defined, is a form of sex discrimination prohibited by Title VII. As an "administrative interpretation of the Act by the enforcing agency," *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433–434 (1971), these Guidelines, "'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 141–142 (1976), quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). The EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII.

In defining "sexual harassment," the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 CFR § 1604.11(a) (1985). Relevant to the charges at issue in this case, the Guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." § 1604.11(a)(3).

In concluding that so-called "hostile environment" (*i. e.*, non *quid pro quo*) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. See generally 45 Fed. Reg. 74676 (1980). *Rogers* v. *EEOC*, 454 F. 2d 234 (CA5 1971), cert. denied, 406 U. S. 957 (1972), was apparently the first case to recognize a cause of action based upon a discriminatory work environment. In *Rogers*, the Court of Appeals for the Fifth

Circuit held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele. The court explained that an employee's protections under Title VII extend beyond the economic aspects of employment:

> "[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . ." 454 F. 2d, at 238.

Courts applied this principle to harassment based on race, *e. g.*, *Firefighters Institute for Racial Equality* v. *St. Louis*, 549 F. 2d 506, 514–515 (CA8), cert. denied *sub nom. Banta* v. *United States*, 434 U. S. 819 (1977); *Gray* v. *Greyhound Lines, East*, 178 U. S. App. D. C. 91, 98, 545 F. 2d 169, 176 (1976), religion, *e. g.*, *Compston* v. *Borden, Inc.*, 424 F. Supp. 157 (SD Ohio 1976), and national origin, *e. g.*, *Cariddi* v. *Kansas City Chiefs Football Club*, 568 F. 2d 87, 88 (CA8 1977). Nothing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited. The Guidelines thus appropriately drew from, and were fully consistent with, the existing case law.

Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in *Henson* v. *Dundee*, 682 F. 2d 897, 902 (1982):

> "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Accord, *Katz* v. *Dole*, 709 F. 2d 251, 254–255 (CA4 1983); *Bundy* v. *Jackson*, 205 U. S. App. D. C., at 444–454, 641 F. 2d, at 934–944; *Zabkowicz* v. *West Bend Co.*, 589 F. Supp. 780 (ED Wis. 1984).

Of course, as the courts in both *Rogers* and *Henson* recognized, not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. See *Rogers* v. *EEOC*, *supra*, at 238 ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); *Henson*, 682 F. 2d, at 904 (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." *Ibid.* Respondent's allegations in this case—which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for "hostile environment" sexual harassment.

The question remains, however, whether the District Court's ultimate finding that respondent "was not the victim of sexual harassment," 22 EPD ¶30,708, at 14,692–14,693, 23 FEP Cases, at 43, effectively disposed of respondent's claim. The Court of Appeals recognized, we think correctly, that this ultimate finding was likely based on one or both of two erroneous views of the law. First, the District Court apparently believed that a claim for sexual harassment will not lie

absent an *economic* effect on the complainant's employment. See *ibid.* ("It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a *condition to obtain employment or to maintain employment or to obtain promotions* falls within protection of Title VII") (emphasis added). Since it appears that the District Court made its findings without ever considering the "hostile environment" theory of sexual harassment, the Court of Appeals' decision to remand was correct.

Second, the District Court's conclusion that no actionable harassment occurred might have rested on its earlier "finding" that "[i]f [respondent] and Taylor did engage in an intimate or sexual relationship . . . , that relationship was a voluntary one." *Id.*, at 14,692, 23 FEP Cases, at 42. But the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 29 CFR § 1604.11(a) (1985). While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

Petitioner contends that even if this case must be remanded to the District Court, the Court of Appeals erred in one of the terms of its remand. Specifically, the Court of Appeals stated that testimony about respondent's "dress and personal fantasies," 243 U. S. App. D. C., at 328, n. 36, 753 F. 2d, at 146, n. 36, which the District Court apparently ad-

mitted into evidence, "had no place in this litigation." *Ibid.* The apparent ground for this conclusion was that respondent's voluntariness *vel non* in submitting to Taylor's advances was immaterial to her sexual harassment claim. While "voluntariness" in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 CFR § 1604.11(b) (1985). Respondent's claim that any marginal relevance of the evidence in question was outweighed by the potential for unfair prejudice is the sort of argument properly addressed to the District Court. In this case the District Court concluded that the evidence should be admitted, and the Court of Appeals' contrary conclusion was based upon the erroneous, categorical view that testimony about provocative dress and publicly expressed sexual fantasies "had no place in this litigation." 243 U. S. App. D. C., at 328, n. 36, 753 F. 2d, at 146, n. 36. While the District Court must carefully weigh the applicable considerations in deciding whether to admit evidence of this kind, there is no *per se* rule against its admissibility.

III

Although the District Court concluded that respondent had not proved a violation of Title VII, it nevertheless went on to consider the question of the bank's liability. Finding that "the bank was without notice" of Taylor's alleged conduct, and that notice to Taylor was not the equivalent of notice to the bank, the court concluded that the bank therefore could not be held liable for Taylor's alleged actions. The Court of Appeals took the opposite view, holding that an employer is

strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knew nor reasonably could have known of the alleged misconduct. The court held that a supervisor, whether or not he possesses the authority to hire, fire, or promote, is necessarily an "agent" of his employer for all Title VII purposes, since "even the appearance" of such authority may enable him to impose himself on his subordinates.

The parties and *amici* suggest several different standards for employer liability. Respondent, not surprisingly, defends the position of the Court of Appeals. Noting that Title VII's definition of "employer" includes any "agent" of the employer, she also argues that "so long as the circumstance is work-related, the supervisor is the employer and the employer is the supervisor." Brief for Respondent 27. Notice to Taylor that the advances were unwelcome, therefore, was notice to the bank.

Petitioner argues that respondent's failure to use its established grievance procedure, or to otherwise put it on notice of the alleged misconduct, insulates petitioner from liability for Taylor's wrongdoing. A contrary rule would be unfair, petitioner argues, since in a hostile environment harassment case the employer often will have no reason to know about, or opportunity to cure, the alleged wrongdoing.

The EEOC, in its brief as *amicus curiae*, contends that courts formulating employer liability rules should draw from traditional agency principles. Examination of those principles has led the EEOC to the view that where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them. Brief for United States and EEOC as *Amici Curiae* 22. Thus, the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory person-

nel, whether or not the employer knew, should have known, or approved of the supervisor's actions. *E. g., Anderson* v. *Methodist Evangelical Hospital, Inc.*, 464 F. 2d 723, 725 (CA6 1972).

The EEOC suggests that when a sexual harassment claim rests exclusively on a "hostile environment" theory, however, the usual basis for a finding of agency will often disappear. In that case, the EEOC believes, agency principles lead to

> "a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, *e. g.*, by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials." Brief for United States and EEOC as *Amici Curiae* 26.

As respondent points out, this suggested rule is in some tension with the EEOC Guidelines, which hold an employer liable for the acts of its agents without regard to notice. 29 CFR § 1604.11(c) (1985). The Guidelines do require, however, an "examin[ation of] the circumstances of the particular employment relationship and the job [f]unctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity." *Ibid.*

This debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case. We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were "so pervasive and so long continuing . . . that the employer must have become conscious of [them]," *Taylor* v. *Jones*, 653 F. 2d 1193, 1197–1199 (CA8 1981) (holding employer liable for racially hostile working environment based on constructive knowledge).

We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U. S. C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219–237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. *Ibid.*

Finally, we reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive. Petitioner's general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their em-

ployer's interest in correcting that form of discrimination. App. 25. Moreover, the bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

IV

In sum, we hold that a claim of "hostile environment" sex discrimination is actionable under Title VII, that the District Court's findings were insufficient to dispose of respondent's hostile environment claim, and that the District Court did not err in admitting testimony about respondent's sexually provocative speech and dress. As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.

Accordingly, the judgment of the Court of Appeals reversing the judgment of the District Court is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

Because I do not see any inconsistency between the two opinions, and because I believe the question of statutory construction that JUSTICE MARSHALL has answered is fairly presented by the record, I join both the Court's opinion and JUSTICE MARSHALL's opinion.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

I fully agree with the Court's conclusion that workplace sexual harassment is illegal, and violates Title VII. Part III of the Court's opinion, however, leaves open the circumstances in which an employer is responsible under Title VII for such conduct. Because I believe that question to be properly before us, I write separately.

The issue the Court declines to resolve is addressed in the EEOC Guidelines on Discrimination Because of Sex, which are entitled to great deference. See *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433–434 (1971) (EEOC Guidelines on Employment Testing Procedures of 1966); see also *ante*, at 65. The Guidelines explain:

> "Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job [f]unctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.
>
> "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 CFR §§ 1604.11(c),(d) (1985).

The Commission, in issuing the Guidelines, explained that its rule was "in keeping with the general standard of em-

ployer liability with respect to agents and supervisory employees. . . . [T]he Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor." 45 Fed. Reg. 74676 (1980). I would adopt the standard set out by the Commission.

An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt companywide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy. Nonetheless, Title VII remedies, such as reinstatement and backpay, generally run against the employer as an entity.[1] The question thus arises as to the circumstances under which an employer will be held liable under Title VII for the acts of its employees.

The answer supplied by general Title VII law, like that supplied by federal labor law, is that the act of a supervisory employee or agent is imputed to the employer.[2] Thus, for example, when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer. The courts do not stop to consider whether the employer otherwise had "notice" of the action, or even whether the supervisor had actual authority to act as he did. *E. g., Flowers* v. *Crouch-Walker Corp.*,

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[1] The remedial provisions of Title VII were largely modeled on those of the National Labor Relations Act (NLRA). See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 419, and n. 11 (1975); see also *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 768–770 (1976).

[2] For NLRA cases, see, *e. g., Graves Trucking, Inc.* v. *NLRB*, 692 F. 2d 470 (CA7 1982); *NLRB* v. *Kaiser Agricultural Chemical, Division of Kaiser Aluminum & Chemical Corp.*, 473 F. 2d 374, 384 (CA5 1973); *Amalgamated Clothing Workers of America* v. *NLRB*, 124 U. S. App. D. C. 365, 377, 365 F. 2d 898, 909 (1966).

552 F. 2d 1277, 1282 (CA7 1977); *Young* v. *Southwestern Sa ings and Loan Assn.*, 509 F. 2d 140 (CA5 1975); *Anderson Methodist Evangelical Hospital, Inc.*, 464 F. 2d 723 (C 1972). Following that approach, every Court of Appe that has considered the issue has held that sexual harassme by supervisory personnel is automatically imputed to the e ployer when the harassment results in tangible job detrime to the subordinate employee. See *Horn* v. *Duke Hom Inc., Div. of Windsor Mobile Homes*, 755 F. 2d 599, 604–6 (CA7 1985); *Craig* v. *Y&Y Snacks, Inc.*, 721 F. 2d 77, 80– (CA3 1983); *Katz* v. *Dole*, 709 F 2d 251, 255, n. 6 (CA4 198 *Henson* v. *Dundee*, 682 F. 2d 897, 910 (CA11 1982); *Miller Bank of America*, 600 F. 2d 211, 213 (CA9 1979).

The brief filed by the Solicitor General on behalf of t United States and the EEOC in this case suggests that a d ferent rule should apply when a supervisor's harassme "merely" results in a discriminatory work environment. T Solicitor General concedes that sexual harassment that a fects tangible job benefits is an exercise of authority del gated to the supervisor by the employer, and thus gives ri to employer liability. But, departing from the EEOC Guid lines, he argues that the case of a supervisor merely creati a discriminatory work environment is different because t supervisor "is not exercising, or threatening to exercise, a tual or apparent authority to make personnel decisions affe ing the victim." Brief for United States and EEOC *Amici Curiae* 24. In the latter situation, he concludes, so further notice requirement should therefore be necessary.

The Solicitor General's position is untenable. A super sor's responsibilities do not begin and end with the power hire, fire, and discipline employees, or with the power to re ommend such actions. Rather, a supervisor is charged wi the day-to-day supervision of the work environment and wi ensuring a safe, productive workplace. There is no reas why abuse of the latter authority should have different cons quences than abuse of the former. In both cases it is the a

thority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied *only* in "hostile environment" cases, that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.

Agency principles and the goals of Title VII law make appropriate some limitation on the liability of employers for the acts of supervisors. Where, for example, a supervisor has no authority over an employee, because the two work in wholly different parts of the employer's business, it may be improper to find strict employer liability. See 29 CFR § 1604.11(c) (1985). Those considerations, however, do not justify the creation of a special "notice" rule in hostile environment cases.

Further, nothing would be gained by crafting such a rule. In the "pure" hostile environment case, where an employee files an EEOC complaint alleging sexual harassment in the workplace, the employee seeks not money damages but injunctive relief. See *Bundy* v. *Jackson*, 205 U. S. App. D. C. 444, 456, n. 12, 641 F. 2d 934, 946, n. 12 (1981). Under Title VII, the EEOC must notify an employer of charges made against it within 10 days after receipt of the complaint. 42 U. S. C. § 2000e–5(b). If the charges appear to be based on "reasonable cause," the EEOC must attempt to eliminate the offending practice through "informal methods of conference, conciliation, and persuasion." *Ibid.* An employer whose internal procedures assertedly would have redressed the discrimination can avoid injunctive relief by employing these procedures after receiving notice of the complaint or during the conciliation period. Cf. Brief for United

States and EEOC as *Amici Curiae* 26. Where a complainant, on the other hand, seeks backpay on the theory that a hostile work environment effected a constructive termination, the existence of an internal complaint procedure may be a factor in determining not the employer's liability but the remedies available against it. Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination and thus to award reinstatement or backpay.

I therefore reject the Solicitor General's position. I would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave "notice" of the offense.

McMILLAN ET AL. v. PENNSYLVANIA

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 85-215. Argued March 4, 1986—Decided June 19, 1986

Pennsylvania's Mandatory Minimum Sentencing Act (Act) provides that anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge—upon considering the evidence introduced at the trial and any additional evidence offered by either the defendant or the Commonwealth at the sentencing hearing—finds, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the offense. The Act, which also provides that visible possession shall not be an element of the crime, operates to divest the judge of discretion to impose any sentence of less than five years for the underlying felony, but does not authorize a sentence in excess of that otherwise allowed for the offense. Each of the petitioners was convicted of one of the Act's enumerated felonies, and in each case the Commonwealth gave notice that at sentencing it would seek to proceed under the Act. However, each of the sentencing judges found the Act unconstitutional and imposed a lesser sentence than that required by the Act. The Pennsylvania Supreme Court consolidated the Commonwealth's appeals, vacated petitioners' sentences, and remanded for sentencing pursuant to the Act. The court held that the Act was consistent with due process, rejecting petitioners' principal argument that visible possession of a firearm was an element of the crimes for which they were sentenced and thus must be proved beyond a reasonable doubt under *In re Winship*, 397 U. S. 358, and *Mullaney* v. *Wilbur*, 421 U. S. 684.

Held:

1. A State may properly treat visible possession of a firearm as a sentencing consideration rather than an element of a particular offense that must be proved beyond a reasonable doubt. This case is controlled by *Patterson* v. *New York*, 432 U. S. 197, which rejected a claim that whenever a State links the "severity of punishment" to the "presence or absence of an identified fact" the State must prove that fact beyond a reasonable doubt. While there are constitutional limits beyond which the States may not go in this regard, the applicability of the reasonable-doubt standard is usually dependent on how a State defines the offense that is charged in any given case. Here, the Pennsylvania Legislature has made visible possession of a firearm a sentencing factor that comes into play only after the defendant has been found guilty of one of the

enumerated crimes beyond a reasonable doubt, and the constitutional limits to a State's power are not exceeded by the Act, which only raises the minimum sentence that may be imposed and neither alters the maximum sentence nor creates a separate offense calling for a separate penalty. *Specht* v. *Patterson*, 386 U. S. 605, distinguished. Pp. 84–91.

2. There is no merit to petitioners' contention that even though States may treat visible possession of a firearm as a sentencing consideration rather than an element of a particular offense, due process nonetheless requires that visible possession be proved by at least clear and convincing evidence. The preponderance standard satisfies due process. Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. Nothing in Pennsylvania's scheme warrants constitutionalizing burdens of proof at sentencing. Pp. 91–93.

3. Nor is there merit to petitioners' claim that the Act denies them their Sixth Amendment right to a trial by jury. There is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact. P. 93.

508 Pa. 25, 494 A. 2d 354, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 93. STEVENS, J., filed a dissenting opinion, *post*, p. 95.

Leonard N. Sosnov argued the cause for petitioners. With him on the briefs were *John W. Packel*, *David Rudovsky*, and *Gerald A. Stein*.

Steven J. Cooperstein argued the cause for respondent. With him on the brief were *Gaele McLaughlin Barthold*, *Harriet R. Brumberg*, *Eric B. Henson*, and *William G. Chadwick, Jr.*

JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to consider the constitutionality, under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, of Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982) (the Act).

I

The Act was adopted in 1982. It provides that anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense. At the sentencing hearing, the judge is directed to consider the evidence introduced at trial and any additional evidence offered by either the defendant or the Commonwealth. § 9712(b).[1] The Act operates to divest

[1] Section 9712 provides in full:

"(a) Mandatory sentence.—Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa. C. S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery), aggravated assault as defined in 18 Pa. C. S. § 2702(a)(1) (relating to aggravated assault) or kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.

"(b) Proof at sentencing.—Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

"(c) Authority of court in sentencing.—There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (a) or to place such offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this section.

"(d) Appeal by Commonwealth.—If a sentencing court refuses to apply this section where applicable, the Commonwealth shall have the right to

the judge of discretion to impose any sentence of less than five years for the underlying felony; it does not authorize a sentence in excess of that otherwise allowed for that offense.

Each petitioner was convicted of, among other things, one of § 9712's enumerated felonies. Petitioner McMillan, who shot his victim in the right buttock after an argument over a debt, was convicted by a jury of aggravated assault. Petitioner Peterson shot and killed her husband and, following a bench trial, was convicted of voluntary manslaughter. Petitioner Dennison shot and seriously wounded an acquaintance and was convicted of aggravated assault after a bench trial. Petitioner Smalls robbed a seafood store at gunpoint; following a bench trial he was convicted of robbery. In each case the Commonwealth gave notice that at sentencing it would seek to proceed under the Act. No § 9712 hearing was held, however, because each of the sentencing judges before whom petitioners appeared found the Act unconstitutional; each imposed a lesser sentence than that required by the Act.[2]

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appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.

"(e) Definition of firearm.—As used in this section 'firearm' means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive or the expansion of gas therein."

[2] McMillan was sentenced to a term of 3 to 10 years for aggravated assault; he was also convicted of possession of instruments of crime, 18 Pa. Cons. Stat. § 2503 (1982), for which he received a concurrent term of 2½ to 5 years. Peterson received a sentence of 1 to 6 years on the manslaughter charge, as well as a concurrent term of 6 to 18 months for possession of instruments of crime. Dennison received concurrent sentences of 11½ to 23 months for aggravated assault and possession of instruments of crime. Smalls was sentenced to concurrent 4- to 8-year terms for robbery and criminal conspiracy; he was also convicted of violating the Uniform Firearms Act, § 6101 *et seq.*, and reckless endangerment, § 2705, for which he was sentenced to concurrent terms of 2½ to 5 years and 1 to 2 years respectively. He received a suspended sentence for possession of instruments of crime.

The Commonwealth appealed all four cases to the Supreme Court of Pennsylvania. That court consolidated the appeals and unanimously concluded that the Act is consistent with due process. *Commonwealth* v. *Wright*, 508 Pa. 25, 494 A. 2d 354 (1985). Petitioners' principal argument was that visible possession of a firearm is an element of the crimes for which they were being sentenced and thus must be proved beyond a reasonable doubt under *In re Winship*, 397 U. S. 358 (1970), and *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975). After observing that the legislature had expressly provided that visible possession "shall not be an element of the crime," § 9712(b), and that the reasonable-doubt standard "'has always been dependent on how a state defines the offense'" in question, 508 Pa., at 34, 494 A. 2d, at 359, quoting *Patterson* v. *New York*, 432 U. S. 197, 211, n. 12 (1977), the court rejected the claim that the Act effectively creates a new set of upgraded felonies of which visible possession is an "element." Section 9712, which comes into play only after the defendant has been convicted of an enumerated felony, neither provides for an increase in the maximum sentence for such felony nor authorizes a separate sentence; it merely requires a minimum sentence of five years, which may be more or less than the minimum sentence that might otherwise have been imposed. And consistent with *Winship*, *Mullaney*, and *Patterson*, the Act "creates no presumption as to any essential fact and places no burden on the defendant"; it "in no way relieve[s] the prosecution of its burden of proving guilt." 508 Pa., at 35, 494 A. 2d, at 359.

Petitioners also contended that even if visible possession is not an element of the offense, due process requires more than proof by a preponderance of the evidence. The Supreme Court of Pennsylvania rejected this claim as well, holding that the preponderance standard satisfies due process under the approach set out in *Addington* v. *Texas*, 441 U. S. 418 (1979). The Commonwealth's interest in deterring the illegal use of firearms and in sure punishment for those who

commit crimes with guns is as compelling as a convicted defendant's contervailing liberty interest, which has been substantially diminished by a guilty verdict. Moreover, the risk of error in the context of a § 9712 proceeding is comparatively slight—visible possession is a simple, straightforward issue susceptible of objective proof. On balance, the court concluded, it is reasonable for the defendant and the Commonwealth to share equally in any risk of error. The court vacated petitioners' sentences and remanded for sentencing pursuant to the Act. One justice concurred and filed a separate opinion.

We granted certiorari, 474 U. S. 815 (1985), and now affirm.

II

Petitioners argue that under the Due Process Clause as interpreted in *Winship* and *Mullaney*, if a State wants to punish visible possession of a firearm it must undertake the burden of proving that fact beyond a reasonable doubt. We disagree. *Winship* held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U. S., at 364. In *Mullaney* v. *Wilbur*, we held that the Due Process Clause "requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." 421 U. S., at 704. But in *Patterson* we rejected the claim that whenever a State links the "severity of punishment" to "the presence or absence of an identified fact" the State must prove that fact beyond a reasonable doubt. 432 U. S., at 214; see also *id.*, at 207 (State need not "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment"). In particular, we upheld against a due process challenge New York's law placing on

defendants charged with murder the burden of proving the affirmative defense of extreme emotional disturbance.

Patterson stressed that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive: "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* of which the defendant is charged." *Id.*, at 210 (emphasis added). While "there are obviously constitutional limits beyond which the States may not go in this regard," *ibid.*, "[t]he applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case," *id.*, at 211, n. 12. *Patterson* rests on a premise that bears repeating here:

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine* v. *California*, 347 U. S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Speiser* v. *Randall*, 357 U. S. 513, 523 (1958)." *Id.*, at 201–202 (citations omitted).

We believe that the present case is controlled by *Patterson*, our most recent pronouncement on this subject, rather than by *Mullaney*. As the Supreme Court of Pennsylvania observed, the Pennsylvania Legislature has expressly provided that visible possession of a firearm is not an element of

the crimes enumerated in the mandatory sentencing statute, § 9712(b), but instead is a sentencing factor that comes into play only after the defendant has been found guilty of one of those crimes beyond a reasonable doubt. Indeed, the elements of the enumerated offenses, like the maximum permissible penalties for those offenses, were established long before the Mandatory Minimum Sentencing Act was passed.[3] While visible possession might well have been included as an element of the enumerated offenses, Pennsylvania chose not to redefine those offenses in order to so include it, and *Patterson* teaches that we should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties.

As *Patterson* recognized, of course, there are constitutional limits to the State's power in this regard; in certain limited circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged. Petitioners argue that Pennsylvania has gone beyond those limits and that its formal provision that visible possession is not an element of the crime is therefore of no effect. We do not think so. While we have never attempted to define precisely the constitutional limits noted in *Patterson*, *i. e.*, the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases, and do not do so today, we are persuaded by several factors that Pennsylvania's Mandatory Minimum Sentencing Act does not exceed those limits.

We note first that the Act plainly does not transgress the limits expressly set out in *Patterson*. Responding to the concern that its rule would permit States unbridled power to redefine crimes to the detriment of criminal defendants, the *Patterson* Court advanced the unremarkable proposition that

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[3] The elements of the enumerated offenses were established in essentially their present form in 1972. See 1972 Pa. Laws No. 334, which compiled, amended, and codified the Pennsylvania "Crimes Code." The Mandatory Minimum Sentencing Act was passed in 1982.

the Due Process Clause precludes States from discarding the presumption of innocence:

> "'[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' *McFarland* v. *American Sugar Rfg. Co.*, 241 U. S. 79, 86 (1916). The legislature cannot 'validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt.' *Tot* v. *United States*, 319 U. S. 463, 469 (1943)." *Patterson*, 432 U. S., at 210.

Here, of course, the Act creates no presumptions of the sort condemned in *McFarland* v. *American Sugar Rfg. Co.*, 241 U. S. 79 (1916) (presumption from price sugar refiner paid for sugar that refiner was party to a monopoly), or *Tot* v. *United States*, 319 U. S. 463 (1943) (presumption that convicted felon who possessed a weapon obtained it in interstate commerce). Nor does it relieve the prosecution of its burden of proving guilt; § 9712 only becomes applicable after a defendant has been duly convicted of the crime for which he is to be punished.

The Court in *Mullaney* observed, with respect to the main criminal statute invalidated in that case, that once the State proved the elements which Maine required it to prove beyond a reasonable doubt the defendant faced "a differential in sentencing ranging from a nominal fine to a mandatory life sentence." 421 U. S., at 700. In the present case the situation is quite different. Of the offenses enumerated in the Act, third-degree murder, robbery as defined in 18 Pa. Cons. Stat. § 3701(a)(1) (1982), kidnaping, rape, and involuntary deviate sexual intercourse are first-degree felonies subjecting the defendant to a maximum of 20 years' imprisonment. § 1103(1). Voluntary manslaughter and aggravated assault as defined in § 2702(a)(1) are felonies of the second degree carrying a maximum sentence of 10 years. § 1103(2). Section 9712 neither alters the maximum penalty for the crime

committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. Section 9712 "ups the ante" for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan.[4] The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense. Petitioners' claim that visible possession under the Pennsylvania statute is "really" an element of the offenses for which they are being punished—that Pennsylvania has in effect defined a new set of upgraded felonies—would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment, cf. 18 U. S. C. § 2113(d) (providing separate and greater punishment for bank robberies accomplished through "use of a dangerous weapon or device"), but it does not.

Petitioners contend that this Court's decision in *Specht* v. *Patterson*, 386 U. S. 605 (1967), requires the invalidation of the Pennsylvania statute challenged here. Again, we think petitioners simply read too much into one of our previous decisions. Under the Colorado scheme at issue in *Specht*, conviction of a sexual offense otherwise carrying a maximum penalty of 10 years exposed a defendant to an indefinite term to and including life imprisonment if the sentencing judge made a post-trial finding that the defendant posed "a threat of bodily harm to members of the public, or is an habitual offender and mentally ill," *id.*, at 607. This finding could be made, without notice or any "hearing in the normal sense,"

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[4] By prescribing a mandatory minimum sentence, the Act incidentally serves to restrict the sentencing court's discretion in setting a maximum sentence. Pennsylvania law provides that a minimum sentence of confinement "shall not exceed one-half of the maximum sentence imposed." 42 Pa. Cons. Stat. § 9756(b) (1982). Thus, the shortest maximum term permissible under the Act is 10 years.

based solely on a presentence psychiatric report. *Id.*, at 608. This Court held that the Colorado scheme failed to satisfy the requirements of due process, and that the defendant had a right to be present with counsel, to be heard, to be confronted with and to cross-examine the witnesses against him, and to offer evidence of his own.

Petitioners suggest that had *Winship* already been decided at the time of *Specht*, the Court would have also required that the burden of proof as to the post-trial findings be beyond a reasonable doubt. But even if we accept petitioners' hypothesis, we do not think it avails them here. The Court in *Specht* observed that following trial the Colorado defendant was confronted with "a radically different situation" from the usual sentencing proceeding. The same simply is not true under the Pennsylvania statute. The finding of visible possession of a firearm of course "ups the ante" for a defendant, or it would not be challenged here; but it does so only in the way that we have previously mentioned, by raising the minimum sentence that may be imposed by the trial court.

Finally, we note that the specter raised by petitioners of States restructuring existing crimes in order to "evade" the commands of *Winship* just does not appear in this case.[5] As noted above, § 9712's enumerated felonies retain the same elements they had before the Mandatory Minimum Sentencing Act was passed. The Pennsylvania Legislature did not change the definition of any existing offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony—and dictated the precise weight

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[5] We reject the view that anything in the Due Process Clause bars States from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions. "From the vantage point of the Constitution, a change in law favorable to defendants is not necessarily good, nor is an innovation favorable to the prosecution necessarily bad." Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1361 (1979).

to be given that factor if the instrumentality is a firearm. Pennsylvania's decision to do so has not transformed against its will a sentencing factor into an "element" of some hypothetical "offense."

Petitioners seek support for their due process claim by observing that many legislatures have made possession of a weapon an element of various aggravated offenses.[6] But the fact that the States have formulated different statutory schemes to punish armed felons is merely a reflection of our federal system, which demands "[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement," *Spencer* v. *Texas*, 385 U. S. 554, 566 (1967). That Pennsylvania's particular approach has been adopted in few other States does not render Pennsylvania's choice unconstitutional.[7] See *Patterson*, 432 U. S., at 211; cf. *Spaziano* v. *Florida*, 468 U. S. 447, 464 (1984). Nor does the historical test advanced by the *Patterson* dissent, on which petitioners apparently also rely, materially advance their cause. While it is surely true that "[f]or hundreds of years some offenses have been considered more serious and the punishment made more severe if the offense was committed with a weapon or while armed," Brief for Petitioners 17, n. 11, petitioners do not contend that the particular factor made relevant here—visible possession of a firearm—has historically been treated "in the Anglo-American legal tradition" as requiring proof beyond a reasonable doubt, *Patterson*, 432 U. S., at 226 (POWELL, J., dissenting). See also *id.*, at 229,

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[6] The Commonwealth argues that the statutes on which petitioners rely typically differ from that at issue here. In particular, most of the statutes are directed at all deadly weapons rather than just firearms, and most treat the armed crime as a higher grade of offense than the unarmed crime. Brief for Respondent 11.

[7] At least two States—New Jersey, see N. J. Stat. Ann. § 2C:43-6c (West 1982); *State* v. *Gantt*, 186 N. J. Super. 262, 452 A. 2d 477 (1982), aff'd, 195 N. J. Super. 144, 478 A. 2d 422 (App. Div. 1984), and Kansas, see Kan. Stat. Ann. § 21-4618 (1981); *State* v. *Mullins*, 223 Kan. 798, 577 P. 2d 51 (1978)—have statutory schemes similar to Pennsylvania's.

n. 14 (POWELL, J., dissenting) (approving new scheme under which State put burden on armed robbery defendant to prove that gun was unloaded or inoperative in order to receive lower sentence).

We have noted a number of differences between this case and *Winship*, *Mullaney*, and *Specht*, and we find these differences controlling here. Our inability to lay down any "bright line" test may leave the constitutionality of statutes more like those in *Mullaney* and *Specht* than is the Pennsylvania statute to depend on differences of degree, but the law is full of situations in which differences of degree produce different results. We have no doubt that Pennsylvania's Mandatory Minimum Sentencing Act falls on the permissible side of the constitutional line.

III

Having concluded that States may treat "visible possession of a firearm" as a sentencing consideration rather than an element of a particular offense, we now turn to petitioners' subsidiary claim that due process nonetheless requires that visible possession be proved by at least clear and convincing evidence. Like the court below, we have little difficulty concluding that in this case the preponderance standard satisfies due process. Indeed, it would be extraordinary if the Due Process Clause as understood in *Patterson* plainly sanctioned Pennsylvania's scheme, while the same Clause explained in some other line of less clearly relevant cases imposed more stringent requirements. There is, after all, only one Due Process Clause in the Fourteenth Amendment. Furthermore, petitioners do not and could not claim that a sentencing court may never rely on a particular fact in passing sentence without finding that fact by "clear and convincing evidence." Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. See *Williams* v. *New York*, 337 U. S. 241 (1949). Pennsylvania has deemed a particular fact relevant and prescribed a

particular burden of proof. We see nothing in Pennsylvania's scheme that would warrant constitutionalizing burdens of proof at sentencing.[8]

Petitioners apparently concede that Pennsylvania's scheme would pass constitutional muster if only it did not remove the sentencing court's discretion, *i. e.*, if the legislature had simply directed the court to *consider* visible possession in passing sentence. Brief for Petitioners 31–32. We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance. Nor is there merit to the claim that a heightened burden of proof is required because visible possession is a fact "concerning the crime committed" rather than the background or character of the defendant. *Ibid.* Sentencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, *e. g.*, *Proffitt* v. *Florida*, 428 U. S. 242 (1976), without suggesting that those facts must be proved beyond a reasonable doubt. The Courts of Appeals have uniformly rejected due process challenges to the preponderance standard under the federal "dangerous special offender" statute, 18

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[8] *Addington* v. *Texas*, 441 U. S. 418 (1979), and *Santosky* v. *Kramer*, 455 U. S. 745 (1982), which respectively applied the "clear and convincing evidence" standard where the State sought involuntary commitment to a mental institution and involuntary termination of parental rights, are not to the contrary. Quite unlike the situation in those cases, criminal sentencing takes place only after a defendant has been adjudged guilty beyond a reasonable doubt. Once the reasonable-doubt standard has been applied to obtain a valid conviction, "the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him." *Meachum* v. *Fano*, 427 U. S. 215, 224 (1976). As noted in text, sentencing courts have always operated without constitutionally imposed burdens of proof; embracing petitioners' suggestion that we apply the clear-and-convincing standard here would significantly alter criminal sentencing, for we see no way to distinguish the visible possession finding at issue here from a host of other express or implied findings sentencing judges typically make on the way to passing sentence.

U. S. C. § 3575, which provides for an enhanced sentence if the court concludes that the defendant is both "dangerous" and a "special offender." See *United States* v. *Davis*, 710 F. 2d 104, 106 (CA3) (collecting cases), cert. denied, 464 U. S. 1001 (1983).

IV

In light of the foregoing, petitioners' final claim—that the Act denies them their Sixth Amendment right to a trial by jury—merits little discussion. Petitioners again argue that the jury must determine all ultimate facts concerning the offense committed. Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact. See *Spaziano* v. *Florida*, 468 U. S., at 459.

For the foregoing reasons, the judgment of the Supreme Court of Pennsylvania is affirmed.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

I agree with much in JUSTICE STEVENS' dissent, *post*, at 96–98. Whether a particular fact is an element of a criminal offense that, under *In re Winship*, 397 U. S. 358 (1970), must be proved by the prosecution beyond a reasonable doubt is a question that must be decided by this Court and cannot be abdicated to the States. "[I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law." *Mullaney* v. *Wilbur*, 421 U. S. 684, 698 (1975). The deference that the majority gives to the Pennsylvania Legislature's statement that the visible possession of a firearm should not be considered an element of the crime defined by 42 Pa. Cons. Stat. § 9712 (1982) is thus wholly inappropriate.

I would not, however, rely in this case on the formalistic distinction between aggravating and mitigating facts. The "continued functioning of the democratic process," *post*, at 100 (STEVENS, J., dissenting), might provide us with some assurance that States will not circumvent the guarantee of *Winship* by criminalizing seemingly innocuous conduct and then placing the burden on the defendant to establish an affirmative defense. But this Court nonetheless must remain ready to enforce that guarantee should the State, by placing upon the defendant the burden of proving certain mitigating facts, effectively lighten the constitutional burden of the prosecution with respect to the elements of the crime. See *Patterson* v. *New York*, 432 U. S. 197, 206–207 (1977) (allowing State to require defendant to prove extreme emotional disturbance by preponderance of the evidence but noting that this affirmative defense "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder").

I would put off until next Term any discussion of how mitigating facts should be analyzed under *Winship*. This issue will be aired when the Court considers *Martin* v. *Ohio*, No. 85–6461, cert. granted, 475 U. S. 1040 (1986), in which a defendant challenges Ohio's requirement that the accused bear the burden of proving a claim of self-defense by a preponderance of the evidence. For now, it is enough to agree with JUSTICE STEVENS that "if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*," *post*, at 103. Pennsylvania has attached just such consequences to a finding that a defendant "visibly possessed a firearm" during the commission of any aggravated assault, and, under *Winship*, the prosecution should not be relieved of proving that fact beyond a reasonable doubt. I dissent.

JUSTICE STEVENS, dissenting.

Petitioner Dennison, a 73-year-old man, committed an aggravated assault upon a neighborhood youth whom he suspected of stealing money from his house. After a trial at which the Commonwealth proved the elements of the offense of aggravated assault beyond a reasonable doubt, the trial judge imposed a sentence of imprisonment of 11½ to 23 months. Because he had concluded that Pennsylvania's recently enacted Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982), was unconstitutional, the trial judge refused to impose the 5-year minimum sentence mandated by that Act whenever the Commonwealth proves—by a preponderance of the evidence—that the defendant "visibly possessed a firearm during the commission of the offense," § 9712(b).

The judge presiding over Dennison's trial, as well as the judges in the other three petitioners' trials and the Superior Court Judges hearing the appeals, all concluded that visible possession of a firearm was an element of the offense. "'Visibly possessed a firearm' is inarguably language which refers to behavior which the legislature intended to prohibit." App. to Pet. for Cert. A35. As a consequence, the prohibited conduct had to be established by proof beyond a reasonable doubt. The Pennsylvania Supreme Court agreed that visible possession of a firearm is conduct that the Pennsylvania General Assembly intended to prohibit, *Commonwealth* v. *Wright*, 508 Pa. 25, 42, 494 A. 2d 354, 363 (1985) (Larsen, J., concurring); *id.*, at 49, 494 A. 2d, at 366 (concurring opinion joined by the majority opinion), and it recognized that evidence of such conduct would mandate a *minimum* sentence of imprisonment more than twice as severe as the *maximum* the trial judge would otherwise have imposed on petitioner Dennison, *id.*, at 29, n. 1, 494 A. 2d, at 356, n. 1. But it nonetheless held that visible possession of a firearm was not an element of the offense because the Pennsylvania

General Assembly had the foresight to declare in § 9712(b) that "Provisions of this section shall not be an element of the crime."

It is common ground that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson* v. *New York*, 432 U. S. 197, 210 (1977). Today the Court holds that state legislatures may not only define the offense with which a criminal defendant is charged, but may also authoritatively determine that the conduct so described—*i. e.*, the prohibited activity which subjects the defendant to criminal sanctions—is *not* an element of the crime which the Due Process Clause requires to be proved by the prosecution beyond a reasonable doubt. In my view, a state legislature may not dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for severe criminal penalties. Because the Pennsylvania statute challenged in this case describes conduct that the Pennsylvania Legislature obviously intended to prohibit, and because it mandates lengthy incarceration for the same, I believe that the conduct so described is an element of the criminal offense to which the proof beyond a reasonable doubt requirement applies.

Once a State defines a criminal offense, the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt. This much has been evident at least since *In re Winship*, 397 U. S. 358 (1970). In that case, the Court "explicitly" held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364. In reasoning to this conclusion the Court reviewed the heritage of the rule that Justice Frankfurter characterized as "basic in our law and rightly one of the boasts of

a free society,"[1] and—of critical importance to the decision before us—explained the reasons that undergird the rule:

> "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' *Coffin* v. *United States*, [156 U. S. 432,] 453 [1895]. As the dissenters in the New York Court of Appeals observed, and we agree, 'a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.' 24 N. Y. 2d [196], 205, 247 N. E. 2d [253], 259 [1969].
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> "The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *Id.*, at 363–364.

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[1] *Leland* v. *Oregon*, 343 U. S. 790, 803 (1952) (Frankfurter, J., dissenting). Later in his opinion he noted that the "duty of the State of establishing every fact of the equation which adds up to a crime, and of establishing it to the satisfaction of a jury beyond a reasonable doubt is the decisive difference between criminal culpability and civil liability." *Id.*, at 805.

In re Winship thus took a purposive approach to the constitutional standard of proof: when the State threatens to stigmatize or incarcerate an individual for engaging in prohibited conduct, it may do so only if it proves the elements of the prohibited transaction beyond a reasonable doubt.[2]

It is true, as the Court points out, that "'[t]he applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case.'" See *ante*, at 85 (quoting *Patterson* v. *New York*, 432 U. S., at 211, n. 12). A State's freedom in this regard, however, has always been understood to reflect the uncontroversial proposition that a State has power, subject of course to constitutional limits, to attach criminal penalties to a wide variety of objectionable transactions; when it does so, the prosecution need establish beyond a reasonable doubt only the constituent elements of the specified criminal transaction. Nothing in *Patterson* or any of its predecessors authorizes a State to decide for itself which of the ingredients of the prohibited transaction are "elements" that it must prove beyond a reasonable doubt at trial.

Indeed, contrary to the supposition of the majority, *Patterson* v. *New York* is entirely in keeping with the limit on state definitional power implied in *Winship*. Patterson was charged with second-degree murder, a crime which in New York included two elements: "'intent to cause the death of another person'" and "'caus[ing] the death of such person or of a third person.'" 432 U. S., at 198 (quoting N. Y. Penal Law § 125.25 (McKinney 1975)). "Malice aforethought [was] not an element of the crime." 432 U. S., at 198. Because

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[2] "The combination of stigma and loss of liberty involved in a conditional or absolute sentence of imprisonment sets that sanction apart from anything else the law imposes." Packer, *Mens Rea* and the Supreme Court, 1962 S. Ct. Rev. 107, 150. The requirement that conduct subjecting an individual to a special stigma and a special punishment be proved beyond a reasonable doubt therefore casts no doubt on the constitutionality of criminal restitution ordered on a lesser standard of proof.

"causing the death of another person with intent to do so," *id.*, at 205, was "an act which . . . the State may constitutionally criminalize and punish," *id.*, at 209; accord, *id.*, at 208, and because New York in fact proscribed and punished that conduct, *id.*, at 206, the Court upheld the State's refusal to "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it [was] willing to recognize as an *exculpatory or mitigating circumstance* affecting the degree of culpability or the severity of the punishment," *id.*, at 207 (emphasis added)—in that case, the affirmative defense of extreme emotional disturbance. The Court explained that "the Due Process Clause did not invalidate every instance of burdening the defendant with proving *an exculpatory fact.*" *Id.*, at 203, n. 9 (emphasis added). "To recognize at all a *mitigating circumstance* does not require the State to prove its nonexistence in each case in which the fact is put in issue." *Id.*, at 209 (emphasis added). *Patterson* thus clarified that the Due Process Clause requires proof beyond a reasonable doubt of conduct which exposes a criminal defendent to greater stigma or punishment, but does not likewise constrain state reductions of criminal penalties—even if such reductions are conditioned on a prosecutor's failure to prove a fact by a preponderance of the evidence or on proof supplied by the criminal defendant.[3]

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[3] The *Patterson* Court also recognized other "constitutional limits beyond which the States may not go in this regard," 432 U. S., at 210, citing *Tot* v. *United States*, 319 U. S. 463, 469 (1943), and other cases invalidating statutory presumptions. It was on the basis of these cases that *Patterson* distinguished the Maine statute struck down in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975). The Maine murder statute prescribed life imprisonment for "Whoever unlawfully kills a human being *with malice aforethought*," Me. Rev. Stat. Ann., Tit. 17, § 2651 (1964) (emphasis added), and the trial judge had charged the jury that "'malice aforethought is an essential and indispensable element of the crime of murder,'" 421 U. S., at 686 (quoting App. in No. 74-13, O. T. 1974, p. 40). Likewise, the Government conceded that the federal enactment in *Tot* proscribed only receipt of firearms in interstate commerce. See *Tot* v. *United States*, 319 U. S., at

The distinction between aggravating and mitigating facts has been criticized as formalistic. But its ability to identify genuine constitutional threats depends on nothing more than the continued functioning of the democratic process. To appreciate the difference between aggravating and mitigating circumstances, it is important to remember that although States may reach the same destination either by criminalizing conduct and allowing an affirmative defense, or by prohibiting lesser conduct and enhancing the penalty, legislation proceeding along these two paths is very different even if it might theoretically achieve the same result. Consider, for example, a statute making presence "in any private or public place" a "felony punishable by up to five years imprisonment" and yet allowing "an affirmative defense for the defendant to prove, to a preponderance of the evidence, that he was not robbing a bank." Dutile, The Burden of Proof in Crimi-

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466. *Patterson* clarified that *Mullaney*, like *Tot*, stood for the proposition that "shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or *presumed* is impermissible under the Due Process Clause." 432 U. S., at 215 (emphasis added). Cf. *United States* v. *Romano*, 382 U. S. 136, 138, 144 (1965). Thus, although Maine could have punished all unlawful, intentional killings with life imprisonment, just as Congress in *Tot* could have punished possession of a firearm by one convicted of a crime of violence, in neither case did the legislature do so. This explanation, although not entirely satisfactory, see *State* v. *Lafferty*, 309 A. 2d 647, 664–665 (Me. 1973); *id.*, at 672–673 (Wernick, J., concurring), is consistent with the Maine Supreme Court's explanation on direct appeal that state law presumed malice. See *State* v. *Wilbur*, 278 A. 2d 139, 145–146 (Me. 1971). The state court downplayed this presumption because "no burden is imposed upon defendant until the State has first convinced the jury beyond a reasonable doubt that defendant is guilty of a voluntary and intentional homicide," at which point the issue "is no longer guilt or innocence of felonious homicide but rather the degree of the homicide." *Id.*, at 146. As we held in *Mullaney*, "[t]he safeguards of due process are not rendered unavailable simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." 421 U. S., at 698. Accord, *Specht* v. *Patterson*, 386 U. S. 605, 608–611 (1967).

nal Cases: A Comment on the *Mullaney-Patterson* Doctrine, 55 Notre Dame Law. 380, 383 (1980). No democratically elected legislature would enact such a law, and if it did, a broad-based coalition of bankers and bank customers would soon see the legislation repealed.[4] Nor is there a serious danger that a State will soon define murder to be the "mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable *mens rea*." *Patterson* v. *New York*, 432 U. S., at 224, n. 8 (POWELL, J., dissenting). No legislator would be willing to expose himself to the severe opprobrium and punishment meted out to murderers for an accidental stumble on the subway. For similar reasons, it can safely be assumed that a State will not "define all assaults as a single offense and then require the defendant to disprove the elements of aggravation." *Mullaney* v. *Wilbur*, 421 U. S. 684, 699,

[4] Cf. Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L. J. 165, 178 (1969) ("In the first statute, a legislature has deemed three factors germane to punishment: (a) presence of the individual; (b) the presence of narcotics in the house; and (c) the defendant's knowledge. In the second statute, only two factors are deemed germane to whether an individual will be punished: (a) presence of the individual; (b) the presence of narcotics in the house. The electorate might approve of the passage of the first statute, but not the passage of the second. The fact that a legislature might pass the second statute does not mean that, given the political temperament of the state, the legislature would in fact have passed it. If the legislature nominally recognizes knowledge as germane (as it did in the first statute) and further, as the type of germane issue to be proved by the state, and then arranges its process so that most of those who lack knowledge are still sent to jail (as though the second statute had been passed), then those individuals are being punished for a crime which has never undergone the political checks guaranteed by representative government"); Note, The Constitutionality of Affirmative Defenses after *Patterson v. New York*, 78 Colum. L. Rev. 655, 667 (1978) ("[A]lthough a state legislature might have decided to define an offense without the mitigating or exculpatory factor, there is no reason to suppose it would have done so, or given the political climate of the state, could have done so").

n. 24 (1975). The very inconceivability of the hypothesized legislation—all of which has been sincerely offered to illustrate the dangers of permitting legislative mitigation of punishment in derogation of the requirement of proof beyond a reasonable doubt—is reason enough to feel secure that it will not command a majority of the electorate.[5]

It is not at all inconceivable, however, to fear that a State might subject those individuals convicted of engaging in antisocial conduct to further punishment for aggravating conduct not proved beyond a reasonable doubt. As this case demonstrates, a State may seek to enhance the deterrent effect of its law forbidding the use of firearms in the course of felonies by mandating a minimum sentence of imprisonment upon proof by a preponderance against those already convicted of specified crimes. But *In re Winship* and *Patterson* teach that a State may not advance the objectives of its criminal laws at the expense of the accurate factfinding owed to the criminally accused who suffer the risk of nonpersuasion.

It would demean the importance of the reasonable-doubt standard—indeed, it would demean the Constitution itself—if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct is not an "element" of a crime. A legislative definition of an offense named "assault" could be broad enough to encompass every intentional infliction of harm by one person upon another, but surely the legislature could not provide that only that fact must be proved beyond a reasonable doubt and then specify a range of increased punishments if the prosecution could show by a preponderance of the evidence that the defendant robbed, raped, or killed his victim "during the commission of the offense."

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[5] See J. Ely, Democracy and Distrust 183 (1980) ("constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can"). See also *id.*, at 182–183.

Appropriate respect for the rule of *In re Winship* requires that there be some constitutional limits on the power of a State to define the elements of criminal offenses. The high standard of proof is required because of the immense importance of the individual interest in avoiding both the loss of liberty and the stigma that results from a criminal conviction. It follows, I submit, that if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a "fact necessary to constitute the crime" within the meaning of our holding in *In re Winship*.

Pennsylvania's Mandatory Minimum Sentencing Act reflects a legislative determination that a defendant who "visibly possessed a firearm" during the commission of an aggravated assault is more blameworthy than a defendant who did not. A judicial finding that the defendant used a firearm in an aggravated assault places a greater stigma on the defendant's name than a simple finding that he committed an aggravated assault. And not to be overlooked, such a finding with respect to petitioner Dennison automatically mandates a punishment that is more than twice as severe as the *maximum* punishment that the trial judge considered appropriate for his conduct.

It is true, as the Court points out, that the enhanced punishment is within the range that was authorized for any aggravated assault. That fact does not, however, minimize the significance of a finding of visible possession of a firearm whether attention is focused on the stigmatizing or punitive consequences of that finding. See *Mullaney* v. *Wilbur*, 421 U. S., at 697–698.[6] The finding identifies conduct that the legislature specifically intended to prohibit and to punish by a

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[6] It is likewise irrelevant that petitioners had first been convicted of predicate felonies. "Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." *Jackson* v. *Virginia*, 443 U. S. 307, 323–324 (1979). See n. 3, *supra*.

special sanction. In my opinion the constitutional significance of the special sanction cannot be avoided by the cavalier observation that it merely "ups the ante" for the defendant. See *ante*, at 88, 89. No matter how culpable petitioner Dennison may be, the difference between 11½ months and 5 years of incarceration merits a more principled justification than the luck of the draw.

I respectfully dissent.

UNITED STATES v. AMERICAN BAR ENDOWMENT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 85-599. Argued April 28, 1986—Decided June 23, 1986

Respondent American Bar Endowment (ABE), a tax-exempt organization, raises money for its charitable work by providing group life, health, accident, and disability insurance policies, underwritten by insurance companies, to its members. Because the members have favorable mortality and morbidity rates, experience-rating results in substantially lower insurance costs than if the insurance were purchased individually. Since the insurance companies' costs of providing insurance to the group are uniformly lower than the annual premiums paid, the companies pay refunds of the excess ("dividends") to ABE that are used for its charitable purposes. Critical to ABE's fundraising efforts is the fact that it requires its members to assign it all dividends as a condition for participating in the insurance program. ABE advises its insured members that each member's share of the dividends, less ABE's administrative costs, constitutes a tax-deductible contribution. In 1980, the Internal Revenue Service (IRS) advised ABE that it considered ABE's insurance plan an "unrelated trade or business" and that hence the profits thereon were subject to income tax under §§ 511–513 of the Internal Revenue Code. Accordingly, the IRS assessed a tax deficiency on ABE's net revenues from the insurance program for 1979 and 1980. ABE paid these taxes, as well as taxes on its 1981 revenues, and, after exhausting administrative remedies, brought an action for a refund in the Claims Court as did the individual respondent ABE members who claimed that they were entitled to charitable deductions for part of the insurance premiums they paid. The suits were consolidated, and the Claims Court entered judgment for ABE but found for the Government on the individual respondents' claims. The Court of Appeals affirmed as to ABE's taxes but reversed as to the individual respondents and remanded for further factfinding.

Held:

1. ABE's insurance program, as constituting both "the sale of goods" and "the performance of services," is a "trade or business" for purposes of the unrelated business income tax. This case presents an example of precisely the sort of unfair competition between tax-exempt organizations and taxable businesses that Congress intended to prevent by pro-

viding for the unrelated business income tax. The undisputed facts do not support the inference that the dividends ABE receives are charitable contributions from its members rather than profits from its insurance program. Pp. 109–116.

2. The individual respondent taxpayers have not established that any portion of their premium payments to ABA constitutes a charitable contribution. To be entitled to a deduction for a charitable contribution where he has made a payment having the "dual character" of a purchase and a contribution, a taxpayer must at a minimum demonstrate that he purposely contributed money or property in excess of the value of any benefit he received in return. Here, the most logical test of the value of the insurance policies the individual respondents received is the cost of similar policies. None of these respondents have demonstrated that they could have purchased similar policies for a lower cost. Pp. 116–118.

761 F. 2d 1573, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 119. POWELL and O'CONNOR, JJ., took no part in the consideration or decision of the case.

Albert G. Lauber, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Acting Assistant Attorney General Olsen, Gary R. Allen*, and *Robert S. Pomerance*.

Francis M. Gregory, Jr., argued the cause for respondents. With him on the brief were *Randolph W. Thrower, Mac Asbill, Jr.*, and *Sheila J. Carpenter*.*

JUSTICE MARSHALL delivered the opinion of the Court.

The first issue in this case is whether income that a tax-exempt charitable organization derives from offering group insurance to its members constitutes "unrelated business income" subject to tax under §§ 511 through 513 of the Internal Revenue Code (Code), 26 U. S. C. §§ 511–513. The second issue is whether the organization's members may claim a charitable deduction for the portion of their premium pay-

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**Thomas F. Olson* and *Carl G. Borden* filed a brief for the California Farm Bureau Federation as *amicus curiae* urging affirmance.

ments that exceeds the actual cost to the organization of providing insurance.

I

Respondent American Bar Endowment (ABE) is a corporation exempt from taxation under § 501(c)(3) of the Code, which, with certain exceptions not relevant here, exempts organizations "organized and operated exclusively for . . . charitable . . . or educational purposes." ABE's primary purposes are to advance legal research and to promote the administration of justice, and it furthers these goals primarily through the distribution of grants to other charitable and educational groups. All members of the American Bar Association (ABA) are automatically members of ABE. The ABA is exempt from taxation as a "business league" under § 501(c)(6).

ABE raises money for its charitable work by providing group insurance policies, underwritten by major insurance companies, to its members. Approximately 20% of ABE's members participate in the group insurance program, which offers life, health, accident, and disability policies. ABE negotiates premium rates with insurers and chooses which insurers shall provide the policies. It also compiles a list of its own members and solicits them, collects the premiums paid by its members, transmits those premiums to the insurer, maintains files on each policyholder, answers members' questions concerning insurance policies, and screens claims for benefits.

There are two important benefits of purchasing insurance as a group rather than individually. The first is that ABE's size gives it bargaining power that individuals lack. The second is that the group policy is experience-rated. This means that the cost of insurance to the group is based on that group's claims experience, rather than general actuarial tables. Because ABA members have favorable mortality and morbidity rates, experience-rating results in a substantially lower insurance cost. When ABE purchases a group policy

for its members, it pays a negotiated premium to the insurance company. If, as is uniformly true, the insurance company's actual cost of providing insurance to the group is lower than the premium paid in a given year, the insurance company pays a refund of the excess, called a "dividend," to ABE. Critical to ABE's fundraising efforts is the fact that ABE requires its members to agree, as a condition of participating in the group insurance program, that they will permit ABE to keep all of the dividends rather than distributing them pro rata to the insured members.

It would be possible for ABE to negotiate lower premium rates for its members than the rates it has charged throughout the relevant period, and thus receive a lower dividend. However, ABE prices its policies competitively with other insurance policies offered to the public and to ABE members. 761 F. 2d 1573, 1575 (CAFC 1985). In this way ABE is able to generate large dividends to be used for its charitable purposes. In recent years the total amount of dividends has exceeded 40% of the members' premium payments. *Ibid.* ABE advises its insured members that each member's share of the dividends, less ABE's administrative costs, constitutes a tax-deductible contribution from the member to ABE. Thus the after-tax cost of ABE's insurance to its members is less than the cost of a commercial policy with identical coverage and premium rates.

In 1980 the Internal Revenue Service (IRS) advised ABE that it considered ABE's insurance plan an "unrelated trade or business" and that the profits thereon were subject to tax under §§ 511–513. Subsequently IRS audited ABE's tax returns for 1979 and 1980 and assessed a tax deficiency on ABE's net revenues from the insurance program. ABE paid those taxes, as well as taxes on the 1981 revenues. After exhausting administrative remedies, it brought an action for a refund in the Claims Court, arguing that its revenues from the insurance program were not subject to tax. At approximately the same time, the individual respondents, who were

participants in the ABE insurance program but who had not originally deducted any part of the insurance premiums as charitable contributions, brought suit for refunds in the Claims Court as well. The individual respondents argued that they were entitled to charitable deductions for a portion of those premium payments. The two suits were consolidated for trial in the Claims Court.

The Claims Court entered judgment for ABE in its suit, finding that ABE's provision of insurance to its members did not constitute a "trade or business" subject to tax. 4 Cl. Ct. 404 (1984). It found for the Government, however, on the individual respondents' claims. The court concluded that a taxpayer may claim a charitable contribution for a portion of a payment for goods or services only when he can show that "he bought goods or services for more than their economic value, with the intention that the excess be used to benefit a charitable enterprise," *id.*, at 415 (citation omitted), and that the individual respondents had not established these facts. The Court of Appeals for the Federal Circuit affirmed as to ABE's taxes. 761 F. 2d, at 1577. As to the individual respondents, however the court reversed and remanded for further factfinding. We granted the Government's petition for certiorari on both issues, 474 U. S. 1004 (1985), and we now reverse.

II

We recently discussed the history and structure of the unrelated business income provisions of the Code in *United States* v. *American College of Physicians*, 475 U. S. 834 (1986). The Code imposes a tax, at ordinary corporate rates, on the income that a tax-exempt organization obtains from an "unrelated trade or business . . . regularly carried on by it." §§ 512(a)(1), 511(a)(1). An "unrelated trade or business" is "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose," § 513(a). The Code thus sets up a three-part test.

ABE's insurance program is taxable if it (1) constitutes a trade or business; (2) is regularly carried on; and (3) is not substantially related to ABE's tax-exempt purposes. Treas. Reg. § 1.513–1(a), 26 CFR § 1.513–1(a) (1985); *American College of Physicians, supra*, at 838–839. ABE concedes that the latter two portions of this test are satisfied. 761 F. 2d, at 1576. Its defense is based solely on the proposition that its insurance program does not constitute a trade or business.

A

In the Tax Reform Act of 1969, Pub. L. 91–172, 83 Stat. 487, Congress defined a "trade or business" as "any activity which is carried on for the production of income from the sale of goods or the performance of services," § 513(c). The Secretary of the Treasury has provided further clarification of that definition in Treas. Reg. § 1.513–1(b) (1985), which provides: "in general, any activity of [an exempt] organization which is carried on for the production of income and which otherwise possesses the characteristics required to constitute 'trade or business' within the meaning of section 162" is a trade or business for purposes of 26 U. S. C. §§ 511–513.[1]

ABE's insurance program falls within the literal language of these definitions. ABE's activity is both "the sale of goods" and "the performance of services," and possesses the

[1] Section 162 permits a taxpayer to deduct "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Undoubtedly due to the desirability of tax deductions, § 162 has spawned a rich and voluminous jurisprudence. The standard test for the existence of a trade or business for purposes of § 162 is whether the activity "was entered into with the dominant hope and intent of realizing a profit." *Brannen* v. *Commissioner*, 722 F. 2d 695, 704 (CA11 1984) (citation omitted). Thus several Courts of Appeals have adopted the "profit motive" test to determine whether an activity constitutes a trade or business for purposes of the unrelated business income tax. See *Professional Insurance Agents of Michigan* v. *Commissioner*, 726 F. 2d 1097 (CA6 1984); *Carolinas Farm & Power Equipment Dealers* v. *United States*, 699 F. 2d 167 (CA4 1983); *Louisiana Credit Union League* v. *United States*, 693 F. 2d 525 (CA5 1982).

general characteristics of a trade or business. Certainly the assembling of a group of better-than-average insurance risks, negotiating on their behalf with insurance companies, and administering a group policy are activities that can be—and are—provided by private commercial entities in order to make a profit. ABE itself earns considerable income from its program. Nevertheless, the Claims Court and Court of Appeals concluded that ABE does not carry out its insurance program in order to make a profit. The Claims Court relied on the former Court of Claims holding, in *Disabled American Veterans* v. *United States*, 650 F. 2d 1178, 1187 (1981), that an activity is a trade or business only if "operated in a competitive, commercial manner." See 4 Cl. Ct., at 409. Because ABE does not operate its insurance program in a competitive, commercial manner, the Claims Court decided, that program is not a trade or business. The Court of Appeals adopted this reasoning. 761 F. 2d, at 1577.

The Claims Court rested its conclusion on four factors. First, it found that "the program was devised as a means for fundraising and has been so presented and perceived from its inception." 4 Cl. Ct., at 409. Second, the court found that the program's phenomenal success in generating dividends for ABE was evidence of noncommercial behavior. The court noted that ABE's insurance program has provided $81.9 million in dividends in its 28 years of operation, and concluded that such large profits could not be the result of commercial success, but must proceed from the generosity of ABE's members. Third, and most important, in the court's view, was the fact that ABE's members collectively had the power to change ABE's conduct of the insurance program so as to drastically reduce premiums. That the members had not done so was strong evidence that they sought to further ABE's charitable purposes by paying higher insurance rates than necessary. Fourth, because ABE did not underwrite insurance or act as a broker, it was not competing with other commercial entities.

It appears, then, that the Claims Court viewed ABE as engaging in two separate activities—the provision of insurance and the acceptance of contributions in the form of dividends. If so, the unspoken premise of the Claims Court's decision is that ABE's income is not a result of the first activity, but of the second. There is some sense to this reasoning; should ABE sell a product to its members for more than that product's fair market value, it could argue to the IRS that the members intended to pay excessive prices as a form of contribution, and that some formula should be adopted to separate the income received into taxable profits and nontaxable contributions. Even if we viewed it as appropriate for the federal courts to engage in such a quasi-legislative activity, however, there is no factual basis for the Claims Court's attempt to do so in this case.

B

We cannot agree with the Claims Court that the enormous dividends generated by ABE's insurance program demonstrate that those dividends cannot constitute "profits." Were ABE's insurance markedly more expensive than other insurance products available to its members, but ABE nevertheless kept the patronage of those members, we might plausibly conclude that generosity was the reason for the program's success. The Claims Court did not find, however, that this was the case. ABE prices its insurance to remain competitive with the rest of the market. *Id.*, at 406. Thus ABE's members never squarely face the decision whether to support ABE or to reduce their own insurance costs.

The Claims Court concluded that "such profit margins [as ABE's] cannot be maintained year after year in a competitive market." *Id.*, at 410. The court apparently reasoned that ABE's staggering success would inevitably induce other firms to offer similar programs to ABA members unless that success is the result of charitable intentions rather than price-sensitive purchasing decisions. It is possible, of

course, that ABE's members genuinely intend to support ABE by paying higher premiums than necessary, and would pay those high premiums even if a competing group insurance plan offered very low premiums. But that is by no means the only possible explanation for the market's failure to provide competition for ABE.[2] Lacking a factual basis for concluding that generosity is at the core of ABE's success, we can easily view this case as a standard example of monopoly pricing. ABE has a unique asset—its access to the ABA's members and their highly favorable mortality and morbidity rates—and it has chosen to appropriate for itself all of the profit possible from that asset, rather than sharing any with its members.

The argument that ABE's members could change the insurance program and receive the bulk of the dividends themselves if they so desired is unconvincing. Were ABE to give each member a choice between retaining his pro-rata share of dividends or assigning them to ABE, the organization would have a strong argument that those dividends constituted a voluntary donation. That, however, is not the case here. ABE requires its members to assign it all dividends as a condition for participating in the insurance program. It is sim-

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[2] One obvious consideration is that ABE's tax-exempt status would make it difficult for private firms to compete, see *infra*, at 114–115. In addition, as the Claims Court recognized, 4 Cl. Ct., at 414, the provision of group insurance coverage to a particular group may have the characteristics of a natural monopoly. The potential savings in insurance costs might decrease rapidly as the group splits into competing components. Finally, if the cost of assembling information about a particular group and maintaining an accurate list of members is high, the provision of group insurance might be economically feasible only if that cost can be shared among a variety of services performed by the group policyholder. In that case preexisting groups like the ABA or a trade association would obviously have a considerable advantage over new entrants. The record here is barren of facts concerning these hypotheses, and we express no opinion as to their accuracy. We present them, however, to demonstrate that it is incorrect to assume, as did the courts below, that ABE's profitability must result from the generosity of its members.

ply incorrect to characterize the assignment of dividends by each member as "voluntary" simply because the members theoretically could band together and attempt to change the policy.

Again, the Claims Court put too much weight on an unsupported assumption. It found that the program was "operated with the approval and consent of the ABA membership," *ibid.*, observing that the program had met with "surprisingly little dissent," *id.*, at 411, even though there were "ample" opportunities for members to change policies with which they disagree, *ibid.* We believe that those facts cannot carry the weight that the Claims Court put on them. Perhaps each member that purchases insurance would, given the option, pay excessive premiums in order to support ABE's charitable purposes; however, that is not the only possible explanation for the members' failure to change the program. Any given member might feel that the potential savings in insurance costs are not sufficient to justify the effort required to mount a challenge to ABE's leadership. Many might not want to "make waves" and upset a program that generates tax-free income for ABE and charitable deductions for their fellow members. The members' theoretical ability to change the program, therefore, is at best inconclusive.

The Claims Court also erred in concluding that ABE's insurance program did not present the potential for unfair competition. The undisputed purpose of the unrelated business income tax was to prevent tax-exempt organizations from competing unfairly with businesses whose earnings were taxed. H. R. Rep. No. 2319, 81st Cong., 2d Sess., 36 (1950); see *United States* v. *American College of Physicians*, 475 U. S., at 838. This case presents an example of precisely the sort of unfair competition that Congress intended to prevent. If ABE's members may deduct part of their premium payments as a charitable contribution, the effective cost of ABE's insurance will be lower than the cost of competing policies that do not offer tax benefits. Similarly, if ABE

may escape taxes on its earnings, it need not be as profitable as its commercial counterparts in order to receive the same return on its investment. Should a commercial company attempt to displace ABE as the group policyholder, therefore, it would be at a decided disadvantage.

The Claims Court failed to find any taxable entities that compete with ABE, and therefore found no danger of unfair competition. It is likely, however, that many of ABE's members belong to other organizations that offer group insurance policies. Employers, trade associations,[3] and financial services companies frequently offer group insurance policies. Presumably those entities are taxed on their profits, and their policyholders may not deduct any part of the premiums paid. Such entities may therefore find it difficult to compete for the business of any ABE members who are otherwise eligible to participate in these group insurance programs.

The only valid argument in ABE's favor, therefore, is that the insurance program is billed as a fundraising effort. That fact, standing alone, cannot be determinative, or any exempt organization could engage in a tax-free business by "giving away" its product in return for a "contribution" equal to the market value of the product. ABE further contends that it must prevail because the Claims Court found that ABE's profits represent contributions rather than business income; ABE argues that we may not upset that finding unless it is

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[3] The unrelated-business-income cases cited in n. 1, *supra*, all concerned group insurance programs offered by trade associations to their members. In each case the Court of Appeals held that those programs constituted a taxable trade or business. The Claims Court distinguished those cases on the grounds that they involved organizations exempt as business leagues under § 501(c)(6) rather than as charities under § 501(c)(3). That distinction, however, is insubstantial. Business leagues engage in fundraising for exempt purposes just as charities do. The taxpayers in those cases could have claimed that the excess dividends constituted tax-exempt membership fees, just as ABE claims that they constitute tax-exempt charitable contributions. Both claims fail for the same reasons.

clearly erroneous. Cf. *Carter* v. *Commissioner*, 645 F. 2d 784, 786 (CA9 1981) (question of profit motive for purposes of § 162 is one of fact). The undisputed facts, however, simply will not support the inference that the dividends ABE receives are charitable contributions from its members rather than profits from its insurance program. Moreover, the Claims Court failed to articulate a legal rule that would permit it to split ABE's activities into the gratuitous provision of a service and the acceptance of voluntary contributions, and we find no such rule in the Code or regulations. Even if we assumed, however, that the court's failure to attach the label "trade or business" to ABE's insurance program constitutes a finding of fact, we would be constrained to hold that finding clearly erroneous.

III

Section 170 of the Code provides that a taxpayer may deduct from taxable income any "charitable contribution," defined as "a contribution or gift to or for the use of" qualifying entities, § 170(c). The individual respondents contend that the excess of their premium payments over the cost to ABE of providing insurance constitutes a contribution or gift to ABE.

Many of the considerations supporting our holding that ABE's earnings from the insurance program are taxable also bear on the question whether ABE's members may deduct part of their premium payments. The evidence demonstrates, and the Claims Court found, that ABE's insurance is no more costly to its members than other policies—group or individual—available to them. Thus, as we have recognized, ABE's members are never faced with the hard choice of supporting a worthwhile charitable endeavor or reducing their own insurance costs.

A payment of money generally cannot constitute a charitable contribution if the contributor expects a substantial benefit in return. S. Rep. No. 1622, 83d Cong., 2d Sess.,

196 (1954); *Singer Co.* v. *United States*, 196 Ct. Cl. 90, 449 F. 2d 413 (1971). However, as the Claims Court recognized, a taxpayer may sometimes receive only a nominal benefit in return for his contribution. Where the size of the payment is clearly out of proportion to the benefit received, it would not serve the purposes of § 170 to deny a deduction altogether. A taxpayer may therefore claim a deduction for the difference between a payment to a charitable organization and the market value of the benefit received in return, on the theory that the payment has the "dual character" of a purchase and a contribution. See, *e. g.*, Rev. Rul. 67–246, 1967–2 Cum. Bull. 104 (price of ticket to charity ball deductible to extent it exceeds market value of admission); Rev. Rul. 68–432, 1968–2 Cum. Bull. 104, 105 (noting possibility that payment to charitable organization may have "dual character").

In Rev. Rul. 67–246, *supra*, the IRS set up a two-part test for determining when part of a "dual payment" is deductible. First, the payment is deductible only if and to the extent it exceeds the market value of the benefit received. Second, the excess payment must be "made with the intention of making a gift." 1967–2 Cum. Bull., at 105. The Tax Court has adopted this test, see *Murphy* v. *Commissioner*, 54 T. C. 249, 254 (1970); *Arceneaux* v. *Commissioner*, 36 TCM 1461, 1464 (1977); but see *Oppewal* v. *Commissioner*, 468 F. 2d 1000, 1002 (CA1 1972) (expressing "dissatisfaction with such subjective tests as the taxpayer's motives in making a purported charitable contribution" and relying solely on differential between amount of payment and value of benefit).

The Claims Court applied that test in this case, and held that respondents Broadfoot, Boynton, and Turner had not established that they could have purchased comparable insurance for less money. Therefore, the court held, they had failed to establish that the value of ABE's insurance to them was less than the premiums paid. 4 Cl. Ct., at 415–417. Respondent Sherwood demonstrated that there did exist a

group insurance program for which he was eligible and which offered lower premiums than ABE's insurance. However, Sherwood failed to establish that he was aware of that competing program during the years at issue. Sherwood therefore had failed to demonstrate that he met the second part of the above test—that he had intentionally paid more than the market value for ABE's insurance because he wished to make a gift.

The Court of Appeals, in reversing, held that the Claims Court had focused excessively on the taxpayers' motivation. In the Court of Appeals' view, the necessary inquiry was whether "the transaction was . . . of a business and not a charitable nature," considering all of the circumstances. 761 F. 2d, at 1582. The Court of Appeals therefore remanded for redetermination under that standard.

We hold that the Claims Court applied the proper standard. The *sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration. The taxpayer, therefore, must at a minimum demonstrate that he purposely contributed money or property in excess of the value of any benefit he received in return. The most logical test of the value of the insurance respondents received is the cost of similar policies. Three of the four individual respondents failed to demonstrate that they could have purchased similar policies for a lower cost, and we must therefore assume that the value of ABE's insurance to those taxpayers at least equals their premium payments. Had respondent Sherwood known that he could purchase comparable insurance for less money, ABE's insurance would necessarily have declined in value to him. Because Sherwood did not have that knowledge, however, we again must assume that he valued ABE's insurance equivalently to those competing policies of which he was aware. Because those policies cost as much as or more than ABE's, Sherwood has failed to demonstrate that he intentionally gave away more than he received.

IV

We hold that ABE's insurance program is a "trade or business" for purposes of the unrelated business income tax. We further hold that the individual taxpayers have not established that any portion of their premium payments to ABE constitutes a charitable contribution. Accordingly, we reverse the judgment of the Court of Appeals and remand to that court with instructions to reverse the judgment of the Claims Court with respect to ABE and to affirm the judgment of the Claims Court with respect to the individual taxpayers.

It is so ordered.

JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE STEVENS, dissenting.

The charitable work of the American Bar Endowment is funded, in large part, through a procedure in which the Endowment provides insurance policies for participating American Bar Association members, and the members assign the dividends to the ABE. The primary question presented is whether that assignment of dividends is taxable as an unrelated "trade or business."

"The problem at which the tax on unrelated business income is directed . . . is primarily that of unfair competition."[1] The unrelated business tax was adopted in 1950,

[1] H. R. Rep. No. 2319, 81st Cong., 2d Sess., 36 (1950). See also *United States* v. *American College of Physicians*, 475 U. S. 834, 838 (1986) ("Congress perceived a need to restrain the unfair competition fostered by the tax laws"); *ante*, at 114 ("The undisputed purpose of the unrelated business income tax was to prevent tax-exempt organizations from competing unfairly with businesses whose earnings were taxed"); Treas. Reg. § 1.513–1(b), 26 CFR § 1.513–1(b) (1985) (Congress enacted the unrelated business tax "to eliminate a source of unfair competition by placing the unrelated business activities of certain exempt organizations upon the same tax basis as the nonexempt business endeavors with which they compete").

and substantially revised in 1969. It is useful to recall the kind of situation that gave rise to the unrelated business tax. Perhaps the best known case involved the C. F. Mueller Company. The Mueller Company was a longstanding macaroni concern. It was acquired and operated for the benefit of the New York University School of Law, and its profits were donated to the University. The Internal Revenue Service claimed that the macaroni company's profits should be taxable, like any other competitive macaroni company, to avoid giving this competitor an unfair advantage. Although longstanding precedent seemed to be against the Commissioner, the Tax Court was sufficiently concerned about the implications that it agreed with the Commissioner. Ultimately, the Court of Appeals reversed, relying on precedent; by that time, however, Congress had acted and imposed a tax on unrelated business income. See *C. F. Mueller Co.* v. *Commissioner*, 190 F. 2d 120 (CA3 1951).

In considering the ABE insurance fundraising, then, it is appropriate to assume that, if the ABE were funded by operating a normal macaroni company and receiving an unfair competitive advantage from its tax exemption, it would be a "trade or business" within the Act and taxable. On the other hand, it is equally clear that, if the ABE simply provided insurance for ABA members at very low cost, and sent the insurance dividends with an urgent request that the dividends be assigned to the Endowment, the arrangement would not be a "trade or business," and would not be taxable.[2] The

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[2] See Tr. of Oral Arg. 16 (Solicitor General's argument) ("If the Endowment were to refund the dividends to the members and the members were then voluntarily and individually to donate the money back to the Endowment, it is clear, and the IRS has agreed that the members would then be entitled to a charitable contribution deduction and that that money would come into the hands of the Endowment as charitable receipts, not as business income"). See also Brief for United States 24–25 ("If the Endowment had instead consented to rebate the dividends to its members, coupling such rebates with a request that the members voluntarily contribute the dividends back to it, it would have a strong claim that funds thus contrib-

central issue in this case is thus whether the ABE's insurance program should be viewed as akin to the macaroni company, and thus a "trade or business," or as akin to the dividend assignment request, and thus not a "trade or business."

I believe that the ABE's activities are far closer to the latter than the former for two reasons. First, there is no danger of unfair competition, the problem that the unrelated business tax addresses. Second, the program has functioned as a charitable fundraising effort, rather than as a business.

I

An understanding of the purpose of the unrelated business income tax exposes a basic error in the Court's analysis. As noted, that purpose is to protect commercial enterprises from the unfair competition that may be generated by the operation of competing businesses by tax-free organizations. There is no evidence in the record, despite more than three weeks of trial and numerous witnesses, to support the notion that the Endowment's provision of insurance to its members has had any competitive impact whatsoever. The Court relies on a parade of hypotheticals to justify its conclusion that there is some effect on competition.[3] The Court is, however, unable to point to a single piece of evidence in the

uted were derived 'from' charitable solicitations rather than 'from' its insurance business"); *id.*, at 37 ("Had the Endowment requested its members individually to return their dividends as an act of generosity, it would have dealt with them as a charity"); *ante*, at 113 ("Were ABE to give each member a choice between retaining his pro-rata share of dividends or assigning them to ABE, the organization would have a strong argument that those dividends constituted a voluntary donation").

[3] See *ante*, at 115 ("It *is likely* . . . that many of ABE's members belong to other organizations that offer group insurance policies"); *ibid.* ("Employers, trade associations, and financial services companies *frequently* offer group insurance policies"); *ibid.* ("*Presumably* those entities are taxed on their profits"); *ibid.* ("Such entities *may* therefore find it difficult to compete for the business of any ABE members who are otherwise eligible to participate in these group insurance programs") (emphases added).

record to justify its conclusion about the effect on competition. "Speculation about hypothetical cases illuminates the discussion in a classroom, but it is evidence and historical fact that provide the most illumination in a courtroom." *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573, 586 (1986) (STEVENS, J., dissenting). The trial judge scoured the record for evidence pointing to a harmful effect on competition, and found none.[4] The ab-

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[4] In its oral opinion at the end of trial, the Claims Court emphasized the absence of a "Ronzoni"—the macaroni-selling competitor who had been harmed by New York University's tax-free entry into the business:

"The unrelated business income tax was passed to avoid a certain kind of evil. . . . So you go back and look at what evil there is in the market. What was Congress trying to do . . . when the . . . tax was passed, and one comes to the frequently-asked question, 'Who is Ronzoni.'

"Now, nobody has really satisfactorily pointed to Ronzoni for me. I have been listening for three weeks of trial and nobody came up and said, 'Here, this is Ronzoni, this is the competitor that will be adversely affected in the manner in which Congress feared there would be adverse effects when it slapped Mueller Macaroni Company on the wrist, or basically said you cannot do that, you cannot use your . . . tax exempt status to make profits.[']

"And I am still somewhat nebulous as to who Ronzoni is, as to who is hurt, who is damaged if members of the association on the one hand allow the association to use its group asset in order to raise funds.

. . . . .

"And . . . perhaps other witnesses and other economists, on a different record, somebody will be able to point out to me Ronzoni in this . . . picture, but I have tried very hard, and looking at the policies of the tax, the policies of the unrelated business income tax, I have not been able to find the evils that Congress sought to alleviate by passing that tax." App. 507–509.

In the published opinion, the Claims Court incorporated its earlier oral opinion, 4 Cl. Ct. 404, 405, n. 1 (1984), and reiterated that the record did not support a finding of a harmful effect on competition:

"The absence of any identifiable business over which the ABE is able to gain an unfair advantage supports the conclusion that its activities are not commercial and therefore not a business. At the very least, it suggests that nothing in the policies underlying the [unrelated business tax] requires that the Endowment's activities be taxed. Indeed, it appears that

sence of evidence in the record, rather than the Court's ruminations about possibilities and likelihoods, should control our analysis.

The legislative history further underscores the fact that the ABE insurance operation poses none of the possible effects on competition that the unrelated business tax was intended to address. Congress has twice made clear that insurance programs by other nonprofit organizations are not subject to the unrelated business tax. When Congress substantially revised the unrelated business tax in 1969, the accompanying legislative history emphasized that the group insurance policies provided by fraternal organizations were not intended to be subject to the unrelated business tax.[5] Similarly, when a question arose concerning the taxability of income from insurance programs administered by veterans' organizations, Congress enacted legislation to ensure that the insurance income would not be taxed.[6] Indeed, Con-

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the Endowment's activities have an entirely procompetitive effect, fully consistent with the policies of the [unrelated business tax]. The congressional purpose behind the statute would therefore not be served by holding that the Endowment was engaging in a business activity by operating the insurance program." *Id.*, at 414.

[5] See H. R. Rep. No. 91–413, p. 47 (1969) ("In extending the unrelated business income tax to virtually all exempt organizations . . . the bill continues to exclude from 'unrelated business income,' earnings from business related to an organization's exempt function—such as an insurance business run by a fraternal beneficial association for its members"); S. Rep. No. 91–552, p. 68 (1969) ("[I]f the fraternal beneficiary society directly provides insurance for its members and their dependents, or arranges with an insurance company to make group insurance available to them, the amounts received by the society from its members for providing, or from the insurance company for arranging, for this exempt function will continue to be excluded from the unrelated business income tax").

[6] See S. Rep. No. 92–1082, pp. 2–3 (1972) (The "1969 Act extended the application of the unrelated business income tax to virtually all exempt organizations, including social welfare organizations and social clubs. . . . As a result, questions have been raised as to whether the income derived by veterans' organizations from their insurance activities is now subject to the unrelated business income tax. . . . [I]t was made clear in a 1969 Act

gress found the taxation of the veterans' insurance operations so contrary to its intent that it took the unusual step of making the 1972 amendment fully retroactive to 1969.[7]

The Government argues that these developments actually support its position because the need for congressional attention, and the emphasis on the "substantially related" prong for the fraternal societies, reveal that, without such attention, and without such a substantial relationship, the activity should be presumptively taxable. Particularly when the general legislative purpose of preventing unfair competition is considered, however, these legislative developments have a different significance. For they highlight the fact that the "market" in which the ABE is competing, even temporarily leaving aside the complete absence of evidence of harm to competitors, is itself already partially exempt from the unrelated business income tax provisions, and the possible threat to competition becomes all the more hypothetical and remote.

Ironically, moreover, the tax-exempt alternative suggested by the Government would have a far more obvious effect on competition than the ABE's current fundraising process. For the ABE would then be offering insurance rates dramatically lower than those available elsewhere. If speculation of the kind indulged in by the majority is appropriate, that speculation surely should include the realization that the tax-exempt alternative—in which the ABE would merely recover its actual costs of managing the program and return all of the premium refunds to the individual policyholders—would attract more than the 20% of the ABA membership

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committee report that income from insurance activities of fraternal beneficiary associations would be exempt from the unrelated business income tax. The committee agrees with the House that there was no reason not to provide similar treatment for exempt veterans' organizations").

[7] See *id.*, at 3 ("Since the committee believes that there was no specific intent to tax the insurance income of veterans' organizations by the 1969 Act, it, therefore, believes it is appropriate to make the exemption of their insurance income from the unrelated business income tax effective as of the effective date of the Tax Reform Act").

that currently hold ABE policies; it would appeal to those who simply want an insurance bargain rather than those who also want to make a charitable contribution.[8]

It is not completely surprising that a consideration of the purpose of the unrelated business tax in light of the record developed at the extensive trial leads to a conclusion that the ABE's program should not be taxed. For the Government itself initially held such a view.[9] Furthermore, the ABE's insurance program was initiated in 1955 as a pioneering, and widely publicized, effort in charitable fundraising. When Congress revamped the unrelated business tax in 1969, there was no suggestion that it was intended to apply to this venerable and successful program, and the IRS did not so interpret it until several years later.

In short, a proper consideration of the purpose of the unrelated business tax leads to a conclusion that the ABE's insurance program is not a "trade or business."[10]

II

Not only does the ABE program completely fail to raise the concerns against which the unrelated business tax is directed, but it is also operated as a charitable fundraising endeavor.

The learned trial judge expressly found, after hearing a good deal of evidence, that the assignment of the dividends

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[8] Cf. 4 Cl. Ct., at 414 ("Had the program been operated entirely as a service, offering the lowest possible rates, many more members would have joined the program and there would have been greater concentration of business in the two insurance carriers").

[9] See I. R. S. Letter Ruling 8042012 (July 3, 1980) (citing technical advice memorandum of January 31, 1973, which concluded that ABE's insurance program was not a business); 4 Record 854. See also 4 Cl. Ct., at 414.

[10] Cf. *Hope School* v. *United States*, 612 F. 2d 298, 304 (CA7 1980) (Sprecher, J.) ("unfair competition is the key to whether the activities of the Hope School constitute an unrelated trade or business as a matter of law").

was the result of charitable intentions, rather than a commercial transaction. First, he found that, since the program's inception, for three decades, the ABE has trumpeted the insurance program as a charitable fundraising activity, and that it has been so understood.[11] The trial court emphasized that even members who testified against the ABE viewed the insurance program as strictly a charitable fundraising effort.[12] Second, the court specifically found that the reason for the Endowment's enormous profits was the charitable intent of the members.[13] Finally, the court emphasized that, all of the factors of the program, taken together, compel the conclusion that the ABE procedure was operated as, and understood to be, charitable fundraising rather than a business.[14]

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[11] See 4 Cl. Ct., at 409 ("Advertising and other promotional materials consistently referred to the use of dividends for the Endowment's charitable endeavors; the Endowment's annual reports discussed the insurance program as a source of charitable contributions; communications to policyholders consistently referred to the Endowment's retention of dividends as donations, not as profits. In short, both the ABE leadership and the insured members considered the insurance program a fundraising activity and treated it as such").

[12] See *id.*, at 409, n. 5 ("Even those ABE members who testified for the defendant appeared to share this view. While these witnesses disagreed with the manner in which the program was operated and would have preferred to pay lower premiums by terminating the program's fundraising function, they certainly never suggested that the Endowment was operating a business which was profiting at their expense").

[13] See *id.*, at 411–412 ("The amount of money ABE is permitted to retain far exceeds the value of any service it may be providing through the operation of the insurance programs. It is quite obvious, then, that this money was not earned 'from the sale of goods or the performance of services,' 26 U. S. C. § 513 (c) (1976), but for some other reason. That reason was the intent of the members to support the Endowment's charitable activities").

[14] The trial judge found:

"When taken together, these factors make it impossible to conclude that the insurance programs were operated by ABE in a competitive, commercial manner. The Endowment raised huge sums of money by its activities, sums wholly unrelated to the value of any service it provided and which

Notwithstanding the Court of Appeals' explicit endorsement of the trial judge's findings,[15] this Court speculates that the members' assignment of their premium refunds was not "voluntary" because the assignment was a condition to participating in the insurance program.[16] This speculation rests on a remarkably unrealistic appraisal of the intelligence and independence of the lawyers who participate in the ABE program. Those who elected to buy the insurance and contribute the premium refunds to the Endowment clearly understood the legal consequences of the transaction, and were free to purchase insurance elsewhere if they did not want to make the requested charitable contribution.[17]

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dwarfed the profit margins of insurance-related businesses. It disclosed the relevant facts to its members at every available opportunity, yet the members (who bore the economic cost of this program) allowed the practice to continue although they collectively had the power to change it. No business could operate in this fashion. . . . One would have to assume that ABA/ABE members have been subject to an epidemic of irrationality in permitting themselves to be bilked in this manner for almost three decades. The far more reasonable explanation is that the members are entirely rational and are permitting the ABE to collect such substantial revenues at their expense because they consider the Endowment to be engaged in fundraising, which they support. By any standard, an enterprise that depends on the consent of its customers for its profits is not operating in a commercial manner and is not a trade or business." *Id.*, at 411.

[15] "In this connection the Claims Court specifically and permissibly rejected the Government's contention that the dividends represent a payment for the Endowment's services. Because the Endowment's accumulation of funds was not the result of a commercial exchange, we agree with the Claims Court's view that the dividends do not constitute 'profits' which fall within the definition of section 513(c)." 761 F. 2d 1573, 1578 (CAFC 1985) (footnote omitted).

[16] See *ante*, at 113 ("It is simply incorrect to characterize the assignment of dividends by each member as 'voluntary' simply because the members theoretically could band together and attempt to change the policy").

[17] The Court's description of the insurance program is also somewhat misleading. For example, it states that "the after-tax cost of ABE's insurance to its members is less than the cost of a commercial policy with identical coverage and premium rates." *Ante*, at 108. This statement assumes, contrary to the Court's holding, that the assignment of the member's pre-

The Court's opinion also seems to rest on the notion that the ABE members who purchased insurance were somehow coerced by a monopolist.[18] But this is absurd. There is nothing in the record to suggest that the insurance policy offered by the ABE to its members was so attractive that the ABE could foist some unwanted condition upon its members. After all, only 20% of the membership purchased the policies. This transaction has none of the earmarks of an improper tying arrangement.[19]

Finally, the Court states that "there is no factual basis" for an assumption that the large revenues generated by the insurance program were the result of the members' charitable motivation rather than the market value of the insurance package, see *ante*, at 112–113. But this is what the Claims Court found:

> "I am persuaded that if the American Bar Association Plan were not viewed as a fundraising enterprise and were not viewed by the overwhelming majority of the membership as something to be tolerated as, to be sure,

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mium refund is a tax-deductible contribution by the member to the ABE. Even on this assumption, however, the statement is inaccurate. Assume an ABE annual premium of $100, a refund of $40 and a 50% tax bracket for the member: After-tax cost is then $80. Identical coverage and premium rates for a non-ABE member (with the $40 refund retained by the policyholder) would produce a net cost of only $60. Only if one assumes "identical coverage and premium rates" but a $40 refund in the ABE case and no refund in the non-ABE case would the Court's statement be accurate. But then the disparity would be attributable to the differing refunds, not to the deductibility of the contribution. The Court seems to assume that a tax deduction is more valuable than cash. No wonder it is unable to recognize the charitable character of the assignments described in this record.

[18] Cf. *ante*, at 113 (suggesting that case presents "a standard example of monopoly pricing").

[19] Nor does the ABA represent the kind of coerced membership situation that raises constitutional concerns and a need for judicial solicitude for a member who disagrees with the organization. Cf. *Teachers* v. *Hudson*, 475 U. S. 292 (1986) (First Amendment rights of nonunion worker when union seeks agency fee as the exclusive bargaining representative).

> an economic expense but one for the good of the profession, and for the greater good of society, that it would not exist, it could not have existed, it could not have survived, it would not have survived to today. And at least on the basis of this record those are my findings on that point." App. 505.

See also 4 Cl. Ct., at 405, n. 1 (incorporating oral findings of fact).

I believe that we are bound by that finding. The Court's suggestion to the contrary notwithstanding,[20] rejecting that finding would run afoul of the "two court rule,"[21] would decide the case on a ground expressly disavowed by the Government, and would conflict with the record. That finding, combined with the other findings and with a proper analysis of the purpose and scope of the unrelated business tax, requires a conclusion that the ABE has been operated as a charitable fundraising effort, rather than as a commercial business.

III

The ABE's program poses no harm to competitors and has been operated as a charitable fundraising activity. Depending on its members' agreement to assign their dividends, it is far less like the operation of a competitive macaroni company than like the provision of insurance as a service with a request for the dividends. In my opinion, the Court of Appeals and the Chief Judge of the Claims Court were both quite correct in concluding that, on the basis of the record

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[20] See also *ante*, at 116 ("Even if we assumed . . . that the court's failure to attach the label 'trade or business' to ABE's insurance program constitutes a finding of fact, we would be constrained to hold that finding clearly erroneous").

[21] See *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error").

generated at the vigorously contested trial, the tax that the Government seeks to collect in this case was not the kind of tax that Congress intended to impose.[22] Accordingly, I respectfully dissent.

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[22] In my opinion, moreover, the charitable character of the dividend assignment requires that the assignment be deductible for the individuals at the time the policy is purchased or renewed just as it would, in the Government's example, at the time the dividend was received and assigned.

MAINE v. TAYLOR ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 85-62. Argued March 24, 1986—Decided June 23, 1986

Appellee bait dealer (appellee) arranged to have live baitfish imported into Maine, despite a Maine statute prohibiting such importation. He was indicted under a federal statute making it a federal crime to transport fish in interstate commerce in violation of state law. He moved to dismiss the indictment on the ground that the Maine statute unconstitutionally burdened interstate commerce, and Maine intervened to defend the validity of its statute. After an evidentiary hearing, the District Court denied the motion to dismiss and held the state statute constitutional. The court found that substantial uncertainties surrounded the effects that baitfish parasites and non-native species would have on the State's wild fish population, and that less discriminatory means of protecting against those threats were currently unavailable. Appellee then entered a conditional guilty plea, reserving the right to appeal the District Court's constitutional ruling. The Court of Appeals reversed, concluding that the state statute was unconstitutional.

Held:

1. Maine is entitled to invoke this Court's jurisdiction under 28 U. S. C. § 1254(2). Nothing in the language or history of § 1254(2) suggests that its scope is limited to civil litigation. The fact that Maine was only an intervenor in the District Court does not deprive it of standing to pursue this appeal, because its stake in the outcome is substantial and the controversy remains live, notwithstanding the Federal Government's decision to abandon its own appeal. Pp. 133-137.

2. The Maine statute is constitutional. The federal statute under which appellee was convicted did not waive the requirement of *Hughes* v. *Oklahoma*, 441 U. S. 322, that where a state statute, such as Maine's import ban, discriminates against interstate commerce either on its face or in practical effect, the State must show both that the statute serves a legitimate local purpose, and that this purpose cannot be served as well by available nondiscriminatory means. But the evidence amply supports the District Court's findings that Maine has made both showings. Under the "clearly erroneous" standard of review applicable to these findings, the Court of Appeals erred in setting them aside. Pp. 137-152.

752 F. 2d 757, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 152.

Cabanne Howard, Deputy Attorney General of Maine, argued the cause for appellant. With him on the briefs was *James E. Tierney*, Attorney General.

Jerrold J. Ganzfried argued the cause for the United States, as appellee under this Court's Rule 10.4, in support of appellant. With him on the brief were *Solicitor General Fried, Assistant Attorney General Habicht, Deputy Solicitor General Wallace, Donald A. Carr, Dirk D. Snel*, and *Margaret A. Hill*.

E. Paul Eggert argued the cause for appellee Taylor. With him on the brief was *Robert Edmond Mittel*.

JUSTICE BLACKMUN delivered the opinion of the Court.

Once again, a little fish has caused a commotion. See *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979); *TVA* v. *Hill*, 437 U. S. 153 (1978); *Cappaert* v. *United States*, 426 U. S. 128 (1976). The fish in this case is the golden shiner, a species of minnow commonly used as live bait in sport fishing.

Appellee Robert J. Taylor (hereafter Taylor or appellee) operates a bait business in Maine. Despite a Maine statute prohibiting the importation of live baitfish,[1] he arranged to have 158,000 live golden shiners delivered to him from outside the State. The shipment was intercepted, and a federal grand jury in the District of Maine indicted Taylor for violating and conspiring to violate the Lacey Act Amendments of 1981, 95 Stat. 1073, 16 U. S. C. §§ 3371–3378. Section 3(a)(2)(A) of those Amendments, 16 U. S. C. § 3372(a)(2)(A), makes it a federal crime "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported,

[1] "A person is guilty of importing live bait if he imports into this State any live fish, including smelts, which are commonly used for bait fishing in inland waters." Me. Rev. Stat. Ann., Tit. 12, § 7613 (1981).

or sold in violation of any law or regulation of any State or in violation of any foreign law."

Taylor moved to dismiss the indictment on the ground that Maine's import ban unconstitutionally burdens interstate commerce and therefore may not form the basis for a federal prosecution under the Lacey Act. Maine, pursuant to 28 U. S. C. § 2403(b), intervened to defend the validity of its statute, arguing that the ban legitimately protects the State's fisheries from parasites and non-native species that might be included in shipments of live baitfish. The District Court found the statute constitutional and denied the motion to dismiss. *United States* v. *Taylor*, 585 F. Supp. 393 (Me. 1984). Taylor then entered a conditional plea of guilty pursuant to Federal Rule of Criminal Procedure 11(a)(2), reserving the right to appeal the District Court's ruling on the constitutional question. The Court of Appeals for the First Circuit reversed, agreeing with Taylor that the underlying state statute impermissibly restricts interstate trade. *United States* v. *Taylor*, 752 F. 2d 757 (1985). Maine appealed. We set the case for plenary review and postponed consideration of Taylor's challenges to our appellate jurisdiction. 474 U. S. 943 (1985).

I

Maine invokes our jurisdiction under 28 U. S. C. § 1254(2), which authorizes an appeal as of right to this Court "by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States." Appellee, however, contends that this provision applies only to civil cases, and that, in any event, Maine lacks standing to appeal the reversal of a federal conviction. These contentions both relate to the unusual procedural posture of the case: an appeal by a State from the reversal of a federal conviction based on a violation of state law. We consider them in turn.

First, despite its procedural peculiarities, this case fits squarely within the plain terms of § 1254(2): Maine relies on a state statute that the Court of Appeals held to be unconsti-

tutional. Although statutes authorizing appeals as of right to this Court are strictly construed, see, *e. g.*, *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 247 (1984), nothing in the language or legislative history of § 1254(2) suggests that its scope is limited to civil litigation. In arguing for such a limitation, appellee relies principally on the fact that §§ 1254(1) and (3)—which authorize discretionary review of cases from the Courts of Appeals by writ of certiorari and certification, respectively—both apply explicitly to "any civil or criminal case."[2] Since this express language is absent from § 1254(2), appellee contends that Congress must have intended this Court's appellate jurisdiction over cases from the courts of appeals to remain limited to civil cases, as indeed it was limited prior to the 1925 enactment of § 1254's predecessor.[3]

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[2] Section 1254 reads in full:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

"(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

"(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."

[3] Congress in 1925 amended § 240(b) of the Judicial Code to read as follows:

"Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall

We find the argument unconvincing. While some statutes governing this Court's jurisdiction, such as §§ 1254(1) and (3), expressly apply to both civil and criminal cases, others are explicitly limited to civil actions. See, *e. g.*, 28 U. S. C. §§ 1252 and 1253. The absence of *either* sort of provision from § 1254(2) hardly demonstrates that Congress had only civil cases in mind, and we see no reason to read such a limitation into the straightforward and unambiguous terms of the statute. This is not a situation where "the sense of the statute and the literal language are at loggerheads," or where adherence to the plain terms of the statute "'would confer upon this Court a jurisdiction beyond what "naturally and properly belongs to it."'" *Heckler* v. *Edwards*, 465 U. S. 870, 879 (1984), quoting *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 94 (1960) (Frankfurter, J., dissenting), in turn quoting *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491, 495 (1912). Section 1254(2) serves to ensure that a state statute is struck down by the federal judiciary only when it is found invalid by this Court, or when the parties acquiesce in the decision of a lower federal court. Federal nullification of a state statute is a grave matter whether it occurs in civil litigation or in the course of a criminal prosecution, and review by this Court is particularly warranted in either event.[4]

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be restricted to an examination and decision of the Federal questions presented in the case." Act of Feb. 13, 1925, § 1, 43 Stat. 939.

Until then, appeals were allowed as of right from decisions of the courts of appeals only in civil cases involving more than $1,000, and not arising under the diversity, admiralty, patent, or revenue jurisdiction of the federal courts. See Act of Mar. 3, 1891, § 6, 26 Stat. 828.

The relevant portion of the 1925 Act was added on the floor of the Senate, and the debates surrounding the amendment contain no suggestion that it was intended to apply only in civil cases. See 66 Cong. Rec. 2753–2754, 2757, 2919–2925 (1925).

[4] Even if this case fell outside the scope of 28 U. S. C. § 1254(2), we would still have discretion under 28 U. S. C. § 2103 to grant review by writ

Appellee's second jurisdictional argument is based on the fact that the only appellant before this Court is the State of Maine—only an intervenor in the District Court—not the United States, which brought the original prosecution.[5] Since the United States and its attorneys have the sole power to prosecute criminal cases in the federal courts, appellee contends that Maine may not seek review of the Court of Appeals' reversal of his conviction. By statute, however, Maine intervened with "all the rights of a party," 28 U. S. C. § 2403(b),[6] and appeals may be taken to this Court under § 1254(2) by any "party relying on a State statute" held invalid under federal law by a Court of Appeals. We previously have recognized that intervenors in lower federal courts may seek review in this Court on their own, so long as they have "a sufficient stake in the outcome of the controversy" to satisfy the constitutional requirement of genuine adversity. *Bryant* v. *Yellen*, 447 U. S. 352, 368 (1980); see

of certiorari. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 927 (1975); *El Paso* v. *Simmons*, 379 U. S. 497, 502–503 (1965).

[5] The United States filed a timely notice of appeal to this Court, App. 311, but later moved in the Court of Appeals to dismiss its appeal. *Id.*, at 313. This was "[b]ecause the Acting Solicitor General determined that other cases were entitled to priority in selecting the limited number of cases the government would ask this Court to review." Brief for United States 14–15. The Court of Appeals granted the Government's motion. App. 315.

[6] Title 28 U. S. C. § 2403(b) provides:

"In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

also, *e. g.*, *Diamond* v. *Charles*, 476 U. S. 54, 68 (1986). Maine's stake in the outcome of this litigation is substantial: if the judgment of the Court of Appeals is left undisturbed, the State will be bound by the conclusive adjudication that its import ban is unconstitutional. See, *e. g.*, *Stoll* v. *Gottlieb*, 305 U. S. 165 (1938). And although private parties, and perhaps even separate sovereigns, have no legally cognizable interest in the prosecutorial decisions of the Federal Government, cf., *e. g.*, *Diamond* v. *Charles*, *supra*, at 64–65; *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 619 (1973), a State clearly has a legitimate interest in the continued enforceability of its own statutes, see *Diamond* v. *Charles*, *supra*, at 65; *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U. S. 592, 601 (1982). Furthermore, because reversal of the judgment of the Court of Appeals would result in the automatic reinstatement of appellee's guilty plea, the controversy before us clearly remains live notwithstanding the Federal Government's decision to abandon its own appeal.[7] We turn to the merits.

II

The Commerce Clause of the Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. "Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 35 (1980). Maine's statute restricts interstate trade in the most direct manner possible, blocking all inward shipments of live baitfish at the State's border. Still, as both the District Court and the Court of

[7] The United States advises us that it does not intend to seek dismissal of the indictment if Maine prevails in this Court. See Brief for United States 17, n. 17.

Appeals recognized, this fact alone does not render the law unconstitutional. The limitation imposed by the Commerce Clause on state regulatory power "is by no means absolute," and "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Id.*, at 36.

In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970), statutes in the second group are subject to more demanding scrutiny. The Court explained in *Hughes* v. *Oklahoma*, 441 U. S., at 336, that once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means. See also, *e. g.*, *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S. 941, 957 (1982); *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 353 (1977); *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354 (1951).

The District Court and the Court of Appeals both reasoned correctly that, since Maine's import ban discriminates on its face against interstate trade, it should be subject to the strict requirements of *Hughes* v. *Oklahoma*, notwithstanding Maine's argument that those requirements were waived by the Lacey Act Amendments of 1981. It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid. See, *e. g.*, *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 769 (1945). But because of the important role

the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been "unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82, 91 (1984). The 1981 Amendments of the Lacey Act clearly provide for federal enforcement of valid state and foreign wildlife laws, but Maine identifies nothing in the text or legislative history of the Amendments that suggests Congress wished to validate state laws that would be unconstitutional without federal approval.

Before this Court, Maine concedes that the Lacey Act Amendments do not exempt state wildlife legislation from scrutiny under the Commerce Clause. See Reply Brief for Appellant 3, n. 2. The State insists, however, that the Amendments should lower the *intensity* of the scrutiny that would otherwise be applied. We do not agree. An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation, regardless of whether the purported authorization takes the form of a flat exemption from Commerce Clause scrutiny or the less direct form of a reduction in the level of scrutiny. Absent "a clear expression of approval by Congress," any relaxation in the restrictions on state power otherwise imposed by the Commerce Clause unacceptably increases "the risk that unrepresented interests will be adversely affected by restraints on commerce." *South-Central Timber, supra*, at 92.

In this case, there simply is no unambiguous statement of any congressional intent whatsoever "to alter the limits of state power otherwise imposed by the Commerce Clause," *United States* v. *Public Utilities Comm'n of California*, 345 U. S. 295, 304 (1953). In arguing to the contrary, Maine relies almost exclusively on the following findings in the Senate Report on the Lacey Act Amendments:

> "It is desirable to extend protection to species of wildlife not now covered by the Lacey Act, and to plants which are presently not covered at all. States and foreign government are encouraged to protect a broad variety of species. Legal mechanisms should be supportive of those governments." S. Rep. No. 97-123, pp. 3-4 (1981).

Maine reads this passage, particularly the last sentence, to direct federal courts to treat state wildlife laws more leniently. We find this interpretation not only less than obvious but positively strained; by far the more natural reading of the last sentence is that it refers only to the availability of federal investigative and prosecutorial resources to enforce *valid* state wildlife laws. The passage certainly does not make "unmistakably clear" that Congress intended in 1981 to alter in any way the level of Commerce Clause scrutiny applied to those laws. Maine's ban on the importation of live baitfish thus is constitutional only if it satisfies the requirements ordinarily applied under *Hughes* v. *Oklahoma* to local regulation that discriminates against interstate trade: the statute must serve a legitimate local purpose, and the purpose must be one that cannot be served as well by available nondiscriminatory means.

III

The District Court found after an evidentiary hearing that both parts of the *Hughes* test were satisfied, but the Court of Appeals disagreed. We conclude that the Court of Appeals erred in setting aside the findings of the District Court. To explain why, we need to discuss the proceedings below in some detail.

A

The evidentiary hearing on which the District Court based its conclusions was one before a Magistrate. Three scientific experts testified for the prosecution and one for the defense. The prosecution experts testified that live baitfish imported

into the State posed two significant threats to Maine's unique and fragile fisheries.[8] First, Maine's population of wild fish—including its own indigenous golden shiners—would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine. See, *e. g.*, App. 39–55.[9] Second, non-native species inadvertently included in shipments of live baitfish could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways. See, *e. g.*, *id.*, at 59–70, 141–149.[10]

The prosecution experts further testified that there was no satisfactory way to inspect shipments of live baitfish for parasites or commingled species.[11] According to their testimony, the small size of baitfish and the large quantities in which they are shipped made inspection for commingled species "a physical impossibility." *Id.*, at 81.[12] Parasite inspection posed a separate set of difficulties because the examination procedure required destruction of the fish. *Id.*, at 81–82,

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[8] One prosecution witness testified that Maine's lakes contain unusually clean water and originally supported "a rather delicate community of just a few species of fish." App. 57. Another stressed that "no other state . . . has any real landlocked salmon fishing. You come to Maine for that or you live in Maine for that." *Id.*, at 137.

[9] Two of these types of parasites were found in appellee's confiscated shipment of golden shiners. See *United States* v. *Taylor*, 585 F. Supp. 393, 395–396 (Me. 1984).

[10] Although appellee's shipment was not found to contain any fish other than golden shiners, it did contain "some polliwogs and . . . some crustacean crawfish." App. 69. There was testimony suggesting that these could pose the same ecological risks as non-native fish. See *id.*, at 70.

[11] The expert who examined appellee's shipment testified that, although his inspection of the shipment revealed only two of the three parasites he described as prevalent in baitfish outside Maine, "I certainly could not put my signature on a certificate to say that [none of the third parasite] was present in that lot." *Id.*, at 85.

[12] The shipment intercepted in this case contained approximately 158,000 fish, with about 70 specimens to the pound. *Id.*, at 80.

195. Although statistical sampling and inspection techniques had been developed for salmonids (*i. e.*, salmon and trout), so that a shipment could be certified parasite-free based on a standardized examination of only some of the fish, no scientifically accepted procedures of this sort were available for baitfish. See, *e. g.*, *id.*, at 71, 184, 193–194.[13]

Appellee's expert denied that any scientific justification supported Maine's total ban on the importation of baitfish. *Id.*, at 241. He testified that none of the three parasites discussed by the prosecution witnesses posed any significant threat to fish in the wild, *id.*, at 206–212, 228–232, and that sampling techniques had not been developed for baitfish precisely because there was no need for them. *Id.*, at 265–266. He further testified that professional baitfish farmers raise their fish in ponds that have been freshly drained to ensure that no other species is inadvertently collected. *Id.*, at 239–240.

Weighing all the testimony, the Magistrate concluded that both prongs of the *Hughes* test were satisfied, and accordingly that appellee's motion to dismiss the indictment should be denied. Appellee filed objections, but the District Court, after an independent review of the evidence, reached the same conclusions. First, the court found that Maine "clearly has a legitimate and substantial purpose in prohibiting the importation of live bait fish," because "substantial uncertainties" surrounded the effects that baitfish parasites would have on the State's unique population of wild fish, and the consequences of introducing non-native species were simi-

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[13] According to the prosecution testimony, the design of sampling and inspection techniques must take into account the particular parasites of concern, and baitfish parasites differ from salmonid parasites. See, *e. g.*, *id.*, at 184, 193–194. Appellee's expert agreed. *Id.*, at 237, 265–267. There was also testimony that the physical layout of bait farms makes inspection at the source of shipment particularly difficult, and that border inspections are not feasible because the fish would die in the time it takes to complete the tests. *Id.*, at 75–79.

larly unpredictable. 585 F. Supp., at 397.[14] Second, the court concluded that less discriminatory means of protecting against these threats were currently unavailable, and that, in particular, testing procedures for baitfish parasites had not yet been devised. *Id.*, at 398. Even if procedures of this sort could be effective, the court found that their development probably would take a considerable amount of time. *Id.*, at 398, n. 11.[15]

Although the Court of Appeals did not expressly set aside the District Court's finding of a legitimate local purpose, it noted that several factors "cast doubt" on that finding. 752 F. 2d, at 762. First, Maine was apparently the only State to bar all importation of live baitfish. See *id.*, at 761. Second, Maine accepted interstate shipments of other freshwater fish, subject to an inspection requirement. Third, "an aura

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[14] For several reasons, the District Court discounted the testimony of appellee's expert that baitfish parasites did not pose so serious a threat as disease organisms found in salmonids. The court noted that "considerable scientific debate" surrounded even the threat posed by salmonid diseases, that appellee's expert testified largely about the effects that baitfish parasites had in commercial hatcheries rather than in the wild, and that he was unfamiliar with northeast fisheries. 585 F. Supp., at 397.

[15] While the District Court approved the Magistrate's general finding that "there are no obviously workable alternatives to the outright prohibition of importation," *id.*, at 398, neither the court nor the Magistrate made any specific finding as to whether Maine could adequately protect against the inadvertent introduction of non-native species by allowing baitfish to be imported only from professional bait farmers using freshly drained ponds. There was conflicting evidence on this point. Appellee's expert suggested that such methods largely eliminated the problem of commingled species, App. 239–240, but a prosecution witness testified that complete success was "unlikely." *Id.*, at 170. See also *id.*, at 150 (prosecution testimony that shipments cannot be screened reliably for commingled species because "[t]his is a business. You have living material that you have to move; you can't hold them in tanks and this kind of thing for any length of time"). We are in no position to resolve this factual dispute, and we conclude in any event that the District Court's findings regarding parasites adequately support the constitutionality of the challenged statute.

of economic protectionism" surrounded statements made in 1981 by the Maine Department of Inland Fisheries and Wildlife in opposition to a proposal by appellee himself to repeal the ban. *Ibid.* Finally, the court noted that parasites and non-native species could be transported into Maine in shipments of nonbaitfish, and that nothing prevented fish from simply swimming into the State from New Hampshire. *Id.*, at 762, n. 12.

Despite these indications of protectionist intent, the Court of Appeals rested its invalidation of Maine's import ban on a different basis, concluding that Maine had not demonstrated that any legitimate local purpose served by the ban could not be promoted equally well without discriminating so heavily against interstate commerce. Specifically, the court found it "difficult to reconcile" Maine's claim that it could not rely on sampling and inspection with the State's reliance on similar procedures in the case of other freshwater fish. *Id.*, at 762.[16]

Following the reversal of appellee's conviction, Maine and the United States petitioned for rehearing on the ground that the Court of Appeals had improperly disregarded the District Court's findings of fact. The court denied the petitions, concluding that, since the unavailability of a less discriminatory alternative "was a mixed finding of law and fact," a reviewing court "was free to examine carefully the factual record and to draw its own conclusions." *Id.*, at 765.

B

Although the proffered justification for any local discrimination against interstate commerce must be subjected to "the strictest scrutiny," *Hughes* v. *Oklahoma*, 441 U. S., at 337, the empirical component of that scrutiny, like any other form of factfinding, "'is the basic responsibility of district courts,

[16] The court also noted that "a restriction on the number and size of importations would be less restrictive than a total ban," 752 F. 2d, at 762, but it identified no reason to believe that such a restriction would protect against parasites and commingled species as effectively as a ban.

rather than appellate courts,'" *Pullman-Standard* v. *Swint*, 456 U. S. 273, 291 (1982), quoting *DeMarco* v. *United States*, 415 U. S. 449, 450, n. (1974). As this Court frequently has emphasized, appellate courts are not to decide factual questions *de novo*, reversing any findings they would have made differently. See, *e. g.*, *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969). The Federal Rules of Criminal Procedure contain no counterpart to Federal Rule of Civil Procedure 52(a), which expressly provides that findings of fact made by the trial judge "shall not be set aside unless clearly erroneous." But the considerations underlying Rule 52(a)—the demands of judicial efficiency, the expertise developed by trial judges, and the importance of first-hand observation, see *Anderson*, *supra*, at 574–575—all apply with full force in the criminal context, at least with respect to factual questions having nothing to do with guilt. Accordingly, the "clearly erroneous" standard of review long has been applied to non-guilt findings of fact by district courts in criminal cases. See *Campbell* v. *United States*, 373 U. S. 487, 493 (1963); 2 C. Wright, Federal Practice and Procedure § 374 (2d ed. 1982). We need not decide now whether all such findings should be reviewed under the "clearly erroneous" standard, because appellee concedes that the standard applies to the factual findings made by the District Court in this case. See Tr. of Oral Arg. 27. We note, however, that no broader review is authorized here simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 501 (1984); *Pullman-Standard* v. *Swint*, 456 U. S., at 287.[17]

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[17] In support of its conclusion that it "was free to examine carefully the factual record and to draw its own conclusions," *id.*, at 765, the Court of Appeals cited *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984), and *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318 (1977). The question in each of these cases was whether a given set of facts amounted

No matter how one describes the abstract issue whether "alternative means could promote this local purpose as well without discriminating against interstate commerce," *Hughes* v. *Oklahoma*, 441 U. S., at 336, the more specific question whether scientifically accepted techniques exist for the sampling and inspection of live baitfish is one of fact, and the District Court's finding that such techniques have not been devised cannot be characterized as clearly erroneous. Indeed, the record probably could not support a contrary finding. Two prosecution witnesses testified to the lack of such procedures, and appellee's expert conceded the point, although he disagreed about the need for such tests. See App. 74–75, 184, 265–266. That Maine has allowed the importation of other freshwater fish after inspection hardly demonstrates that the District Court clearly erred in crediting the corroborated and uncontradicted expert testimony that standardized inspection techniques had not yet been developed for baitfish. This is particularly so because the text of the permit statute suggests that it was designed specifically to regulate importation of salmonids, for which, the experts testified, testing procedures had been developed.[18]

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to discrimination forbidden by the Commerce Clause; in neither case did this Court reject underlying factual findings made by the trial court. Indeed, there were no such findings to reject—the facts were stipulated in *Bacchus*, see 468 U. S., at 269, and *Boston Stock Exchange* was decided on a motion to dismiss, see 429 U. S., at 320.

[18] The statute provides: "The commissioner *may* grant permits" for the importation of freshwater fish upon an application that describes the fish and their source and includes "[a] statement from a recognized fish pathologist, from a college or university, from a state conservation department or from the United States Fish and Wildlife Service, certifying that the fish . . . are from sources which show no evidence of viral hemorrhagic septicemia, infectious pancreatic necrosis, infectious hematopoietic necrosis, Myxosomo cerebralis or other diseases which may threaten fish stocks within the State." Me. Rev. Stat. Ann., Tit. 12, § 7202 (1981) (emphasis added). The listed diseases all were identified at the hearing before the Magistrate as salmonid disorders. See App. 193.

Before this Court, appellee does not argue that sampling and inspection procedures already exist for baitfish; he contends only that such procedures "could be easily developed." Brief for Appellee 25. Perhaps this is also what the Court of Appeals meant to suggest. Unlike the proposition that the techniques already exist, the contention that they could readily be devised enjoys some support in the record. Appellee's expert testified that developing the techniques "would just require that those experts in the field . . . get together and do it." App. 271. He gave no estimate of the time and expense that would be involved, however, and one of the prosecution experts testified that development of the testing procedures for salmonids had required years of heavily financed research. See *id.*, at 74. In light of this testimony, we cannot say that the District Court clearly erred in concluding, 585 F. Supp., at 398, n. 11, that the development of sampling and inspection techniques for baitfish could be expected to take a significant amount of time.

More importantly, we agree with the District Court that the "abstract possibility," *id.*, at 398, of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an "[a]vailabl[e] . . . nondiscriminatory alternativ[e]," *Hunt*, 432 U. S., at 353, for purposes of the Commerce Clause. A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost. Appellee, of course, is free to work on his own or in conjunction with other bait dealers to develop scientifically acceptable sampling and inspection procedures for golden shiners; if and when such procedures are developed, Maine no longer may be able to justify its import ban. The State need not join in those efforts, however, and it need not pretend they already have succeeded.

C

Although the Court of Appeals did not expressly overturn the District Court's finding that Maine's import ban serves a legitimate local purpose, appellee argues as an alternative ground for affirmance that this finding should be rejected. After reviewing the expert testimony presented to the Magistrate, however, we cannot say that the District Court clearly erred in finding that substantial scientific uncertainty surrounds the effect that baitfish parasites and non-native species could have on Maine's fisheries. Moreover, we agree with the District Court that Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible. "[T]he constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences." 585 F. Supp., at 397.

Nor do we think that much doubt is cast on the legitimacy of Maine's purposes by what the Court of Appeals took to be signs of protectionist intent. Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to "simple economic protectionism" consequently have been subject to a "virtually *per se* rule of invalidity." *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978); accord, *e. g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471 (1981).[19] But

[19] This rule has been applied not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade, for "the evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia* v. *New Jersey*, 437 U. S., at 626. The Court has held, for example, that New Jersey may not conserve the disposal capacity of its landfill sites by banning importation of

there is little reason in this case to believe that the legitimate justifications the State has put forward for its statute are merely a sham or a "*post hoc* rationalization." *Hughes*, 441 U. S., at 338, n. 20. In suggesting to the contrary, the Court of Appeals relied heavily on a 3-sentence passage near the end of a 2,000-word statement submitted in 1981 by the Maine Department of Inland Fisheries and Wildlife in opposition to appellee's proposed repeal of the State's ban on the importation of live baitfish:

> "'[W]e can't help asking why we should spend our money in Arkansas when it is far better spent at home? It is very clear that much more can be done here in Maine to provide our sportsmen with safe, home-grown bait. There is also the possibility that such an industry could develop a lucrative export market in neighboring states.'" 752 F. 2d, at 760, quoting Baitfish Importation: The Position of the Maine Department of Inland Fisheries and Wildlife, App. 294, 309–310.

We fully agree with the Magistrate that "[t]hese three sentences do not convert the Maine statute into an economic pro-

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wastes, see *ibid.*, and that Oklahoma may not fight depletion of its population of natural minnows by prohibiting their commercial exportation, see *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979). In each case, out-of-state residents were forced to bear the brunt of the conservation program for no apparent reason other than that they lived and voted in other States. See *Philadelphia* v. *New Jersey*, 437 U. S., at 629; *Hughes*, 441 U. S., at 337–338, and n. 20. Not all intentional barriers to interstate trade are protectionist, however, and the Commerce Clause "is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community." *Robertson* v. *California*, 328 U. S. 440, 458 (1946). Even overt discrimination against interstate trade may be justified where, as in this case, out-of-state goods or services are particularly likely for some reason to threaten the health and safety of a State's citizens or the integrity of its natural resources, and where "outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecti[on]." *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 43 (1980).

tectionism measure." App. to Juris. Statement E–6, n. 4.[20] As the Magistrate pointed out, the context of the statements cited by appellee "reveals [they] are advanced not in direct support of the statute, but to counter the argument that inadequate bait supplies in Maine require acceptance of the environmental risks of imports. Instead, the Department argues, Maine's own bait supplies can be increased." *Ibid.* Furthermore, the comments were made by a state administrative agency long after the statute's enactment, and thus constitute weak evidence of legislative intent in any event. See *ibid.*[21]

The other evidence of protectionism identified by the Court of Appeals is no more persuasive. The fact that Maine allows importation of salmonids, for which standardized sampling and inspection procedures are available, hardly demonstrates that Maine has no legitimate interest in prohibiting the importation of baitfish, for which such procedures have not yet been devised. Nor is this demonstrated by the fact that other States may not have enacted similar bans, espe-

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[20] The District Court did not address appellee's argument that the import ban was protectionist, because it did not believe that appellee had objected to the Magistrate's rejection of that argument. See 585 F. Supp., at 395, n. 5. The Court of Appeals disagreed, concluding that appellee's objections to the Magistrate's recommended decision incorporated all the arguments included in his motion to dismiss. See 752 F. 2d, at 760, n. 7. In the objections he filed with the District Court, appellee did not specifically contend that the statute was protectionist, but he concluded by asking that the indictment be dismissed "[f]or the reasons stated herein and *also for those reasons stated in Defendant's Memorandum of Law in Support of Motion to Dismiss.*" Defendant's Objection to the Magistrate's Recommended Decision on Defendant's Motion to Dismiss Indictment 4 (Mar. 12, 1984) (emphasis added). Because we think the Magistrate was clearly right to reject the argument that Maine's bait statute constitutes economic protectionism, we need not decide whether this catchall language sufficed to preserve the argument for later review. Cf. *Thomas* v. *Arn*, 474 U. S. 140, 148–149 (1985).

[21] The import ban was originally enacted in 1959. See 1959 Me. Acts, ch. 112.

cially given the testimony that Maine's fisheries are unique and unusually fragile.[22] Finally, it is of little relevance that fish can swim directly into Maine from New Hampshire. As the Magistrate explained: "The impediments to complete success . . . cannot be a ground for preventing a state from using its best efforts to limit [an environmental] risk." *Id.*, at E-10, n. 8.

IV

The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 527 (1935), it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the

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[22] Although Maine's flat statutory ban on the importation of all live baitfish is apparently unique, Minnesota prohibits the use of imported minnows for bait purposes "[e]xcept as otherwise specifically permitted," Minn. Stat. § 101.42, subd. 6 (1984), and several other States require administrative approval for the importation and introduction of any live fish, see, *e. g.*, Utah Code Ann. § 23-15-12 (1984); Va. Code § 28.1-183.2 (1985); Wis. Stat. § 29.535 (Supp. 1985); cf. S. D. Codified Laws § 41-14-30 (1977) (minnows may be transported "into or through South Dakota" only pursuant to a 12-hour permit). Other States have granted authority to their wildlife agencies to prohibit the importation of particular species. See, *e. g.*, Ala. Code § 9-2-13 (1980); N. C. Gen. Stat. § 113-160 (1983); cf. Nev. Rev. Stat. § 503.310(1) (1985) ("The [state wildlife] commission is empowered to regulate or prohibit the use of live bait in fishing to the end that no undesirable species of fish intentionally or unintentionally may be introduced into the public waters of this state").

record suggests that Maine has legitimate reasons, "apart from their origin, to treat [out-of-state baitfish] differently," *Philadelphia* v. *New Jersey*, 437 U. S., at 627. The judgment of the Court of Appeals setting aside appellee's conviction is therefore reversed.

It is so ordered.

JUSTICE STEVENS, dissenting.

There is something fishy about this case. Maine is the only State in the Union that blatantly discriminates against out-of-state baitfish by flatly prohibiting their importation. Although golden shiners are already present and thriving in Maine (and, perhaps not coincidentally, the subject of a flourishing domestic industry), Maine excludes golden shiners grown and harvested (and, perhaps not coincidentally, sold) in other States. This kind of stark discrimination against out-of-state articles of commerce requires rigorous justification by the discriminating State. "When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 353 (1977).

Like the District Court, the Court concludes that uncertainty about possible ecological effects from the possible presence of parasites and nonnative species in shipments of out-of-state shiners suffices to carry the State's burden of proving a legitimate public purpose. *Ante*, at 142–143, 148. The Court similarly concludes that the State has no obligation to develop feasible inspection procedures that would make a total ban unnecessary. *Ante*, at 147. It seems clear, however, that the presumption should run the other way. Since the State engages in obvious discrimination against out-of-state commerce, it should be put to its proof. Ambiguity about dangers and alternatives should actually defeat, rather than sustain, the discriminatory measure.

This is not to derogate the State's interest in ecological purity. But the invocation of environmental protection or public health has never been thought to confer some kind of special dispensation from the general principle of nondiscrimination in interstate commerce. "A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no restraints on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354 (1951). If Maine wishes to rely on its interest in ecological preservation, it must show that interest, and the infeasibility of other alternatives, with far greater specificity. Otherwise, it must further that asserted interest in a manner far less offensive to the notions of comity and cooperation that underlie the Commerce Clause.

Significantly, the Court of Appeals, which is more familiar with Maine's natural resources and with its legislation than we are, was concerned by the uniqueness of Maine's ban. That court felt, as I do, that Maine's unquestionable natural splendor notwithstanding, the State has not carried its substantial burden of proving why it cannot meet its environmental concerns in the same manner as other States with the same interest in the health of their fish and ecology. Cf. *ante*, at 151, n. 22 (describing less restrictive procedures in other States).

I respectfully dissent.

ATKINS, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE *v.* RIVERA ET AL.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 85-632. Argued April 21, 1986—Decided June 23, 1986

The Medicaid program of the Social Security Act (Act) provides medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services. States participating in the program must provide coverage to the "categorically needy," that is, persons eligible for cash assistance under either the Supplemental Security Income for the Aged, Blind, and Disabled (SSI) program or the Aid to Families with Dependent Children (AFDC) program. A participating State also may elect to provide Medicaid benefits to the "medically needy," that is, persons who meet the nonfinancial eligibility requirements for cash assistance under AFDC or SSI, but whose income or resources exceed the financial eligibility standards for those programs. Under 42 U. S. C. § 1396a(a)(17), the medically needy may qualify for Medicaid benefits if they incur medical expenses, *i. e.*, "spenddown," in an amount that reduces their income to the eligibility level. That section provides that a State is to take into account, "except to the extent prescribed by the Secretary [of Health and Human Services], the costs . . . incurred for medical care," and must determine eligibility under standards that are "reasonable" and "comparable for all groups." Pursuant to § 1396a(a)(17), the Secretary issued a regulation permitting States to employ a maximum spenddown period of six months to compute income of the medically needy. Under § 1396a(a)(10)(C)(i)(III), a state Medicaid plan must prescribe "the single standard to be employed in determining income and resource eligibility for all such groups, and the methodology to be employed in determining such eligibility which shall be the same methodology which would be employed under [AFDC or SSI]." Under the Massachusetts Medicaid plan, persons who lack sufficient income measured on a monthly basis to meet their basic needs automatically qualify for Medicaid. Massachusetts also provides Medicaid benefits to persons who earn enough to meet their basic needs, but whose medical expenses within a 6-month period consume the amount by which their earnings exceed what is required for basic needs. The Massachusetts Department of Public Welfare denied respondents Medicaid benefits because their income exceeded the Medicaid eligibility limit, and they incurred insufficient medical expenses within a 6-month period.

After the denial was upheld on administrative review, respondents sought injunctive relief from the Massachusetts Superior Court against use of the 6-month spenddown period. That court held the period invalid, and the Massachusetts Supreme Judicial Court agreed, holding that in providing that the "same methodology" be used for both the categorically needy and the medically needy, the Act requires that a 1-month period be applied in eligibility calculations for the medically needy.

Held: Massachusetts' 6-month spenddown period for calculating the income of the medically needy does not violate the Act's "same methodology" requirement. Pp. 161–167.

(a) The Secretary's regulation permitting States to employ a maximum spenddown period of six months plainly permits what Massachusetts has done. Because that regulation is supported by the Act's plain language and was adopted pursuant to the Act's explicit grant of rulemaking authority, it is entitled to "legislative effect" and is controlling unless it is arbitrary, capricious, or manifestly contrary to the Act. Pp. 161–162.

(b) The history of the "same methodology" requirement demonstrates that it was never intended to control the length of the spenddown, but rather simply to instruct States to treat components of income similarly for both medically needy and categorically needy persons. Pp. 162–166.

395 Mass. 189, 479 N. E. 2d 639, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

H. Reed Witherby, Assistant Attorney General of Massachusetts, argued the cause for petitioner. With him on the briefs was *Francis X. Bellotti*, Attorney General.

Jerrold J. Ganzfried argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller, John F. Cordes* and *Nicholas S. Zeppos*.

Rene H. Reixach, Jr., argued the cause for respondents and filed a brief for respondent McKenna.*

**Robert Abrams*, Attorney General, *Robert Hermann*, Solicitor General, *Peter H. Schiff*, Deputy Solicitor General, and *Alan W. Rubenstein*, Assistant Attorney General, filed a brief for the State of New York as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Gray Panthers Advocacy Committee et al. by *Roger A. Schwartz* and *Gill Deford*; and for Susan Reed et al. by *Evelyn R. Frank*.

JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the means by which a State may calculate eligibility for medical-assistance benefits (Medicaid) under Title XIX of the Social Security Act.

In Massachusetts, persons who lack sufficient income, measured on a monthly basis, to meet their basic needs automatically qualify for Medicaid. The Commonwealth, however, also provides Medicaid benefits to persons, like respondents, who earn enough to meet their basic needs, but whose medical expenses within a 6-month period consume the amount by which their earnings exceed what is required for basic needs. Construing the Act's requirement that assistance for the two groups be calculated using the "same methodology," the Massachusetts Supreme Judicial Court held invalid the Commonwealth's use of a 6-month period for measuring medical expenses. The court ruled that inasmuch as a 1-month period is used to measure the income of those with insufficient means, an identical period must be used to measure medical expenses for persons like respondents. Because this holding conflicts with rulings of two Federal Courts of Appeals,[1] we granted certiorari. 474 U. S. 1018 (1985).

I

Medicaid, enacted in 1965 as Title XIX of the Social Security Act, 79 Stat. 343, as amended, 42 U. S. C. § 1396 *et seq.* (1982 ed. and Supp. II), is designed to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services. See *Schweiker* v. *Hogan*, 457 U. S. 569, 571 (1982). The Federal Government shares the costs of Medicaid with States that

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[1] See *Hogan* v. *Heckler*, 769 F. 2d 886 (CA1 1985), cert. pending *sub nom. Hogan* v. *Bowen*, No. 85-6386 (construing Massachusetts provision); *DeJesus* v. *Perales*, 770 F. 2d 316 (CA2 1985), cert. pending, No. 85-6337 (construing identical New York provision).

elect to participate in the program. In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services. See 42 U. S. C. § 1396a (1982 ed. and Supp. II); *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 36–37 (1981).

States participating in the Medicaid program must provide coverage to the "categorically needy." 42 U. S. C. § 1396a(a)(10)(A) (1982 ed. and Supp. II). These are persons eligible for cash assistance under either of two programs: Supplemental Security Income for the Aged, Blind, and Disabled (SSI), 42 U. S. C. § 1381 *et seq.* (1982 ed. and Supp. II), or Aid to Families with Dependent Children (AFDC), 42 U. S. C. § 601 *et seq.*[2] (1982 ed. and Supp. II). Congress considered these persons "especially deserving of public assistance" for medical expenses, see *Gray Panthers*, 453 U. S., at 37, because one is eligible for AFDC or SSI only if, in a given month, he or she earns less than what has been determined to be required for the basic necessities of life. AFDC and SSI assistance are intended to cover basic necessities, but not medical expenses. Thus, if a person in this category also incurs medical expenses during that month, payment of those expenses would consume funds required for basic necessities.

A participating State also may elect to provide medical benefits to the "medically needy," that is, persons who meet the nonfinancial eligibility requirements for cash assistance under AFDC or SSI, but whose income or resources exceed the financial eligibility standards of those programs.[3] See

[2] Congress created SSI in 1972, 86 Stat. 1465, to replace three existing categorical assistance programs—Old Age Assistance, 42 U. S. C. § 301 *et seq.* (1970 ed.); Aid to the Blind, 42 U. S. C. § 1201 *et seq.* (1970 ed.); and Aid to the Permanently and Totally Disabled, 42 U. S. C. § 1351 *et seq.* (1970 ed.). These programs, together with AFDC, previously had been state administered with state-eligibility standards. See *Schweiker* v. *Hogan*, 457 U. S. 569, 581–582, n. 18 (1982).

[3] In Massachusetts, the income eligibility level for the medically needy is comparable in most, but not all, instances to the corresponding SSI or

Schweiker v. *Hogan*, 457 U. S., at 581–582. Under 42 U. S. C. § 1396a(a)(17), the medically needy may qualify for financial assistance for medical expenses if they incur such expenses in an amount that effectively reduces their income to the eligibility level. Only when they "spenddown" the amount by which their income exceeds that level, are they in roughly the same position as persons eligible for AFDC or SSI: any further expenditures for medical expenses then would have to come from funds required for basic necessities.

In creating the spenddown mechanism of 42 U. S. C. § 1396a(a)(17) (1982 ed. and Supp. II), Congress provided that a State is to take into account, "except to the extent prescribed by the Secretary, the costs . . . incurred for medical care." Pursuant to this statute, the Secretary of Health and Human Services has instructed state agencies to "use a prospective period of not more than 6 months to compute income" of the medically needy. 42 CFR § 435.831 (1985).

A State electing to assist the medically needy must determine eligibility under standards that are "reasonable" and "comparable for all groups." 42 U. S. C. § 1396a(a)(17). In addition, and significantly for present purposes, state plans for Medicaid must describe

> "the single standard to be employed in determining income and resource eligibility for all such groups, and the methodology to be employed in determining such eligibility which *shall be the same methodology which would be employed* under [AFDC or SSI]." 42 U. S. C. § 1396a(a)(10)(C)(i)(III) (emphasis added).

AFDC standard of need. The maximum income eligibility limits for some medically needy applicants are, in the case of small families (one to three persons), higher than those used for AFDC coverage. See 106 Code of Mass. Regs. §§ 506.410 and 304.410 (1985). This results in some medically needy families in Massachusetts qualifying for Medicaid without use of a spenddown.

II

Respondent Rivera is employed outside her home and is the mother of two children. She receives no medical benefits from her job, and earns an amount slightly in excess of that which would permit her to qualify for AFDC. In 1983, Rivera applied to the Massachusetts Department of Public Welfare for Medicaid. Massachusetts has chosen to participate in the Medicaid program, Mass. Gen. Laws, ch. 118E:1 *et seq.* (1984), and also to provide coverage to medically needy persons.

To determine Rivera's eligibility for Medicaid, the Department first calculated her gross monthly income. See 106 Code of Mass. Regs. (CMR) §§ 505.200, 505.210, 505.320 (1985). Next, the Department prescribed certain deductions and disregards to arrive at her monthly "countable income" of $535.30.[4] See 106 CMR §§ 505.200 and 506.100–506.200 (1985). See also 42 CFR § 435.831(a) (1985). Rivera's monthly countable income exceeded the Medicaid eligibility limit by $100.30. See 106 CMR § 506.400 (1985). See also 42 U. S. C. §§ 1382(c)(1) and 602(a)(13) (1982 ed. and Supp. II). As a result, she did not qualify for Medicaid at that time. She would be able to qualify at a later date, provided her excess income was subject to being consumed or spent down by medical expenses.

Massachusetts has adopted a 6-month period over which the spenddown is calculated. Mass. Gen. Laws, ch. 118E:10 (1984); 106 CMR §§ 506.400 and 506.510 (1985). This is the maximum permitted under the federal regulations. See 42 CFR § 435.831 (1985). Accordingly, the Department multiplied Rivera's excess $100.30 by six; she thus could receive Medicaid during the 6-month period beginning with the date of her first medical service only after she spent down $601.80

[4] In administrative and state-court proceedings, Rivera raised a challenge to the manner in which certain portions of her income were disregarded. That issue, however, is not presently before this Court.

on medical expenses.[5] The Department's decision denying assistance was upheld by the Welfare Appeals Referee. App. to Pet. for Cert. A46.

Rivera then sought injunctive relief in State Superior Court against use of the 6-month period. She argued that the 6-month period for calculating the income of medically needy applicants violates the "same methodology" requirement of 42 U. S. C. §§ 1396a(a)(10)(C)(i)(III) and 1396a(a)(17) (1982 ed. and Supp. II), because the Act mandates that AFDC and SSI determinations be calculated on the basis of income earned in a 1-month period. The use of the shorter period would have permitted Rivera to receive Medicaid after incurring only $100.30 in medical expenses.[6]

The court certified a class of all persons who have been, are being, or will be subjected to the Department's 6-month spenddown requirement. On a motion for summary judgment, the court found that the Department's use of the 6-month spenddown period violated the statutory requirement that the "same methodology" be used for determining eligibility of the medically needy as is used for the categorically needy. App. to Pet. for Cert. A28.

The Department appealed to the Massachusetts Supreme Judicial Court. It argued there that, since the eligibility determination for the categorically needy does not involve a spenddown at all, there is no methodology for the Department to match. The Department further argued that federal regulations explicitly allow a 6-month period.

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[5] The spenddown may be satisfied by submission of paid or unpaid medical bills. 106 CMR § 506.540 (1985).

[6] Respondent Madeline McKenna was permitted to intervene in the Superior Court proceedings. McKenna, like Rivera, was denied Medicaid. McKenna's monthly countable income was calculated to be $531.66, which is $106.66 in excess of the $425 eligibility standard for a family of two. Thus, McKenna could receive medical assistance only after incurring medical expenses of $639.96 in a 6-month period.

The Supreme Judicial Court, by a unanimous panel vote, held that the Massachusetts requirement for a 6-month spenddown period was invalid. *Rivera* v. *Commissioner of Public Welfare*, 395 Mass. 189, 479 N. E. 2d 639 (1985). It relied in part, *id.*, at 197, 479 N. E. 2d, at 644–645, on a ruling by the United States District Court for the District of Massachusetts sustaining an identical challenge to the Department's 6-month spenddown regulation. See *Hogan* v. *Heckler*, 597 F. Supp. 1106, 1110–1113 (1984), subsequently reversed, 769 F. 2d 886 (CA1 1985), cert. pending *sub nom. Hogan* v. *Bowen*, No. 85–6386. Although noting that eligibility determinations for the categorically needy do not involve spenddowns, the court observed that such determinations do require the use of a 1-month computation period. Therefore, it concluded, in providing that the "same methodology" be employed, the Act requires that a 1-month period be applied in eligibility calculations for the medically needy.

III

Congress created the spenddown provision in 1965 to eliminate a perceived weakness in the medical-assistance program then in effect. See Social Security Amendments of 1960, § 601(a), 74 Stat. 987. A 1965 Senate Report explained that under existing law some States used an absolute-income cutoff point. An individual with income just under the specified limit thus was able to obtain all the aid provided under the state plan, while one with income just over the limit was unable to obtain any assistance, even if the excess income was small when compared with the cost of the medical care needed. See S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 78 (1965).

To cure this problem, the Medicaid statute was amended to require state eligibility standards to measure income in terms of both the State's allowance for basic maintenance needs *and* the cost of the medical care required. The standards applied to the medically needy are to be "reasonable"

and "comparable for all groups." Congress imposed no further instruction on the spenddown, stating only that a State is to take into account the costs incurred for medical care, "except to the extent prescribed by the Secretary." 42 U. S. C. § 1396a(a)(17).

Pursuant to this authority, the Secretary has provided, from the inception of Medicaid until the present time, that States may employ a maximum spenddown period of six months. See 45 CFR § 248.21(a)(4) (1970), originally promulgated as HEW Handbook of Public Assistance Administration, Supplement D, Medical Assistance Programs, D-4220(A)(4) (June 17, 1966). This regulation plainly permits what Massachusetts has done. We long have recognized that, perhaps due to the intricacy of the Act, "Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Act." *Gray Panthers*, 453 U. S., at 43. See *Batterton* v. *Francis*, 432 U. S. 416, 425 (1977). The broad delegation to the Secretary in the spenddown provision includes the authority to provide the period in which the spenddown is to be calculated. Because the Secretary's regulation appears supported by the plain language of the statute and is adopted pursuant to the explicit grant of rulemaking authority in § 1396a(a)(17), it is "'entitled to more than mere deference or weight.'" *Gray Panthers*, 453 U. S., at 44, quoting *Batterton* v. *Francis*, 432 U. S., at 426. Indeed, it is entitled to "legislative effect," *id.*, at 425, and is controlling "unless [it is] arbitrary, capricious, or manifestly contrary to the statute," *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984).

IV

A

Respondents contend that the Secretary's regulation, and Massachusetts' 6-month spenddown enacted pursuant thereto, are "manifestly contrary to the statute." Respondents point to another section of the Act, 42 U. S. C. § 1396a(a)(10)(C)

(i)(III), requiring that a State's plan describe "the single standard to be employed in determining income . . . eligibility . . . and the methodology to be employed in determining such eligibility, which shall be the same methodology" employed under SSI or AFDC. To respondents, this statutory language is an express congressional mandate that the same methodology, here the 1-month budget period, be applied to eligibility determinations for the medically needy. This requirement, the argument goes, operates as an express limitation on the Secretary's authority to regulate the state administration of spenddowns. Similarly, it is a direct restriction on the States, requiring them to use a 1-month period in which the medically needy must spend down, on medical expenses, their excess income.

B

The history of the "same methodology" proviso, which first appeared in the Act in 1981, demonstrates that it was never intended to control the length of the spenddown. Rather, the "same methodology" requirement simply instructs States to treat components of income—*e. g.*, interest or court-ordered support payments—similarly for both medically and categorically needy persons.

The "same methodology" proviso was not Congress' first attempt to regulate the relationship between treatment of the categorically needy and treatment of the medically needy. To understand the precise purpose of the "same methodology" proviso requires a brief foray into Congress' earlier efforts to address this relationship, for the proviso reflects Congress' desire to overrule a particular interpretation that had been advanced by the Secretary.

When Medicaid was first enacted, Congress did not require that the "same methodology" be used for determining the eligibility of categorically and medically needy individuals. Instead, it required only that a State's Medicaid plan use

"comparable" standards for both groups.[7] The Secretary and several Courts of Appeals interpreted the original "comparability" language to require virtually identical treatment. See, *e. g.*, 38 Fed. Reg. 32216 (1973), originally codified as 45 CFR § 248.2; *Caldwell* v. *Blum*, 621 F. 2d 491, 495 (CA2 1980), cert. denied, 452 U. S. 909 (1981); *Greklek* v. *Toia*, 565 F. 2d 1259, 1261 (CA2 1977), cert. denied *sub nom. Blum* v. *Toomey*, 436 U. S. 962 (1978); *Fabula* v. *Buck*, 598 F. 2d 869, 872–873 (CA4 1979). Notably, no one advanced the claim that this "comparability" language prevented States from using a spenddown period of up to six months.[8]

Congress concluded that the administrative and judicial interpretation of the "comparability" provision denied States necessary flexibility to set eligibility standards and to adjust the scope of services to fit the varying requirements of medically needy persons. See H. R. Rep. No. 97–208, p. 971 (1981). Thus, as part of the Omnibus Budget Reconciliation Act of 1981 (OBRA), 95 Stat. 357, Congress amended the

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[7] The 1965 legislation was to the effect that a State choosing to extend assistance to the medically needy provide "for making medical or remedial care and services available to all individuals who would, if needy, be eligible for aid or assistance under any . . . State [cash assistance program] and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical or remedial care and services." 79 Stat. 345.

[8] The current version of the Act also contains a "comparability" requirement. See § 42 U. S. C. § 1396a(a)(17). Although the Supreme Judicial Court did not rely on "comparability" in arriving at its result, we note that that requirement did not mandate the use of a 1-month spenddown. The very purpose of § 1396a(a)(17) is to regulate the standards under which persons having incomes higher than allowed in the cash-assistance programs may still qualify for Medicaid; therefore, "comparability" cannot be read to require that the standards must be identical with those in the cash-assistance programs. Because the medically and categorically needy are different in a fundamental way, this Court previously has recognized that the comparability provisions of Medicaid "did not require that the medically needy be treated comparably to the categorically needy in all respects." *Schweiker* v. *Hogan*, 457 U. S. 569, 587 (1982). See *DeJesus* v. *Perales*, 770 F. 2d, at 323–324; *Hogan* v. *Heckler*, 769 F. 2d, at 891–897.

Medicaid Act by deleting the "comparability" requirement. After the amendment, a State was required only to include in its plan for the medically needy "a description of . . . the criteria for determining eligibility of individuals . . . for medical assistance." OBRA § 2171(a)(3)(C)(i), 95 Stat. 807.

The Secretary interpreted OBRA to authorize States to use income and resource criteria for medically needy different from those for categorically needy individuals:

> "States are no longer required to apply a uniform methodology for treating income and resources in such matters as deemed income, interest, court-ordered support payments, and infrequent and irregular income. Rather, the State plan must specify the methodology that will be used, and that methodology must be reasonable." 46 Fed. Reg. 47980 (1981).

The regulations promulgated by the Secretary accordingly left the States free to use eligibility standards that were unrelated to the standards used in AFDC or SSI, as long as the standards were "reasonable."[9] The Secretary's regulations did not address treatment of excess income for the medically needy or the calculation of spenddowns. Despite the various changes that followed OBRA's passage, many States contin-

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[9] The Secretary further explained:

"Before the 1981 Amendments, the methodology for treatment of income and resources of the medically needy depended on the individual's relationship to a specific cash assistance program. For example, the methodology for deeming the income of medically needy aged, blind, and disabled was taken from the SSI program. . . . [T]he 1981 Amendments revised the Medicaid statute so that the direct linkage between the cash assistance programs and the medically needy is no longer explicit. . . . Therefore, we have concluded that the State need not adopt the methodology of a related cash assistance program in treating income and resources of the medically needy. Rather, the State may develop its own. However, section 1902(a)(17)(C) of the Act has not been amended. Consequently, these final regulations require that the State must use a methodology for the treatment of income and resources that is reasonable." 46 Fed. Reg. 47980 (1981).

ued to use a 6-month spenddown, in conformity with the still-existing regulation permitting that choice.

Congress disagreed with the Secretary's interpretation. See, *e. g.*, 127 Cong. Rec. 23363 (1981) (remarks of Rep. Waxman). This disagreement led to the enactment of the "same methodology" proviso, as part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), § 137(a)(8), 96 Stat. 378. The House Report explained that TEFRA "makes clear that the Department [of Health and Human Services] had no authority to alter the rules that applied before September 30, 1981, with respect to medically needy income levels, medically needy resource standards, and the methodology for treating medically needy income and resources." H. R. Rep. No. 97-757, pt. 1, p. 13 (1982). The House Report further explained that TEFRA reaffirmed "the financial requirements previously in effect for the medically needy." *Ibid.*

Thus, the "same methodology" proviso was designed to correct a problem wholly unrelated to the 6-month spenddown, which had remained in force from the inception of Medicaid. The proviso operated solely to invalidate the post-OBRA regulations permitting the income and resource standards in state Medicaid plans to deviate from those used in the AFDC and SSI programs in "such matters as deemed income, interest, court-ordered support payments, and infrequent and irregular income." See 46 Fed. Reg. 47980 (1981). Treatment of excess income and the calculation of spenddowns were left untouched by the "same methodology" proviso.[10]

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[10] Subsequent legislative history is to the same effect and makes clear that TEFRA did not address the length of the spenddown. In the Deficit Reduction Act of 1984, § 2373(c)(1), 98 Stat. 1112, Congress amended § 1396a(a)(17) to impose a moratorium on disapproving state Medicaid plans that might be inconsistent with the "same methodology" requirement. In doing so, Congress reaffirmed that its sole intent in enacting the "same methodology" requirement had been to invalidate the Secretary's 1981 regulations. See H. R. Rep. No. 98-861, pp. 1366-1367 (1984).

V

The Medicaid Act itself is silent as to how many months' excess income the State may require an individual or a family to contribute to medical expenses before Medicaid coverage of further medical expenses begins. The Secretary's interpretation of the Act is consistent with congressional intent, and under that interpretation Massachusetts is free to choose a 6-month spenddown. Accordingly, the judgment of the Supreme Judicial Court is reversed.

It is so ordered.

DARDEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-5319. Argued January 13, 1986—Decided June 23, 1986

After a jury trial in a Florida court, petitioner was found guilty of murder, robbery, and assault with intent to kill. Pursuant to Florida's capital sentencing statute, the same jury heard further testimony and argument, and made a nonbinding recommendation that the death penalty be imposed. The trial judge followed that recommendation, and the Florida Supreme Court affirmed the conviction and the sentence, rejecting petitioner's contention that the prosecution's closing argument during the guilt phase of the trial rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the Eighth Amendment. The court also rejected petitioner's contention that the trial court erred in excluding a member of the venire for cause on the basis of his affirmative response to the judge's question during *voir dire* "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" In subsequent federal habeas corpus proceedings, petitioner raised the same claims, as well as the additional claim that he had been denied effective assistance of counsel at the sentencing phase of his trial. The District Court denied relief, and the Court of Appeals ultimately affirmed the District Court's judgment in all of its aspects.

Held:

1. The record of the jury *voir dire*, viewed in its entirety, shows that the trial court's decision to exclude the juror involved here was proper. *Wainwright* v. *Witt*, 469 U. S. 412, held that the proper test is whether a juror's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Petitioner's argument on this issue rested solely on the wording of the question (quoted above) that the trial court asked the juror before excluding him. However, a proper determination of the issue requires examination of the context surrounding the juror's exclusion. The record shows that prior to individual questioning the trial court told the entire venire that they would be questioned on this point, and that the juror in question was present while the court re-

peatedly stated the correct standard when questioning other individual members of the panel. Pp. 175–178.

2. The record also supports the rejection of petitioner's contention as to the prosecution's closing argument. The prosecution's argument included improper remarks that indicated that petitioner was on weekend furlough from an earlier prison sentence when the crime involved here occurred; implied that the death penalty would be the only guarantee against a future similar act; referred to petitioner as an "animal"; and reflected an emotional reaction to the case. However, the relevant question is whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Viewed under this standard, the prosecution's comments did not deprive petitioner of a fair trial. The comments did not manipulate or misstate the evidence, or implicate other specific rights of the accused, and much of their objectionable content was responsive to the opening summation of the defense (available under a state procedural rule). Moreover, defense counsel were able to use their final rebuttal argument to turn much of the prosecution's closing argument against them. Pp. 178–183.

3. With respect to the claim of ineffective assistance of counsel at the sentencing phase of the trial, petitioner failed to satisfy the first part of the two-part test set forth in *Strickland* v. *Washington*, 466 U. S. 668, that his trial counsels' performance fell below an objective standard of reasonableness. There is no merit to petitioner's contention that trial counsel devoted only the time between the close of the guilt phase of trial and the start of the penalty phase—approximately one-half hour—to prepare the case in mitigation. The record indicates that a great deal of time and effort went into the defense of this case; a significant portion of that time was devoted to preparation for sentencing. Moreover, a defendant must overcome the presumption that, under the circumstances, the challenged action of counsel might be considered sound trial strategy. Petitioner did not overcome that presumption here. The record shows several reasons why counsel reasonably could have chosen to rely on a simple plea for mercy from petitioner himself, rather than to attempt to introduce mitigating evidence. Pp. 184–187.

767 F. 2d 752, affirmed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p, 187. BRENNAN, J., filed a dissenting opinion, *post*, p. 188. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 188.

Robert Augustus Harper, Jr., argued the cause and filed briefs for petitioner.

Richard W. Prospect, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Jim Smith*, Attorney General.

JUSTICE POWELL delivered the opinion of the Court.

This case presents three questions concerning the validity of petitioner's criminal conviction and death sentence: (i) whether the exclusion for cause of a member of the venire violated the principles announced in *Wainwright* v. *Witt*, 469 U. S. 412 (1985); (ii) whether the prosecution's closing argument during the guilt phase of a bifurcated trial rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the Eighth Amendment; and (iii) whether petitioner was denied effective assistance of counsel at the sentencing phase of his trial.

I

Petitioner was tried and found guilty of murder, robbery, and assault with intent to kill in the Circuit Court for Citrus County, Florida, in January 1974. Pursuant to Florida's capital sentencing statute, the same jury that convicted petitioner heard further testimony and argument in order to make a nonbinding recommendation as to whether a death sentence should be imposed. The jury recommended a death sentence, and the trial judge followed that recommendation. On direct appeal, the Florida Supreme Court affirmed the conviction and the sentence. Petitioner made several of the same arguments in that appeal that he makes here. With respect to the prosecutorial misconduct claim, the court disapproved of the closing argument, but reasoned that the law required a new trial "only in those cases in which it is reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt . . . or in which the comment is unfair." *Darden* v. *State*, 329 So. 2d 287, 289 (1976). It concluded that the comments had not rendered

petitioner's trial unfair. Petitioner's challenge to the juror exclusion was rejected without comment. Petitioner did not at that time raise his claim of ineffective assistance of counsel. This Court granted certiorari, 429 U. S. 917 (1976), limited the grant to the claim of prosecutorial misconduct, 429 U. S. 1036 (1977), heard oral argument, and dismissed the writ as improvidently granted, 430 U. S. 704 (1977).

Petitioner then sought federal habeas corpus relief, raising the same claims he raises here. The District Court denied the petition. *Darden* v. *Wainwright*, 513 F. Supp. 947 (MD Fla. 1981). A divided panel of the Court of Appeals for the Eleventh Circuit affirmed. *Darden* v. *Wainwright*, 699 F. 2d 1031 (1983). The Court of Appeals granted rehearing en banc, and affirmed the District Court by an equally divided court. 708 F. 2d 646 (1983). Following a second rehearing en banc the Court of Appeals reversed on the claim of improper excusal of a member of the venire. 725 F. 2d 1526 (1984). This Court granted the State's petition for certiorari on that claim, vacated the Court of Appeals' judgment and remanded for reconsideration in light of *Wainwright* v. *Witt*. 469 U. S. 1202 (1985). On remand, the en banc court denied relief, 767 F. 2d 752 (1985). Petitioner filed an application for a stay of his execution that this Court treated as a petition for certiorari and granted, at the same time staying his execution. 473 U. S. 928 (1985). We now affirm.

II

Because of the nature of petitioner's claims, the facts of this case will be stated in more detail than is normally necessary in this Court. On September 8, 1973, at about 5:30 p. m., a black adult male entered Carl's Furniture Store near Lakeland, Florida. The only other person in the store was the proprietor, Mrs. Turman, who lived with her husband in a house behind the store. Mr. Turman, who worked nights at a juvenile home, had awakened at about 5 p. m., had a cup of coffee at the store with his wife, and returned home to let

their dogs out for a run. Mrs. Turman showed the man around the store. He stated that he was interested in purchasing about $600 worth of furniture for a rental unit, and asked to see several different items. He left the store briefly, stating that his wife would be back to look at some of the items.

The same man returned just a few minutes later asking to see some stoves, and inquiring about the price. When Mrs. Turman turned toward the adding machine, he grabbed her and pressed a gun to her back, saying "Do as I say and you won't get hurt." He took her to the rear of the store and told her to open the cash register. He took the money, then ordered her to the part of the store where some box springs and mattresses were stacked against the wall. At that time Mr. Turman appeared at the back door. Mrs. Turman screamed while the man reached across her right shoulder and shot Mr. Turman between the eyes. Mr. Turman fell backwards, with one foot partially in the building. Ordering Mrs. Turman not to move, the man tried to pull Mr. Turman into the building and close the door, but could not do so because one of Mr. Turman's feet was caught in the door. The man left Mr. Turman faceup in the rain, and told Mrs. Turman to get down on the floor approximately five feet from where her husband lay dying. While she begged to go to her husband, he told her to remove her false teeth. He unzipped his pants, unbuckled his belt, and demanded that Mrs. Turman perform oral sex on him. She began to cry "Lord, have mercy." He told her to get up and go towards the front of the store.

Meanwhile, a neighbor family, the Arnolds, became aware that something had happened to Mr. Turman. The mother sent her 16-year-old son Phillip, a part-time employee at the furniture store, to help. When Phillip reached the back door he saw Mr. Turman lying partially in the building. When Phillip opened the door to take Turman's body inside, Mrs. Turman shouted "Phillip, no, go back." Phillip did not know

what she meant and asked the man to help get Turman inside. He replied, "Sure, buddy, I will help you." As Phillip looked up, the man was pointing a gun in his face. He pulled the trigger and the gun misfired; he pulled the trigger again and shot Phillip in the mouth. Phillip started to run away, and was shot in the neck. While he was still running, he was shot a third time in the side. Despite these wounds, Phillip managed to stumble to the home of a neighbor, Mrs. Edith Hill. She had her husband call an ambulance while she tried to stop Phillip's bleeding. While she was helping Phillip, she saw a late model green Chevrolet leave the store and head towards Tampa on State Highway 92. Phillip survived the incident; Mr. Turman, who never regained consciousness, died later that night.

Minutes after the murder petitioner was driving towards Tampa on Highway 92, just a few miles away from the furniture store. He was out on furlough from a Florida prison, and was driving a car borrowed from his girlfriend in Tampa. He was driving fast on a wet road. Petitioner testified that as he came up on a line of cars in his lane, he was unable to slow down. He attempted to pass, but was forced off the road to avoid a head-on collision with an oncoming car. Petitioner crashed into a telephone pole. The driver of the oncoming car, John Stone, stopped his car and went to petitioner to see if he could help. Stone testified that as he approached the car, petitioner was zipping up his pants and buckling his belt. Police at the crash site later identified petitioner's car as a 1969 Chevrolet Impala of greenish golden brown color. Petitioner paid a bystander to give him a ride to Tampa. Petitioner later returned with a wrecker, only to find that the car had been towed away by the police.

By the time the police arrived at the scene of the accident, petitioner had left. The fact that the car matched the description of the car leaving the scene of the murder, and that the accident had occurred within three and one-half miles of the furniture store and within minutes of the murder, led po-

lice to suspect that the car was driven by the murderer. They searched the area. An officer found a pistol—a revolver—about 40 feet from the crash site. The arrangement of shells within the chambers exactly matched the pattern that should have been found in the murder weapon: one shot, one misfire, followed by three shots, with a live shell remaining in the next chamber to be fired. A specialist for the Federal Bureau of Investigation examined the pistol and testified that it was a Smith & Wesson .38 special revolver. It had been manufactured as a standard .38; it later was sent to England to be rebored, making it a much rarer type of gun than the standard .38. An examination of the bullet that killed Mr. Turman revealed that it came from a .38 Smith & Wesson special.

On the day following the murder petitioner was arrested at his girlfriend's house in Tampa. A few days later Mrs. Turman identified him at a preliminary hearing as her husband's murderer. Phillip Arnold selected petitioner's picture out of a spread of six photographs as the man who had shot him.[1] By that time, a Public Defender had been appointed to represent petitioner.

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[1] There are some minor discrepancies in the eyewitness identification. Mrs. Turman first described her assailant immediately after the murder while her husband was being taken to the emergency room. She told the investigating officer that the attacker was a heavyset man. Tr. 237. When asked if he was "neat in his appearance, clean-looking, clean-shaven," she responded "[a]s far as I can remember, yes, sir." *Ibid.* She also stated to the officer that she thought that the attacker was about her height, 5' 6" tall, and that he was wearing a pullover shirt with a stripe around the neck. *Id.*, at 227. The first time she saw petitioner after the attack was when she identified him at the preliminary hearing. She had not read any newspaper accounts of the crime, nor had she seen any picture of petitioner. When she was asked if petitioner was the man who had committed the crimes, she said yes. She also repeatedly identified him at trial.

Phillip Arnold first identified petitioner in a photo lineup while in the hospital. He could not speak at the time, and in response to the written question whether petitioner had a mustache, Phillip wrote back "I don't

As petitioner's arguments all relate to incidents in the course of his trial, they will be taken up, together with the relevant facts, in chronological order.

III

Petitioner contends that one member of the venire, Mr. Murphy, was excluded improperly under the test enunciated in *Wainwright* v. *Witt*, 496 U. S. 412 (1985). That case modified this Court's opinion in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). *Witherspoon* had held that potential jurors may be excused for cause when their opposition to the death penalty is such that they automatically would vote against a sentence of death or would be impaired in the task of determining defendant's guilt. *Witt* held that the proper test is whether the juror's views on capital punishment would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" 469 U. S., at 424, quoting *Adams* v. *Texas*, 448 U. S. 38, 45 (1980). *Witt* also made clear that the trial judge's determination that a potential juror is impermissibly biased is a factual finding entitled to a presumption of correctness under 28 U. S. C. § 2254.

Petitioner's argument on this issue relies solely on the wording of a question the trial court asked Murphy before excluding him. The court asked: "Do you have any moral or religious, conscientious moral or religious principles in oppo-

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think so." *Id.*, at 476. Phillip also testified at trial that the attacker was a heavyset man wearing a dull, light color knit shirt with a ring around the neck. *Id.*, at 443. He testified that the man was almost his height, about 6' 2" tall.

A motorist who stopped at the scene of the accident testified that petitioner was wearing a white or off-grey button-down shirt and that he had a slight mustache. *Id.*, at 313, 318–320. In fact, the witness stated that he "didn't know it was that [the mustache] or the raindrops on him or not. I couldn't really tell that much to it, it was real thin, that's all." *Id.*, at 318–319. Petitioner is about 5' 10" tall, and at the time of trial testified that he weighed about 175 pounds.

sition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" App. 9. Petitioner argues that this question does not correctly state the relevant legal standard. As *Witt* makes clear, however, our inquiry does not end with a mechanical recitation of a single question and answer. 469 U. S., at 424–426. We therefore examine the context surrounding Murphy's exclusion to determine whether the trial court's decision that Murphy's beliefs would "substantially impair the performance of his duties as a juror" was fairly supported by the record.

During *voir dire*, but prior to individual questioning on this point, the trial court spoke to the entire venire, including Murphy, saying:

> "Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation? Do you understand my question?"

The court then proceeded to question the members of the venire individually, but did so while the entire venire was present in the courtroom. Thus, throughout the individual questioning, all the veniremen could hear the questions and answers. In fact, the prosecution frequently incorporated prior questioning of other veniremen by reference, each time with the assurance from the individual being questioned that he or she had heard and understood the previous questions. See Tr. 89–90, 112, 141–142; see also *id.*, at 150.

The court repeatedly stated the correct standard when questioning individual members of the venire.[2] Murphy was present and heard the court ask the proper *Witherspoon* question over and over again.[3] After many instances of such

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[2] Prior to *voir dire* defense counsel objected to any questioning by the prosecution regarding a potential juror's feelings about the death penalty. The judge denied the motion, stating:

"It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law . . . ." App. 6.

Although the judge correctly stated the general standard for dismissal, he assured defense counsel that they were free to make an objection to any particular *Witherspoon* question that was otherwise objectionable or that had "gone too far." *Id.*, at 7.

[3] For example, the court asked Mrs. Macy: "[D]o you hold such conscientious moral or religious principles in opposition to the death penalty that you would be unwilling under any circumstances to recommend the death sentence?" Tr. 44. To Mr. Varney, who responded affirmatively to the above question, the court asked further: "[I]n the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?" *Ibid.* When three new veniremen replaced others who had been excused, the court asked: "Do either of the three of you hold such strong religious, moral or conscientious principles in opposition to the imposition of the death penalty that you would be unwilling to vote to recommend the death penalty regardless of what the evidence was?" *Id.*, at 88. At a similar point later on, the court explained to replacements from the venire that "I have asked the others and I will ask each of the four of you whether you have such strong religious, conscientious or moral principles against the imposition of the death penalty that you would be unwilling to vote to return a recommended sentence of the death penalty regardless of what the evidence or the facts might be?" *Id.*, at 109. When one of the four expressed reservations, the court once again followed up with further questioning, demonstrating its practice of assuring itself, if there was any doubt, of the potential juror's true position. See also *id.*, at 107. During the *voir dire* examination prior to Murphy, four potential jurors were excused on *Witherspoon* grounds.

questioning, Murphy was seated in the jury box. The court first asked Murphy his occupation, and learned that he was retired, but had spent the eight years before retirement working in the administration office of St. Pios Seminary. As previously noted, the court then asked: "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" After Murphy responded "Yes, I have" he was excused.

The precise wording of the question asked of Murphy, and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty. But *Witt* recognized that "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." 469 U. S., at 424. The trial court, "aided as it undoubtedly was by its assessment of [the potential juror's] demeanor," *id.*, at 434, was under the obligation to determine whether Murphy's views would "'prevent or substantially impair the performance of his duties as a juror,'" *id.*, at 424. In making this determination, the trial court could take account of the fact that Murphy was present throughout an entire series of questions that made the purpose and meaning of the *Witt* inquiry absolutely clear. No specific objection was made to the excusal of Murphy by defense counsel. Nor did the court perceive, as it had previously, any need to question further. Viewing the record of *voir dire* in its entirety, we agree with the reasoning of the Court of Appeals that the trial court's decision to exclude this juror was proper. 767 F. 2d, at 754.

IV

Petitioner next contends that the prosecution's closing argument at the guilt-innocence stage of the trial rendered his conviction fundamentally unfair and deprived the sentencing

determination of the reliability that the Eighth Amendment requires.

It is helpful as an initial matter to place these remarks in context. Closing argument came at the end of several days of trial. Because of a state procedural rule[4] petitioner's counsel had the opportunity to present the initial summation as well as a rebuttal to the prosecutors' closing arguments. The prosecutors' comments must be evaluated in light of the defense argument that preceded it, which blamed the Polk County Sheriff's Office for a lack of evidence,[5] alluded to the death penalty,[6] characterized the perpetrator of the crimes as an "animal,"[7] and contained counsel's personal opinion of the strength of the State's evidence.[8]

The prosecutors then made their closing argument. That argument deserves the condemnation it has received from every court to review it, although no court has held that the argument rendered the trial unfair. Several comments attempted to place some of the blame for the crime on the

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[4] Rule 3.250 of the Florida Rules of Criminal Procedure (1973) provided that "a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury."

[5] "The Judge is going to tell you to consider the evidence or the lack of evidence. We have a lack of evidence, almost criminally negligent on the part of the Polk County Sheriff's Office in this case. You could go on and on about it." Tr. 728.

[6] "They took a coincidence and magnified that into a capital case. And they are asking you to kill a man on coincidence." *Id.*, at 730.

[7] "The first witness that you saw was Mrs. Turman, who was a pathetic figure; who worked and struggled all of her life to build what little she had, the little furniture store; and a woman who was robbed, sexually assaulted, and then had her husband slaughtered before her eyes, by what would have to be a vicious animal." *Id.*, at 717. "And this murderer ran after him, aimed again, and this poor kid with half his brains blown away. . . . It's the work of an animal, there's no doubt about it." *Id.*, at 731–732.

[8] "So they come on up here and ask Citrus County people to kill the man. You will be instructed on lesser included offenses. . . . The question is, do they have enough evidence to kill that man, enough evidence? And I honestly do not think they do." *Id.*, at 736–737.

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Division of Corrections, because Darden was on weekend furlough from a prison sentence when the crime occurred.[9] Some comments implied that the death penalty would be the only guarantee against a future similar act.[10] Others incorporated the defense's use of the word "animal."[11] Prosecutor McDaniel made several offensive comments reflecting an emotional reaction to the case.[12] These comments undoubtedly were improper. But as both the District Court and the

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[9] "As far as I am concerned, there should be another Defendant in this courtroom, one more, and that is the division of corrections, the prisons. . . . Can we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?" App. 15–16. "Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them." *Id.*, at 16.

[10] "I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose—." *Id.*, at 17–18.

[11] "As far as I am concerned, and as Mr. Maloney said as he identified this man, this person as an animal, this animal was on the public for one reason." *Id.*, at 15.

[12] "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." *Id.*, at 16. "I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his [Darden's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun." *Id.*, at 20. "I wish someone had walked in the back door and blown his head off at that point." *Ibid.* "He fired in the boy's back, number five, saving one. Didn't get a chance to use it. I wish he had used it on himself." *Id.*, at 28. "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." *Id.*, at 29. "[D]on't forget what he has done according to those witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the moustache and the weight. The only thing he hasn't done that I know of is cut his throat." *Id.*, at 31. After this, the last in a series of such comments, defense counsel objected for the first time.

original panel of the Court of Appeals (whose opinion on this issue still stands) recognized, it "is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden* v. *Wainwright*, 699 F. 2d, at 1036. The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power." *Id.*, at 642.

Under this standard of review, we agree with the reasoning of every court to consider these comments that they did not deprive petitioner of a fair trial.[13] The prosecutors' argu-

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[13] JUSTICE BLACKMUN's dissenting opinion argues that because of prosecutorial misconduct petitioner did not receive a fair trial. The dissent states that the Court is "willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe." *Post*, at 189. We agree that the argument was, and deserved to be, condemned. *Supra*, at 179. Conscientious prosecutors will recognize, however, that *every court* that criticized the argument went on to hold that the *fairness* of petitioner's trial was not affected by the prosecutors' argument.

On direct appeal in 1976, the Florida Supreme Court so held after a careful review of the "totality of the record." *Darden* v. *State*, 329 So. 2d 287, 290–291. On the first federal habeas petition, the District Court considered the prosecution's closing argument at length and denied the petition. It concluded after a "thorough review of the record" that it was "convinced that no relief is warranted." *Darden* v. *Wainwright*, 513 F. Supp. 947, 958 (MD Fla. 1981). "Darden's trial was not perfect—few are—but neither was it fundamentally unfair." *Ibid.* The original panel of the Court of Appeals affirmed the District Court's holding with respect to the prosecutors' argument. It stated that it had "considered the prosecutors' remarks and evaluated them in light of Darden's entire trial," and that it "agree[d] with the district court's conclusion that the prosecutors' comments did not deny Darden a fundamentally fair trial." 699 F. 2d 1031, 1036–1037 (1983). When the Court of Appeals reheard the case en banc

ment did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent. See *Darden* v. *Wainwright*, 513 F. Supp., at 958. Much of the objectionable content was invited by or was responsive to the opening summation of the defense. As we explained in *United States* v. *Young*, 470 U. S. 1 (1985), the idea of "invited response" is used not to excuse improper comments, but to determine their effect on the trial as a whole. *Id.*, at 13. The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. The weight of the evidence against petitioner was heavy; the "overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges," 329 So. 2d, at 291, reduced the likelihood that the jury's decision was influenced by argument. Finally, defense counsel made the tactical decision not to present any witness other than petitioner. This decision not only permitted them to give their summation prior to the prosecution's closing argument, but also gave them the opportunity to make a final rebuttal argument. Defense counsel were able to use the opportunity for rebuttal very effectively, turning much of the prosecutors' closing argument against them by placing many of the prosecutors' comments and actions in a light that was more likely to engender strong disapproval than result in inflamed passions against peti-

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for the second time it expressly agreed with the panel decision on the prosecutorial misconduct issue. 725 F. 2d 1526, 1532 (1984).

The Court of Appeals, however, reversed the District Court on the *Witherspoon* issue. This Court granted the State's petition for certiorari only on that issue, and vacated and remanded the case for reconsideration in light of *Wainwright* v. *Witt*, 469 U. S. 412 (1985). The Court of Appeals denied all relief, 767 F. 2d 752 (1985). During this protracted litigation not one court has agreed with petitioner's claim with respect to improper prosecutorial argument.

tioner.[14] For these reasons, we agree with the District Court below that "Darden's trial was not perfect—few are—but neither was it fundamentally unfair." 513 F. Supp., at 958.[15]

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[14] "Mr. McDaniel made an impassioned plea . . . how many times did he repeat [it]? I wish you had been shot, I wish they had blown his face away. My God, I get the impression he would like to be the man that stands there and pulls the switch on him." Tr. 791; see also *id.*, at 794.

One of Darden's counsel testified at the habeas corpus hearing that he made the tactical decision not to object to the improper comments. Based on his long experience with prosecutor McDaniel, he knew McDaniel would "get much more vehement in his remarks if you allowed him to go on." By not immediately objecting, he hoped to encourage the prosecution to commit reversible error. Supp. App. 46–47.

[15] JUSTICE BLACKMUN's dissenting opinion mistakenly argues that the Court today finds, in essence, that any error was harmless, and then criticizes the Court for not applying the harmless-error standard. *Post*, at 196–197. We do not decide the claim of prosecutorial misconduct on the ground that it was harmless error. In our view of the case, that issue is not presented. Rather, we agree with the holding of every court that has addressed the issue, that the prosecutorial argument, in the context of the facts and circumstances of this case, did not render petitioner's trial unfair—*i. e.*, that it was not constitutional error.

Petitioner also maintains that the comments violated the requirement of reliability in the sentencing process articulated in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). The principles of *Caldwell* are not applicable to this case. *Caldwell* involved comments by a prosecutor during the sentencing phase of trial to the effect that the jury's decision as to life or death was not final, that it would automatically be reviewed by the State Supreme Court, and that the jury should not be made to feel that the entire burden of the defendant's life was on them. This Court held that such comments "presen[t] an intolerable danger that the jury will in fact choose to minimize the importance of its role," a view that would be fundamentally incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case. *Id.*, at 333.

There are several factual reasons for distinguishing *Caldwell* from the present case. The comments in *Caldwell* were made at the sentencing phase of trial and were approved by the trial judge. In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. The trial judge did

V

Petitioner contends that he was denied effective assistance of counsel at the sentencing phase of trial. That claim must be evaluated against the two-part test announced in *Strickland* v. *Washington*, 466 U. S. 668 (1984). First, petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688. Second, petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. Petitioner argues that his trial counsel did not delve sufficiently into his background, and as a result were unprepared to present mitigating evidence at the sentencing hearing.

As an initial matter, petitioner contends that trial counsel devoted only the time between the close of the guilt phase of trial and the start of the penalty phase—approximately one-half hour—to preparing the case in mitigation. That argument is without merit. Defense counsel engaged in extensive preparation prior to trial, in a manner that included preparation for sentencing. Mr. Jack Johnson, head of the Public Defender's office at the time, stated to the habeas court that "we had expended hundreds of hours on [petitioner's] behalf trying to represent him," Tr. of Habeas Corpus Proceedings 219, and that his office "worked very hard on the case." *Id.*, at 237. Mr. Goodwill, an experienced criminal trial lawyer, testified that he "spent more time on this case

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not approve of the comments, and several times instructed the jurors that the arguments were not evidence and that their decision was to be based only on the evidence. But petitioner's reliance on *Caldwell* is even more fundamentally mistaken than these factual differences indicate. *Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. In this case, none of the comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process. If anything, the prosecutors' comments would have had the tendency to *increase* the jury's perception of its role. We therefore find petitioner's Eighth Amendment argument unconvincing.

than I spent on . . . any capital case I have been involved in, probably more time than any case I've ever been involved in." Supp. App. 30. That included time investigating petitioner's alibi, and driving petitioner around the scene of events to establish each point of his story. Counsel obtained a psychiatric report on petitioner, with an eye toward using it in mitigation during sentencing. Counsel also learned in pretrial preparation that Mrs. Turman was opposed to the death penalty, and considered the possibility of putting her on the stand at the sentencing phase. The record clearly indicates that a great deal of time and effort went into the defense of this case; a significant portion of that time was devoted to preparation for sentencing.

Petitioner also claims that his trial counsel interpreted Fla. Stat. § 921.141(6) (1985), a statutory list of mitigating factors, as an exclusive list. He contends that their failure to introduce any evidence in mitigation was the result of this interpretation of the statute, and that he was thereby deprived of effective assistance of counsel. We express no view about the reasonableness of that interpretation of Florida law, because in this case the trial court specifically informed petitioner and his counsel just prior to the sentencing phase of trial that they could "go into any other factors that might really be pertinent to full consideration of your case and the analysis of you and your family situation, your causes, or anything else that might be pertinent to what is the appropriate sentence." Tr. 887. At that point, even if counsel previously believed the list to be exclusive, they knew they were free to offer nonstatutory mitigating evidence, and chose not to do so.

As we recognized in *Strickland:* "Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U. S., at 689. In particular, "a court

must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Ibid.*, quoting *Michel* v. *Louisiana*, 350 U. S. 91, 101 (1955). In this case, there are several reasons why counsel reasonably could have chosen to rely on a simple plea for mercy from petitioner himself. Any attempt to portray petitioner as a nonviolent man would have opened the door for the State to rebut with evidence of petitioner's prior convictions. This evidence had not previously been admitted in evidence, and trial counsel reasonably could have viewed it as particularly damaging. The head of the Public Defenders Office testified at the habeas corpus hearing that petitioner "had been in and out of jails and prisons for most of his adult life . . . ." Tr. of Habeas Corpus Proceedings 209. Petitioner had, for example, previously been convicted of assault with intent to commit rape. *Darden* v. *State*, 218 So. 2d 485 (Fla. App. 1969). In addition, if defense counsel had attempted to offer testimony that petitioner was incapable of committing the crimes at issue here, the State could have responded with a psychiatric report that indicated that petitioner "very well could have committed the crime; that he was, as I recall his [the psychiatrist's] term, sociopathic type personality; that he would act entirely on impulse with no premeditation from the standpoint of planning. But that when a situation arose, the decision would be made simultaneously to commit the act." Supp. App. 76 (testimony of Mr. Goodwill). For that reason, after consultation with petitioner, defense counsel rejected use of the psychiatric testimony. Tr. 886. Similarly, if defense counsel had attempted to put on evidence that petitioner was a family man, they would have been faced with his admission at trial that, although still married, he was spending the weekend furlough with a girlfriend. In sum, petitioner has not "overcome the presumption that, under the circumstances, the challenged action 'might be considered

sound trial strategy.'" 466 U. S., at 689, quoting *Michel* v. *Louisiana*, *supra*, at 101. Petitioner has failed to satisfy the first part of the *Strickland* test, that his trial counsels' performance fell below an objective standard of reasonableness. We agree with both the District Court and the Court of Appeals that petitioner was not deprived of the effective assistance of counsel. 699 F. 2d, at 1037.

VI

The judgment of the Court of Appeals is affirmed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE BURGER, concurring.

I concur fully in the opinion for the Court and write separately only to address the suggestion in JUSTICE BLACKMUN's dissent that the Court rejects Darden's *Witherspoon* claim because of its "impatience with the progress of Darden's constitutional challenges to his conviction." *Post*, at 204. In support of this contention, reference is made to my dissent from the grant of certiorari in this case. The dissent states that I voted to deny the petition because Darden's claims have been reviewed by 95 judges in the 12 years since his conviction. This is simply incorrect. To set the record straight, I quote my dissent in full:

> "In the 12 years since petitioner was convicted of murder and sentenced to death, the issues now raised in the petition for certiorari have been considered by this Court four times, see *Darden* v. *Florida*, 430 U. S. 704 (1977) (dismissing certiorari as improvidently granted); *Darden* v. *Wainwright*, 467 U. S. 1230 (1984) (denying certiorari); *Wainwright* v. *Darden*, 469 U. S. 1202 (1985) (vacating and remanding 725 F. 2d 1526 (CA11 1984)); *Darden* v. *Wainwright*, [473 U. S. 927] (order dated September 3, 1985, denying application for stay), and have been passed upon no fewer than 95 times by federal and

state court judges. Upon review of the petition and the history of this case, I conclude that no issues are presented that merit plenary review by this Court. Because we abuse our discretion when we accept meritless petitions presenting claims that we rejected only hours ago, I dissent." 473 U. S. 929 (1985).

As my dissent makes clear, I voted to deny the petition in this extraordinary case because the meritless claims raised did not require plenary review. Full briefing and oral argument have not changed my views.

The dissent's suggestion that this Court is motivated by impatience with Darden's constitutional claims is refuted by the record; the 13 years of judicial proceedings in this case manifest substantial care and patience. Our rejection of Darden's claims in this the fourth time he has sought review in this Court is once again based on a thoughtful application of the law to the facts of the case. At some point there must be finality.

JUSTICE BRENNAN, dissenting.

I join my Brother BLACKMUN's dissent. Moreover, adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would vacate the death sentence imposed in this case.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

Although the Constitution guarantees a criminal defendant only "a fair trial [and] not a perfect one," *Lutwak* v. *United States*, 344 U. S. 604, 619 (1953); *Bruton* v. *United States*, 391 U. S. 123, 135 (1968), this Court has stressed repeatedly in the decade since *Gregg* v. *Georgia*, 428 U. S. 153 (1976), that the Eighth Amendment requires a heightened degree of reliability in any case where a State seeks to take the defend-

ant's life.[1] Today's opinion, however, reveals a Court willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe.

I

A

The Court's discussion of Darden's claim of prosecutorial misconduct is noteworthy for its omissions. Despite the fact that earlier this Term the Court relied heavily on standards governing the professional responsibility of defense counsel in ruling that an attorney's actions did not deprive his client of any constitutional right, see *Nix* v. *Whiteside*, 475 U. S. 157, 166–171 (1986), today it entirely ignores standards governing the professional responsibility of prosecutors in reaching the conclusion that the summations of Darden's prosecutors did not deprive him of a fair trial. See *ante*, at 178–183.

The prosecutors' remarks in this case reflect behavior as to which "virtually all the sources speak with one voice," *Nix* v. *Whiteside*, *supra*, at 166, that is, a voice of strong condemnation.[2] The following brief comparison of established stand-

[1] See, *e. g.*, *Caldwell* v. *Mississippi*, 472 U. S. 320, 328–329 (1985); *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983); *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion); *Gardner* v. *Florida*, 430 U. S. 349, 358–359 (1977) (plurality opinion); *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion).

[2] Every judge who has addressed the prosecutors' behavior has condemned it. See *Darden* v. *State*, 329 So. 2d 287, 290 (Fla. 1976) ("[T]he prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility"); *id.*, at 291–295 (dissenting opinion); *Darden* v. *Wainwright*, 513 F. Supp. 947, 955 (MD Fla. 1981) ("Anyone attempting a text-book illustration of a violation of the Code of Professional Responsibility . . . could not possibly improve upon [prosecutor White's final statement]"); *Darden* v. *Wainwright*, 699 F. 2d 1031, 1035–1036 (CA11 1983); *id.*, at 1040–1043 (dissenting opinion). Even the State's Attorney concedes that prosecutor McDaniel's summation was an "unnecessary tirade," Supp. App. 46, that "[n]o one has ever even weakly suggested that McDaniel's closing remarks were anything but

ards of prosecutorial conduct with the prosecutors' behavior in this case merely illustrates, but hardly exhausts, the scope of the misconduct involved:

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improper," Supplemental Answer in *Darden* v. *Wainwright*, Case No. 79-566-Civ. T. H. (MD Fla.) (June 1, 1979), p. 12, and that much of the summation consisted of "inflammatory irrelevancies," Answer to Pet. for Habeas Corpus in *Darden* v. *Wainwright*, Case. No. 79-566-Civ. T. H. (MD Fla.) (May 22, 1979), p. 11.

It is true that the Florida Supreme Court, the Federal District Court, and the Court of Appeals each ultimately concluded that Darden had not been deprived of a fair trial. But the grounds on which each rested its conclusion are troubling indeed. The Florida Supreme Court's "careful review of the 'totality of the record,'" as this Court now would describe it, *ante*, at 181, n. 13, consists of three paragraphs. The first of these discusses evidence that petitioner "was a career criminal," who stayed with a woman other than his wife while on furlough, and used her car to visit various bars and a pool hall contrary to the conditions of his furlough. The second paragraph notes, among other things, that petitioner "admitted speeding in a rainstorm and creating great danger to other motorists" on the night of the murder. And the last describes the heinousness of the events that occurred at the Turmans' store, but says absolutely nothing about the evidence tying petitioner to those events. 329 So. 2d, at 290. (The court earlier had noted that Mrs. Turman and Phillip Arnold had identified petitioner as the perpetrator. *Id.*, at 288.)

The crux of the Florida Supreme Court's analysis, however, is that it was not "possible to use language which is fair comment about these crimes without shocking the feelings of any normal person[.] The language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes. The law permits fair comment. This comment was fair." *Id.*, at 290. Since the prosecutors had "reasonably describ[ed] what happened and what should be done to the guilty party," their comments were not erroneous. *Id.*, at 291.

The standard apparently applied by Florida is wholly unacceptable. A defendant's right to a fair trial cannot depend on the nature of the crime of which he is accused. And "what should be done to the guilty party" cannot be relevant to the determination of guilt.

The District Court's conclusion suffers from a similar error. In addition to advancing many of the arguments adopted by the Court today—none of which is persuasive, see *infra*, at 194-200—the District Court found no prejudice because the offensive statements were not "keyed to arouse prejudice against the accused on any basis other than the horror of the crimes

1. "A lawyer shall not . . . state a personal opinion as to . . . the credibility of a witness . . . or the guilt or innocence of an accused." Model Rules of Professional Conduct, Rule 3.4(e) (1984); see also Code of Professional Responsibility, DR 7-106(C)(4) (1980), ABA Standards for Criminal Justice 3-5.8(b)(2d ed. 1980). Yet one prosecutor, White, stated: "I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life." App. 15. And the other prosecutor, McDaniel, stated, with respect to Darden's testimony: "Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out." *Id.*, at 18.

2. "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the

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themselves." 513 F. Supp., at 956, n. 12. But at the guilt phase of this bifurcated trial, horror about the crimes was irrelevant. The sole issue was whether Darden committed them. The Court of Appeals merely quoted and approved the analysis of the District Court. See 699 F. 2d, at 1036–1037.

In its catalog of the number of judges who have found petitioner's trial to have been fair, the Court fails to include the Magistrate before whom petitioner's federal habeas proceedings were actually conducted, and who recommended that the District Court grant petitioner habeas relief on the basis of his claim of prosecutorial misconduct. Magistrate Paul Game, Jr., correctly recognized that this case essentially turned on the relative credibility of three witnesses, Mrs. Turman, Phillip Arnold, and Willie Darden, and that the prosecutors' concerted attack on Darden's humanity could well have affected the jury's assessment of his credibility. See App. 214. He also recognized that the remarks occurred "[i]n the context of the emotionally charged trial of Darden, a black man, accused of robbery, the brutal murder of a white man, the repeated shooting of a defenseless white teenager and vile sexual advances on a white woman." *Id.*, at 215. Notably, the Court today ignores the context in which the trial took place, including the fact that petitioner's motion for a change of venue was granted, and contents itself instead with hypothesizing reasons why the prosecutors' shameful conduct should not deprive them of a hanging verdict.

evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict." ABA Standards for Criminal Justice 3-5.8(d) (2d ed. 1980); cf. Model Rules of Professional Conduct, Rule 3.4(e); Code of Professional Responsibility, DR 7-106(C)(7); ABA Standards for Criminal Justice 3-6.1(c) (2d ed. 1980). Yet McDaniel's argument was filled with references to Darden's status as a prisoner on furlough who "shouldn't be out of his cell unless he has a leash on him." App. 16; see also, *e. g.*, *id.*, at 17, 18, 23, 24, 26. Again and again, he sought to put on trial an absent "defendant," the State Department of Corrections that had furloughed Darden. See, *e. g.*, *id.*, at 15, 17, 23, 32. He also implied that defense counsel would use improper tricks to deflect the jury from the real issue. See *id.*, at 15, 26. Darden's status as a furloughed prisoner, the release policies of the Department of Corrections, and his counsel's anticipated tactics obviously had no legal relevance to the question the jury was being asked to decide: whether he had committed the robbery and murder at the Turmans' furniture store. Indeed, the State argued before this Court that McDaniel's remarks were harmless precisely *because* he "failed to discuss the issues, the weight of the evidence, or the credibility of the witnesses." Brief for Respondent 26.

3. "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." ABA Standards for Criminal Justice 3-5.8(c) (2d ed. 1980); see *Berger* v. *United States*, 295 U. S. 78, 88 (1935). Yet McDaniel repeatedly expressed a wish "that I could see [Darden] sitting here with no face, blown away by a shotgun," App. 20; see also, *e. g.*, *id.*, at 28, 29, 31. Indeed, I do not think McDaniel's summation, taken as a whole, can accurately be described as anything but a relentless and single-minded attempt to inflame the jury.

B

The Court, see *ante*, at 181, relies on the standard established in *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 643 (1974), for deciding when a prosecutor's comments at a state trial render that trial fundamentally unfair. It omits, however, any discussion of the facts, so different from those in this case, that led the Court to conclude in *DeChristoforo* that that defendant had not been deprived of a fair trial.

DeChristoforo concerned "two remarks made by the prosecutor during the course of his rather lengthy closing argument to the jury." *Id.*, at 640. One remark was "but one moment of an extended trial." *Id.*, at 645. And even the more objectionable remark was so "ambiguous," *ibid.*, that it provided no basis for inferring either that the prosecutor "intend[ed] [it] to have its most damaging meaning or that a jury, sitting through lengthy exhortation, [would] draw that meaning from the plethora of less damaging interpretations," *id.*, at 647. Finally, the trial judge in *DeChristoforo* expressly instructed the jury to disregard the improper statements. *Id.*, at 645. This Court's holding thus rested on its conclusion that the prosecutor's comments were neither so extensive nor so improper as to violate the Constitution.

Far from involving "ambiguous" statements that "might or might not" affect the jury, *id.*, at 647, the remarks at issue here were "focused, unambiguous, and strong." *Caldwell* v. *Mississippi*, 472 U. S. 320, 340 (1985). It is impossible to read the transcript of McDaniel's summation without seeing it as a calculated and sustained attempt to inflame the jury. Almost every page contains at least one offensive or improper statement; some pages contain little else. The misconduct here was not "slight or confined to a single instance, but . . . was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Berger* v. *United States*, 295 U. S., at 89.

C

The Court presents what is, for me, an entirely unpersuasive one-page laundry list of reasons for ignoring this blatant misconduct. First, the Court says that the summations "did not manipulate or misstate the evidence [or] . . . implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Ante*, at 182. With all respect, that observation is quite beside the point. The "solemn purpose of endeavoring to ascertain the truth . . . is the *sine qua non* of a fair trial," *Estes* v. *Texas*, 381 U. S. 532, 540 (1965), and the summations cut to the very heart of the Due Process Clause by diverting the jury's attention "from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding." *Stone* v. *Powell*, 428 U. S. 465, 490 (1976).

Second, the Court says that "[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense." *Ante*, at 182, citing *United States* v. *Young*, 470 U. S. 1 (1985). The Court identifies four portions of the defense summation that it thinks somehow "invited" McDaniel's sustained barrage. The State, however, did not object to any of these statements, and, to my mind, none of them is so objectionable that it would have justified a tactical decision to interrupt the defense summation and perhaps irritate the jury. Cf. *id.*, at 13–14.

The Court begins by stating that defense counsel "blamed" the Sheriff's Office for a lack of evidence. *Ante*, at 179. The Court does not identify which, if any, of McDaniel's remarks represented a response to this statement. I cannot believe that the Court is suggesting, for example, that defense counsel's one mention of the "almost crimina[l] negligen[ce] on the part of the Polk County Sheriff's Office," Tr. 728, justified McDaniel's express and repeated wish that he could try the Department of Corrections for murder. See, *e. g.*, App. 15, 17, 23, 32.

Next, the Court notes that defense counsel "alluded" to the death penalty. *Ante*, at 179. While this allusion might have justified McDaniel's statement that "you are merely to determine his innocence or guilt, nothing else," App. 17, it could hardly justify, for example, McDaniel's expressions of his personal wish that Darden be "blown away by a shotgun," *id.*, at 20; see also *id.*, at 28, 29, 31.

Moreover, the Court says, defense counsel twice referred to the perpetrator as an "animal." *Ante*, at 179; see Tr. 717, 732. It is entirely unclear to me why this characterization called for any response from the prosecutor at all. Taken in context, defense counsel's statements did nothing more than tell the jury that, although everyone agreed that a heinous crime had been committed, the issue on which it should focus was whether *Darden* had committed it.

Finally, the Court finds that Darden brought upon himself McDaniel's tirade because defense counsel gave his "personal opinion of the strength of the State's evidence." *Ante*, at 179. Again, the Court gives no explanation of how the statement it quotes—a single, mild expression of defense counsel's overall assessment of the evidence—justified the "response" that followed, which consisted, to the extent it represented a comment on the evidence at all, of accusations of perjury, see App. 18–19, and personal disparagements of opposing counsel, see *id.*, at 15, 26. In sum, McDaniel went so far beyond "respond[ing] substantially in order to 'right the scale,'" *Young*, 470 U. S., at 13, that the reasoning in *Young* provides no basis at all for the Court's holding today.

The third reason the Court gives for discounting the effects of the improper summations is the supposed curative effect of the trial judge's instructions: the judge had instructed the jury that it was to decide the case on the evidence and that the arguments of counsel were not evidence. *Ante*, at 182. But the trial court overruled Darden's objection to McDaniel's repeated expressions of his wish that Darden had been killed, App. 31, thus perhaps leaving the jury with the

impression that McDaniel's comments were somehow relevant to the question before them. The trial judge's instruction that the attorneys were "trained in the law," and thus that their "analysis of the issues" could be "extremely helpful," Tr. 714, might also have suggested to the jury that the substance of McDaniel's tirade was pertinent to their deliberations.

Fourth, the Court suggests that because Darden enjoyed the tactical advantage of having the last summation, he was able to "tur[n] much of the prosecutors' closing argument against them." *Ante*, at 182. But the issue before the jury was whether Darden was guilty, not whether McDaniel's summation was proper. And the question before this Court is not whether we agree with defense counsel's criticism of the summation but whether the jury was affected by it. Since Darden was ultimately convicted, it is hard to see what basis the Court has for its naked assertion that "[d]efense counsel were able to use the opportunity for rebuttal very effectively." *Ante*, at 182; cf. *Young*, 470 U. S., at 18, n. 15 (the defendant's acquittal of the most serious charge "reinforces our conclusion that the prosecutor's remarks did not undermine the jury's ability to view the evidence independently and fairly").

Fifth, the Court finds, in essence, that any error was harmless: "The weight of the evidence against petitioner was heavy; the 'overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges,' 329 So. 2d, at 291, reduced the likelihood that the jury's decision was influenced by argument." *Ante*, at 182. The Court rejects the "no effect" test set out in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), see *ante*, at 183, n. 14, but it does not identify the standard it does use to decide the harmlessness of the error.[3]

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[3] The Court finds *Caldwell* inapposite because the offending comment in *Caldwell* occurred at the sentencing stage of the defendant's trial and misled the jury as to its role in the sentencing process. *Ante*, at 183, n. 14. But *Caldwell*'s Eighth Amendment underpinnings clearly extend to guilt

Every harmless-error standard that this Court has employed, however, shares two salient features. First, once serious error has been identified, the burden shifts to the beneficiary of the error to show that the conviction was not tainted. Second, although different formulations of the harmless-error standard differ in the level of confidence in the outcome required to overcome that burden, the question before a reviewing court is never whether the evidence would have been sufficient to justify conviction, absent an error, but, rather, whether the error undermines its confidence in the outcome of the proceeding to an unacceptable degree. See, *e. g.*, *United States* v. *Young*, 470 U. S., at 20; *Chapman* v. *California*, 386 U. S. 18, 24 (1967); *Kotteakos* v. *United States*, 328 U. S. 750, 765 (1946).

Regardless of which test is used, I simply do not believe the evidence in this case was so overwhelming that this Court can conclude, on the basis of the written record before it, that the jury's verdict was not the product of the prosecutors' misconduct. The three most damaging pieces of evidence—the identifications of Darden by Phillip Arnold and Helen Turman and the ballistics evidence—are all sufficiently problematic that they leave me unconvinced that a jury not exposed to McDaniel's egregious summation would necessarily have convicted Darden.

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determinations in capital cases as well as to sentencing. *Beck* v. *Alabama*, 447 U. S., at 637–638. And under the circumstances of this case, where the sentencing hearing followed immediately upon the jury's return of a guilty verdict and the State's summation consisted of less than a full page of transcript, see Tr. 894, I think the State must have assumed that its attacks on the Department of Corrections and repeatedly expressed wish that Darden die would affect the jury's sentencing decision as well as its determination of guilt. Indeed, the District Court found that the summations during the guilt phase were "in effect [the State's] principal argument in support of the death penalty." 513 F. Supp., at 953, and n. 10. Moreover, I do not see why misleading a jury as to the relevant issues in a capital trial is somehow less pernicious than misleading a jury as to its role.

Arnold first identified Darden in a photo array shown to him in the hospital. The trial court suppressed that out-of-court identification following a long argument concerning the reliability and constitutionality of the procedures by which it was obtained. See Tr. 487–488.[4]

Mrs. Turman's initial identification was made under even more suggestive circumstances. She testified at trial that she was taken to a preliminary hearing at which Darden appeared in order "[t]o identify him." *Id.*, at 215. Instead of being asked to view Darden in a lineup, Mrs. Turman was brought into the courtroom, where Darden apparently was the only black man present. See *id.*, at 220–221. Over defense counsel's objection, after the prosecutor asked her whether "this man sitting here" was "the man that shot your husband," *ibid.*, she identified Darden.[5] Cf. *Moore* v. *Illinois*, 434 U. S. 220, 229–230 (1977).

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[4] Of the six photographs in the array, Arnold immediately rejected four because "[t]hey just didn't fit the description" he had earlier given the police. Tr. 457. Darden's photograph was one of no more than two that identified the subject by name, and under the name on Darden's photograph was the notation "Sheriff's Department, Bartow, Florida" and the date "9/9/73." *Id.*, at 476–477. Arnold was aware at the time of the identification on September 11 that a suspect recently had been arrested. *Id.*, at 459.

[5] Mrs. Turman's identification took place after the following colloquy between the court, the prosecutor (Mr. Mars), and the defense attorney (Mr. Hill):

"THE COURT: Ask her to identify.
"MR. MARS: Yes, sir.
"Q: Can you see this man sitting here?
"MR. HILL: Your Honor, I am going to object to that type of identification.
"THE COURT: I am not. Sit down.
"MR. HILL: Judge—
"THE COURT: Not under these circumstances, Mr. Hill.
"MR. HILL: Judge, even as a defense attorney, that shows no respect in court, much less for the Court, and I—
"THE COURT: I appreciate—
"MR. HILL: And the objection, I want on the record.

The use of showups has long been condemned by this Court, precisely because they can result in unreliable identifications. See, *e. g.*, *Stovall* v. *Denno*, 388 U. S. 293, 302 (1967). Similarly, the Court has condemned the use of photo arrays in which the suspect's photograph "is in some way emphasized." *Simmons* v. *United States*, 390 U. S. 377, 383 (1968). While the question whether the various in- and out-of-court identifications ought to have been suppressed is not now before the Court,[6] my confidence in their reliability is nonetheless undermined by the suggestiveness of the procedures by which they were obtained, particularly in light of Mrs. Turman's earlier difficulties in describing the criminal.

Finally, the ballistics evidence is hardly overwhelming. The purported murder weapon was tied conclusively neither to the crime nor to Darden. Special Agent Cunningham of the Federal Bureau of Investigation's Firearms Identification Unit testified that the bullets recovered at the scene of the crime "could have been fired" from the gun, but he was unwilling to say that they in fact had come from that weapon.

"THE COURT: I appreciate that. It's on the record. This woman has had a traumatic experience and she—

"MR. HILL: Judge, I appreciate that. I still have an obligation to my client.

"THE COURT: I appreciate that. Now if you want to be held in contempt, you pardon me. Alright, go ahead.

"Q: Is this the man that shot your husband?

"A: Yes, sir."

See Pet. for Habeas Corpus in *Darden* v. *Wainwright*, Case No. 79-566-Civ. T. H. (MD Fla.) (May 21, 1979), pp. 18-19; Tr. 218-219.

[6] Challenges to the admissibility of the various identifications were presented in Darden's petition to this Court for direct review of his conviction and sentence. See Brief for Petitioner in *Darden* v. *Florida* O. T. 1976, No. 76-5382, pp. 2-3 (second and third questions presented raising issues concerning the witnesses' identifications). Although that petition for certiorari was granted, 429 U. S. 917 (1976), the Court later limited its grant to the issue of the prosecutor's closing argument, 429 U. S. 1036 (1977), and ultimately dismissed the writ as improvidently granted, 430 U. S. 704 (1977).

Tr. 347, 357. He also testified, contrary to the Court's assertion, that rebored Smith & Wessons were fairly common. See *id.*, at 350–351, 357–358. Deputy Sheriff Weatherford testified that the gun was discovered in a roadside ditch adjacent to where Darden had wrecked his car on the evening of the crime. But the gun was discovered the next day, *id.*, at 503, and the ditch was also next to a bar's parking lot. *Id.*, at 531.

Darden testified at trial on his own behalf and denied any involvement in the robbery and murder. See *id.*, at 571–660. His account of his actions on the day of the crime was contradicted only by Mrs. Turman's and Arnold's identifications. Indeed, a number of the State's witnesses corroborated parts of Darden's account. The trial judge who had seen and heard Darden testify found that he "emotionally and with what appeared on its face to be sincerity, proclaimed his innocence." App. 34. In setting sentence, he viewed the fact that Darden "repeatedly professed his complete innocence of the charges" as a mitigating factor. *Id.*, at 35.

Thus, at bottom, this case rests on the jury's determination of the credibility of three witnesses—Helen Turman and Phillip Arnold, on the one side, and Willie Darden, on the other. I cannot conclude that McDaniel's sustained assault on Darden's very humanity did not affect the jury's ability to judge the credibility question on the real evidence before it. Because I believe that he did not have a trial that was fair, I would reverse Darden's conviction; I would not allow him to go to his death until he has been convicted at a fair trial.

II

Even if Darden had been convicted fairly, however, I believe his death sentence should be vacated because of the improper exclusion for cause of a member of the venire who was qualified to serve under this Court's decisions in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and *Wainwright* v. *Witt*, 469 U. S. 412 (1985). In *Davis* v. *Georgia*, 429 U. S. 122 (1976),

the Court held that the improper exclusion of one juror renders a death sentence constitutionally infirm *per se*. In Darden's case, the potential prejudice is palpable. Even though it was stripped of members expressing reservations about the death penalty, this jury could not agree unanimously that a death sentence was appropriate. See Tr. 908; 699 F. 2d, at 1041 (dissenting opinion).

Witherspoon concerned an Illinois statute that excused for cause "'any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.'" 391 U. S., at 512, quoting Ill. Rev. Stat., ch. 38, § 743 (1959). The Court held that the Constitution barred the execution of a defendant sentenced to death by a jury from which such persons had been excluded for cause. That holding rested in large part on the Court's recognition that even some jurors who oppose the death penalty can set aside their personal beliefs and follow the court's instructions to consider whether death is an appropriate penalty. See 391 U. S., at 514–515, n. 7, 515–516, n. 9, 519, 520. As recently as last Term, we held once again that trial courts must distinguish between "prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." *Witt*, 469 U. S., at 421; see also *id.*, at 422, n. 4; *Adams* v. *Texas*, 448 U. S. 38, 44–45 (1980); *Boulden* v. *Holman*, 394 U. S. 478, 483–484 (1969).

The Court's discussion of Darden's claim rests on a premise that the claim depends entirely on the wording of a single question asked by the trial judge prior to the exclusion of venire member Murphy. See *ante*, at 176. That premise is mistaken. The trial court's error lay in its misunderstanding of the proper standard for exclusion under *Witherspoon*. This misunderstanding influenced both the question the court

asked Murphy and its evaluation of his answer. On this record, I cannot say with any assurance that Murphy was properly excluded.

Prior to the *voir dire* of individual venire members, the trial judge announced his intention to excuse, not only any potential juror whose religious or moral principles made him unable to impose the death penalty, but also any potential juror who, if he did follow the court's instructions, "would be going against his principles" (emphasis deleted). App. 6.[7] This standard is essentially indistinguishable from the standard employed by Illinois and expressly disapproved by this Court in *Witherspoon*. If a juror who has reservations about the wisdom or morality of the death penalty nonetheless follows the court's instructions, he has *not* been "'prevent[ed] or substantially impair[ed in] the performance of his duties as

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[7] In denying Darden's pretrial motion to limit *voir dire* concerning jurors' attitudes towards the death penalty, the trial court stated:

"It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law the court shall charge upon it and disregard and be unwilling to follow it or if he did follow it, it would be going against his principles, and therefore, I would rule that would be disqualification. If that exists, I intend to disqualify for cause." App. 6 (emphasis deleted).

The Court's statement that "the judge correctly stated the general standard for dismissal," *ante*, at 177, n. 2, comes immediately on the heels of a truncated quotation of the trial judge's ruling which omits the critical phrase, "if he did follow it, it would be going against his principles, and therefore, I would rule that would be disqualification."

The court gave petitioner a continuing objection to its proposed *voir dire* questioning. App. 7. Even if this continuing objection were not enough standing alone to preserve petitioner's claim—and the Court does not so hold—the statement that "[n]o specific objection was made to the excusal of Murphy by defense counsel," *ante*, at 178, is flatly contradicted by the trial transcript. Immediately following Murphy's excusal, the court directed the stenographer to "note the defendant's object to him being excused for cause." Tr. 165.

a juror in accordance with his instructions and his oath,'" *Witt*, 469 U. S., at 424, quoting *Adams*, 448 U. S., at 45. To permit only those individuals who have no reservations about exercising "the truly awesome responsibility of decreeing death for a fellow human," *McGautha* v. *California*, 402 U. S. 183, 208 (1971), to serve on capital juries would surely mark a return to the empaneling of juries "uncommonly willing to condemn a man to die," *Witherspoon*, 391 U. S., at 521.

This case is thus entirely unlike *Witt*. *Witt*'s statement that determinations of juror bias cannot be reduced to a catechism, 469 U. S., at 424, and its reliance on the peculiar ability of trial judges to observe the demeanor and credibility of potential jurors, *id.*, at 428, make sense when there is "every indication that the judge . . . applied the correct standard." *Id.*, at 431. But the record before us today provides no such indication. It is impossible to determine whether the judge's finding of bias reflected a belief that Murphy would be unable to follow the court's instructions or a belief that Murphy would have to set aside his personal beliefs to do so. In fact, Murphy never gave any indication that he could not follow the court's instructions. The burden of proving Murphy's bias rested on the State. *Id.*, at 423–424. The Court's present heavy reliance on "the context surrounding Murphy's exclusion," *ante*, at 176, simply cannot support its conclusion because the trial court's improper interpretation of *Witherspoon* infected that context.

The Court's statement that "the trial court could take account of the fact that Murphy was present throughout an entire series of questions that made the purpose and meaning of the *Witt* inquiry absolutely clear," *ante*, at 178, suffers from a similar defect.[8] I find implausible the Court's assumption

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[8] Even to refer to the "*Witt* inquiry" reflects inattention to chronology. This case was tried about a dozen years before *Witt* sought to dispel the "general confusion surrounding the application of *Witherspoon*" under which courts across the country had labored for 15 years. 469 U. S., at 418. How the purpose and meaning of *Witt* could be clear to a layman like

that Murphy followed closely the day-long questioning of other jurors. But if that assumption were correct, then the Court should also assume that Murphy anticipated being asked whether his beliefs would prevent or substantially impair performance of his duties as a juror, as other jurors expressing similar sentiments had been asked. That three other jurors, under somewhat more extensive questioning, explicitly stated that *they* did not think *they* could vote for the death penalty, see Tr. 44 (juror Varney); *id.*, at 107 (juror Carn); *id.*, at 109–110 (juror Maher), says nothing about whether *Murphy* shared their inability to put aside personal beliefs and obey his oath as a juror. *Witt* may be right that "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear,'" 469 U. S., at 424–425; here, however, the judge did not even ask the one question that might have given him real insight into Murphy's ability to serve. The wrong answer is what no question at all begets. Cf. A. Bickel, The Least Dangerous Branch 103 (1962).

A close reading of the lengthy *voir dire* transcript leads me to conclude that the trial court's behavior is more easily explained by Murphy's appearance in the jury box at the end of a long day of questioning and the desire to finish jury selection expeditiously than by any definite impression on the part of the trial judge that Murphy was unqualified. But neither the trial court's eagerness to get the trial started, nor this Court's impatience with the progress of Darden's constitutional challenges to his conviction and death sentence, see, *e. g.*, 473 U. S. 928, 929 (1985) (BURGER, C. J., dissenting

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Murphy when they were unclear to the judge trying this case and to federal and state appellate courts is nowhere explained. Moreover, from Murphy's perspective, the purpose of the inquiry was to obtain from him truthful answers regarding his background and beliefs. His oath as a juror required him to reveal his strong feelings about the death penalty, even if he believed that he could follow the judge's instructions notwithstanding those feelings.

from the grant of certiorari because 12 years had elapsed since Darden's conviction and sentence and no fewer than "95" judges had reviewed the case),[9] renders Murphy's exclusion justifiable or harmless.

III

Twice during the past year—in *United States* v. *Young*, 470 U. S. 1 (1985), and again today—this Court has been faced with clearly improper prosecutorial misconduct during summations. Each time, the Court has condemned the behavior but affirmed the conviction. Forty years ago, Judge Jerome N. Frank, in dissent, discussed the Second Circuit's similar approach in language we would do well to remember today:

> "This court has several times used vigorous language in denouncing government counsel for such conduct as

[9] A public dissent from a grant of certiorari is extremely rare. Indeed, I know of no other recent case in which a Justice has dissented on the ground that the claims raised by the petitioner—which at least four Justices must have found worthy of full consideration—were meritless. See also *Ohio ex rel. Eaton* v. *Price*, 360 U. S. 246, 247, n. 1 (1959) (memorandum of BRENNAN, J.) (finding only one instance of such a dissent—the extraordinary case of *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 937 (1952), where certiorari was granted prior to the Court of Appeals' judgment). The concurrence filed by THE CHIEF JUSTICE today, see *ante*, p. 187, to justify his dissent from the grant of certiorari in this case shows why. As JUSTICE BRENNAN persuasively explained in *Price*, a public dissent from a grant of certiorari poses dangers both to the actual workings of the adjudicatory process and to public respect for that process. 360 U. S., at 247–248. By reprinting his dissent in its entirety and emphasizing once again the number of times this Court has been asked to review Darden's claims, THE CHIEF JUSTICE suggests that he irrevocably had committed himself to rejecting those claims before he had received the benefit of the full briefing, oral argument, access to the record, and discussion of the issues by other Members of the Court that followed our grant of certiorari. To me, the fact that this Court has granted certiorari three times is hardly a reason for concluding Darden's claims are meritless, or that the undoubted interest in finality should outweigh our duty to ensure that Darden receives due process.

that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary" (footnote omitted). *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 661, cert. denied, 329 U. S. 742 (1946).

I believe this Court must do more than wring its hands when a State uses improper legal standards to select juries in capital cases and permits prosecutors to pervert the adversary process. I therefore dissent.

OFFSHORE LOGISTICS, INC., ET AL. v. TALLENTIRE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-202. Argued February 24, 1986—Decided June 23, 1986

Respondents' husbands were killed when petitioner Air Logistic's helicopter crashed in the high seas 35 miles off the Louisiana coast while transporting the decedents from the offshore drilling platform where they worked to Louisiana. Respondents each filed a wrongful death action (later consolidated) in Federal District Court, raising claims under the Death on the High Seas Act (DOHSA), the Outer Continental Shelf Lands Act (OCSLA), and Louisiana law. Ruling that DOHSA provides the exclusive remedy for death on the high seas, the District Court dismissed respondents' claims based on the Louisiana wrongful death statute. Petitioner Air Logistics having admitted liability, the trial was limited to the question of damages. Because DOHSA limits recovery to "fair and just compensation for . . . pecuniary loss," the court's awards to respondents did not include damages for nonpecuniary losses. The Court of Appeals reversed the District Court's denial of nonpecuniary benefits recoverable under the Louisiana wrongful death statute, holding that state law could apply of its own force by virtue of § 7 of DOHSA, which provides that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected" by the Act. The court concluded, on the basis of § 7's legislative history, that the section was intended to preserve the applicability of state wrongful death statutes on the high seas, and that Louisiana had legislative jurisdiction to extend its wrongful death statute to remedy deaths on the high seas and in fact had intended its statute to have that effect.

Held: Neither OCSLA nor DOHSA requires or permits the application of the Louisiana wrongful death statute in this case so as to entitle respondents to recover nonpecuniary damages under that statute. Pp. 217–233.

(a) Because the fatalities in question did not arise from an accident in the area covered by OCSLA, *i.e.*, "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures" erected thereon, but rather occurred on the high seas, DOHSA, which provides a maritime remedy for wrongful deaths "occurring on the high seas" plainly was intended to control. The character of the decedents as platform workers who had a special relationship with the shore community

has no relevance to the resolution of the question of the application of OCSLA to this case. Pp. 217–220.

(b) The language of § 7 of DOHSA and its legislative history, as well as the congressional purposes underlying DOHSA, mandate that § 7 be read not as an endorsement of the application of state wrongful death statutes to the high seas, but rather as a jurisdictional saving clause ensuring that state courts have the right to entertain causes of action and provide wrongful death remedies both for accidents occurring on state territorial waters and, under DOHSA, for accidents occurring on the high seas. Viewed in this light, § 7 serves not to destroy the uniformity of wrongful death remedies on the high seas but to facilitate the efficient and just administration of those remedies. Pp. 220–232.

(c) Once it is determined that § 7 does not sanction the applicability of state wrongful death statutes to accidents on the high seas, it must be concluded that state wrongful death statutes are pre-empted by DOHSA where it applies. Pp. 232–233.

754 F. 2d 1274, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined, and in Part III of which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 233.

Keith A. Jones argued the cause for petitioners. With him on the briefs were *J. B. Ruhl* and *Howard Daigle, Jr.*

Charles Hanemann argued the cause for respondents. With him on the brief was *V. Farley Sonnier.**

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller, Deputy Assistant Attorney General Willmore,* and *Thomas L. Jones;* and for Sonat Offshore Drilling, Inc., et al. by *E. D. Vickery* and *Gus A. Schill, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the Association of Trial Lawyers of America by *James A. George* and *Peter Perlman;* and for Domengeaux & Wright by *William Rutledge.*

Briefs of *amici curiae* were filed for the Louisiana Trial Lawyers Association by *Drew Ranier;* for the Texas Trial Lawyers Association by *Robert A. Chaffin;* and for Kenneth G. Engerrand, *pro se.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Respondents' husbands were killed when petitioner Air Logistic's helicopter, in which the decedents were traveling, crashed into the high seas. The issue presented is whether the Death on the High Seas Act (DOHSA), 41 Stat. 537, 46 U. S. C. § 761 *et seq.*, provides the exclusive remedy by which respondents may recover against petitioner for the wrongful death of their husbands, or whether they may also recover the measure of damages provided by the Louisiana wrongful death statute, La. Civ. Code Ann., Art. 2315 (West Supp. 1986), applying either of its own force or as surrogate federal law under the Outer Continental Shelf Lands Act (OCSLA), 67 Stat. 462, as amended, 43 U. S. C. § 1331 *et seq.*

I

The husbands of respondents Corrine Taylor and Beth Tallentire worked on drilling platforms in the Gulf of Mexico, off the coast of Louisiana. On August 6, 1980, respondents' husbands were killed while being transported in a helicopter owned and operated by petitioner Air Logistics (hereafter petitioner), a Division of Offshore Logistics, Inc., from a drilling platform to Houma, Louisiana. The crash occurred approximately 35 miles off the coast of Louisiana, well over the 3-mile limit that separates Louisiana's territorial waters from the high seas for purposes of DOHSA.

Respondents each filed wrongful death suits in United States District Court, raising claims under DOHSA, OCSLA, and the law of Louisiana. These actions were later consolidated in the Eastern District of Louisiana. Upon petitioner's pretrial motion for partial summary judgment, the District Court ruled that DOHSA provides the exclusive remedy for death on the high seas, and it therefore dismissed respondents' claims based upon the Louisiana wrongful death statute. Petitioner admitted liability and the trial was limited to the question of damages. Because DOHSA limits recovery to "fair and just compensation for . . . pecuniary loss,"

the District Court's awards to respondents did not include damages for nonpecuniary losses. 46 U. S. C. § 762.

Respondents appealed the District Court's dismissal of their OCSLA and state law wrongful death claims, contending that they were entitled to nonpecuniary damages under the Louisiana wrongful death statute. See La. Civ. Code Ann., Art. 2315(B) (West Supp. 1986) (permitting recovery for both pecuniary and nonpecuniary damages, "includ[ing] loss of consortium, service, and society"). They argued that the Louisiana statute applied to this helicopter crash on the high seas, either of its own force by virtue of the saving provision in § 7 of DOHSA, 46 U. S. C. § 767, or as adopted federal law through OCSLA. See 43 U. S. C. § 1333(a)(2)(A). The Court of Appeals for the Fifth Circuit reversed the District Court's denial of benefits recoverable under Lousiana law, with one judge specially concurring and another judge dissenting. See 754 F. 2d 1274 (1985).

The Court of Appeals first observed that even if OCSLA did apply to this action, OCSLA adopts state law as surrogate federal law only "[t]o the extent [the state laws] are . . . not inconsistent with . . . other Federal laws." 43 U. S. C. § 1333(a)(2)(A). Because the precedent of the Fifth Circuit held that DOHSA applies to a helicopter crash on the high seas, the court concluded that Louisiana law could not be applied through OCSLA as the Louisiana wrongful death scheme was inconsistent with DOHSA. Accordingly, the court turned to the question whether state law could apply of its own force by virtue of § 7 of DOHSA, which provides:

> "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone." 46 U. S. C. § 767.

After examining the legislative history of § 7, the Court of Appeals concluded that that section was intended to preserve

the applicability of state wrongful death statutes on the high seas. It further held that Louisiana had legislative jurisdiction to extend its wrongful death statute to remedy deaths on the high seas and that Louisiana in fact intended its statute to have that effect. In reaching its result, the court acknowledged that the disunity that its decision would create was "profoundly unsettling," 754 F. 2d, at 1284, but ultimately concluded that "[o]ur desire for a uniform, consistent, scheme of maritime death remedies cannot justify a refusal to follow" the perceived legislative will. *Id.*, at 1288.

Judge Jolly filed a special concurrence, observing that although the court's result was compelled by § 7, it would create "significant problems in the field of maritime law because it defies reason, runs contrary to principles of the general precedent in the field, and creates all sorts of internal inconsistencies in the prosecution of cases dealing with death on the high seas." *Id.*, at 1289. Judge Garza dissented, arguing that § 7 was intended to preserve state wrongful death actions only in territorial waters and echoing the view of the Court of Appeals for the Ninth Circuit that the application of state law to wrongful death actions arising on the high seas would be "'as damaging to uniformity in wrongful death actions as it is illogical'" *Ibid.* (quoting *Nygaard* v. *Peter Pan Seafoods, Inc.*, 701 F. 2d 77, 80 (CA9 1983)).

Because the Fifth Circuit's decision creates the potential for disunity in the administration of wrongful death remedies for causes of action arising from accidents on the high seas and is in conflict with the prevailing view in other courts that DOHSA pre-empts state law wrongful death statutes in the area of its operation, we granted certiorari. 474 U. S. 816 (1985). We now hold that neither OCSLA nor DOHSA requires or permits the application of Louisiana law in this case, and accordingly reverse the judgment of the Court of Appeals for the Fifth Circuit.

II

The tortuous development of the law of wrongful death in the maritime context illustrates the truth of Justice Cardozo's observation that "[d]eath is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land." *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U. S. 367, 371 (1932). In *The Harrisburg*, 119 U. S. 199 (1886), this Court held that in the absence of an applicable state or federal statute, general federal maritime law did not afford a wrongful death cause of action to the survivors of individuals killed on the high seas, or waters navigable from the sea. It reasoned that because the common law did not recognize a civil action for injury which resulted in death on the land, no different rule should apply with respect to maritime deaths. Unable to tolerate this archaism, some courts began to allow recovery for deaths within state territorial waters if an applicable state statute permitted such recovery. See, *e. g.*, *The City of Norwalk*, 55 F. 98, 103–108 (SDNY 1893) (state wrongful death statute may validly be applied to "maritime affairs within the state limits"), aff'd, 61 F. 364, 367–368 (CA2 1894) (application of state wrongful death statute to accident in state territorial waters valid "in the absence of any regulation of the subject by congress"). See also *Steamboat Co.* v. *Chase*, 16 Wall. 522 (1873).

In an attempt to alleviate the harshness of the rule of *The Harrisburg*, this Court also recognized in *The Hamilton*, 207 U. S. 398 (1907), that state wrongful death statutes could, in some limited circumstances, be applied to fatal accidents occurring on the high seas. In *The Hamilton*, the Court held that where the statutes of the United States enabled the owner of a vessel to transfer its liability to a fund and to claim the exclusive jurisdiction of admiralty, and where that fund was being distributed, a Delaware citizen's claim under Delaware law against another citizen of Delaware for wrongful death on the high seas would be recognized in admiralty. The Court noted that "[i]n such circumstances all claims to

which the admiralty does not deny existence must be recognized whether admiralty liens or not." *Id.*, at 406.

The Hamilton has sometimes been understood to endorse a broader application of state law on the high seas than its holding suggested. Some courts came to rely on dicta in *The Hamilton* for the "questionable" proposition that if a state wrongful death statute was intended to extend to torts occurring on the high seas, then an action between citizens of that state for a wrongful death on the high seas could lie in admiralty. Day, Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform, 64 Colum. L. Rev. 648, 650 (1964). See also *Wilson* v. *Transocean Airlines*, 121 F. Supp. 85, 88 (ND Cal. 1954); Comment, 51 Calif. L. Rev. 389 (1963) ("Because the constitutionality of the application of a state wrongful death statute to occurrences on the high seas was doubtful, the cases [recognizing such an application] had to rest on farfetched theories"); Putnam, The Remedy for Death at Sea, 22 Case & Com. 125, 126–127 (1915). There was continued doubt, in spite of *The Hamilton*'s dicta, as to the States' competence to provide wrongful death relief for causes of action arising on the high seas. See *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, 393, n. 10 (1970) ("The general understanding was that the statutes of the coastal States, which provided remedies for deaths within territorial waters, did not apply beyond state boundaries"); H. R. Rep. No. 674, 66th Cong., 2d Sess., 2, 4 (1920) (accompanying DOHSA) ("there is no right of action for death under" maritime law; "the right to affirmative action [outside of limitation of liability actions] in the admiralty against ship or owner has never been sustained by the Supreme Court").

Even where *The Hamilton* was understood to sanction a state remedy for the high seas, "probably because most state death statutes were not meant to have application to the high seas, [the] possibility [of recovery under state law for deaths on the high seas] did little to fill the vacuum" left by *The Har-*

risburg. *Moragne* v. *States Marine Lines*, *supra*, at 393, n. 10. Moreover, those state wrongful death statutes that were held to apply to the high seas had limited effectiveness because, under the dicta in *The Hamilton*, "[l]egislative jurisdiction to impose a liability for a wrongful act at sea beyond the boundaries of the state had to rest upon one of two theories: either (1) that the vessel upon which the wrongful act occurred was constructively part of the territory of the state; or (2) that the wrongdoer was a vessel or citizen of the state subject to its jurisdiction even when beyond its territorial limits. Neither theory sufficed for every situation." *Wilson* v. *Transocean Airlines*, *supra*, at 88. Such conflict of laws problems arose out of collisions between vessels incorporated in different States and between American-flag vessels and those flying the flag of a foreign jurisdiction that in one celebrated case the perplexed court simply denied recovery entirely. See, *e. g.*, *The Middlesex*, 253 F. 142 (Mass. 1916) (where collision on high seas was between two American vessels whose owners resided or were incorporated in different states, recovery could not be had under any of the potentially applicable state statutes). See also Day, *supra*, at 650–651, and n. 13; Robinson, Wrongful Death in Admiralty and the Conflict of Laws, 36 Colum. L. Rev. 406 (1936). In sum, for all practical purposes, from the date of *The Harrisburg* until the passage of DOHSA in 1920, "there was no remedy for death on the high seas caused by breach of one of the duties imposed by federal maritime law." *Moragne* v. *States Marine Lines, Inc.*, 398 U. S., at 393.

It was in this atmosphere that Congress considered legislation designed to provide a uniform and effective wrongful death remedy for survivors of persons killed on the high seas. See *id.*, at 398, 401; *Wilson* v. *Transocean Airlines*, *supra*, at 88–90. In 1920, Congress enacted DOHSA, in which it finally repudiated the rule of *The Harrisburg* for maritime deaths occurring beyond state territorial waters by providing for a federal maritime remedy for wrongful deaths more than

three miles from shore.[1] DOHSA limits the class of beneficiaries to the decedent's "wife, husband, parent, child, or dependent relative," 46 U. S. C. § 761, establishes a 3-year statute of limitations period, § 763a, allows a suit filed by the victim to continue as a wrongful death action if the victim dies of his injuries while suit is pending, § 765, provides that contributory negligence will not bar recovery, § 766, and declares that "recovery . . . shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought. . . . " § 762.

As this Court explained in *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 621–622 (1978):

> "In the half century between 1920 and 1970, deaths on the high seas gave rise to federal suits under DOHSA, while those in territorial waters were largely governed by state wrongful-death statutes, [the primary exception being survivor's suits for wrongful death under the Jones Act, which gives a remedy no matter where the wrong takes place.] DOHSA brought a measure of uniformity and predictability to the law on the high seas, but in territorial waters, where *The Harrisburg* made state law the only source of a wrongful-death remedy, the continuing impact of that decision produced uncertainty and incongruity. The reasoning of *The Harrisburg*, which was dubious at best in 1886, became less and less satisfactory as the years passed.
>
> "In 1970, therefore, the Court overruled *The Harrisburg*. In *Moragne* v. *States Marine Lines, Inc.*, 398

[1] DOHSA does not include a survival provision authorizing recovery for pain and suffering before death. We do not address the issue whether the DOHSA recovery for the beneficiaries' pecuniary loss may be "supplemented" by a recovery for the decedent's pain and suffering before death under the survival provision of some conceivably applicable state statute that is intended to apply on the high seas. See generally *Barbe* v. *Drummond*, 507 F. 2d 794, 797–798 (CA1 1974); *Dugas* v. *National Aircraft Corp.*, 438 F. 2d 1386 (CA3 1971).

U. S. 375, the Court held that a federal remedy for wrongful death does exist under general maritime law. The case concerned a death in Florida's territorial waters. The defendant argued that Congress, by limiting DOHSA to the high seas, had evidenced an intent to preclude federal judicial remedies in territorial waters. The Court concluded, however, that the reason Congress confined DOHSA to the high seas was to prevent the Act from abrogating, by its own force, the state remedies then available in state waters. *Id.*, at 400." (Footnotes omitted.)

Subsequently, the Court confronted some of the various subsidiary questions concerning the *Moragne* federal death remedy in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573 (1974), in which it was held that awards in a *Moragne*-based suit could include compensation for loss of support and services, for funeral expenses, and for loss of society, but not for mental anguish. Finally, in *Higginbotham*, the Court ruled that the nonpecuniary loss standard provided by DOHSA controlled on the high seas, and could not be supplemented by the measure of damages recognized in *Gaudet* for *Moragne* causes of action. In so doing, the Court concluded:

"We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages . . . . The Act does not address every issue of wrongful-death law . . . but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." 436 U. S., at 625.

With this background, we now proceed to the question at hand: whether the DOHSA measure of recovery may be sup-

plemented by the remedies provided by state law, through either OCSLA or § 7 of DOHSA.

III

As explained above, DOHSA is intended to provide a maritime remedy for deaths stemming from wrongful acts or omissions "occurring on the high seas." 46 U. S. C. § 761. OCSLA, by contrast, provides an essentially nonmaritime remedy and controls only on "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures" erected thereon. 43 U. S. C. § 1333(a)(2)(A). By its terms, OCSLA must be "construed in such a manner that the character of the waters above the outer Continental Shelf as high seas . . . shall not be affected." § 1332(2). Within the area covered by OCSLA, federal law controls but the law of the adjacent State is adopted as surrogate federal law to the extent that it is not inconsistent with applicable federal laws or regulations. § 1333(a)(2)(A).

The intent behind OCSLA was to treat the artificial structures covered by the Act as upland islands or as federal enclaves within a landlocked State, and not as vessels, for purposes of defining the applicable law because maritime law was deemed inapposite to these fixed structures. See *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U. S. 352, 361–366 (1969). This Court endorsed the congressional assumption that admiralty law generally would not apply to the lands and structures covered by OCSLA in *Rodrigue*, noting that accidents on the artificial islands covered by OCSLA "had no more connection with the ordinary stuff of admiralty than do accidents on piers." *Id.*, at 360. See also *Herb's Welding, Inc.* v. *Gray*, 470 U. S. 414, 422 (1985). Thus, in *Rodrigue*, the Court held that an admiralty action under DOHSA does not apply to accidents "actually occurring" on these artificial islands, and that DOHSA therefore does not preclude the application of state law as adopted federal law through OCSLA to wrongful death actions arising from acci-

dents on offshore platforms. *Rodrigue* v. *Aetna Casualty Co.*, *supra*, at 366.

Respondents argue that because the decedents were platform workers being transported from work to the mainland, OCSLA, not DOHSA, governs their cause of action. They contend that in *Rodrigue* and *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473 (1981), the Court recognized the applicability of state law through OCSLA to accidents that resulted in deaths or injuries not on platforms, but on boats in the waters immediately adjacent to the platforms. This, they state, evidences the Court's assumption that OCSLA applies to traditionally maritime locales on the high seas, beyond the confines of the platform, when the decedent is a platform worker. In support of their apparent assumption that it is the decedent's status as a platform worker that controls, they note that it was the "special relationship between the men working on these artificial islands and the adjacent shore to which they commute to visit their families" that moved Congress to treat drilling platforms as upland federal enclaves rather than vessels. *Rodrigue* v. *Aetna Casualty Co.*, 395 U. S., at 365.

We cannot accept respondents' attempt to rewrite OCSLA. The extension of OCSLA far beyond its intended locale to the accident in this case simply cannot be reconciled with either the narrowly circumscribed area defined by the statute or the statutory prescription that the Act not be construed to affect the high seas which cover the Continental Shelf. Nor can the extension of OCSLA to this case be reconciled with the operative assumption underlying the statute: that admiralty jurisdiction generally should not be extended to accidents in areas covered by OCSLA. See, *e. g.*, *id.*, at 361. Here, admiralty jurisdiction is expressly provided under DOHSA because the accidental deaths occurred beyond a marine league from shore. See 46 U. S. C. § 761. Even without this statutory provision, admiralty jurisdiction is appropriately invoked here under traditional principles be-

cause the accident occurred on the high seas and in furtherance of an activity bearing a significant relationship to a traditional maritime activity. See *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U. S. 249 (1972). Although the decedents were killed while riding in a helicopter and not a more traditional maritime conveyance, that helicopter was engaged in a function traditionally performed by waterborne vessels: the ferrying of passengers from an "island," albeit an artificial one, to the shore. *Id.*, at 271, and n. 20.

The character of the decedents as platform workers who have a special relationship with the shore community simply has no special relevance to the resolution of the question of the application of OCSLA to this case. Neither of the cases cited by respondents supports their position. *Rodrigue* and *Gulf Offshore* did not endorse the proposition that it is the decedent's status or his special relationship with the shore that required the application of OCSLA, regardless of the location of the accident. Indeed, no question was even raised in *Gulf Offshore* regarding whether OCSLA applied to an accident aboard a vessel adjacent to the platform. Moreover, the facts of these cases make clear that OCSLA was presumed applicable not because of the status of the decedents but because of the proximity of the workers' accidents to the platforms and the fact that the fatalities were intimately connected with the decedents' work on the platforms.

We do not interpret § 4 of OCSLA, 43 U. S. C. § 1333, to require or permit us to extend the coverage of the statute to the platform workers in this case who were killed miles away from the platform and on the high seas simply because they were platform workers. Congress determined that the general scope of OCSLA's coverage, like the operation of DOHSA's remedies, would be determined principally by locale, not by the status of the individual injured or killed.[2]

[2] Only one provision of OCSLA superimposes a status requirement on the otherwise determinative OCSLA situs requirement; § 1333(b) makes compensation for the death or injury of an "employee" resulting from cer-

See 43 U. S. C. § 1333(a)(2)(A) ("To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations . . . , the civil and criminal laws of each adjacent State . . . are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon"); 46 U. S. C. § 761 (DOHSA's coverage extends to the death of any "person . . . caused by wrongful act, neglect, or default occurring on the high seas beyond a maritime league from the shore of any State . . ."). Cf. *Herb's Welding, Inc.* v. *Gray, supra* (discussing status and situs requirements of the Longshoremen's and Harbor Workers' Compensation Act as applied to platform workers making claims against their employers); *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, 459 U. S. 297 (1983); 46 U. S. C. § 688 (recovery under Jones Act confined to "seaman"). Because the fatalities underlying this suit did not arise from an accident in the area covered by OCSLA but rather occurred on the high seas, DOHSA plainly was intended to control.

In the circumstances presented, then, the conclusion is inescapable that the remedies afforded by DOHSA, not OCSLA, govern this action. Thus, respondents may secure the nonpecuniary damages made available by Louisiana's wrongful death statute only if it is found that DOHSA preserves, or does not pre-empt, state remedies on the high seas.

IV

Respondents argue that the first sentence of § 7 of DOHSA was intended to ensure the applicability of state wrongful death statutes to deaths on the high seas. We conclude that that provision will not bear respondents' reading when evalu-

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tain operations on the Outer Continental Shelf payable under the Longshoremen's and Harbor Workers' Compensation Act. We note that because this case does not involve a suit by an injured employee against his employer pursuant to § 1333(b), this provision has no bearing on this case.

ated in light of the language of the Act as a whole, the legislative history of § 7, the congressional purposes underlying the Act, and the importance of uniformity of admiralty law. See *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 285 (1956) ("'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'") (quoting *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1849)). These references persuade us that the first sentence of § 7 was intended only to serve as a jurisdictional saving clause, ensuring that state courts enjoyed the right to entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters and, under DOHSA, for accidents occurring more than one marine league from shore.

The first sentence of § 7 of DOHSA, as originally drafted, provided that "the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act as to causes of action accruing within the territorial limits of any State." See 59 Cong. Rec. 4482 (1920). During the House debate, Representative Mann proposed an amendment deleting the words "as to causes of action accruing within the territorial limits of any state." Although at first blush the language of the amended § 7 seems to support respondents' position, a closer comparison of the language of § 7, both before and after its amendment, with the language of § 4 of the Act belies respondents' facial argument.

The only other amendment made to the bill as originally submitted was the addition of § 4, which provides:

> "Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is

> authorized, any statute of the United States to the contrary notwithstanding." 46 U. S. C. § 764.

Section 4 indicates that when Congress wanted to preserve the right to recover under the law of another sovereign for whatever measure of damages that law might provide, regardless of any inconsistency with the measure of damages provided by DOHSA, it did so expressly. We are reluctant to read the much more ambiguous language of § 7, which states only that state law "remedies" or "rights of action" would not be "affected" and which makes no provision for reconciling potentially conflicting state and federal measures of recovery, to have the same substantive effect as the explicit command of § 4. Normal principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ, particularly where, as here, Congress isolated only these sections for special consideration by way of amendment while it was considering DOHSA.

The language of § 7 bears a marked similarity to the "saving to suitors" clause that allows litigants to bring *in personam* maritime actions in state courts. See Judiciary Act of 1789, § 9, 1 Stat. 76 ("saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it"); 28 U. S. C. § 1333 (1948 and 1949 amendments to original saving clause) ("saving to suitors in all cases all other remedies to which they are otherwise entitled"). See also *Madruga* v. *Superior Court*, 346 U. S. 556, 560, n. 12 (1954) (1948 and 1949 amendments effected no substantive change). The "saving to suitors" clause leaves state courts competent to adjudicate maritime causes of action in proceedings *in personam* and means that "a state, 'having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit' so long as it does not attempt to [give *in rem* remedies or] make changes in the 'substantive maritime law.'" *Id.*, at 560–561 (quoting *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 124 (1924)). Stated another way, the "saving to suitors" clause allows

state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse-*Erie*" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards. Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1, 34 (1963) (referring to *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938)). See also *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245 (1942); Stevens, Erie RR. v. Tompkins and the Uniform General Maritime Law, 64 Harv. L. Rev. 246 (1950).

Thus, a natural reading of § 7 is that a state statute providing a wrongful death right of action traditionally unavailable at common law, would not be "affected" by DOHSA in the sense of being rendered an incompetent means of invoking state jurisdiction, but the state statute's substantive provisions would not, by virtue of the saving provision, "extend as a conduct-governing enactment on the high seas" if in conflict with DOHSA's provisions. *Safir* v. *Compagnie Generale Transatlantique*, 241 F. Supp. 501, 508 (EDNY 1965) (interpreting § 7). The legislative history of § 7, as originally proposed and as amended, supports this construction of the section's language.

The Maritime Law Association (MLA), an organization of experts in admiralty law and a prime force in the movement for a federal wrongful death remedy, drafted the bill that was enacted as DOHSA. The MLA envisioned § 7 to be a jurisdictional saving clause which completed the statutory scheme by ensuring continued concurrent state and federal jurisdiction over wrongful death claims arising from accidents on territorial waters. See, *e. g.*, American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts § 1316(b), pp. 236–237 (1969) (hereinafter ALI Study). See also Hughes, Death Actions in Admiralty, 31 Yale L. J. 115, 123 (1921). Although congressional proponents viewed § 7 as a product of perhaps overabundant caution, the MLA,

an expert body of maritime lawyers, had reason to fear that absent a saving clause specifically recognizing the continued viability of this type of action, state wrongful death remedies on territorial waters might be deemed beyond the competency of state courts. In 1917, this Court handed down *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, a landmark in admiralty law. In that case the Court held that the remedy a state workmen's compensation statute "attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction" where the rights and liabilities of the parties are clearly matters within admiralty jurisdiction. *Id.*, at 218. The felt necessity for a DOHSA saving clause, then, may be traced to the fact that wrongful death statutes, like workmen's compensation schemes, were not "common law remedies," see *The Harrisburg*, 119 U. S., at 213, and thus may not have been deemed "saved to suitors" under the Judiciary Act of 1789, as construed in *Jensen*.

Although not intended to function as a substantive law saving clause, § 7 incidentally ensured that state courts exercising concurrent jurisdiction could, as under the "saving to suitors" clause, apply such state remedies as were not inconsistent with substantive federal maritime law. It had been recognized that States could "modify" or "supplement" the federal maritime law by providing a wrongful death remedy enforceable in admiralty for accidents on territorial waters. See, *e. g.*, *Western Fuel Co.* v. *Garcia*, 257 U. S. 233 (1921); *Steamboat Co.* v. *Chase*, 16 Wall. 522 (1873). The reach of DOHSA's substantive provisions was explicitly limited to actions arising from accidents on the high seas, see 46 U. S. C. § 761, so as to "prevent the Act from abrogating by its own force, the state remedies then available in state waters." *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S., at 621–622. Thus, because DOHSA by its terms extended only to the high seas and therefore was thought not to displace these

state remedies on territorial waters, see *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970), § 7, as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court.

Although the congressional debates on § 7 were exceedingly confused and often ill-informed, the remarks of the proponents of the bill amply support the theory that § 7 originally was intended to preserve the state courts' jurisdiction to provide wrongful death remedies under state law for fatalities on territorial waters. In the debate, the discussion focused almost exclusively on the intended jurisdictional effects of that section. See 59 Cong. Rec. 4482–4485 (1920). The proponents of § 7 before its amendment expressed their resolve to save to suitors the benefits of state judicial, and, derivatively, legislative jurisdiction within state territorial waters. See, *e. g.*, *id.*, at 4482 (remarks of Rep. Volstead); *id.*, at 4483 (remarks of Rep. Montague) ("the territorial waters of the States shall be retained within the jurisdiction and sovereignty of the States and their courts"); *ibid.* (remarks of Rep. Montague) (§ 7, as originally drafted, was "put in out of abundant caution, to calm the minds of those who think that rights within the territorial waters will be usurped by the national law"). They also, however, stated their firm intent to make exclusive federal jurisdiction over wrongful death actions arising on the high seas by restricting the scope of § 7 to territorial waters. See, *e. g.*, *ibid.* (remarks of Rep. Moore) ("The purpose . . . is to give exclusive jurisdiction to the admiralty courts where the accident occurs on the high seas"). Thus, they asserted that the effect of § 7, as originally drafted, would be to confer exclusive jurisdiction on the federal admiralty courts for causes of action arising on the high seas. See, *e. g.*, *ibid.* (remarks of Rep. Sanders); *id.*, at 4484 (remarks of Rep. Volstead) ("This bill clearly leaves the jurisdiction exclusive in the Federal court outside the 3-mile limit").

It is against this backdrop that Representative Mann introduced his amendment to § 7. To the extent that Representative Mann's specific intent in introducing his amendment can be deciphered from his contribution to the debate's confusion, his purpose appears at least consistent with the idea that § 7 would serve as a jurisdictional saving clause, as his principal concern seems to have been the recognition of state court jurisdiction over DOHSA claims. Representative Mann had, in debates over an earlier draft of DOHSA, expressed his belief that federal admiralty courts had exclusive jurisdiction over accidents occurring on the high seas. See 51 Cong. Rec. 1928 (1914). In those debates, his principal concern was that state courts would continue to enjoy concurrent jurisdiction with federal admiralty courts over causes of action arising on the Great Lakes. *Ibid.* During the debates on the bill that became DOHSA, Representative Mann continued to express his concern regarding the jurisdiction of state courts over death claims growing out of accidents on territorial waters and the Great Lakes. See, *e. g.*, 59 Cong. Rec. 4483 (1920). However, he also argued in these later debates that if state courts had ever previously exercised jurisdiction over death claims arising on the high seas, they should be permitted to continue to do so. See, *e. g.*, *ibid.* ("Though I do not know, I suppose if a man is injured on the high seas . . . and he can get service on the defendant, as a result of that injury, he can bring suit"); *id.*, at 4484 ("I remember this bill very distinctly in previous Congresses, and . . . I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any State court"); *ibid.* ("If this act as originally drawn by the admiralty lawyers was intended for the purpose of taking away jurisdiction now conferred by State statutes, it ought to be critically examined"). By suggesting the deletion of the language limiting the jurisdictional saving clause's scope only to territorial waters, Representative Mann intended to ensure that state courts could also serve as a forum for the adjudica-

tion of wrongful death actions arising out of accidents on the high seas. See, *e. g.*, *ibid.* (under Rep. Mann's amendment, where a State gives a cause of action and a death occurred on the high seas, "there would be concurrent jurisdiction"); *id.*, at 4485 (If § 7 were amended as he suggested, "the act will not take away any jurisdiction conferred now by the States").

We conclude that Representative Mann's amendment extended the jurisdictional saving clause to the high seas but in doing so, it did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters. Under the prevailing "uniformity" doctrine expressed most forcefully in *Southern Pacific Co.* v. *Jensen*, 244 U. S., at 215–216, to the extent Congress provided a federal remedy for wrongful death on the high seas, the federal substantive law would clearly have pre-empted conflicting state wrongful death statutes, as was recognized by various Members during the debates on DOHSA. See, *e. g.*, 59 Cong. Rec. 4485 (1920) (remarks of Rep. Volstead) ("the power to pass laws on this subject is conferred on Congress in the Constitution, and whenever Congress acts I have no doubt it excludes the power on the part of the State to pass laws on the same subject"); *id.*, at 4486 (remarks of Rep. Goodykoontz). Admiralty courts would, of course, apply federal maritime law in adjudicating such claims and, as was noted in the congressional debates at the time of DOHSA's passage, state and federal courts exercising jurisdiction under the "saving to suitors" clause over maritime claims for deaths on the high seas were obliged to apply governing federal substantive law in resolving those claims to the extent state common law remedies conflicted with governing federal maritime law. See *Chelentis* v. *Luckenbach S.S. Co.*, 247 U. S. 372, 384 (1918) ("Plainly, . . . under the saving [to suitors] clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to

give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law . . . . [W]ithout regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea"); *Southern Pacific Co.* v. *Jensen*, *supra*. Cf. *Workman* v. *New York City*, 179 U. S. 552 (1900). No reasonable doubt could be entertained of the displacement of state remedies for deaths occurring on the high seas because the conflicting federal standard was not derived just from general federal maritime law; it was explicitly provided for by federal legislation directly on point. See *Southern Pacific Co.* v. *Jensen*, *supra*, at 216 ("no [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress"). See also *Garrett* v. *Moore-McCormack Co.*, 317 U. S., at 245; *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 411 (1953).

Although Representative Mann's discussion may reflect a broader intent, we believe his references to state court jurisdiction should be read to mean only the ability of state courts to entertain maritime actions based on DOHSA, not the legislative ability to supply a different standard of recovery. As has been explained, even at the time that DOHSA was being considered it was understood that where Congress had spoken, or where general federal maritime law controlled, the States exercising concurrent jurisdiction over maritime matters could not apply conflicting state substantive law. See *Chelentis* v. *Luckenbach S.S. Co.*, *supra; Southern Pacific Co.* v. *Jensen*, *supra*. See also *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law"). Indeed, while the reference is somewhat unclear, Representative Mann at least once in the debate seemed to have recognized that, where Congress passed a law, that law would control, exclusively of state law, in the area of its operation. See 59 Cong. Rec. 4484 (1920) (exchange between Reps. Igoe and Mann).

Finally, we note that under the *Jensen* and *Chelentis* cases, there was a fair doubt whether Congress could constitutionally require the application of state statutory remedies to maritime injuries. Just one year after DOHSA was passed, the Court invalidated a congressional attempt to override the result in *Jensen* by authorizing the application of state workers' compensation statutes to maritime injuries, ruling that Congress could not delegate to the States the ability to prescribe rules governing maritime injuries that "would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established." *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 164 (1920). See *Wilson* v. *Transocean Airlines*, 121 F. Supp., at 90–91. Given this legal climate and the congressional recognition of that climate, we must infer that if Representative Mann and his colleagues intended affirmatively to require enforcement of state substantive law on the high seas, they would have taken care to make that requirement explicit. The language of § 7, when read in light of § 4, does not provide an unambiguous guide. And certainly the debates surrounding § 7's amendment do not indicate with any degree of clarity a congressional intent to save state substantive law on the high seas. In fact, immediately before the amendment went to a vote, Representative Goodykoontz cautioned that the amendment would simply "leave the [first] sentence [of § 7] incomplete and the remaining language, not unlike Mahomet's coffin, suspended between heaven and earth, having no application to anything in particular." 59 Cong. Rec., at 4486. The ambiguous language of the proposed amendment went to a vote without clarification, despite Representative Goodykoontz' explicit warning during the final moments of the debate that the amendment would at best be "surplusage" with no meaning, and at worst would destroy the object of § 7 as originally framed because, under the "decisions of the Supreme Court," the incomplete sentence would not be effective to save the state jurisdiction in

territorial waters from being "superseded by the exclusive power and authority of the admiralty courts." *Ibid.*

In sum, we believe that our reading of § 7, while not free from doubt, gives the proper meaning to the language of that section, is supported by its legislative history, and is consistent with the law governing at the time of its passage. It is also in accord with the general congressional purpose behind the enactment of DOHSA. As we have previously recognized, Congress acted in 1920 to remedy "[t]he void that existed in maritime law up until 1920[:] the absence of any remedy for wrongful death on the high seas," and to achieve uniformity in the provision of such a remedy. *Moragne* v. *States Marine Lines, Inc.*, 398 U. S., at 398, 401. See also *supra*, at 214–215. To read § 7 as intended to preserve intact largely nonexistent or ineffective state law remedies for wrongful death on the high seas would, of course, be incongruous. Just as incongruous is the idea that a Congress seeking uniformity in maritime law would intend to allow widely divergent state law wrongful death statutes to be applied on the high seas. See, *e. g.*, Putnam, The Remedy for Death at Sea, 22 Case & Com., at 125–127 (use of state wrongful death statutes "leaves the courts obliged to struggle with state statutes quite divergent in their terms, so that the resulting congeries of modes of remedy on navigable waters show a striking intricacy, leading to marked inefficiency"). See also *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S., at 625 ("Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements," citing as authority *Wilson* v. *Transocean Airlines*, *supra* (§ 7 does not preserve the operation of state wrongful death statutes on the high seas)). Indeed, it is hardly conceivable that Congress could have intended that these diverse state statutes could be applied to remedy maritime torts occurring the world over. A majority of courts and commentators that have addressed this issue in the 66 years since the passage of DOHSA have

rejected such an illogical interpretation of § 7's intended effect.[3] Many courts and commentators have adopted our construction of § 7 as the only means by which the statutory scheme can be read coherently. See, *e. g.*, *Safir* v. *Compagnie Generale Transatlantique*, 241 F. Supp., at 501; *Ledet* v. *United Aircraft Corp.*, 10 N. Y. 2d 258, 176 N. E. 2d 820 (1961); ALI Study § 1316(b), at 236–237. Cf. *Moragne* v. *States Marine Lines, Inc.*, *supra*, at 400, n. 14 (§ 1 of DOHSA does not place exclusive jurisdiction on the admiralty side of the federal courts for suits under the Act); *Rairigh* v. *Erlbeck*, 488 F. Supp. 865 (Md. 1980).

In sum, the language of § 7 and its legislative history, as well as the congressional purposes underlying DOHSA, man-

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[3] See, *e. g.*, *Jennings* v. *Goodyear Aircraft Corp.*, 227 F. Supp. 246, 248 (Del. 1964); *Wilson* v. *Transocean Airlines*, 121 F. Supp. 85, 99 (ND Cal. 1954); *Echavarria* v. *Atlantic & Caribbean Steam Nav. Co.*, 10 F. Supp. 677, 678 (EDNY 1935); Robinson, Wrongful Death in Admiralty and the Conflict of Laws, 36 Colum. L. Rev. 406, 410, n. 19 (1936); Magruder & Grout, Wrongful Death within the Admiralty Jurisdiction, 35 Yale L. J. 395, 416, 422–423 (1926). See also, *e. g.*, *Nygaard* v. *Peter Pan Seafoods, Inc.*, 701 F. 2d 77 (CA9 1983) (finding state statutes pre-empted by exclusive DOHSA remedy); *Barbe* v. *Drummond*, 507 F. 2d, at 801, n. 10; *Dugas* v. *National Aircraft Corp.*, 438 F. 2d, at 1388; *Lockwood* v. *Astronautics Flying Club, Inc.*, 437 F. 2d 437, 438 (CA5 1971); *Middleton* v. *Luckenbach S.S. Co.*, 70 F. 2d 326, 329 (CA2 1934); G. Gilmore & C. Black, Law of Admiralty 364 (2d ed. 1975); D. Robertson, Admiralty and Federalism 224 (1970); 1 E. Benedict, Law of Admiralty §§ 143, 148, pp. 385–386, 394, and n. 57 (6th ed. 1940); Day, Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform, 64 Colum. L. Rev. 648, 651 (1964); Hughes, Death Actions in Admiralty, 31 Yale L. J. 115, 122–123 (1921); Note, Maritime Wrongful Death After *Moragne:* The Seaman's Legal Lifeboat, 59 Geo. L. J. 1411, 1417 (1971); Note, The Tangled Seine: A Survey of Maritime Personal Injury Remedies, 57 Yale L. J. 243 (1947). Cf. *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573, 588, and n. 22 (1974) (discussing availability of certain elements of damages on territorial waters under federal maritime law on the clear assumption that state damages remedies not available on high seas). But see *Alexander* v. *United Technologies Corp.*, 548 F. Supp. 139, 142–143 (Conn. 1982); *In re Complaint of Exxon Corp.*, 548 F. Supp. 977, 978 (SDNY 1982).

date that § 7 be read not as an endorsement of the application of state wrongful death statutes to the high seas, but rather as a jurisdictional saving clause. Viewed in this light, § 7 serves not to destroy the uniformity of wrongful death remedies on the high seas but to facilitate the effective and just administration of those remedies. The recognition of concurrent state jurisdiction to hear DOHSA actions makes available to DOHSA beneficiaries a convenient forum for the decision of their wrongful death claims. See Note, Admiralty: Death on the High Seas by Wrongful Act, 47 Cornell L. Q. 632, 638 (1962) (hereinafter Note). Because the resolution of DOHSA claims does not normally require the expertise that admiralty courts bring to bear, DOHSA actions are clearly within the competence of state courts to adjudicate. See ALI Study, at 237; Note, at 637. Also, the availability of concurrent jurisdiction prevents disunity in the provision of forums to survivors of those killed on the high seas; it ensures that if a seaman and a passenger are killed at sea in the same accident, the beneficiaries of both are able to choose the forum in which they prefer to proceed. See *Engel* v. *Davenport*, 271 U. S. 33 (1926) (state and federal courts have concurrent jurisdiction over Jones Act claims). See also ALI Study § 1316(b), at 237; Note, at 638. Cf. also *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473 (1981) (recognizing state courts' concurrent jurisdiction over OCSLA claims).

Once it is determined that § 7 acts as a jurisdictional saving clause, and not as a guarantee of the applicability of state substantive law to wrongful deaths on the high seas, the conclusion that the state statutes are pre-empted by DOHSA where it applies is inevitable. As we held in *Higginbotham*, Congress has "struck the balance for us" in determining that survivors should be restricted to the recovery of their pecuniary losses, and when DOHSA "does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." 436 U. S., at 625.

Admittedly, in the circumstances of this case, the recognition of a state damages remedy for loss of society would bring respondents' DOHSA recovery into line with the damages available to a beneficiary of a federal *Moragne* maritime cause of action arising from a death on territorial waters. See *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573 (1974) (holding that awards under the general federal maritime cause of action for wrongful death could include compensation for loss of society). However, the questionable practical significance of this difference in recovery, see *Mobil Oil Corp.* v. *Higginbotham*, *supra*, at 624, and n. 20, is far overshadowed by the potential for serious conflicts between DOHSA and state substantive law in such areas as limitations periods, classes of beneficiaries, and the definition of potential defenses. We defer to Congress' purpose in making a uniform provision for recovery for wrongful deaths on the high seas, an area where the federal interests are primary.

The judgment of the Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, concurring in part and dissenting in part.

The Court today holds that § 7 of the Death on the High Seas Act (DOHSA), 41 Stat. 538, 46 U. S. C. § 767, forecloses application of state remedies for wrongful deaths on the high seas. Thus, the Court confines state courts to the adjudication of causes of action brought under DOHSA. Because I believe that the Court's reading of § 7 is at odds with the language of the statute and its legislative history, I dissent.[1]

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[1] I agree with the Court's conclusion that the Outer Continental Shelf Lands Act, 67 Stat. 462, as amended, 43 U. S. C. § 1331 *et seq.*, does not govern this action, and therefore join Part III of the Court's opinion.

I

In the early judicial history of the United States, a few courts of admiralty, moved by humanitarian considerations, found in general maritime law a right of action for wrongful death. As Chief Justice Chase noted in an often-quoted passage: "[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *The Sea Gull*, 21 F. Cas. 909, 910 (No. 12,578) (CC Md. 1865). See *The Highland Light*, 12 F. Cas. 138, 139 (No. 6,477) (CC Md. 1867) ("The admiralty may be styled, not improperly, the human providence which watches over the rights and interests of those 'who go down to the sea in ships'"). In 1886, however, this Court in *The Harrisburg*, 119 U. S. 199, held that such a right of recovery was not provided by general maritime law, but instead must be created by a state or federal statute.[2]

At the time of *The Harrisburg*, no federal statute afforded a right of action for wrongful death at sea. See *id.*, at 213. Many States, including Louisiana, had statutes that granted a right of action for wrongful death generally, and lower federal courts had begun to enforce such rights in admiralty.[3]

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[2] The Court stated:

"The argument everywhere in support of [wrongful death] suits in admiralty has been, not that the maritime law, as actually administered in common law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to 'natural equity and the general principles of law.' Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law." 119 U. S., at 213.

[3] See cases cited in 754 F. 2d 1274, 1277, n. 1 (CA5 1985).

In 1907, the Court confirmed the power of a State to provide a right of action for wrongful death upon the high seas. *The Hamilton*, 207 U. S. 398. This power, however, created jurisdictional fictions and serious problems in choice of law that sometimes denied recovery altogether. See *Wilson* v. *Transocean Airlines*, 121 F. Supp. 85, 88–89 (ND Cal. 1954).

As a result, from 1898 to 1917 legislators in Congress introduced several bills that would have provided an exclusive federal right of action for wrongful death on all navigable waters. *Id.*, at 89, nn. 8 and 9. These proposals met with an unbroken string of defeats, primarily because of considerable local opposition to any federal displacement of the operation of state wrongful death statutes on territorial waters. *Ibid.* Finally, in the predecessor of § 7 of DOHSA, proposed legislation provided a uniform federal right of action for death on the high seas, and left unaffected the operation of state statutes on territorial waters. S. 4288, 64th Cong., 1st Sess. (1916); H. R. 9919, 64th Cong., 1st Sess. (1916). The bill was favorably reported by both Houses. S. Rep. No. 741, 64th Cong., 1st Sess. (1916); H. R. Rep. No. 1419, 64th Cong., 2d Sess. (1917). The same bill was introduced again in the House on the opening day of the 65th Congress. H. R. 39, 65th Cong., 1st Sess. (1917). Congress took no action on that bill, presumably because the United States entered World War I four days later.

Following World War I, the bill was reintroduced in the 66th Congress. S. 2085, 66th Cong., 1st Sess. (1919). The Senate passed the bill without material amendment. As it then stood, the bill provided in § 1 a right to maintain a suit in admiralty for wrongful death on the high seas. Section 7 of the bill, crucial to the disposition of the issue here today, stated that "the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act *as to causes of action accruing within the territorial limits of any State*." (Emphasis added.)

Before the bill went to the floor of the House, it was clear from the language of the bill and from the Reports of the Senate and the House Judiciary Committees that the federal right of action would be exclusive for deaths on the high seas and that the state wrongful death statutes would provide the right of action for deaths on territorial waters. S. Rep. No. 216, 66th Cong., 1st Sess. (1919); H. R. Rep. No. 674, 66th Cong., 2d Sess. (1920). As the Court correctly observes: "§ 7, as originally proposed, ensured that [DOHSA] saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court." *Ante*, at 225.

Had the bill passed in that form, the resolution of this case would be clear—the federal statute would preclude application of state law for respondents' cause of action. During the floor debate in the House of Representatives, however, Representative Mann from Illinois successfully offered an amendment striking from § 7 the concluding phrase, "as to causes of action accruing within the territorial limits of any State." Thus, although the original § 7 preserved state-law rights of action within territorial waters, the ultimately enacted § 7 preserved these rights of action without geographic qualification. Although § 7 is plainly intended to save state remedies for death on the high seas, the Court today ignores the section's language and holds that it is a jurisdictional saving clause.

II

The starting point in statutory construction is, of course, the language of the statute itself. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring). See *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102 (1980). The language of § 7, given scant attention by the Court, reads as codified:

> "§ 767. Exceptions from operation of chapter
>
> "The provisions of any State statute *giving or regulating rights of action or remedies for death* shall not be af-

> fected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone." 46 U. S. C. § 767 (emphasis added).

The terms of the provision are clear. The provision preserves state rights of action and state remedies for wrongful death without any territorial qualification. It encompasses not only jurisdiction, but also "rights of action" and "remedies." The geographic reach of these traditional rights of action is therefore undiminished by DOHSA.

The congressional debate and other legislative history cast no doubt on the plain meaning of § 7. It is true, as the Court states, that the debate on the Mann Amendment was "exceedingly confused and often ill-informed." *Ante*, at 225. Judge Davis, who made a meticulous review of the congressional debate in his opinion for the Court of Appeals, stated:

> "The congressional debate reflects a number of differing concerns and beliefs on the part of the legislators. These include whether the federal courts would have exclusive jurisdiction of DOHSA claims and whether causes of action granted by state statutes would be affected or preempted by DOHSA. The debate is not couched in the most precise legal terminology, and it appears that the term 'jurisdiction' was used indiscriminately to refer to both the power of state or federal courts to hear a particular case and the power of a state to grant a right of recovery. . . . In this circumstance, an attempt to discern the congressional intent from the conflicting statements by participants in the debate is hopeless. It is also unnecessary in light of the clear language of the statute. Absent a clearly-expressed legislative intention to the contrary, the plain words of the statute must ordinarily be regarded as controlling." 754 F. 2d 1274, 1280–1282 (1985).

Despite the confusion of the debate, it *is* clear that the Mann Amendment removed the clause that expressly limited state remedies "to causes of action accruing within the territorial limits of any State." Accordingly, § 7, once confined to territorial waters, on its face extends to the high seas as well. Today's holding, by barring state rights of action for deaths occurring on the high seas, limits § 7 in a manner that Congress expressly rejected. Whatever the policy advantages such a reading may have, it is inappropriate for this Court to make the "judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 200 (1974).

III

The Court attempts to explain its holding through a comparison of § 7 with § 4 of DOHSA, and with the "saving to suitors" clause in the Judiciary Act of 1789, § 9, 1 Stat. 76 (codified, as amended, at 28 U. S. C. § 1333). I find neither argument convincing. Section 4 preserves "a right of action . . . granted by the law of any foreign State . . . *without abatement in respect to the amount for which recovery is authorized*, any statute of the United States to the contrary notwithstanding." (Emphasis added.) It is true that the italicized language is absent from § 7. But § 7 contains its own explicit language, since it expressly provides that state statutes "giving *or regulating rights of action or remedies for death* shall not be affected by this Act." (Emphasis added.) Thus, by its terms, § 7 protects the operation of state statutes that *either* create rights of action for wrongful death *or* "regulat[e]" the amount of those rights of action. That clear purpose is inconsistent with the notion that § 7 fails to preserve state-law rights of action on the high seas.

The Court's second argument, never advanced by any of the federal courts that have considered this issue, is that § 7 is merely a "jurisdictional saving clause" that preserves state courts' power to entertain certain causes of action for wrong-

ful death. I cannot accept this argument because it is inconsistent not only with the plain language of the provision, but also with one of the clear purposes of § 7.

The Court concedes that the original version of § 7 preserved both state-law remedies for wrongful death occurring within territorial waters and state jurisdiction over those remedies. *Ante*, at 224, 225 ("§ 7, as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court"). The Court then asserts, however, that the Mann Amendment "extended the jurisdictional saving clause to the high seas but in doing so, it did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters." *Ante*, at 227.

It is not easy to understand how § 7 was transformed from a provision that preserved both state jurisdiction and state rights of action in territorial waters, into a mere "jurisdictional saving clause" with no power to preserve state rights of action on the high seas. The Mann Amendment did nothing more than remove a territorial restriction; all other clauses of § 7 remained intact. As Representative Mann stated: "If the amendment which I have suggested should be agreed to, the bill *would not interfere in any way with rights now granted by any State statute*, whether the cause of action accrued within the territorial limits of the State or not." 59 Cong. Rec. 4484 (1920) (emphasis added). Moreover, as already noted, construing § 7 as preserving only state jurisdiction on the high seas is at odds with the terms of the provision itself. The language plainly refers to "[t]he provisions of any State statute giving or regulating rights of action or remedies for death."[4]

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[4] Nor does the Court's extended discussion of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917), see *ante*, at 224, 227–228, explain its view that the Mann Amendment converted § 7 into a jurisdictional saving clause. It is true that the uniformity requirement in *Jensen* was broad enough on

As final support for its reading of § 7, the Court argues that it would be "incongruous" to read § 7 as "preserv[ing] intact largely nonexistent or ineffective state law remedies for wrongful death on the high seas." *Ante*, at 230. Aside from the question whether this argument accurately portrays state-law remedies for death on the high seas, see *The Hamilton*, 207 U. S. 398 (1907) (Delaware right of action for wrongful death on the high seas); *La Bourgogne*, 210 U. S. 95, 138 (1908) (similar Louisiana statute, direct precedessor of current respondents' claim), it certainly is plausible to suggest that Congress may have wished to establish an assured and uniform federal right of action for wrongful death at sea. And in the light of the adoption of the Mann Amendment, it is not "incongruous" to believe that Congress, in providing that federal right of action, also decided to preserve the array of state-law remedies because these remedies sometimes—as is the case here—conferred upon a State's residents rights of recovery beyond those of the federal statute.

IV

The Court argues that preserving state rights of action for death on the high seas, in accordance with the plain language of § 7, would undermine a uniform federal remedy and conflict with the exclusive, federal character of most aspects of admiralty law. I agree that such a result undercuts a federal uniformity that seems desirable here, but it is not the role of this Court to reconsider the wisdom of a policy choice that Congress has already made. Congress enacted the Mann Amendment to remove the territorial restriction from § 7's preservation of state-law rights of action for wrongful death.

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its face to foreclose state wrongful death rights of action. (But cf. 244 U. S., at 216 (state wrongful death statute expressly exempted from *Jensen* rule)). Congress therefore might have believed that an express reservation of state-law rights of action was necessary to save state causes of action after Congress had enacted DOHSA. This concern, however, does not explain how the Mann Amendment transformed § 7 into a *jurisdictional* saving clause.

The Court now holds that those rights of action may not be enforced on the high seas, and thereby imposes an *exclusive* federal remedy that Congress declined to enact. We should respect the outcome of the legislative process and preserve State rights of action for wrongful death on the high seas until Congress legislates otherwise. Accordingly, I dissent.

ANDERSON ET AL. *v.* LIBERTY LOBBY, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1602. Argued December 3, 1985—Decided June 25, 1986

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, it was held that, in a libel suit brought by a public official (extended by later cases to public figures), the First Amendment requires the plaintiff to show that in publishing the alleged defamatory statement the defendant acted with actual malice. It was further held that such actual malice must be shown with "convincing clarity." Respondents, a nonprofit corporation described as a "citizens' lobby" and its founder, filed a libel action in Federal District Court against petitioners, alleging that certain statements in a magazine published by petitioners were false and derogatory. Following discovery, petitioners moved for summary judgment pursuant to Federal Rule of Civil Procedure 56, asserting that because respondents were public figures they were required to prove their case under the *New York Times* standards and that summary judgment was proper because actual malice was absent as a matter of law in view of an affidavit by the author of the articles in question that they had been thoroughly researched and that the facts were obtained from numerous sources. Opposing the motion, respondents claimed that an issue of actual malice was presented because the author had relied on patently unreliable sources in preparing the articles. After holding that *New York Times* applied because respondents were limited-purpose public figures, the District Court entered summary judgment for petitioners on the ground that the author's investigation and research and his reliance on numerous sources precluded a finding of actual malice. Reversing as to certain of the allegedly defamatory statements, the Court of Appeals held that the requirement that actual malice be proved by clear and convincing evidence need not be considered at the summary judgment stage, and that with respect to those statements summary judgment had been improperly granted because a jury could reasonably have concluded that the allegations were defamatory, false, and made with actual malice.

Held: The Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment. Pp. 247-257.

(a) Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and

determine the truth of the matter but to determine whether there is a genuine issue for trial. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Pp. 247–252.

(b) A trial court ruling on a motion for summary judgment in a case such as this must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists, that is, whether the evidence is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Pp. 252–256.

(c) A plaintiff may not defeat a defendant's properly supported motion for summary judgment in a libel case such as this one without offering any concrete evidence from which a reasonable jury could return a verdict in his favor and by merely asserting that the jury might disbelieve the defendant's denial of actual malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Pp. 256–257.

241 U. S. App. D. C. 246, 746 F. 2d 1563, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, *post*, p. 257. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 268.

David J. Branson argued the cause for petitioners. With him on the briefs was *David O. Bickart*.

Mark Lane argued the cause for respondents. With him on the brief were *Linda Huber* and *Fleming Lee*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Newspaper Publishers Association et al. by *Robert D. Sack, Robert S. Warren, W. Terry Maguire, Richard M. Schmidt, Jr., R. Bruce Rich, Lawrence Gunnels, Harvey L. Lipton, Peter C. Gould,* and *Jane E. Kirtley;* and for the Reader's Digest Association, Inc., by *Walter R. Allan* and *Karen J. Wegner*.

Briefs of *amici curiae* urging affirmance were filed for the American Legal Foundation by *Daniel J. Popeo;* and for the Synanon Church et al. by *Jonathan W. Lubell, Philip C. Bourdette, David R. Benjamin,* and *Andrew J. Weill*.

JUSTICE WHITE delivered the opinion of the Court.

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964), we held that, in a libel suit brought by a public official, the First Amendment requires the plaintiff to show that in publishing the defamatory statement the defendant acted with actual malice—"with knowledge that it was false or with reckless disregard of whether it was false or not." We held further that such actual malice must be shown with "convincing clarity." *Id.*, at 285–286. See also *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 342 (1974). These *New York Times* requirements we have since extended to libel suits brought by public figures as well. See, *e. g.*, *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967).

This case presents the question whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies. The United States Court of Appeals for the District of Columbia Circuit held that that requirement need not be considered at the summary judgment stage. 241 U. S. App. D. C. 246, 746 F. 2d 1563 (1984). We granted certiorari, 471 U. S. 1134 (1985), because that holding was in conflict with decisions of several other Courts of Appeals, which had held that the *New York Times* requirement of clear and convincing evidence must be considered on a motion for summary judgment.[1] We now reverse.

I

Respondent Liberty Lobby, Inc., is a not-for-profit corporation and self-described "citizens' lobby." Respondent Willis Carto is its founder and treasurer. In October 1981,

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[1] See, *e. g.*, *Rebozo* v. *Washington Post Co.*, 637 F. 2d 375, 381 (CA5), cert. denied, 454 U. S. 964 (1981); *Yiamouyiannis* v. *Consumers Union of United States, Inc.*, 619 F. 2d 932, 940 (CA2), cert. denied, 449 U. S. 839 (1980); *Carson* v. *Allied News Co.*, 529 F. 2d 206, 210 (CA7 1976).

The Investigator magazine published two articles: "The Private World of Willis Carto" and "Yockey: Profile of an American Hitler." These articles were introduced by a third, shorter article entitled "America's Neo-Nazi Underground: Did *Mein Kampf* Spawn Yockey's *Imperium*, a Book Revived by Carto's Liberty Lobby?" These articles portrayed the respondents as neo-Nazi, anti-Semitic, racist, and Fascist.

The respondents filed this diversity libel action in the United States District Court for the District of Columbia, alleging that some 28 statements and 2 illustrations in the 3 articles were false and derogatory. Named as defendants in the action were petitioner Jack Anderson, the publisher of The Investigator, petitioner Bill Adkins, president and chief executive officer of the Investigator Publishing Co., and petitioner Investigator Publishing Co. itself.

Following discovery, the petitioners moved for summary judgment pursuant to Rule 56. In their motion, the petitioners asserted that because the respondents are public figures they were required to prove their case under the standards set forth in *New York Times*. The petitioners also asserted that summary judgment was proper because actual malice was absent as a matter of law. In support of this latter assertion, the petitioners submitted the affidavit of Charles Bermant, an employee of the petitioners and the author of the two longer articles.[2] In this affidavit, Bermant stated that he had spent a substantial amount of time researching and writing the articles and that his facts were obtained from a wide variety of sources. He also stated that he had at all times believed and still believed that the facts contained in the articles were truthful and accurate. Attached to this affidavit was an appendix in which Bermant detailed the sources for each of the statements alleged by the respondents to be libelous.

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[2] The short, introductory article was written by petitioner Anderson and relied exclusively on the information obtained by Bermant.

The respondents opposed the motion for summary judgment, asserting that there were numerous inaccuracies in the articles and claiming that an issue of actual malice was presented by virtue of the fact that in preparing the articles Bermant had relied on several sources that the respondents asserted were patently unreliable. Generally, the respondents charged that the petitioners had failed adequately to verify their information before publishing. The respondents also presented evidence that William McGaw, an editor of The Investigator, had told petitioner Adkins before publication that the articles were "terrible" and "ridiculous."

In ruling on the motion for summary judgment, the District Court first held that the respondents were limited-purpose public figures and that *New York Times* therefore applied.[3] The District Court then held that Bermant's thorough investigation and research and his reliance on numerous sources precluded a finding of actual malice. Thus, the District Court granted the motion and entered judgment in favor of the petitioners.

On appeal, the Court of Appeals affirmed as to 21 and reversed as to 9 of the allegedly defamatory statements. Although it noted that the respondents did not challenge the District Court's ruling that they were limited-purpose public

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[3] In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 351 (1974), this Court summarized who will be considered to be a public figure to whom the *New York Times* standards will apply:

"[The public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."

The District Court found that the respondents, as political lobbyists, are the second type of political figure described by the *Gertz* court—a limited-purpose public figure. See also *Waldbaum* v. *Fairchild Publications, Inc.*, 201 U. S. App. D. C. 301, 306, 627 F. 2d 1287, 1292, cert. denied, 449 U. S. 898 (1980).

figures and that they were thus required to prove their case under *New York Times*, the Court of Appeals nevertheless held that for the purposes of summary judgment the requirement that actual malice be proved by clear and convincing evidence, rather than by a preponderance of the evidence, was irrelevant: To defeat summary judgment the respondents did not have to show that a jury could find actual malice with "convincing clarity." The court based this conclusion on a perception that to impose the greater evidentiary burden at summary judgment "would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well." 241 U. S. App. D. C., at 253, 746 F. 2d, at 1570. The court then held, with respect to nine of the statements, that summary judgment had been improperly granted because "a jury could reasonably conclude that the . . . allegations were defamatory, false, and made with actual malice." *Id.*, at 260, 746 F. 2d, at 1577.

II

A

Our inquiry is whether the Court of Appeals erred in holding that the heightened evidentiary requirements that apply to proof of actual malice in this *New York Times* case need not be considered for the purposes of a motion for summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly sup-

ported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. See generally 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93–95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.

More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. In *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253 (1968), we affirmed a grant of summary judgment for an antitrust defendant where the issue was whether there was a genuine factual dispute as to the existence of a conspiracy. We noted Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment "'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" We observed further that

> "[i]t is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to

> trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." 391 U. S., at 288–289.

We went on to hold that, in the face of the defendant's properly supported motion for summary judgment, the plaintiff could not rest on his allegations of a conspiracy to get to a jury without "any significant probative evidence tending to support the complaint." *Id.*, at 290.

Again, in *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970), the Court emphasized that the availability of summary judgment turned on whether a proper jury question was presented. There, one of the issues was whether there was a conspiracy between private persons and law enforcement officers. The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an inference of conspiracy. We reversed, pointing out that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury . . . to infer from the circumstances" that there had been a meeting of the minds. *Id.*, at 158–159.

Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As *Adickes*, *supra*, and *Cities Service*, *supra*, indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service*, *supra*, at 288–289. If the evidence is merely colorable, *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967) *(per curiam)*, or is not significantly pro-

bative, *Cities Service, supra*, at 290, summary judgment may be granted.

That this is the proper focus of the inquiry is strongly suggested by the Rule itself. Rule 56(e) provides that, when a properly supported motion for summary judgment is made,[4] the adverse party "must set forth specific facts showing that there is a genuine issue for trial."[5] And, as we noted above, Rule 56(c) provides that the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. There is no requirement that the trial judge make findings of fact.[6] The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

The petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady* v. *Southern R. Co.*, 320 U. S. 476, 479–480 (1943). If reasonable minds could differ as to the import of the evidence, how-

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[4] Our analysis here does not address the question of the initial burden of production of evidence placed by Rule 56 on the party moving for summary judgment. See *Celotex Corp.* v. *Catrett, post*, p. 317. Respondents have not raised this issue here, and for the purposes of our discussion we assume that the moving party has met initially the requisite evidentiary burden.

[5] This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

[6] In many cases, however, findings are extremely helpful to a reviewing court.

ever, a verdict should not be directed. *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62 (1949). As the Court long ago said in *Improvement Co.* v. *Munson*, 14 Wall. 442, 448 (1872), and has several times repeated:

> "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." (Footnotes omitted.)

See also *Pleasants* v. *Fant*, 22 Wall. 116, 120–121 (1875); *Coughran* v. *Bigelow*, 164 U. S. 301, 307 (1896); *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 343 (1933).

The Court has said that summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party." *Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620, 624 (1944). And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 745, n. 11 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submis-

sion to a jury or whether it is so one-sided that one party must prevail as a matter of law.

B

Progressing to the specific issue in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict—"whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Munson, supra*, at 448.

In terms of the nature of the inquiry, this is no different from the consideration of a motion for acquittal in a criminal case, where the beyond-a-reasonable-doubt standard applies and where the trial judge asks whether a reasonable jury could find guilt beyond a reasonable doubt. See *Jackson* v. *Virginia*, 443 U. S. 307, 318–319 (1979). Similarly, where the First Amendment mandates a "clear and convincing" standard, the trial judge in disposing of a directed verdict motion should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity.

The case for the proposition that a higher burden of proof should have a corresponding effect on the judge when deciding whether to send the case to the jury was well made by the Court of Appeals for the Second Circuit in *United States* v. *Taylor*, 464 F. 2d 240 (1972), which overruled *United States* v. *Feinberg*, 140 F. 2d 592 (1944), a case holding that the standard of evidence necessary for a judge to send a case to the jury is the same in both civil and criminal cases even though the standard that the jury must apply in a criminal case is more demanding than in civil proceedings. Speaking through Judge Friendly, the Second Circuit said: "It would seem at first blush—and we think also at second—that more 'facts in evidence' are needed for the judge to allow [reasonable jurors to pass on a claim] when the proponent is required to establish [the claim] not merely by a preponderance of the evidence but . . . beyond a reasonable doubt." 464 F. 2d, at 242. The court could not find a "satisfying explanation in the *Feinberg* opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury." *Ibid.* The *Taylor* court also pointed out that almost all the Circuits had adopted something like Judge Prettyman's formulation in *Curley* v. *United States*, 160 F. 2d 229, 232–233 (1947):

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the

> two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter."

This view is equally applicable to a civil case to which the "clear and convincing" standard applies. Indeed, the *Taylor* court thought that it was implicit in this Court's adoption of the clear-and-convincing-evidence standard for certain kinds of cases that there was a "concomitant duty on the judge to consider the applicable burden when deciding whether to send a case to the jury." 464 F. 2d, at 243. Although the court thought that this higher standard would not produce different results in many cases, it could not say that it would never do so.

Just as the "convincing clarity" requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment. When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some

benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes*, 398 U. S., at 158–159. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249 (1948).

In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the *New York Times* "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury find-

ing either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.[7]

III

Respondents argue, however, that whatever may be true of the applicability of the "clear and convincing" standard at the summary judgment or directed verdict stage, the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on *Poller* v. *Columbia Broadcasting Co.*, 368 U. S. 464 (1962), for this proposition. We do not understand *Poller*, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Based on that Rule, *Cities Service*, 391 U. S., at 290, held that the plaintiff could not defeat the properly supported summary judgment motion of a defendant charged with a conspiracy without offering "any significant probative evidence tending to support the complaint." As we have recently said, "discredited testi-

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[7] Our statement in *Hutchinson* v. *Proxmire*, 443 U. S. 111, 120, n. 9 (1979), that proof of actual malice "does not readily lend itself to summary disposition" was simply an acknowledgment of our general reluctance "to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Calder* v. *Jones*, 465 U. S. 783, 790–791 (1984).

mony is not [normally] considered a sufficient basis for drawing a contrary conclusion." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 512 (1984). Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery. We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

IV

In sum, a court ruling on a motion for summary judgment must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists—that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Because the Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment, we vacate its decision and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, dissenting.

The Court today holds that "whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case," *ante*, at 255.[1] In my view, the Court's analysis is deeply flawed,

[1] The Court's holding today is not, of course, confined in its application to First Amendment cases. Although this case arises in the context of litigation involving libel and the press, the Court's holding is that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Ante*, at 254. Accordingly, I simply do not understand why JUSTICE REHNQUIST, dissenting, feels it appropriate to cite *Calder* v. *Jones*, 465 U. S. 783 (1984), and to remind the Court that we have consistently refused to

and rests on a shaky foundation of unconnected and unsupported observations, assertions, and conclusions. Moreover, I am unable to divine from the Court's opinion *how* these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment. Accordingly, I respectfully dissent.

To support its holding that in ruling on a motion for summary judgment a trial court must consider substantive evidentiary burdens, the Court appropriately begins with the language of Rule 56c, which states that summary judgment shall be granted if it appears that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Court then purports to restate this Rule, and asserts that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Ante*, at 248. No direct authority is cited for the proposition that in order to determine whether a dispute is "genuine" for Rule 56 purposes a judge must ask if a "reasonable" jury could find for the nonmoving party. Instead, the Court quotes from *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S.

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extend special procedural protections to defendants in libel and defamation suits. The Court today does nothing of the kind. It changes summary judgment procedure for *all* litigants, regardless of the substantive nature of the underlying litigation.

Moreover, the Court's holding is not limited to those cases in which the evidentiary standard is "heightened," *i. e.*, those in which a plaintiff must prove his case by more than a mere preponderance of the evidence. Presumably, if a district court ruling on a motion for summary judgment in a libel case is to consider the "quantum and quality" of proof necessary to support liability under *New York Times*, *ante*, at 254, and then ask whether the evidence presented is of "sufficient caliber or quantity" to support that quantum and quality, the court must ask the same questions in a garden-variety action where the plaintiff need prevail only by a mere preponderance of the evidence. In other words, today's decision by its terms applies to all summary judgment motions, irrespective of the burden of proof required and the subject matter of the suit.

253, 288–289 (1968), to the effect that a summary judgment motion will be defeated if "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial," *ante*, at 249, and that a plaintiff may not, in defending against a motion for summary judgment, rest on mere allegations or denials of his pleadings. After citing *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970), for the unstartling proposition that "the availability of summary judgment turn[s] on whether a proper jury question [is] presented," *ante*, at 249, the Court then reasserts, again with no direct authority, that in determining whether a jury question is presented, the inquiry is whether there are factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Ante*, at 250. The Court maintains that this summary judgment inquiry "mirrors" that which applies in the context of a motion for directed verdict under Federal Rule of Civil Procedure 50(a): "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Ante*, at 251–252.

Having thus decided that a "genuine" dispute is one which is not "one-sided," and one which could "reasonably" be resolved by a "fair-minded" jury in favor of either party, *ibid.*, the Court then concludes:

> "Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards." *Ante*, at 254–255.

As far as I can discern, this conclusion, which is at the heart of the case, has been reached without the benefit of any support in the case law. Although, as noted above, the Court cites *Adickes* and *Cities Service*, those cases simply do not stand for the proposition that in ruling on a summary judgment motion, the trial court is to inquire into the "one-sidedness" of the evidence presented by the parties. *Cities Service* involved the propriety of a grant of summary judgment in favor of a defendant alleged to have conspired to violate the antitrust laws. The issue in the case was whether, on the basis of the facts in the record, a jury could *infer* that the defendant had entered into a conspiracy to boycott. No direct evidence of the conspiracy was produced. In agreeing with the lower courts that the *circumstantial* evidence presented by the plaintiff was insufficient to take the case to the jury, we observed that there was "one fact" that petitioner had produced to support the existence of the illegal agreement, and that that single fact could not support petitioner's *theory* of liability. Critically, we observed that "[t]he case at hand presents peculiar difficulties because the issue of fact crucial to petitioner's case is also an issue of law, namely the existence of a conspiracy." 391 U. S., at 289. In other words, *Cities Service* is at heart about whether certain facts can support inferences that are, as a matter of antitrust law, sufficient to support a particular theory of liability under the Sherman Act. Just this Term, in discussing summary judgment in the context of suits brought under the antitrust laws, we characterized both *Cities Service* and *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984), as cases in which "*antitrust law* limit[ed] the range of permissible inferences from ambiguous evidence. . . ." *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 588 (1986) (emphasis added). *Cities Service* thus provides no authority for the conclusion that Rule 56 requires a trial court to consider whether direct evidence produced by the parties is "one-sided." To the contrary, in *Matsushita*, the most re-

cent case to cite and discuss *Cities Service*, we stated that the requirement that a dispute be "genuine" means simply that there must be more than "some metaphysical doubt as to the material facts." 475 U. S., at 586.[2]

Nor does *Adickes*, also relied on by the Court, suggest in any way that the appropriate summary judgment inquiry is whether the evidence overwhelmingly supports one party. *Adickes*, like *Cities Service*, presented the question of whether a grant of summary judgment in favor of a defendant on a conspiracy count was appropriate. The plaintiff, a

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[2] Writing in dissent in *Matsushita*, JUSTICE WHITE stated that he agreed with the summary judgment test employed by the Court, namely, that "'[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" 475 U. S., at 599. Whether the shift, announced today, from looking to a "reasonable" rather than a "rational" jury is intended to be of any significance, there are other aspects of the *Matsushita* dissent which I find difficult to square with the Court's holding in the present case. The *Matsushita* dissenters argued:

". . . [T]he Court summarizes *Monsanto* v. *Spray-Rite Corp.*, *supra*, as holding that 'courts should not permit factfinders to infer conspiracies when such inferences are implausible. . . .' *Ante*, at 18. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury. These holdings in no way undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

"If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language." *Id.*, at 600–601.

In my view, these words are as applicable and relevant to the Court's opinion today as they were to the opinion of the Court in *Matsushita*.

white schoolteacher, maintained that employees of defendant Kress conspired with the police to deny her rights protected by the Fourteenth Amendment by refusing to serve her in one of its lunchrooms simply because she was white and accompanied by a number of black schoolchildren. She maintained, among other things, that Kress arranged with the police to have her arrested for vagrancy when she left the defendant's premises. In support of its motion for summary judgment, Kress submitted statements from a deposition of one of its employees asserting that he had not communicated or agreed with the police to deny plaintiff service or to have her arrested, and explaining that the store had taken the challenged action not because of the race of the plaintiff, but because it was fearful of the reaction of some of its customers if it served a racially mixed group. Kress also submitted affidavits from the Chief of Police and the arresting officers denying that the store manager had requested that petitioner be arrested, and noted that in the plaintiff's own deposition, she conceded that she had no knowledge of any communication between the police and any Kress employee and was relying on circumstantial evidence to support her allegations. In opposing defendant's motion for summary judgment, plaintiff stated that defendant in its moving papers failed to dispute an allegation in the complaint, a statement at her deposition, and an unsworn statement by a Kress employee all to the effect that there was a policeman in the store at the time of the refusal to serve, and that it was this policeman who subsequently made the arrest. Plaintiff argued that this sequence of events "created a substantial enough possibility of a conspiracy to allow her to proceed to trial. . . ." 398 U. S., at 157.

We agreed, and therefore reversed the lower courts, reasoning that Kress "did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some

Kress employee that petitioner not be served." *Ibid.* Despite the fact that *none of the materials relied on by plaintiff* met the requirements of Rule 56(e), we stated nonetheless that Kress failed to meet its initial burden of showing that there was no genuine dispute of a material fact. Specifically, we held that because Kress failed to negate plaintiff's materials suggesting that a policeman was in fact in the store at the time of the refusal to serve, "it would be open to a jury . . . to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." *Id.*, at 158.

In *Adickes* we held that a jury might permissibly infer a conspiracy from the mere presence of a policeman in a restaurant. We never reached and did not consider whether the evidence was "one-sided," and had we done so, we clearly would have had to affirm, rather than reverse, the lower courts, since in that case there was no admissible evidence submitted by petitioner, and a significant amount of evidence presented by the defendant tending to rebut the existence of a conspiracy. The question we did reach was simply whether, as a matter of conspiracy law, a jury would be entitled, again, as a matter of law, to infer from the presence of a policeman in a restaurant the making of an agreement between that policeman and an employee. Because we held that a jury was entitled so to infer, and because the defendant had not carried its initial burden of production of demonstrating that there was no evidence that there was not a policeman in the lunchroom, we concluded that summary judgment was inappropriate.

Accordingly, it is surprising to find the case cited by the majority for the proposition that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Ante*, at 249. There was, of course, *no* admissible evidence in *Adickes* favoring the nonmoving plaintiff; there was only an

unrebutted assertion that a Kress employee and a policeman were in the same room at the time of the alleged constitutional violation. Like *Cities Service*, *Adickes* suggests that on a defendant's motion for summary judgment, a trial court must consider whether, as a matter of the substantive law of the plaintiff's cause of action, a jury will be permitted to draw inferences supporting the plaintiff's legal theory. In *Cities Service* we found, in effect, that the plaintiff had failed to make out a prima facie case; in *Adickes* we held that the moving defendant had failed to rebut the plaintiff's prima facie case. In neither case is there any intimation that a trial court should inquire whether plaintiff's evidence is "significantly probative," as opposed to "merely colorable," or, again, "one-sided." Nor is there in either case any suggestion that once a nonmoving plaintiff has made out a prima facie case based on evidence satisfying Rule 56(e) that there is any showing that a defendant can make to prevail on a motion for summary judgment. Yet this is what the Court appears to hold, relying, in part, on these two cases.[3]

As explained above, and as explained also by JUSTICE REHNQUIST in his dissent, see *post*, at 271, I cannot agree that the authority cited by the Court supports its position. In my view, the Court's result is the product of an exercise

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[3] I am also baffled by the other cases cited by the majority to support its holding. For example, the Court asserts that "[i]f . . . evidence is merely colorable, *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967) *(per curiam)*, . . . summary judgment may be granted." *Ante*, at 249–250. In *Dombrowski*, we reversed a judgment granting summary judgment to the counsel to the Internal Security Subcommittee of the Judiciary Committee of the United States Senate because there was "controverted evidence in the record . . . which affords more than merely colorable substance" to the petitioners' allegations. 387 U. S., at 84. *Dombrowski* simply cannot be read to mean that summary judgment may be *granted* if evidence is merely colorable; what the case actually says is that summary judgment will be *denied* if evidence is "*controverted*," because when evidence is controverted, assertions become colorable for purposes of motions for summary judgment law.

akin to the child's game of "telephone," in which a message is repeated from one person to another and then another; after some time, the message bears little resemblance to what was originally spoken. In the present case, the Court purports to restate the summary judgment test, but with each repetition, the original understanding is increasingly distorted.

But my concern is not only that the Court's decision is unsupported; after all, unsupported views may nonetheless be supportable. I am more troubled by the fact that the Court's opinion sends conflicting signals to trial courts and reviewing courts which must deal with summary judgment motions on a day-to-day basis. This case is about a trial court's responsibility when considering a motion for summary judgment, but in my view, the Court, while instructing the trial judge to "consider" heightened evidentiary standards, fails to explain what that means. In other words, how does a judge assess how one-sided evidence is, or what a "fair-minded" jury could "reasonably" decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

The Court's opinion is replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions:

> "[I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter . . . ." *Ante*, at 249.
>
> "Our holding . . . does not denigrate the role of the jury. . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Ante*, at 255.

But the Court's opinion is also full of language which could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would:

> "When determining if a genuine factual issue . . . exists . . . , a trial judge must *bear in mind the actual quantum and quality* of proof necessary to support liability . . . . For example, *there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity* to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Ante*, at 254 (emphasis added).
>
> "[T]he inquiry . . . [is] whether the evidence presents a *sufficient* disagreement to require submission to a jury or whether *it is so one-sided* that one party must prevail as a matter of law." *Ante*, at 251–252 (emphasis added).
>
> "[T]he judge must ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Ante*, at 252.

I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," *i. e.*, the importance and value, of the evidence in light of the "quantum," *i. e.*, amount "required," could *only* be performed by weighing the evidence.

If in fact, this is what the Court would, under today's decision, require of district courts, then I am fearful that this new rule—for this surely would be a brand new procedure—will transform what is meant to provide an expedited "summary"

procedure into a full-blown paper trial on the merits. It is hard for me to imagine that a responsible counsel, aware that the judge will be assessing the "quantum" of the evidence he is presenting, will risk either moving for or responding to a summary judgment motion without coming forth with *all* of the evidence he can muster in support of his client's case. Moreover, if the judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

It may well be, as JUSTICE REHNQUIST suggests, see *post*, at 270–271, that the Court's decision today will be of little practical effect. I, for one, cannot imagine a case in which a judge might plausibly hold that the evidence on motion for summary judgment was sufficient to enable a plaintiff bearing a mere preponderance burden to get to the jury—*i. e.*, that a prima facie case had been made out—but insufficient for a plaintiff bearing a clear-and-convincing burden to withstand a defendant's summary judgment motion. Imagine a suit for breach of contract. If, for example, the defendant moves for summary judgment and produces one purported eyewitness who states that he was present at the time the parties discussed the possibility of an agreement, and unequivocally denies that the parties ever agreed to enter into a contract, while the plaintiff produces one purported eyewitness who asserts that the parties did in fact come to terms, presumably that case would go to the jury. But if the defendant produced not one, but 100 eyewitnesses, while the plaintiff stuck with his single witness, would that case, under the Court's holding, still go to the jury? After all, although the plaintiff's burden in this hypothetical contract action is to prove his case by a mere preponderance of the evidence, the judge, so the Court tells us, is to "ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Ante*, at 252. Is there, in this hypothetical example, "a sufficient disagreement to require sub-

mission to a jury," or is the evidence "so one-sided that one party must prevail as a matter of law"? *Ante*, at 251–252. Would the result change if the plaintiff's one witness were now shown to be a convicted perjurer? Would the result change if, instead of a garden-variety contract claim, the plaintiff sued on a fraud theory, thus requiring him to prove his case by clear and convincing evidence?

It seems to me that the Court's decision today unpersuasively answers the question presented, and in doing so raises a host of difficult and troubling questions for which there may well be no adequate solutions. What is particularly unfair is that the mess we make is not, at least in the first instance, our own to deal with; it is the district courts and courts of appeals that must struggle to clean up after us.

In my view, if a plaintiff presents evidence which either directly or by permissible inference (and these inferences are a product of the substantive law of the underlying claim) supports all of the elements he needs to prove in order to prevail on his legal claim, the plaintiff has made out a prima facie case and a defendant's motion for summary judgment must fail regardless of the burden of proof that the plaintiff must meet. In other words, whether evidence is "clear and convincing," or proves a point by a mere preponderance, is for the factfinder to determine. As I read the case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court, apparently moved by concerns for intellectual tidiness, mistakenly decides that the "clear and convincing evidence" standard governing finders of fact in libel cases must be applied by trial courts in deciding a motion for summary judgment in such a case. The Court refers to this as a "substantive standard," but I think is is actually a procedural

requirement engrafted onto Rule 56, contrary to our statement in *Calder* v. *Jones*, 465 U. S. 783 (1984), that

> "[w]e have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Id.*, at 790–791.

The Court, I believe, makes an even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now.

There is a large class of cases in which the higher standard imposed by the Court today would seem to have no effect at all. Suppose, for example, on motion for summary judgment in a hypothetical libel case, the plaintiff concedes that his only proof of malice is the testimony of witness A. Witness A testifies at his deposition that the reporter who wrote the story in question told him that she, the reporter, had done absolutely no checking on the story and had real doubts about whether or not it was correct as to the plaintiff. The defendant's examination of witness A brings out that he has a prior conviction for perjury.

May the Court grant the defendant's motion for summary judgment on the ground that the plaintiff has failed to produce sufficient proof of malice? Surely not, if the Court means what it says, when it states: "Credibility determinations . . . are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Ante*, at 255.

The case proceeds to trial, and at the close of the plaintiff's evidence the defendant moves for a directed verdict on the

ground that the plaintiff has failed to produce sufficient evidence of malice. The only evidence of malice produced by the plaintiff is the same testimony of witness A, who is duly impeached by the defendant for the prior perjury conviction. In addition, the trial judge has now had an opportunity to observe the demeanor of witness A, and has noticed that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers.

May the trial court at this stage grant a directed verdict? Again, surely not; we are still dealing with "credibility determinations."

The defendant now puts on its testimony, and produces three witnesses who were present at the time when witness A alleges that the reporter said she had not checked the story and had grave doubts about its accuracy as to plaintiff. Witness A concedes that these three people were present at the meeting, and that the statement of the reporter took place in the presence of all these witnesses. Each witness categorically denies that the reporter made the claimed statement to witness A.

May the trial court now grant a directed verdict at the close of all the evidence? Certainly the plaintiff's case is appreciably weakened by the testimony of three disinterested witnesses, and one would hope that a properly charged jury would quickly return a verdict for the defendant. But as long as credibility is exclusively for the jury, it seems the Court's analysis would still require this case to be decided by that body.

Thus, in the case that I have posed, it would seem to make no difference whether the standard of proof which the plaintiff had to meet in order to prevail was the preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt. But if the application of the standards makes no difference in the case that I hypothesize, one may fairly ask in what sort of case *does* the difference in stand-

ards make a difference in outcome? Cases may be posed dealing with evidence that is essentially documentary, rather than testimonial; but the Court has held in a related context involving Federal Rule of Civil Procedure 52(a) that inferences from documentary evidence are as much the prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985). The Court affords the lower courts no guidance whatsoever as to what, if any, difference the abstract standards that it propounds would make in a particular case.

There may be more merit than the Court is willing to admit to Judge Learned Hand's observation in *United States* v. *Feinberg*, 140 F. 2d 592, 594 (CA2), cert. denied, 322 U. S. 726 (1944), that "[w]hile at times it may be practicable" to "distinguish between the evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt[,] . . . in the long run the line between them is too thin for day to day use." The Court apparently approves the overruling of the *Feinberg* case in the Court of Appeals by Judge Friendly's opinion in *United States* v. *Taylor*, 464 F. 2d 240 (1972). But even if the Court is entirely correct in its judgment on this point, Judge Hand's statement seems applicable to this case because the criminal case differs from the libel case in that the standard in the former is proof "beyond a reasonable doubt," which is presumably easier to distinguish from the normal "preponderance of the evidence" standard than is the intermediate standard of "clear and convincing evidence."

More important for purposes of analyzing the present case, there is no exact analog in the criminal process to the motion for summary judgment in a civil case. Perhaps the closest comparable device for screening out unmeritorious cases in the criminal area is the grand jury proceeding, though the comparison is obviously not on all fours. The standard for allowing a criminal case to proceed to trial is not whether the government has produced prima facie evidence of guilt be-

yond a reasonable doubt for every element of the offense, but only whether it has established probable cause. See *United States* v. *Mechanik*, 475 U. S. 66, 70 (1986). Thus, in a criminal case the standard used prior to trial is much more lenient than the "clear beyond a reasonable doubt" standard which must be employed by the finder of fact.

The three differentiated burdens of proof in civil and criminal cases, vague and impressionistic though they necessarily are, probably do make some difference when considered by the finder of fact, whether it be a jury or a judge in a bench trial. Yet it is not a logical or analytical message that the terms convey, but instead almost a state of mind; we have previously said:

> "Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests . . . may well be largely an academic exercise. . . . Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be *unknowable*, given that factfinding is a process shared by countless thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence." *Addington* v. *Texas*, 441 U. S. 418, 424–425 (1979) (emphasis added).

The Court's decision to engraft the standard of proof applicable to a factfinder onto the law governing the procedural motion for a summary judgment (a motion that has always been regarded as raising a question of law rather than a question of fact, see, *e. g.*, *La Riviere* v. *EEOC*, 682 F. 2d 1275, 1277–1278 (CA9 1982) (Wallace, J.)), will do great mischief with little corresponding benefit. The primary effect of the Court's opinion today will likely be to cause the decisions of trial judges on summary judgment motions in libel cases to be

more erratic and inconsistent than before. This is largely because the Court has created a standard that is different from the standard traditionally applied in summary judgment motions without even hinting as to how its new standard will be applied to particular cases.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. v. BROCK, SECRETARY OF LABOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1777. Argued March 25, 1986—Decided June 25, 1986

To supplement state unemployment insurance benefits, the Trade Act of 1974 (Act) provides federally funded trade readjustment allowance (TRA) benefits to workers laid off because of competition from imports. As authorized by the Act, the Secretary of Labor (Secretary) has contracted out to state unemployment insurance agencies the job of making individual eligibility determinations for the benefits. To qualify for benefits, a worker must have at least 26 weeks of employment in the 52 weeks immediately preceding his layoff. In a 1975 policy handbook, the Secretary advised the state agencies that they should not count toward these 26 weeks leaves of absence, sick leaves, vacations, and military leaves. These guidelines were superseded by a 1981 amendment to the Act that permits inclusion of such periods of nonservice in determining a worker's period of employment, but the amendment was limited to benefits payable for weeks of unemployment beginning after September 30, 1981. Petitioner union and petitioner union members (some of whom had been denied benefits before October 1, 1981, because of the 1975 guidelines and some of whom were defending the award of benefits against appeals by their respective state agencies) filed an action in Federal District Court against the Secretary, claiming that his interpretation of the Act in the 1975 guidelines was incorrect, and seeking declaratory and injunctive relief. On cross-motions for summary judgment, the District Court first rejected the Secretary's argument that the provision of the Act, 19 U. S. C. § 2311(d), that makes entitlement determinations reviewable only "in the same manner and to the same extent as determinations under the applicable State law," precluded federal jurisdiction over the action. On the merits, the court held that the 1975 guidelines were inconsistent with the Act, and granted the requested relief. Without reaching the merits, the Court of Appeals reversed, holding that the union had no standing to bring the action. As to the individual union member plaintiffs, who claim to have been denied benefits because of an improper construction of the Act, the court, relying on § 2311(d)'s requirement, held that no relief could properly be awarded because the

plaintiffs had failed to join as party-defendants the state agencies that had denied their claims.

Held:

1. Petitioner union has standing to litigate this action. Pp. 281–290.

(a) An association has standing to bring suit on behalf of its members when (1) "its members would otherwise have standing to sue in their own right"; (2) "the interests it seeks to protect are germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 343. All three of these conditions have been met in this case. As to the first condition, § 2311(d) does not preclude a union member or any other aggrieved claimant from challenging the 1975 guidelines. The question is not whether there are any union members who might have circumvented any state administrative and judicial process in order to bring the claims that the union now seeks to litigate, but rather whether there are union members who have yet to receive either benefits they believe are due or a final state judgment that will preclude further consideration of their claims. Such individuals would have the live interest in challenging the guidelines that would support standing in this case. As to the second condition for associational standing, there is little question that the interests the union seeks to protect in this action are "germane" to its purpose of obtaining benefits, including unemployment benefits, for its members. As to the third condition, although the unique facts of each union member's claim will have to be considered by the state authorities before the member can receive the claimed benefits, the union can litigate this action without those individual members' participation and still ensure that the remedy, if granted, will benefit those members actually injured. Pp. 282–288.

(b) The principles of associational standing set out in *Hunt*, *supra*, are reaffirmed. The Secretary's suggestion that members of an association who wish to litigate common questions of law or fact against the same defendant should be permitted to proceed only pursuant to the class-action provisions of Federal Rule of Civil Procedure 23, fails to recognize the special features distinguishing suits by associations on behalf of their members from class actions. While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate its members' interests can draw upon a pre-existing reservoir of expertise and capital that can assist both courts and plaintiffs. In addition, the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with

others. Here, the Secretary has given no reason to doubt the union's ability to proceed on behalf of its aggrieved members. Pp. 288–290.

2. The action can be maintained without the joinder as defendants of the state agencies administering the TRA benefit program. The action is not an appeal from an adverse benefit determination, removed to federal court, but is a challenge to federal guidelines that required that determination. Just as § 2311(d) cannot be read to bar federal jurisdiction over a challenge to the guidelines, that section does not demand that the state rules governing review of the entitlement decisions bind the federal court entertaining that challenge. Under circumstances where the state agencies would be bound to comply with the relief ordered here and are reimbursed by the Federal Government for TRA benefits they pay, the state agencies are not "indispensable parties" within the meaning of Federal Rule of Civil Procedure 19(b) whose absence from the action rendered the District Court unable to grant the relief sought. Pp. 290–293.

241 U. S. App. D. C. 106, 746 F. 2d 839, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 293. POWELL, J., filed a dissenting opinion, *post*, p. 296.

Marsha S. Berzon argued the cause for petitioners. With her on the briefs were *Jordan Rossen*, *Leonard Page*, and *Stephen P. Berzon*.

Deputy Solicitor General Kuhl argued the cause for respondent. With her on the brief were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Mark I. Levy*, *Leonard Schaitman*, and *William G. Cole*.*

JUSTICE MARSHALL delivered the opinion of the Court.

This suit was brought by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and several of its members challenging the Secretary of Labor's interpretation of the eligibility provisions of the Trade Act of 1974, 88 Stat. 1978, 19 U. S. C.

**Benjamin W. Heineman, Jr.*, and *Carter G. Phillips* filed a brief for the Chamber of Commerce of the United States et al. as *amici curiae* urging reversal.

§ 2101, which provides benefits to workers laid off because of competition from imports. The issues presented here are whether the Union has standing to sue in federal court on behalf of its affected members and whether such a suit can be maintained without the joinder as defendants of the state agencies that administer the benefit program in question.

I

To aid workers who have lost their jobs because of import competition, the Trade Act of 1974 established a program of trade readjustment allowance (TRA) benefits as a supplement to state unemployment insurance benefits. 19 U. S. C. § 2291. Under the Act's scheme, a group of workers, their union, or some other authorized representative may petition the Secretary of Labor to certify that their firm has been adversely affected by imports. §§ 2271–2273. If the Secretary issues a certificate of eligibility for such a group, workers within that group who meet certain standards of individual eligibility may then apply for and receive TRA benefits. These benefits are funded entirely by the Federal Government, as is the cost of administering the program.

While the Secretary of Labor cannot delegate his certification duties, the Act does permit him to contract out the job of making individual eligibility determinations to the state agencies that administer state unemployment insurance programs. The Secretary has in fact entered into such agreements with unemployment insurance agencies in each State and in the District of Columbia and Puerto Rico. Pursuant to the agreements, each of these "cooperating Stat[e] agencies," § 2311(a), becomes an "agent of the United States," § 2313(a), charged with processing applications and using federal funds to pay TRA benefits to individuals eligible under the Act. Review of eligibility decisions by these agencies is to be "in the same manner and to the same extent as determinations under the applicable State law and only in that

best copy available

manner and to that extent." § 2311(d). In making these eligibility determinations, however, state authorities are bound to apply the relevant regulations promulgated by the Secretary of Labor and the substantive provisions of the Act. 29 CFR § 91.51(c) (1985).

To qualify for TRA benefits under the Act, a worker must have "had, in the 52 weeks immediately preceding . . . separation, at least 26 weeks of employment at wages of $30 or more a week in adversely affected employment with a single firm or subdivision of a firm." 19 U. S. C. § 2291(2) (1976 ed.). In a 1975 policy handbook, the Secretary advised the state agencies that they should not count toward these 26 weeks

> "[p]eriods in which service is not being performed, such as leave of absence, sick or annual leave or vacation leave, and periods in which service is being performed for other than the adversely affected employer, such as military service, temporary loan or detail to another employer, or work for another employer while attached to the adversely affected employer . . . ." App. 85.

These guidelines were superseded in August 1981 by the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. 97–35, 95 Stat. 357, which amended the Trade Act to provide that "leave for purposes of vacation, sickness, injury, maternity, or inactive duty or active duty military service for training" is to be included in determining an individual's period of employment with an adversely affected firm. 19 U. S. C. § 2291(a)(2)(A). The effect of this amendment, however, was limited to TRA benefits "payable for weeks of unemployment which begin after September 30, 1981." OBRA, § 2514(a)(2)(B), 95 Stat. 889, note following 19 U. S. C. § 2291.

Shortly after the passage of the OBRA, petitioners, the UAW and 11 of its members—some of whom had been denied benefits for weeks of employment before October 1, 1981, because of the interpretation of § 2291 in the 1975 handbook and

some of whom were defending the award of benefits against appeals by their respective state agencies—filed this suit in District Court against the Secretary of Labor. Claiming that the Secretary's interpretation had been incorrect and, to the extent that it related to military leave, in violation of the Veterans' Employment and Readjustment Act of 1972, 38 U. S. C. § 2013, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U. S. C. §§ 2014, 2024, petitioners sought a declaration that the interpretation was improper and an injunction requiring the Secretary both to notify all cooperating state agencies of the invalidity of the handbook and to direct those agencies to review and reprocess all cases in which TRA benefits had been denied.

On cross-motions for summary judgment, the District Court first rejected the Secretary's argument that § 2311(d), which makes entitlement determinations reviewable only "in the same manner and to the same extent as determinations under the applicable State law," precluded federal jurisdiction over the action. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *Donovan*, 568 F. Supp. 1047, 1050–1052 (DC 1983). It noted:

> "In the typical case the Act envisions that a disappointed applicant for TRA benefits appeals to the state court the administering agency's application of the pertinent guidelines or regulations to the facts of his case. The instant case, however, is atypical. Here, plaintiffs allege that the guidelines themselves are invalid; they do not contest the particulars of the application of the guidelines to the facts of individual cases." *Id.*, at 1050.

On the merits of the complaint, the court held that the 1975 guidelines were indeed inconsistent with the Trade Act and the Veterans' Readjustment Assistance Act of 1972. It therefore ordered the Secretary to notify all cooperating state agencies of the Act's proper construction and to direct those agencies to process anew, applying the proper eligibil-

ity standards, any TRA claims wrongfully denied as a result of the 1975 guidelines.

Without reaching the merits, a divided panel of the Court of Appeals reversed. 241 U. S. App. D. C. 106, 746 F. 2d 839 (1984). The court first noted that the UAW "is not an appropriate representative of those TRA claimants who were not its members," *id.*, at 109, 746 F. 2d, at 842, and that, at this stage of the proceedings, it would be "impermissible" to treat the suit as a class action on behalf of all disappointed claimants, *id.*, at 108, 746 F. 2d, at 841. The court then held that the UAW could not even represent the interests of those claimants who *were* union members. It reasoned:

> "In this case . . . , the Union has alleged no injury to itself; nor are the members' associational rights affected. . . . It seeks standing solely because some of the claimants, but far from all, were members of the Automobile Workers Union. Many of the members of the Union, however, have not had their employment terminated because of increasing imports. They have no interest in this case and no standing to seek any judicial relief. Those members of the Union who were disappointed claimants of the benefits have been injured, or denied advantages, in various amounts. The controversy could draw to a conclusion in these proceedings only if each individual claimant was a party plaintiff." *Id.*, at 109, 746 F. 2d, at 842.

Turning to the six named plaintiffs who claimed to have been denied administrative awards of benefits because of an improper construction of § 2291, the court held that, even assuming that § 2311(d) did not preclude federal jurisdiction, "no relief could properly be awarded in this action" because plaintiffs had failed to join as party-defendants the cooperating state agencies that had denied their claims. *Id.*, at 111, 746 F. 2d, at 844. Relying on the requirement of § 2311(d) "that review of determinations with respect to TRA benefits

must be 'in the same manner' as a determination under the state's unemployment insurance law," the court concluded:

> "Judicial review of a state agency's determination of benefits under its own unemployment insurance law may not be had without the presence of the state agency, [and] since the state agencies are outside the district court's jurisdiction, it may not be had here." *Id.*, at 110, 746 F. 2d, at 843.

We granted certiorari to consider the procedural issues raised by the Court of Appeals' decision, 474 U. S. 900 (1985). We now reverse.

II

The first question raised by the Court of Appeals' decision is a simple one: Does the UAW have standing to challenge the 1975 policy directive that allegedly resulted in the denial of TRA benefits to thousands of the Union's members? See Complaint ¶ 69. As the Court of Appeals properly noted, "the Union has alleged no injury to itself; nor are the members' associational rights affected," 241 U. S. App. D. C., at 109, 746 F. 2d, at 842. The inquiry here is thus whether the UAW may proceed solely as a representative of those of its members injured by the Secretary's policy.

It has long been settled that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members. *E. g., National Motor Freight Assn.* v. *United States*, 372 U. S. 246 (1963)." *Warth* v. *Seldin*, 422 U. S. 490, 511 (1975). While the "possibility of such representational standing . . . does not eliminate or attenuate the constitutional requirement of a case or controversy," *ibid.*; see *Sierra Club* v. *Morton*, 405 U. S. 727 (1972), we have found that, under certain circumstances, injury to an organization's members will satisfy Article III and allow that organization to litigate in federal court on their behalf. See *Simon* v. *Eastern Kentucky Welfare Rights*

Organization, 426 U. S. 26, 40 (1976). In *Warth*, *supra*, we set out the nature of these circumstances:

> "The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Id.*, at 511.

Subsequently, this doctrine was stated as a three-part test:

> "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 343 (1977).

The Court of Appeals here held that the UAW could not litigate its challenge to the Secretary's policy directive on behalf of its members because it found that the third of these conditions was not present in this case. Defending the court's decision, however, the Secretary argues that none of the three has been satisfied. We will consider each in turn.

A

Addressing the first part of the analysis in *Hunt*, the Secretary does not dispute petitioners' claim that a large number of UAW members were denied TRA benefits by their respective state agencies as a result of his Department's interpretation of § 2291(2) between 1975 and 1981. His argument is not

that all members whom the UAW purports to represent have suffered no injury. Rather, he relies on 19 U. S. C. § 2311(d), which makes TRA entitlement determinations by state agencies "subject to review in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent," and maintains that not a single member of the UAW—or any other aggrieved TRA claimant—can challenge the 1975 policy directive without running afoul of settled principles of administrative finality and judicial comity, as well as statutory intent.

The reasons the Secretary gives for the preclusion of various UAW members differ, but the end result is the same. TRA claimants who were awarded benefits and whose cases were finally resolved in their favor on judicial review cannot challenge the Secretary's interpretation of the Trade Act because they were not injured by it. At the same time, claimants denied benefits in final state judicial decisions are barred by res judicata from raising any eligibility claim in federal court. As for workers, who, at the time the suit was brought, had claims pending in state court after either favorable or unfavorable administrative determinations, the Secretary argues that it would "be contrary to Congress's incorporation of the state system into the administration of the Trade Act, and an affront to the integrity and authority of the state courts, to allow claimants whose cases were under state judicial review to pretermit that process by proceeding in federal court." Brief for Respondent 16. Workers with claims still pending in state administrative proceedings cannot complain, according to the Secretary, because they have yet to suffer any cognizable injury and may not circumvent state processes. And workers who failed to seek judicial review of adverse administrative determinations should also be barred from coming to federal court because their inaction has allowed those determinations to become final.

The Secretary's arguments simply miss the point of petitioners' claims. The statutory challenges raised here will no doubt affect the outcome of individual entitlement determinations if petitioners are successful on the merits of their suit. However, this action does not directly seek TRA benefits. In accordance with § 2231(d), decisions as to the eligibility of individual claimants for benefits will remain the province of state authorities. The question is thus not whether there are any individual members of the UAW who might have circumvented state administrative and judicial processes in order to bring the claims that the UAW now seeks to litigate. Rather, it is whether there are members of the UAW who have yet to receive either the TRA benefits they believe they are due or a final state judgment that would preclude further consideration of their eligibility claims. Such individuals would have the live interest in challenging the Labor Department guidelines that would support standing in this case. And there is no question here that among the UAW's members are many such individuals.

At bottom, the Secretary's invocation of administrative exhaustion principles is merely a variant of his argument that § 2311(d) irrevocably commits to state processes all claims relating to TRA entitlements. Citing this Court's recent decision in *Green* v. *Mansour*, 474 U. S. 64 (1985), he argues that "this suit, like *Green*, is an impermissible attempt to gain a federal judicial ruling to serve as the predicate for a state claim that could not be brought directly in federal court." Brief for Respondent 21. In *Green*, this Court held that when the Eleventh Amendment bars a federal court from directly ordering a State to pay damages for a past constitutional violation, the court cannot enter a declaratory judgment that plaintiffs might use as res judicata in state court damages actions. The Eleventh Amendment bar that precluded equitable relief in *Green*, however, has little in common with 19 U. S. C. § 2311(d). The Trade Act provision does not foreclose review in federal court of every claim

relating to the Act's application by federal and state officials. While the Act vested state courts with exclusive jurisdiction over claims challenging a state agency's application of federal guidelines to the benefit claims of individual employees, there is no indication that Congress intended § 2311(d) to deprive federal district courts of subject-matter jurisdiction under 28 U. S. C. § 1331(a) (1976 ed.) to hear statutory or constitutional challenges to the federal guidelines themselves. Indeed, we have frequently upheld a contrary principle: that although review of individual eligibility determinations in certain benefit programs may be confined by state and federal law to state administrative and judicial processes, claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court. See *Ohio Bureau of Employment Services* v. *Hodory*, 431 U. S. 471 (1977); *Fusari* v. *Steinberg*, 419 U. S. 379 (1975); *Christian* v. *New York State Dept. of Labor*, 414 U. S. 614 (1974); *California Dept. of Human Resources Development* v. *Java*, 402 U. S. 121 (1971); cf. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 678 (1986) (judicial review available for challenge to Secretary's regulations even where statute bars review of determinations of specific benefit amounts). In *Christian*, *supra*, for example, former employees denied unemployment compensation benefits in state proceedings brought an action in District Court alleging that the Secretary of Labor and the state agency acting as his agent had not adhered to the procedural guarantees of the Unemployment Compensation for Federal Employees Program. Even though the provision governing review of benefit determinations in that program, 5 U. S. C. § 8502(d), is nearly identical to 19 U. S. C. § 2311(d), we noted that the court had jurisdiction over plaintiffs' claims against both state and federal defendants. 414 U. S., at 617, n. 3.

As we find § 2311(d) to pose no bar to petitioners' claims, we see no jurisdictional impediment to this suit in federal

court challenging a federal official's interpretation of a federal statute. In view of the extent to which state agencies are bound to adhere to the Secretary's directives with respect to the administration and interpretation of the Trade Act, see *infra*, at 292, such a direct challenge is not only proper, but appropriate.

B

Having found that at least some members of the UAW would have had standing to bring this suit in their own right, we need pause only briefly to consider whether the second of *Hunt*'s preconditions for associational standing has been satisfied here. For there is little question that the interests that the UAW seeks to protect in this suit are "germane to the organization's purpose," *Hunt*, 432 U. S., at 343. The UAW's Constitution announces that one of the Union's goals is "to work for legislation on a national scale, having as its object the establishment of real social and unemployment insurance, the expense of which is to be borne by the employer and the Government." Constitution of the International Union, UAW, Art. 2, § 4 (quoted in Brief for Petitioners 14–15). In pursuit of that goal, the leadership of the UAW, along with other representatives of organized labor, lobbied hard for the establishment of the TRA benefit program. See, *e. g.*, Trade Reform Act of 1973: Hearings on H. R. 6767 before the House Committee on Ways and Means, 93d Cong., 1st Sess., pt. 3, pp. 849–914 (1973) (testimony of Leonard Woodcock, President of the UAW).

Recognizing the interest of organized labor in obtaining benefits for its workers, Congress gave unions a role in the administration of the TRA program, allowing them to petition the Secretary to certify that particular firms have been adversely affected by imports. 19 U. S. C. §§ 2271–2273. Once the issuance of such a certification permits individual union members to file for TRA benefits, a union like the UAW—whose members, we are told, have constituted over 40% of the workers certified as eligible to apply for TRA

benefits between April 1975 and January 1984, Brief for Petitioners 15—surely maintains an interest in ensuring that its members receive all the benefits available under the Act.

C

Relying on our decision in *Warth* v. *Seldin*, 422 U. S. 490 (1975), the Court of Appeals concluded that the UAW had failed to satisfy the last of the preconditions for associational standing set out in *Hunt*. In *Warth*, we noted that even where the members of an association have suffered the sort of injury that might otherwise support a suit by the association, "whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought." 422 U. S., at 515. An organization of construction firms, we held, could not seek damages for the profits and business lost by its members because "whatever injury might have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof." *Id.*, at 515–516. Each member therefore had to be a party to the suit, and the association lacked standing to proceed on his behalf. Likening the instant case to *Warth*, the Court of Appeals noted that because those UAW members "who had suffered an alleged injury had done so in varying amounts requiring individualized proof," the relief sought here could not be obtained unless "each individual claimant was a party plaintiff." 241 U. S. App. D. C., at 109, 746 F. 2d, at 842.

Like the Secretary in his arguments before this Court, the Court of Appeals misconstrued the nature of petitioners' claims. Neither these claims nor the relief sought required the District Court to consider the individual circumstances of any aggrieved UAW member. The suit raises a pure question of law: whether the Secretary properly interpreted the Trade Act's TRA eligibility provisions. Cf. *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 40, n. 8 (1981). And the relief

requested, and granted by the District Court, leaves any questions regarding the eligibility of individual TRA claimants to the state authorities given jurisdiction over such questions by 19 U. S. C. § 2311(d). See *Bowen* v. *City of New York*, 476 U. S. 467, 485 (1986) ("by ordering simply that the claims be reopened at the administrative level, the District Court showed proper respect for the administrative process"). Thus, though the unique facts of each UAW member's claim will have to be considered by the proper state authorities before any member will be able to receive the benefits allegedly due him, the UAW can litigate this case without the participation of those individual claimants and still ensure that "the remedy, if granted, will inure to the benefit of those members of the association actually injured," *Warth, supra*, at 515.

III

As an alternative basis for affirming the Court of Appeals, the Secretary asks that we reconsider and reject the principles of associational standing set out in *Hunt*. He suggests that "at least absent a showing of particularized need," members of an association who wish to litigate common questions of law or fact against the same defendant be permitted to proceed only pursuant to the class-action provisions of Federal Rule of Civil Procedure 23. Brief for Respondent 34.*

Both associational standing and Rule 23 are "designed to serve precisely the same purpose," according to the Secretary: "to facilitate, in a fair and efficient manner, the collective adjudication of the common rights of an association's members." *Id.*, at 37. Rule 23, however, contains special

*Even while contending that UAW members should have brought their claims in the form of a class action, the Secretary argues that, at this stage of the litigation, certification of the members as a class would be inappropriate. Because we find that the UAW has standing to maintain this action on behalf of its affected members, we need not consider whether it would have been proper to treat this suit as a class action once the District Court had entered judgment.

safeguards to ensure that the diverse interests of class members are properly represented by the named plaintiff seeking to bring a case on their behalf. No such adequacy of representation, the Secretary argues, is guaranteed by the approach this Court has taken to associational standing in *Warth*, *Hunt*, and other cases. Yet an association might prove an inadequate representative of its members' legal interests for a number of reasons. It might lack resources or experience or might bring lawsuits without authorization from its membership. In addition, the litigation strategy selected by the association might reflect the views of only a bare majority—or even an influential minority—of the full membership.

The Secretary's presentation, however, fails to recognize the special features, advantageous both to the individuals represented and to the judicial system as a whole, that distinguish suits by associations on behalf of their members from class actions. While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital. "Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack." Note, From Net to Sword: Organizational Representatives Litigating Their Members' Claims, 1974 U. Ill. L. Forum 663, 669. These resources can assist both courts and plaintiffs. As one court observed of an association's role in pending litigation: "[T]he interest and expertise of this plaintiff, when exerted on behalf of its directly affected members, assure 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.'" *Harlem Valley Transportation Assn.* v. *Stafford*, 360 F. Supp. 1057, 1065 (SDNY 1973), quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962).

In addition, the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others. "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 187 (1951) (Jackson, J., concurring); see *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 459 (1958) (association "is but the medium through which its individual members seek to make more effective the expression of their views"). The very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests.

We are not prepared to dismiss out of hand the Secretary's concern that associations allowed to proceed under *Hunt* will not always be able to represent adequately the interests of all their injured members. Should an association be deficient in this regard, a judgment won against it might not preclude subsequent claims by the association's members without offending due process principles. And were we presented with evidence that such a problem existed either here or in cases of this type, we would have to consider how it might be alleviated. However, the Secretary has given us absolutely no reason to doubt the ability of the UAW to proceed here on behalf of its aggrieved members, and his presentation has fallen far short of meeting the heavy burden of persuading us to abandon settled principles of associational standing. See *Vasquez* v. *Hillery*, 474 U. S. 254, 265–266 (1986). We therefore reaffirm the principles we set out in *Hunt*, and hold that the UAW has standing to litigate this action.

IV

Our conclusion that the UAW has standing would be of little consequence if we agreed with the Court of Appeals

that "the complaint should be dismissed because it was filed without the joinder of necessary parties," namely, the cooperating state agencies whose adverse benefit determinations gave rise to the injuries complained of here. 241 U. S. App. D. C., at 110, 746 F. 2d, at 843. Because petitioners appear to have conceded that the state agencies are outside the jurisdiction of the District Court, Brief for Petitioners 44, n. 44, a demand that all the agencies involved be named as defendants would bar the UAW from proceeding any further with this action. However, we believe that the Court of Appeals' resolution of the joinder issue was erroneous.

In part, the Court of Appeals' decision was based upon its reading 19 U. S. C. § 2311(d) to require that the state procedural rules applicable to the review of individual entitlement determinations be applied in this case. Since, under state law, review of an individual TRA claimant's eligibility determination cannot be had without the joinder of the state agency that made that determination, the Court of Appeals reasoned that a plaintiff could not pursue the claims raised here unless he joined as defendant the state agency whose reliance on the 1975 handbook had allegedly denied him TRA benefits. As should be clear from the foregoing discussion of the standing issue, however, the court's application of § 2311(d) was founded on a mischaracterization of this lawsuit. This action is not an appeal from an adverse benefit determination, removed to federal court. It is a challenge to the federal guidelines that required those determinations. And just as § 2311(d) cannot be read to bar federal jurisdiction over a challenge to the Secretary's statutory interpretation, so § 2311(d) does not demand that the state rules governing review of agency entitlement decisions bind the federal court entertaining that challenge.

The second basis of the Court of Appeals' decision was its concern that without the joinder of every state agency whose cooperation was needed to effect the relief granted by the District Court against the Secretary, such relief might "be a futile thing except to the extent that voluntary compliance

[by those agencies] with the request of the Secretary may be expected." 241 U. S. App. D. C., at 111, 746 F. 2d, at 844. We do not share this fear. If upon reaching the merits of this case, the Court of Appeals upholds the relief ordered by the District Court, we have little doubt that the state agencies, which have agreed to administer TRA benefits as "agent[s] of the United States," 19 U. S. C. §§ 2311(a), 2313(a), would obey the Secretary's directive to process anew any TRA claims wrongfully denied as a result of the 1975 handbook's interpretation of the Trade Act.

Regulations promulgated by the Secretary provide that "[i]n making determinations, redeterminations, and in connection with proceedings for review thereof," a cooperating state agency "shall be an agent of the United States and shall carry out fully the purpose stated in § 91.2." 29 CFR § 91.51(d) (1985). Among the goals set out in § 91.2 of those regulations is "to implement the provisions of the Act uniformly and effectively throughout the United States." State agencies that have entered into agreements with the Secretary would thus be bound to comply with the relief ordered here. Were a state agency to balk at engaging in the reprocessing the Secretary would order pursuant to the court's injunction, it could be found in breach of its agreement. 29 CFR § 91.63(e) (1985). Such a finding would cause employers in that agency's State to lose certain tax credits against their liability for the Federal Unemployment Tax. 26 U. S. C. § 3302(c)(3). In any event, since state agencies are fully reimbursed by the Federal Government for the TRA benefits they pay and for the administrative costs of processing those payments, it seems unlikely that a directive from the Secretary would meet any resistance from his agents.

Under these circumstances, we do not believe that the state agencies should be considered "indispensable parties" within the meaning of Federal Rule of Civil Procedure 19(b), whose absence from this action rendered the District Court unable to grant in full the relief sought by petitioners. Fur-

thermore, given that the only prejudice to absent third parties suggested here is administrative work for which the agencies will be fully reimbursed, it would be indeed odd were we to prevent this suit from going forward simply because there is a slight chance that petitioners will not be able to obtain the full extent of the relief they seek.

V

We hold that the UAW has standing to proceed in this case, and that petitioners' failure to join the various cooperating state agencies poses no obstacle to the suit. It remains for the Court of Appeals to consider the merits of the District Court's decision and any procedural issues properly preserved and raised.

The judgment of the Court of Appeals is reversed, and the case is remanded to that court for proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

I disagree with the Court's conclusion that the District Court properly exercised jurisdiction over this case.

Section 239(d) of the Trade Act of 1974, 19 U. S. C. § 2311(d), provides that "[a] determination by a cooperating State agency with respect to entitlement to program benefits . . . is subject to review in the same manner and to the same extent as determinations under the applicable State law [regarding unemployment compensation benefits] and only in that manner and to that extent." The legislative history explains that "[t]he bill would have the effect of channeling all questions arising from determinations by State agencies through the normal State review procedure." S. Rep. No. 93-1298, p. 139 (1974). Congress thus expressed the intent that once a claim for trade readjustment allowance (TRA) benefits is submitted to a cooperating state agency, the agency and state courts shall have exclusive jurisdiction

to determine *all* questions, legal as well as factual, regarding the claim.

The Court treats § 239(d) as inapplicable to the present case on the ground that petitioners have not requested federal-court review of any particular benefit determination under the relevant federal guideline, but instead challenge the guideline itself. *Ante*, at 285. The distinction between a challenge to the guideline and a challenge to benefit determinations might be meaningful if petitioners had only challenged the application of the guideline to as-yet-unsubmitted claims, but that is not this case. At the time the District Court entered its judgment, the guideline at issue had been superseded for nearly 22 months, and the only live controversy related to the cooperating state agencies' applications of the guideline to already-submitted claims.[1] Thus, this suit is precluded by Congress' clearly expressed intent to commit to the state review process the adjudication of all questions regarding TRA benefit claims under submission to a state agency.

In explaining its holding that § 239(d) does not apply to this case, the Court states that "although review of individual eligibility determinations in certain benefit programs may be confined by state and federal law to state administrative and judicial processes, claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court." *Ante*, at 285. If the Court means that this case could have been brought even if the underlying benefit claims were state unemployment compensation claims, I disagree. In such a case, petitioners'

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[1] The claims in this case related to weeks of unemployment beginning prior to October 1, 1981. Brief for Petitioners 4, n. 4. When the District Court entered its judgment on July 28, 1983, the relief granted related only to already-accrued claims for periods 22 months past or older. The record does not indicate that any unadjudicated claims for the period preceding October 1, 1981, remained outstanding at the time the District Court's opinion issued.

suit, which seeks declaratory and injunctive relief for the sole purpose of providing a predicate for the recovery of already-accrued benefit claims in state court, would have been barred by the Eleventh Amendment. *Green* v. *Mansour*, 474 U. S. 64 (1985).[2] Of course, the Eleventh Amendment does not directly apply in the present case, since TRA benefits are paid entirely from federal funds, but what § 239(d) commands a federal court to do is treat questions arising from TRA benefit determinations *as if* they were questions arising from benefit determinations under state unemployment compensation law. Under that standard, this is not a case that should be adjudicated by the federal courts.[3] Accordingly, I dissent from the Court's decision to address petitioners' claims on the merits.

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[2] The cases cited by the Court that involve claims for state unemployment compensation benefits—*Ohio Bureau of Employment Services* v. *Hodory*, 431 U. S. 471 (1977), *Fusari* v. *Steinberg*, 419 U. S. 379 (1975), and *California Dept. of Human Resources Development* v. *Java*, 402 U. S. 121 (1971)—are not to the contrary. These cases concern requests for declarations or injunctions that pertain at least in part to future claims for benefits, see, *e. g.*, *Hodory*, *supra*, at 475, which is not true of petitioners' suit as of the time the District Court issued its judgment, see n. 1, *supra*. Also, whether or not the Eleventh Amendment might have been a bar to any aspect of the relief sought in *Hodory*, *Fusari*, or *Java*, the defendant state agency failed to raise the issue.

[3] *Christian* v. *New York Dept. of Labor*, 414 U. S. 614 (1974), is not sound support for the Court's conclusion that the present case is properly in federal court. In *Christian*, the Court never directly considered the jurisdictional implications of 5 U. S. C. § 8502, the analogue of § 239(d) in this case. The only jurisdictional question the Court squarely addressed was whether mandamus jurisdiction lay against the Secretary of Labor, and the Secretary in fact conceded that such jurisdiction was proper. *Id.*, at 617, n. 3. Arguably, any bar to federal-court adjudication presented by the jurisdictional statute in *Christian* is, like an Eleventh Amendment bar, waivable by the defendant. In any event, the Court's failure to squarely consider the jurisdictional question in *Christian* makes it inappropriate to rely on that case for guidance in determining the jurisdictional question here.

JUSTICE POWELL, dissenting.

The Court today holds that petitioner UAW has standing to proceed in a suit challenging the Secretary of Labor's interpretation of the eligibility provisions of the Trade Act, codified at 19 U. S. C. § 2291, because those members of the UAW who have claims pending before a state administrative agency would have standing to bring a similar suit. The record, however, provides no information as to how many members of the UAW fall within this potential class. There is the danger that ultimately the number of members that the UAW can represent will be quite small. The Union may therefore lack the incentive to provide the adequate representation needed by the courts.

It is well settled that an association can represent its members' interest in a third-party action when an association has alleged a related injury. *E. g., Warth* v. *Seldin*, 422 U. S. 490 (1975). Moreover, in appropriate circumstances this Court has conferred standing upon an association whose members have suffered an alleged injury, even though the organization itself has not suffered an injury. In *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333 (1977), the Court stated:

> "[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.*, at 343.

It is undisputed that achieving unemployment benefits under the program of trade readjustment allowance is "germane" to the UAW's purpose in the sense that one of its goals is to secure such benefits for its workers. I do not believe, however, that a determination of "germane" in this formalis-

tic sense should be sufficient to confer standing upon the UAW here.

A consistent concern of our standing cases has been the adequacy of representation of the organization purportedly acting on behalf of the injured parties, especially when the organization itself has not suffered injury. This Court has repeatedly expressed its reluctance to confer standing on third parties for fear of inadequate representation. "The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them." *Singleton* v. *Wulff*, 428 U. S. 106, 114 (1976) (opinion of BLACKMUN, J.). See, *e. g.*, *Baker* v. *Carr*, 369 U. S. 186, 204 (1962) (standing requirement aimed at "assur[ing] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends"); *Holden* v. *Hardy*, 169 U. S. 366, 397 (1898) (assertion of third parties' rights would come with "greater cogency" from the third parties themselves).

Since the concept of organizational representation is based on a theoretical identity between the organization and its members, the organization's interest in the outcome is based on the members' stake in the outcome. The number of members in the organization with a concrete stake in the outcome, however, may be so small that this theoretical identity disappears. It may develop in this case, in fact, that the great majority of members in the Union have little or no interest in the litigation. Moreover, a union may have reasons for instituting a suit—such as the publicity that attends a major case—other than to assert rights of its members. In such a case, the "concrete adverseness" required throughout a litigation by our cases may be absent.*

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*It is, of course, true that many organizations have financial resources, expertise, and research ability that individual plaintiffs or ad hoc groups lack. But absent the requisite interest of the organization itself, the presence of these resources does not ensure adequacy of representation. It also may be noted that organizational standing differs in controlling

In the light of these dangers of inadequate representation, I would not find—on the basis of the record before us—that the UAW had standing based on an amorphous and unenumerated group of injured parties. Accordingly, I dissent.

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respects from the typical class action. In the latter, there must be an identity of interests among all plaintiffs before the court—an identity that can be counted upon to assure adequate representation.

MEMPHIS COMMUNITY SCHOOL DISTRICT ET AL. v. STACHURA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85–410. Argued April 2, 1986—Decided June 25, 1986

Respondent, a tenured teacher in the Memphis, Michigan, public schools, was suspended following parents' complaints about his teaching methods in a 7th-grade life science course that included the showing of allegedly sexually explicit pictures and films. While respondent was later reinstated, he, before being reinstated, brought suit in Federal District Court under 42 U. S. C. § 1983 against petitioner School District, Board of Education, Board Members, school administrators, and parents, alleging that his suspension deprived him of liberty and property without due process of law and violated his First Amendment right to academic freedom. He sought both compensatory and punitive damages. The District Court instructed the jury on the standard elements of compensatory and punitive damages and also charged the jury that additional compensatory damages could be awarded based on the value or importance of the constitutional rights that were violated. The jury found petitioners liable, awarding both compensatory and punitive damages. The Court of Appeals affirmed.

Held: Damages based on the abstract "value" or "importance" of constitutional rights are not a permissible element of compensatory damages in § 1983 cases. Pp. 304–313.

(a) The basic purpose of § 1983 damages is "to *compensate persons for injuries* that are caused by the deprivation of constitutional rights." *Carey* v. *Piphus*, 435 U. S. 247, 254. The instructions at issue cannot be squared with *Carey*, or with the principles of tort damages on which *Carey* and § 1983 are grounded. Damages measured by the jury's perception of the abstract "importance" of a constitutional right are not necessary to vindicate the constitutional rights that § 1983 protects, and moreover are an unwieldy tool for ensuring compliance with the Constitution. Pp. 305–310.

(b) Since such damages are wholly divorced from any compensatory purpose, they cannot be justified as presumed damages, which are a *substitute* for ordinary compensatory damages, not a *supplement* for an award that fully compensates the alleged injury. Pp. 310–312.

(c) The erroneous instructions were not harmless error where the verdict did not specify how much of the compensatory damages was de-

signed to compensate respondent for his injury and how much reflected the jury's estimation of the value of the constitutional rights that were infringed. Pp. 312–313.

763 F. 2d 211, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BRENNAN and STEVENS, JJ., filed a separate statement, *post*, p. 313. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 313.

Patrick J. Berardo argued the cause and filed briefs for petitioners.

Jeffrey A. Heldt argued the cause for respondent. With him on the brief was *Erwin B. Ellmann.**

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to decide whether 42 U. S. C. § 1983 authorizes an award of compensatory damages based on the factfinder's assessment of the value or importance of a substantive constitutional right.

I

Respondent Edward Stachura is a tenured teacher in the Memphis, Michigan, public schools. When the events that led to this case occurred, respondent taught seventh-grade life science, using a textbook that had been approved by the School Board. The textbook included a chapter on human reproduction. During the 1978–1979 school year, respondent spent six weeks on this chapter. As part of their instruction, students were shown pictures of respondent's wife dur-

**Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller, Bruce N. Kuhlik,* and *Barbard L. Herwig* filed a brief for the United States as *amicus curiae* urging reversal.

Charles S. Sims and *Stuart H. Singer* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

Gwendolyn H. Gregory, August W. Steinhilber, and *Thomas A. Shannon* filed a brief for the National School Boards Association as *amicus curiae.*

ing her pregnancy. Respondent also showed the students two films concerning human growth and sexuality. These films were provided by the County Health Department, and the Principal of respondent's school had approved their use. Both films had been shown in past school years without incident.

After the showing of the pictures and the films, a number of parents complained to school officials about respondent's teaching methods. These complaints, which appear to have been based largely on inaccurate rumors about the allegedly sexually explicit nature of the pictures and films, were discussed at an open School Board meeting held on April 23, 1979. Following the advice of the School Superintendent, respondent did not attend the meeting, during which a number of parents expressed the view that respondent should not be allowed to teach in the Memphis school system.[1] The day after the meeting, respondent was suspended with pay. The School Board later confirmed the suspension, and notified respondent that an "administration evaluation" of his teaching methods was underway. No such evaluation was ever made. Respondent was reinstated the next fall, after filing this lawsuit.

Respondent sued the School District, the Board of Education, various Board members and school administrators, and two parents who had participated in the April 23 School Board meeting. The complaint alleged that respondent's suspension deprived him of both liberty and property without due process of law and violated his First Amendment right to

[1] One member of the School Board described the meeting as follows:

"At this time, the public was in a total uproar and completely out of control. . . . People were hollering and shouting and the statement was made from the public that if Mr. Stachura was allowed to return in the morning, they would be there to picket the school.

"At this point of total panic, [the School Superintendent] stated in order to maintain peace in our school district, we would suspend Mr. Stachura with full pay and get this mess straightened out." Tr. 583–584, quoted in *Stachura* v. *Truszkowski*, 763 F. 2d 211, 214 (CA6 1985).

academic freedom. Respondent sought compensatory and punitive damages under 42 U. S. C. § 1983 for these constitutional violations.

At the close of trial on these claims, the District Court instructed the jury as to the law governing the asserted bases for liability. Turning to damages, the court instructed the jury that on finding liability it should award a sufficient amount to compensate respondent for the injury caused by petitioners' unlawful actions:

> "You should consider in this regard any lost earnings; loss of earning capacity; out-of-pocket expenses; and any mental anguish or emotional distress that you find the Plaintiff to have suffered as a result of conduct by the Defendants depriving him of his civil rights." App. 94.

In addition to this instruction on the standard elements of compensatory damages, the court explained that punitive damages could be awarded, and described the standards governing punitive awards.[2] Finally, at respondent's request and over petitioners' objection, the court charged that damages also could be awarded based on the value or importance of the constitutional rights that were violated:

> "If you find that the Plaintiff has been deprived of a Constitutional right, you may award damages to compensate him for the deprivation. Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property. There are no medical bills or other expenses by which you can judge how much compensation is appropriate. In one sense, no monetary value we place upon Constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation. However, just because these rights are not capable of

[2] Petitioners do not challenge the award of punitive damages in this Court.

precise evaluation does not mean that an appropriate monetary amount should not be awarded.

"The precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right." *Id.*, at 96.

The jury found petitioners liable,[3] and awarded a total of $275,000 in compensatory damages and $46,000 in punitive damages.[4] The District Court entered judgment notwithstanding the verdict as to one of the defendants, reducing the total award to $266,750 in compensatory damages and $36,000 in punitive damages.

In an opinion devoted primarily to liability issues, the Court of Appeals for the Sixth Circuit affirmed, holding that respondent's suspension had violated both procedural due process and the First Amendment. *Stachura* v. *Truszkowski*, 763 F. 2d 211 (1985). Responding to petitioners' contention that the District Court improperly authorized damages based solely on the value of constitutional rights, the court noted only that "there was ample proof of actual injury to plaintiff Stachura both in his effective discharge . . . and by the damage to his reputation and to his professional career as a teacher. Contrary to the situation in *Carey* v. *Piphus*, 435 U. S. 247 (1978) . . . , there was proof from which the jury

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[3] The jury found petitioners liable based both on the alleged deprivation of procedural due process and on the alleged violation of respondent's First Amendment rights.

[4] The bulk of the award was against the School Board, which was assessed $233,750 in compensatory damages. Three of the individual defendants were each assessed $8,250, while six others were each charged $2,750. Nine individual defendants were assessed punitive damages, ranging from $1,000 to $15,000.

could have found, as it did, actual and important damages." *Id.*, at 214.

We granted certiorari limited to the question whether the Court of Appeals erred in affirming the damages award in the light of the District Court's instructions that authorized not only compensatory and punitive damages, but also damages for the deprivation of "any constitutional right."[5] 474 U. S. 918 (1985). We reverse, and remand for a new trial limited to the issue of compensatory damages.

II

Petitioners challenge the jury instructions authorizing damages for violation of constitutional rights on the ground that those instructions permitted the jury to award damages based on its own unguided estimation of the value of such rights.[6] Respondent disagrees with this characterization of

[5] Since our decision in *Carey* v. *Piphus*, 435 U. S. 247 (1978), several of the Courts of Appeals have concluded that damages awards based on the abstract value of constitutional rights are proper, at least as long as the right in question is substantive. *E. g.*, *Bell* v. *Little Axe Independent School Dist. No. 70*, 766 F. 2d 1391 (CA10 1985); *Herrera* v. *Valentine*, 653 F. 2d 1220, 1227–1229 (CA8 1981); *Konczak* v. *Tyrrell*, 603 F. 2d 13, 17 (CA7 1979) (dicta), cert. denied, 444 U. S. 1016 (1980). See also Love, Damages: A Remedy for the Violation of Constitutional Rights, 67 Calif. L. Rev. 1242 (1979). Other courts have determined that our reasoning in *Carey* foreclosures such awards. *E. g.*, *Hobson* v. *Wilson*, 237 U. S. App. D. C. 21[illegible] 278–279, 737 F. 2d 1, 60–61 (1984), cert. denied, 470 U. S. 1084 (1985); *Familias Unidas* v. *Briscoe*, 619 F. 2d 391, 402 (CA5 1980); *Davis* v. *Village Park II Realty Co.*, 578 F. 2d 461, 463 (CA2 1978). Cf. *Freeman* v. *Franzen*, 695 F. 2d 485, 492–494 (CA7 1982), cert. denied, 463 U. S. 1214 (1983).

[6] Respondent argues that petitioners did not preserve their challenge to the jury instructions below. Petitioners' counsel expressly objected to the authorization of damages based on the value of constitutional rights, on the ground that such damages were impermissible under *Carey* v. *Piphus*, *supra*, and on the ground that they required the jury to "speculate as to what the value of the Constitutional right is." App. 97–98. The District Court responded by stating that it relied on *Herrera* v. *Valentine*, *supra*, at 1227, and on *Corriz* v. *Naranjo*, 667 F. 2d 892 (CA10), cert. dism'd, 458 U. S. 1123 (1982). App. 98. Both of those cases held that jury instruc-

the jury instructions, contending that the compensatory damages instructions taken as a whole focused solely on respondent's injury and not on the abstract value of the rights he asserted.

We believe petitioners more accurately characterize the instructions. The damages instructions were divided into three distinct segments: (i) compensatory damages for harm to respondent, (ii) punitive damages, and (iii) additional "compensat[ory]" damages for violations of constitutional rights. No sensible juror could read the third of these segments to modify the first.[7] On the contrary, the damages instructions plainly authorized—in addition to punitive damages—two distinct types of "compensatory" damages: one based on respondent's actual injury according to ordinary tort law standards, and another based on the "value" of certain rights. We therefore consider whether the latter category of damages was properly before the jury.

III

A

We have repeatedly noted that 42 U. S. C. § 1983[8] creates "'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them

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tions similar to those used here were permissible under *Carey*. This exchange satisfies us that counsel for petitioners "stat[ed] distinctly the matter to which he object[ed] and the grounds of his objection," Fed. Rule Civ. Proc. 51, and that the District Court understood the objection.

[7] The jurors were given written copies of the instructions for use in their deliberations. App. 96.

[8] Section 1983 reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

by the Constitution." *Carey* v. *Piphus*, 435 U. S. 247, 253 (1978), quoting *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976). See also *Smith* v. *Wade*, 461 U. S. 30, 34 (1983); *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 258–259 (1981). Accordingly, when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts. See *Smith* v. *Wade*, *supra*, at 34; *Carey* v. *Piphus*, *supra*, at 257–258; cf. *Monroe* v. *Pape*, 365 U. S. 167, 196, and n. 5 (1961) (Harlan, J., concurring).

Punitive damages aside,[9] damages in tort cases are designed to provide "*compensation* for the injury caused to plaintiff by defendant's breach of duty." 2 F. Harper, F. James, & O. Gray, Law of Torts § 25.1, p. 490 (2d ed. 1986) (emphasis in original), quoted in *Carey* v. *Piphus*, *supra*, at 255. See also *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 395, 397 (1971); *id.*, at 408–409 (Har-

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[9] The purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior. *E. g.*, Restatement (Second) of Torts § 908(1) (1979); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 9 (5th ed. 1984); C. McCormick, Law of Damages 275 (1935). See also *Electrical Workers* v. *Foust*, 442 U. S. 42, 48 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974). In *Smith* v. *Wade*, 461 U. S. 30 (1983), the Court held that punitive damages may be available in a proper § 1983 case. As the punitive damages instructions used in this case explained, however, such damages are available only on a showing of the requisite intent. App. 94–95 (authorizing punitive damages for acts "maliciously, or wantonly, or oppressively done"); *Smith* v. *Wade*, *supra*, at 51.

Respondent does not, and could not reasonably, contend that the separate instructions authorizing damages for violation of constitutional rights were equivalent to punitive damages instructions. In these separate instructions, the jury was authorized to find damages for constitutional violations without any finding of malice or ill will. Moreover, the jury instructions separately authorized punitive damages, and the District Court expressly labeled the "constitutional rights" damages compensatory. The instructions concerning damages for constitutional violations are thus impermissible unless they reasonably could be read as authorizing *compensatory* damages.

lan, J., concurring in judgment). To that end, compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as "impairment of reputation . . . , personal humiliation, and mental anguish and suffering." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974). See also *Carey* v. *Piphus*, *supra*, at 264 (mental and emotional distress constitute compensable injury in § 1983 cases). Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are *compensatory*—damages grounded in determinations of plaintiffs' actual losses. *E. g.*, 4 Harper, James, & Gray, *supra*, § 25.3 (discussing need for certainty in damages determinations); D. Dobbs, Law of Remedies § 3.1, pp. 135–136 (1973). Congress adopted this common-law system of recovery when it established liability for "constitutional torts."[10] Consequently, "the basic purpose" of § 1983 damages is "to *compensate persons for injuries* that are caused by the deprivation of constitutional rights." *Carey* v. *Piphus*, 435 U. S., at 254 (emphasis added). See also *id.*, at 257 ("damages awards under § 1983 should be governed by the principle of compensation").

Carey v. *Piphus* represents a straightforward application of these principles. *Carey* involved a suit by a high school student suspended for smoking marijuana; the student claimed that he was denied procedural due process because he was suspended without an opportunity to respond to the charges against him. The Court of Appeals for the Seventh Circuit held that even if the suspension was justified, the student could recover substantial compensatory damages simply because of the insufficient procedures used to suspend him from school. We reversed, and held that the student could recover compensatory damages only if he proved actual injury caused by the denial of his constitutional rights. *Id.*, at 264. We noted: "Rights, constitutional and otherwise, do

[10] See generally Whitman, Constitutional Torts, 79 Mich. L. Rev. 5 (1980).

not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests . . . ." *Id.*, at 254. Where no injury was present, no "compensatory" damages could be awarded.

The instructions at issue here cannot be squared with *Carey*, or with the principles of tort damages on which *Carey* and § 1983 are grounded. The jurors in this case were told that, in determining how much was necessary to "compensate [respondent] for the deprivation" of his constitutional rights, they should place a money value on the "rights" themselves by considering such factors as the particular right's "importance . . . in our system of government," its role in American history, and its "significance . . . in the context of the activities" in which respondent was engaged. App. 96. These factors focus, not on compensation for provable injury, but on the jury's subjective perception of the importance of constitutional rights as an abstract matter. *Carey* establishes that such an approach is impermissible. The constitutional right transgressed in *Carey*—the right to due process of law—is central to our system of ordered liberty. See *In re Gault*, 387 U. S. 1, 20–21 (1967). We nevertheless held that *no* compensatory damages could be awarded for violation of that right absent proof of actual injury. *Carey*, 435 U. S., at 264. *Carey* thus makes clear that the abstract value of a constitutional right may not form the basis for § 1983 damages.[11]

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[11] We did approve an award of nominal damages for the deprivation of due process in *Carey*. 435 U. S., at 266. Our discussion of that issue makes clear that nominal damages, and not damages based on some undefinable "value" of infringed rights, are the appropriate means of "vindicating" rights whose deprivation has not caused actual, provable injury:

"Common-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compen-

Respondent nevertheless argues that *Carey* does not control here, because in this case a *substantive* constitutional right—respondent's First Amendment right to academic freedom[12]—was infringed. The argument misperceives our analysis in *Carey*. That case does not establish a two-tiered system of constitutional rights, with substantive rights afforded greater protection than "mere" procedural safeguards. We did acknowledge in *Carey* that "the elements and prerequisites for recovery of damages" might vary depending on the interests protected by the constitutional right at issue. *Id.*, at 264–265. But we emphasized that, whatever the constitutional basis for § 1983 liability, such damages must always be designed "to *compensate injuries* caused by the [constitutional] deprivation." *Id.*, at 265 (emphasis added).[13] See also *Hobson* v. *Wilson*, 237 U. S. App. D. C. 219, 277–279, 737 F. 2d 1, 59–61 (1984), cert. denied, 470 U. S. 1084 (1985); cf. *Smith* v. *Wade*, 461 U. S. 30 (1983). That conclusion simply leaves no room for noncompensatory

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sate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights." *Ibid.* (footnote omitted).

[12] Our grant of certiorari in this case does not encompass the question whether respondent stated or proved a claim under either the Due Process Clause or the First Amendment. We therefore treat the Court of Appeals' decision on all liability issues as final for purposes of our decision.

[13] *Carey* recognized that "the task . . . of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right" is one "of some delicacy." *Id.*, at 258. We also noted that "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Id.*, at 264–265. See also *Hobson* v. *Wilson*, 237 U. S. App. D. C., at 279–281, 737 F. 2d, at 61–63. This "delicate" task need not be undertaken here. None of the parties challenges the portion of the jury instructions that permitted recovery for actual harm to respondent, and the instructions that *are* challenged simply do not authorize compensation for injury. We therefore hold only that damages based on the "value" or "importance" of constitutional rights are not authorized by § 1983, because they are not truly compensatory.

damages measured by the jury's perception of the abstract "importance" of a constitutional right.

Nor do we find such damages necessary to vindicate the constitutional rights that § 1983 protects. See n. 11, *supra*. Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations. *Carey*, *supra*, at 256–257 ("To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages"). Moreover, damages based on the "value" of constitutional rights are an unwieldy tool for ensuring compliance with the Constitution. History and tradition do not afford any sound guidance concerning the precise value that juries should place on constitutional protections. Accordingly, were such damages available, juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants. Cf. *Gertz*, 418 U. S., at 350. Such damages would be too uncertain to be of any great value to plaintiffs, and would inject caprice into determinations of damages in § 1983 cases. We therefore hold that damages based on the abstract "value" or "importance" of constitutional rights are not a permissible element of compensatory damages in such cases.

B

Respondent further argues that the challenged instructions authorized a form of "presumed" damages—a remedy that is both compensatory in nature and traditionally part of the range of tort law remedies. Alternatively, respondent argues that the erroneous instructions were at worst harmless error.

Neither argument has merit. Presumed damages are a *substitute* for ordinary compensatory damages, not a *supplement* for an award that fully compensates the alleged injury. When a plaintiff seeks compensation for an injury that is

likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate. See *Carey, supra*, at 262; cf. *Dun & Bradstreet, Inc.* v. *Greenmoss Builders*, 472 U. S. 749, 760–761 (1985) (opinion of POWELL, J.); *Gertz* v. *Robert Welch, Inc., supra*, at 349. In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure. As we earlier explained, the instructions at issue in this case did not serve this purpose, but instead called on the jury to measure damages based on a subjective evaluation of the importance of particular constitutional values. Since such damages are wholly divorced from any compensatory purpose, they cannot be justified as presumed damages.[14]

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[14] For the same reason, *Nixon* v. *Herndon*, 273 U. S. 536 (1927), and similar cases do not support the challenged instructions. In *Nixon*, the Court held that a plaintiff who was illegally prevented from voting in a state primary election suffered compensable injury. Accord, *Lane* v. *Wilson*, 307 U. S. 268 (1939). This holding did not rest on the "value" of the right to vote as an abstract matter; rather, the Court recognized that the plaintiff had suffered a particular injury—his inability to vote in a particular election—that might be compensated through substantial money damages. See 273 U. S., at 540 ("the petition . . . seeks to recover for private damage").

Nixon followed a long line of cases, going back to Lord Holt's decision in *Ashby* v. *White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (1703), authorizing substantial money damages as compensation for persons deprived of their right to vote in particular elections. *E. g., Wiley* v. *Sinkler*, 179 U. S. 58, 65 (1900); *Wayne* v. *Venable*, 260 F. 64, 66 (CA8 1919). Although these decisions sometimes speak of damages for the value of the right to vote, their analysis shows that they involve nothing more than an award of presumed damages for a nonmonetary harm that cannot easily be quantified:

"In the eyes of the law th[e] right [to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right." *Ibid.*

See also *Ashby* v. *White, supra*, at 955, 92 Eng. Rep., at 137 (Holt, C. J.) ("As in an action for slanderous words, though a man does not lose a penny

Moreover, no rough substitute for compensatory damages was required in this case, since the jury was fully authorized to compensate respondent for both monetary and nonmonetary harms caused by petitioners' conduct.

Nor can we find that the erroneous instructions were harmless. See 28 U. S. C. § 2111; *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U. S. 548 (1984). When damages instructions are faulty and the verdict does not reveal the means by which the jury calculated damages, "[the] error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict." *Newport* v. *Fact Concerts*, 453 U. S., at 256, n. 12. The jury was authorized to award three categories of damages: (i) compensatory damages for injury to respondent, (ii) punitive damages, and (iii) damages based on the jury's perception of the "importance" of two provisions of the Constitution. The submission of the third of these categories was error. Although the verdict specified an amount for punitive damages, it did not specify how much of the remaining damages was designed to compensate respondent for his injury and how much reflected the jury's estimation of the value of the constitutional rights that were infringed. The effect of the erroneous instruction is therefore unknowable, although probably significant: the jury awarded respondent a very substantial amount of damages, none of which could have derived from any monetary loss.[15] It is likely, although not certain, that a

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by reason of the speaking [of] them, yet he shall have an action"). The "value of the right" in the context of these decisions is the money value of the particular loss that the plaintiff suffered—a loss of which "each member of the jury has personal knowledge." It is *not* the value of the right to vote as a general, abstract matter, based on its role in our history or system of government. Thus, whatever the wisdom of these decisions in the context of the changing scope of compensatory damages over the course of this century, they do not support awards of noncompensatory damages such as those authorized in this case.

[15] Throughout his suspension, respondent continued to receive his teacher's salary.

major part of these damages was intended to "compensate" respondent for the abstract "value" of his due process and First Amendment rights. For these reasons, the case must be remanded for a new trial on compensatory damages.

IV

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN and JUSTICE STEVENS join the opinion of the Court and also join JUSTICE MARSHALL's opinion concurring in the judgment.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

I agree with the Court that this case must be remanded for a new trial on damages. Certain portions of the Court's opinion, however, can be read to suggest that damages in § 1983 cases are necessarily limited to "out-of-pocket loss," "other monetary harms," and "such injuries as 'impairment of reputation . . . , personal humiliation, and mental anguish and suffering.'" See *ante*, at 307. I do not understand the Court so to hold, and I write separately to emphasize that the violation of a constitutional right, in proper cases, may itself constitute a compensable injury.

The appropriate starting point of any analysis in this area is this Court's opinion in *Carey* v. *Piphus*, 435 U. S. 247 (1978). In *Carey*, we recognized that "the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights." *Id.*, at 254; see *ante*, at 306–307. We explained, however, that application of that principle to concrete cases was not a

simple matter. 435 U. S., at 257. "It is not clear," we stated, "that common-law tort rules of damages will provide a complete solution to the damages issue in every § 1983 case." *Id.*, at 258. Rather, "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules of damages themselves were defined by the interests protected in various branches of tort law." *Id.*, at 259.

Applying those principles, we held in *Carey* that substantial damages should not be awarded where a plaintiff has been denied procedural due process but has made no further showing of compensable damage. We repeated, however, that "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Id.*, at 264–265. We referred to cases that support the award of substantial damages simply upon a showing that a plaintiff was wrongfully deprived of the right to vote, without requiring any further demonstration of damages. *Id.*, at 264–265, n. 22.

Following *Carey*, the Courts of Appeals have recognized that invasions of constitutional rights sometimes cause injuries that cannot be redressed by a wooden application of common-law damages rules.* In *Hobson* v. *Wilson*, 237 U. S. App. D. C. 219, 275–281, 737 F. 2d 1, 57–63 (1984), cert. denied, 470 U. S. 1084 (1985), which the Court cites, *ante*, at 309, and n. 13, plaintiffs claimed that defendant Federal Bureau of Investigation agents had invaded their First

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*See, *e.g.*, *Bell* v. *Little Axe Independent School District No. 70 of Cleveland Cty.*, 766 F. 2d 1391, 1408–1413 (CA10 1985); *Hobson* v. *Wilson*, 237 U. S. App. D. C. 219, 275–281, 737 F. 2d 1, 57–63 (1984), cert. denied, 470 U. S. 1084 (1985); *Kincaid* v. *Rusk*, 670 F. 2d 737, 745–746 (CA7 1982); *Mickens* v. *Winston*, 462 F. Supp. 910, 913 (ED Va. 1978), summarily aff'd, 609 F. 2d 508 (CA4 1979).

Amendment rights to assemble for peaceable political protest, to associate with others to engage in political expression, and to speak on public issues free of unreasonable government interference. The District Court found that the defendants had succeeded in diverting plaintiffs from, and impeding them in, their protest activities. The Court of Appeals for the District of Columbia Circuit held that that injury to a First Amendment-protected interest could itself constitute compensable injury wholly apart from any "emotional distress, humiliation and personal indignity, emotional pain, embarassment, fear, anxiety and anguish" suffered by plaintiffs. 237 U. S. App. D. C., at 280, 737 F. 2d, at 62 (footnotes omitted). The court warned, however, that that injury could be compensated with substantial damages only to the extent that it was "reasonably quantifiable"; damages should not be based on "the so-called inherent value of the rights violated." *Ibid.*

I believe that the *Hobson* court correctly stated the law. When a plaintiff is deprived, for example, of the opportunity to engage in a demonstration to express his political views, "[i]t is facile to suggest that no damage is done." *Dellums* v. *Powell*, 184 U. S. App. D. C. 275, 303, 566 F. 2d 167, 195 (1977). Loss of such an opportunity constitutes loss of First Amendment rights "'in their most pristine and classic form.'" *Ibid.*, quoting *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963). There is no reason why such an injury should not be compensable in damages. At the same time, however, the award must be proportional to the actual loss sustained.

The instructions given the jury in this case were improper because they did not require the jury to focus on the loss actually sustained by respondent. Rather, they invited the jury to base its award on speculation about "the importance of the right in our system of government" and "the role which this right has played in the history of our republic," guided only by the admonition that "[i]n one sense, no monetary value we place on Constitutional rights can measure their im-

portance in our society or compensate a citizen adequately for their deprivation." App. 96. These instructions invited the jury to speculate on matters wholly detached from the real injury occasioned respondent by the deprivation of the right. Further, the instructions might have led the jury to grant respondent damages based on the "abstract value" of the right to procedural due process—a course directly barred by our decision in *Carey*.

The Court therefore properly remands for a new trial on damages. I do not understand the Court, however, to hold that deprivations of constitutional rights can never themselves constitute compensable injuries. Such a rule would be inconsistent with the logic of *Carey*, and would defeat the purpose of § 1983 by denying compensation for genuine injuries caused by the deprivation of constitutional rights.

CELOTEX CORP. v. CATRETT, ADMINISTRATRIX OF THE ESTATE OF CATRETT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-198. Argued April 1, 1986—Decided June 25, 1986

In September 1980, respondent administratrix filed this wrongful-death action in Federal District Court, alleging that her husband's death in 1979 resulted from his exposure to asbestos products manufactured or distributed by the defendants, who included petitioner corporation. In September 1981, petitioner filed a motion for summary judgment, asserting that during discovery respondent failed to produce any evidence to support her allegation that the decedent had been exposed to petitioner's products. In response, respondent produced documents tending to show such exposure, but petitioner argued that the documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion. In July 1982, the court granted the motion because there was no showing of exposure to petitioner's products, but the Court of Appeals reversed, holding that summary judgment in petitioner's favor was precluded because of petitioner's failure to support its motion with evidence tending to *negate* such exposure, as required by Federal Rule of Civil Procedure 56(e) and the decision in *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144.

Held:

1. The Court of Appeals' position is inconsistent with the standard for summary judgment set forth in Rule 56(c), which provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pp. 322-326.

(a) The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to

make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. Pp. 322–323.

(b) There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to the affidavits, "if any," suggests the absence of such a requirement, and Rules 56(a) and (b) provide that claimants and defending parties may move for summary judgment "with or without supporting affidavits." Rule 56(e), which relates to the form and use of affidavits and other materials, does not require that the moving party's motion always be supported by affidavits to show initially the absence of a genuine issue for trial. *Adickes* v. *S. H. Kress & Co., supra,* explained. Pp. 323–326.

(c) No serious claim can be made that respondent was "railroaded" by a premature motion for summary judgment, since the motion was not filed until one year after the action was commenced and since the parties had conducted discovery. Moreover, any potential problem with such premature motions can be adequately dealt with under Rule 56(f). P. 326.

2. The questions whether an adequate showing of exposure to petitioner's products was in fact made by respondent in opposition to the motion, and whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial, should be determined by the Court of Appeals in the first instance. Pp. 326–327.

244 U. S. App. D. C. 160, 756 F. 2d 181, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 328. BRENNAN, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 329. STEVENS, J., filed a dissenting opinion, *post*, p. 337.

Leland S. Van Koten argued the cause for petitioner. With him on the briefs were *H. Emslie Parks* and *Drake C. Zaharris.*

Paul March Smith argued the cause for respondent. With him on the brief were *Joseph N. Onek, Joel I. Klein, James F. Green,* and *Peter T. Enslein.**

**Stephen M. Shapiro, Robert L. Stern, William H. Crabtree, Edward P. Good,* and *Paul M. Bator* filed a brief for the Motor Vehicle Manufacturers Association et al. as *amici curiae* urging reversal.

JUSTICE REHNQUIST delivered the opinion of the Court.

The United States District Court for the District of Columbia granted the motion of petitioner Celotex Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to *negate* such exposure precluded the entry of summary judgment in its favor. *Catrett* v. *Johns-Manville Sales Corp.*, 244 U. S. App. D. C. 160, 756 F. 2d 181 (1985). This view conflicted with that of the Third Circuit in *In re Japanese Electronic Products*, 723 F. 2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986).[1] We granted certiorari to resolve the conflict, 474 U. S. 944 (1985), and now reverse the decision of the District of Columbia Circuit.

Respondent commenced this lawsuit in September 1980, alleging that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in negligence, breach of warranty, and strict liability. Two of the defendants filed motions challenging the District Court's *in personam* jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September 1981, argued that summary judgment was proper because respondent had "failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged within the jurisdic-

[1] Since our grant of certiorari in this case, the Fifth Circuit has rendered a decision squarely rejecting the position adopted here by the District of Columbia Circuit. See *Fontenot* v. *Upjohn Co.*, 780 F. 2d 1190 (1986).

tional limits of [the District] Court." In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's summary judgment motion, respondent then produced three documents which she claimed "demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970–1971. Petitioner, in turn, argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion.

In July 1982, almost two years after the commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that it was granting petitioner's summary judgment motion because "there [was] no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." App. 217.[2] Re-

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[2] JUSTICE STEVENS, in dissent, argues that the District Court granted summary judgment only because respondent presented no evidence that the decedent was exposed to Celotex asbestos products *in the District of Columbia*. See *post*, at 338–339. According to JUSTICE STEVENS, we should affirm the decision of the Court of Appeals, reversing the District Court, on the "narrower ground" that respondent "made an adequate showing" that the decedent was exposed to Celotex asbestos products in Chicago during 1970–1971. See *post*, at 338–339.

JUSTICE STEVENS' position is factually incorrect. The District Court expressly stated that respondent had made no showing of exposure to Celotex asbestos products "in the District of Columbia *or elsewhere*." App. 217 (emphasis added). Unlike JUSTICE STEVENS, we assume that

spondent appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion." 244 U. S. App. D. C., at 163, 756 F. 2d, at 184 (emphasis in original). According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure,[3] and this Court's decision in *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 159 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 244 U. S. App. D. C., at 163, 756

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the District Court meant what it said. The majority of the Court of Appeals addressed the very issue raised by JUSTICE STEVENS, and decided that "[t]he District Court's grant of summary judgment must therefore have been based on its conclusion that there was 'no showing that the plaintiff was exposed to defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period.'" *Catrett* v. *Johns-Manville Sales Corp.*, 244 U. S. App. D. C. 160, 162, n. 3, 756 F. 2d 181, 183, n. 3 (1985) (emphasis in original). In other words, no judge involved in this case to date shares JUSTICE STEVENS' view of the District Court's decision.

[3] Rule 56(e) provides:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

F. 2d, at 184 (emphasis in original; footnote omitted). The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial. *Ibid.* The dissenting judge argued that "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute." *Id.*, at 167, 756 F. 2d, at 188 (Bork, J., dissenting). According to the dissenting judge, the majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." *Id.*, at 166, 756 F. 2d, at 187.

We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure.[4] Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situa-

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[4] Rule 56(c) provides:

"The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

tion, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ." *Anderson* v. *Liberty Lobby, Inc.*, *ante*, at 250.

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment "*with or without supporting affidavits*" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually un-

supported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.[5]

Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for summary judgment "made and supported as provided in this rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

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[5] See Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L. J. 745, 752 (1974); Currie, Thoughts on Directed Verdicts and Summary Judgments, 45 U. Chi. L. Rev. 72, 79 (1977).

The Court of Appeals in this case felt itself constrained, however, by language in our decision in *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970). There we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 U. S. C. § 1983. In the course of its opinion, the *Adickes* Court said that "both the commentary on and the background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party . . . to show initially the absence of a genuine issue concerning any material fact." *Id.*, at 159. We think that this statement is accurate in a literal sense, since we fully agree with the *Adickes* Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in *Adickes*, the motion for summary judgment in that case should have been denied. But we do not think the *Adickes* language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.

The last two sentences of Rule 56(e) were added, as this Court indicated in *Adickes*, to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. While the *Adickes* Court was undoubtedly correct in concluding that these two sentences were not intended to *reduce* the burden of the moving party, it is also obvious that they were not adopted to *add to* that burden. Yet that is exactly the result which the reasoning of the Court of Appeals would produce; in effect, an amendment to Rule 56(e) designed to

facilitate the granting of motions for summary judgment would be interpreted to make it *more difficult* to grant such motions. Nothing in the two sentences themselves requires this result, for the reasons we have previously indicated, and we now put to rest any inference that they do so.

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence. See 244 U. S. App. D. C., at 167–168, 756 F. 2d, at 189 (Bork, J., dissenting); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2720, pp. 28–29 (1983). It would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

Respondent commenced this action in September 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f),[6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was

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[6] Rule 56(f) provides:

"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial. We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.

The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. Rule Civ. Proc. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F. R. D. 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring.

I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Tr. of Oral Arg. 43, 45. It asserts, however, that respondent has failed on request to produce any basis for her case. Respondent, on the other hand, does not contend that she was not obligated to reveal her witnesses and evidence but insists that she has revealed enough to defeat the motion for summary judgment. Because the Court of Appeals found it unnecessary to address this aspect

of the case, I agree that the case should be remanded for further proceedings.

JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting.

This case requires the Court to determine whether Celotex satisfied its initial burden of production in moving for summary judgment on the ground that the plaintiff lacked evidence to establish an essential element of her case at trial. I do not disagree with the Court's legal analysis. The Court clearly rejects the ruling of the Court of Appeals that the defendant must provide affirmative evidence disproving the plaintiff's case. Beyond this, however, the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case.[1] This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion. For this reason, even if I agreed with the Court's result, I would have written separately to explain more clearly the law in this area. However, because I believe that Celotex did not meet its burden of production under Federal Rule of Civil Procedure 56, I respectfully dissent from the Court's judgment.

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[1] It is also unclear what the Court of Appeals is supposed to do in this case on remand. JUSTICE WHITE—who has provided the Court's fifth vote—plainly believes that the Court of Appeals should reevaluate whether the defendant met its initial burden of production. However, the decision to reverse rather than to vacate the judgment below implies that the Court of Appeals should assume that Celotex has met its initial burden of production and ask only whether the plaintiff responded adequately, and, if so, whether the defendant has met its ultimate burden of persuasion that no genuine issue exists for trial. Absent some clearer expression from the Court to the contrary, JUSTICE WHITE's understanding would seem to be controlling. Cf. *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

I

Summary judgment is appropriate where the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. Rule Civ. Proc. 56(c). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727, p. 121 (2d ed. 1983) (hereinafter Wright) (citing cases); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15[3] (2d ed. 1985) (hereinafter Moore) (citing cases). See also, *ante*, at 323; *ante*, at 328 (WHITE, J., concurring). This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. See 10A Wright § 2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion[2] unless and until the court finds that the moving party has discharged its initial

[2] The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. 6 Moore ¶ 56.15[3], p. 56–466; 10A Wright § 2727, p. 124. Summary judgment should not be granted unless it is clear that a trial is unnecessary, *Anderson* v. *Liberty Lobby, Inc.*, *ante*, at 255, and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party, *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 158–159 (1970). In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion. 10A Wright § 2721, p. 44; see, *e. g.*, *Stepanischen* v. *Merchants Despatch Transportation Corp.*, 722 F. 2d 922, 930 (CA1 1983); *Higgenbotham* v. *Ochsner Foundation Hosp.*, 607 F. 2d 653, 656 (CA5 1979). As explained by the Court of Appeals for the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*, 723 F. 2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986), "[i]f . . . there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment . . . ." 723 F. 2d, at 258.

burden of production. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 157–161 (1970); 1963 Advisory Committee's Notes on Fed. Rule Civ. Proc. 56(e), 28 U. S. C. App., p. 626.

The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment. 10A Wright § 2727. The manner in which this showing can be made depends upon which party will bear the burden of persuasion on the challenged claim at trial. If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence—using any of the materials specified in Rule 56(c)—that would entitle it to a directed verdict if not controverted at trial. *Ibid.* Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery. *Ibid.*; Fed. Rules Civ. Proc. 56(e), (f).

If the burden of persuasion at trial would be on the *nonmoving* party, the party moving for summary judgment may satisfy Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. See 10A Wright § 2727, pp. 130–131; Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L. J. 745, 750 (1974) (hereinafter Louis). If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Anderson* v. *Liberty Lobby, Inc.*, *ante*, at 249.

Where the moving party adopts this second option and seeks summary judgment on the ground that the nonmoving party—who will bear the burden of persuasion at trial—has

no evidence, the mechanics of discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. See *ante*, at 328 (WHITE, J., concurring). Such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. See Louis 750–751. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. *Ante*, at 323. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the court need not consider whether the moving party has met its ultimate burden of persuasion. Accordingly, the nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party has no evidence by calling the court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party. In that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attacking all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56's burden of production.[3] Thus, if the record disclosed that the moving

[3] Once the moving party has attacked whatever record evidence—if any—the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evi-

party had overlooked a witness who would provide relevant testimony for the nonmoving party at trial, the court could not find that the moving party had discharged its initial burden of production unless the moving party sought to demonstrate the inadequacy of this witness' testimony. Absent such a demonstration, summary judgment would have to be denied on the ground that the moving party had failed to meet its burden of production under Rule 56.

The result in *Adickes* v. *S. H. Kress & Co.*, *supra*, is fully consistent with these principles. In that case, petitioner was refused service in respondent's lunchroom and then was arrested for vagrancy by a local policeman as she left. Petitioner brought an action under 42 U. S. C. § 1983 claiming that the refusal of service and subsequent arrest were the product of a conspiracy between respondent and the police; as proof of this conspiracy, petitioner's complaint alleged that the arresting officer was in respondent's store at the time service was refused. Respondent subsequently moved for summary judgment on the ground that there was no actual evidence in the record from which a jury could draw an inference of conspiracy. In response, petitioner pointed to a statement from her own deposition and an unsworn statement by a Kress employee, both already in the record and both ignored by respondent, that the policeman who arrested petitioner was in the store at the time she was refused service. We agreed that "[i]f a policeman were present, . . . it would be open to a jury, in light of the sequence that fol-

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dence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). See 10A Wright § 2727, pp. 138–143. Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial. See, *e. g.*, *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253, 289 (1968).

lowed, to infer from the circumstances that the policeman and Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." 398 U. S., at 158. Consequently, we held that it was error to grant summary judgment "on the basis of this record" because respondent had "failed to fulfill its initial burden" of demonstrating that there was no evidence that there was a policeman in the store. *Id.*, at 157–158.

The opinion in *Adickes* has sometimes been read to hold that summary judgment was inappropriate because the respondent had not submitted affirmative evidence to negate the possibility that there was a policeman in the store. See Brief for Respondent 20, n. 30 (citing cases). The Court of Appeals apparently read *Adickes* this way and therefore required Celotex to submit evidence establishing that plaintiff's decedent had not been exposed to Celotex asbestos. I agree with the Court that this reading of *Adickes* was erroneous and that Celotex could seek summary judgment on the ground that plaintiff could not prove exposure to Celotex asbestos at trial. However, Celotex was still required to satisfy its initial burden of production.

II

I do not read the Court's opinion to say anything inconsistent with or different than the preceding discussion. My disagreement with the Court concerns the application of these principles to the facts of this case.

Defendant Celotex sought summary judgment on the ground that plaintiff had "failed to produce" any evidence that her decedent had ever been exposed to Celotex asbestos.[4] App. 170. Celotex supported this motion with a

[4] JUSTICE STEVENS asserts that the District Court granted summary judgment on the ground that the plaintiff had failed to show exposure in the District of Columbia. He contends that the judgment of the Court of Appeals reversing the District Court's judgment should be affirmed on the "narrow ground" that it was "palpably erroneous" to grant summary judgment on this basis. *Post*, at 339 (dissenting). The Court replies that

2-page "Statement of Material Facts as to Which There is No Genuine Issue" and a 3-page "Memorandum of Points and Authorities" which asserted that the plaintiff had failed to identify any evidence in responding to two sets of interrogatories propounded by Celotex and that therefore the record was "totally devoid" of evidence to support plaintiff's claim. See *id.*, at 171–176.

Approximately three months earlier, Celotex had filed an essentially identical motion. Plaintiff responded to this earlier motion by producing three pieces of evidence which she claimed "[a]t the very least . . . demonstrate that there is a genuine factual dispute for trial," *id.*, at 143: (1) a letter from an insurance representative of another defendant describing asbestos products to which plaintiff's decedent had been exposed, *id.*, at 160; (2) a letter from T. R. Hoff, a former supervisor of decedent, describing asbestos products to which decedent had been exposed, *id.*, at 162; and (3) a copy of decedent's deposition from earlier workmen's compensation proceedings, *id.*, at 164. Plaintiff also apparently in-

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what the District Court said was that plaintiff had failed to show exposure in the District of Columbia "or elsewhere." *Ante*, at 320, n. 2. In my view, it does not really matter which reading is correct in this case. For, contrary to JUSTICE STEVENS' claim, deciding this case on the ground that Celotex failed to meet its burden of production under Rule 56 does not involve an "abstract exercise in Rule construction." *Post*, at 339 (STEVENS, J., dissenting). To the contrary, the principles governing a movant's burden of proof are straightforward and well established, and deciding the case on this basis does not require a new construction of Rule 56 at all; it simply entails applying established law to the particular facts of this case. The choice to reverse because of "palpable erro[r]" with respect to the burden of a moving party under Rule 56 is thus no more "abstract" than the choice to reverse because of such error with respect to the elements of a tort claim. Indeed, given that the issue of the moving party's burden under Rule 56 was the basis of the Court of Appeals' decision, the question upon which certiorari was granted, and the issue briefed by the parties and argued to the Court, it would seem to be the preferable ground for deciding the case

dicated at that time that she intended to call Mr. Hoff as a witness at trial. Tr. of Oral Arg. 6–7, 27–29.

Celotex subsequently withdrew its first motion for summary judgment. See App. 167.[5] However, as a result of this motion, when Celotex filed its second summary judgment motion, the record *did* contain evidence—including at least one witness—supporting plaintiff's claim. Indeed, counsel for Celotex admitted to this Court at oral argument that Celotex was aware of this evidence and of plaintiff's intention to call Mr. Hoff as a witness at trial when the second summary judgment motion was filed. Tr. of Oral Arg. 5–7. Moreover, plaintiff's response to Celotex' second motion pointed to this evidence—noting that it had already been provided to counsel for Celotex in connection with the first motion—and argued that Celotex had failed to "meet its burden of proving that there is no genuine factual dispute for trial." App. 188.

On these facts, there is simply no question that Celotex failed to discharge its initial burden of production. Having chosen to base its motion on the argument that there was no evidence in the record to support plaintiff's claim, Celotex was not free to ignore supporting evidence that the record clearly contained. Rather, Celotex was required, as an initial matter, to attack the adequacy of this evidence. Celotex' failure to fulfill this simple requirement constituted a failure to discharge its initial burden of production under Rule 56, and thereby rendered summary judgment improper.[6]

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[5] Celotex apparently withdrew this motion because, contrary to the assertion made in the first summary judgment motion, its second set of interrogatories had not been served on the plaintiff.

[6] If the plaintiff had answered Celotex' second set of interrogatories with the evidence in her response to the first summary judgment motion, and Celotex had ignored those interrogatories and based its second summary judgment motion on the first set of interrogatories only, Celotex obviously could not claim to have discharged its Rule 56 burden of production. This result should not be different simply because the evidence

This case is indistinguishable from *Adickes*. Here, as there, the defendant moved for summary judgment on the ground that the record contained no evidence to support an essential element of the plaintiff's claim. Here, as there, the plaintiff responded by drawing the court's attention to evidence that was already in the record and that had been ignored by the moving party. Consequently, here, as there, summary judgment should be denied on the ground that the moving party failed to satisfy its initial burden of production.[7]

JUSTICE STEVENS, dissenting.

As the Court points out, *ante*, at 319–320, the petitioner's motion for summary judgment was based on the proposition that respondent could not prevail unless she proved that her deceased husband had been exposed to petitioner's products "within the jurisdictional limits" of the District of Columbia.[1]

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plaintiff relied upon to support her claim was acquired by Celotex other than in plaintiff's answers to interrogatories.

[7] Although JUSTICE WHITE agrees that "if [plaintiff] has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact," he would remand "[b]ecause the Court of Appeals found it unnecessary to address this aspect of the case." *Ante*, at 328–329 (concurring). However, Celotex has admitted that plaintiff had disclosed her intent to call Mr. Hoff as a witness at trial before Celotex filed its second motion for summary judgment. Tr. of Oral Arg. 6–7. Under the circumstances, then, remanding is a waste of time.

[1] See Motion of Defendant Celotex Corporation for Summary Judgment, App. 170 ("Defendant Celotex Corporation, pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure moves this Court for an Order granting Summary Judgment on the ground that plaintiff has failed to produce evidence that any product designed, manufactured or distributed by Celotex Corporation was the proximate cause of the injuries alleged *within the jurisdictional limits of this Court*") (emphasis added); Memorandum of Points and Authorities in Support of Motion of Defendant Celotex Corporation for Summary Judgment, *id.*, at 175 (Plaintiff "must demonstrate some link between a Celotex Corporation product claimed to be the cause of the decedent's illness and the decedent himself. The record is totally devoid of any such evidence *within the jurisdictional confines of this Court*") (emphasis added); Transcript of Argument in Support of Motion of Defend-

Respondent made an adequate showing—albeit possibly not in admissible form[2]—that her husband had been exposed to petitioner's product in Illinois.[3] Although the basis of the motion and the argument had been the lack of exposure *in the District of Columbia*, the District Court stated at the end of the argument: "The Court will grant the defendant Celotex's motion for summary judgment there being no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period." App. 217 (emphasis added). The District Court offered no additional explanation and no written opinion. The Court of Appeals reversed on the basis that Celotex had not met its burden; the court noted the incongruity of the District Court's opinion in the context of the motion and argument, but did not rest on that basis because of the "or elsewhere" language.[4]

Taken in the context of the motion for summary judgment on the basis of no exposure in the District of Columbia, the

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ant Celotex Corporation for Summary Judgment, *id.*, at 211 ("Our position is . . . there has been no product identification of any Celotex products . . . that have been used *in the District of Columbia* to which the decedent was exposed") (emphasis added).

[2] But cf. *ante*, at 324 ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment").

[3] See App. 160 (letter from Aetna Life Insurance Co.) (referring to the "asbestos that Mr. Catrett came into contact with while working for Anning-Johnson Company" and noting that the "manufacturer of this product" was purchased by Celotex); *id.*, at 162 (letter from Anning-Johnson Co.) (confirming that Catrett worked for the company and supervised the installation of asbestos produced by the company that Celotex ultimately purchased); *id.*, at 164, 164c (deposition of Catrett) (description of his work with asbestos "in Chicago").

[4] See *Catrett* v. *Johns-Manville Sales Corp.*, 756 F. 2d 181, 185, n. 14 (1985) ("[T]he discussion at the time the motion was granted actually spoke to venue. It was only the phrase 'or elsewhere,' appearing with no prior discussion, in the judge's oral ruling at the close of argument that made the grant of summary judgment even conceivably proper").

District Court's decision to grant summary judgment was palpably erroneous. The court's bench reference to "or elsewhere" neither validated that decision nor raised the complex question addressed by this Court today. In light of the District Court's plain error, therefore, it is perfectly clear that, even after this Court's abstract exercise in Rule construction, we should nonetheless affirm the reversal of summary judgment on that narrow ground.[5]

I respectfully dissent.

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[5] Cf. n. 2, *supra*. The Court's statement that the case should be remanded because the Court of Appeals has a "superior knowledge of local law," *ante*, at 327, is bewildering because there is no question of local law to be decided. Cf. *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976).

The Court's decision to remand when a sufficient ground for affirmance is available does reveal, however, the Court's increasing tendency to adopt a presumption of reversal. See, *e. g.*, *New York* v. *P. J. Video, Inc.*, 475 U. S. 868, 884 (1986) (MARSHALL, J., dissenting); *Icicle Seafoods, Inc.* v. *Worthington*, 475 U. S. 709, 715 (1986) (STEVENS, J., dissenting); *City of Los Angeles* v. *Heller*, 475 U. S. 796, 800 (1986) (STEVENS, J., dissenting); *Pennsylvania* v. *Goldhammer*, 474 U. S. 28, 31 (1985) (STEVENS, J., dissenting). As a matter of efficient judicial administration and of respect for the state and federal courts, I believe the presumption should be precisely the opposite.

MacDONALD, SOMMER & FRATES *v.* COUNTY OF YOLO ET AL.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

No. 84-2015. Argued March 26, 1986—Decided June 25, 1986

Appellant submitted a proposal to the Yolo County Planning Commission to subdivide certain property into 159 single-family and multifamily residential lots. The Commission rejected the proposal, and the County Board of Supervisors affirmed on the grounds that the proposal failed to provide adequate public street access, sewer services, water supplies, and police protection. Appellant then filed an action in California Superior Court, alleging that appellee county and city restricted the property in question to agricultural use by denying all subdivision applications and thereby appropriated the "entire economic use" of the property for the sole purpose of providing a public, open-space buffer. Appellant sought declaratory and monetary relief. The court sustained a demurrer to the complaint, holding that appellant's factual allegations were insufficient and that monetary damages for inverse condemnation were foreclosed by *Agins* v. *City of Tiburon*, 24 Cal. 3d 266, 598 P. 2d 25, aff'd, 447 U. S. 255. The California Court of Appeal affirmed, and the California Supreme Court denied appellant's petition for hearing.

Held: Absent a final and authoritative determination by the County Planning Commission as to how it will apply the regulations at issue to the property in question, this Court cannot determine whether a "taking" has occurred or whether the county failed to provide "just compensation." Without knowing the nature and extent of permitted development, this Court cannot adjudicate the constitutionality of the regulations that purport to limit it. Pp. 348–353.

Affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., joined and in Parts I, II, and III of which POWELL and REHNQUIST, JJ., joined, *post*, p. 353. REHNQUIST, J., filed a dissenting opinion in which POWELL, J., joined, *post*, p. 364.

Howard N. Ellman argued the cause for appellant. With him on the briefs were *Gus Bauman*, *Kenneth N. Burns*, *Scott C. Verges*, and *Edward R. MacDonald*.

William L. Owen argued the cause for appellees. With him on the brief were *Richard W. Sherwood, Charles R. Mack*, and *P. Lawrence Klose.**

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*Briefs of *amici curiae* urging reversal were filed for Adirondack Park Local Government Review Board et al. by *Ronald A. Zumbrun, Robert K. Best*, and *Thomas W. Birmingham;* for the American College of Real Estate Lawyers by *Robert O. Hetlage, Eugene J. Morris, John P. Trevaskis, Jr.*, and *Edward I. Cutler;* for the California Building Industry Association by *Rex E. Lee, Benjamin W. Heineman, Jr.*, and *Carter G. Phillips;* for the First English Evangelical Lutheran Church of Glendale, Cal., et al. by *Jerrold A. Fadem* and *Michael M. Berger;* for Lodestar Co. by *Gideon Kanner;* and for the Mid-America Legal Foundation by *John M. Cannon, Susan W. Wanat*, and *Ann Plunkett Sheldon.*

Briefs of *amici curiae* urging affirmance were filed for the City of Mountain View, Cal., et al. by *Peter D. Bulens, Robert J. Logan, Carter J. Stroud, Albert E. Polonsky, R. R. Campagna, Robert J. Lanzone, Mary Jo Levinger, Steven F. Nord, K. Duane Lyders, John W. Witt, Hadden Roth*, and *Robert Rogers;* for the American Farmland Trust et al. by *Fred P. Bosselman* and *Clifford L. Weaver;* for the County Supervisors Association of California by *Mark A. Wasser;* and for the National Association of Counties et al. by *Benna Ruth Solomon* and *Joyce Holmes Benjamin.*

Briefs of *amici curiae* were filed for the United States by *Solicitor General Fried, Assistant Attorney General Habicht, Deputy Solicitor General Kuhl, Deputy Assistant Attorney General Marzulla*, and *Peter R. Steenland;* for the State of California *ex rel.* John K. Van de Kamp, Attorney General, et al. by *Mr. Van de Kamp, Richard C. Jacobs, N. Gregory Taylor* and *Theodora Berger*, Assistant Attorneys General, *Craig C. Thompson* and *Richard M. Frank*, Deputy Attorneys General, joined by the Attorneys General of their respective jurisdictions as follows: *Harold M. Brown* of Alaska, *Francis X. Bellotti* of Massachusetts, *LeRoy S. Zimmerman* of Pennsylvania, *Charles M. Oberly III* of Delaware, *Jim Smith* of Florida, *L. Su' esu' Lutu* of American Samoa, *Leroy Mercer* of the Virgin Islands, *Richard Opper* of Guam, *Corinne K. A. Watanabe* of Hawaii, *James T. Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *Stephen H. Sachs* of Maryland, *Frank J. Kelley* of Michigan, *William L. Webster* of Missouri, *Jeffrey L. Amestoy* of Vermont, *Hubert H. Humphrey III* of Minnesota, *Robert Abrams* of New York, *T. Travis Medlock* of South Carolina, *Jim Maddox* of Texas, *David L. Wilkenson* of Utah, *Kenneth O. Eikenberry* of Washington, *Bronson C. La Follette* of Wisconsin, and *Archie G. McClintock* of Wyoming; for the National Institute of Municipal Law Officers et al. by *Roy D. Bates, Wil-*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether rejection of a subdivision proposal deprived appellant of its property without just compensation contrary to the Fifth and Fourteenth Amendments to the United States Constitution.[1]

I

This appeal is taken from a judgment sustaining a demurrer to a property owner's complaint for money damages for an alleged "taking" of its property. In 1975, appellant submitted a tentative subdivision map to the Yolo County Planning Commission. Under appellant's proposal, the subject property, at least part of which was planted with corn, would be subdivided into 159 single-family and multifamily residential lots.

The Yolo County Planning Commission rejected the subdivision plan, however, and the Board of Supervisors of the county affirmed that determination. The Board found numerous reasons why appellant's tentative subdivision map was neither "consistent with the General Plan of the County of Yolo, nor with the specific plan of the County of Yolo embodied in the Zoning Regulations for the County." App. 73. Appellant focuses our attention on four of those reasons. See *id.*, at 45–46 (fourth amended complaint). First, the

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liam I. Thornton, Jr., John W. Witt, Roger F. Cutler, George Agnost, J. Lamar Shelley, Robert J. Alfton, James K. Baker, Frank B. Gummey III, James D. Montgomery, Clifford D. Pierce, Jr., William H. Taube, and *Charles S. Rhyne;* and for the Conservation Foundation et al. by *Charles L. Siemon, Wendy U. Larsen,* and *Christopher J. Duerksen.*

[1] The Fifth Amendment provides "nor shall private property be taken for public use, without just compensation." The Fifth Amendment prohibition applies against the States through the Fourteenth Amendment. See *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 236, 239, 241 (1897). See also *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172, 175, n. 1 (1985); *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 623, n. 1 (1981).

Board criticized the plan because it failed to provide for access to the proposed subdivision by a public street: the city of Davis, to which the subdivision would adjoin, refused to permit the extension of Cowell Boulevard into the development. See *id.*, at 74. Even ignoring this obstacle, "[t]he map presented ma[de] no provision for any other means of access to the subdivision," and the Board calculated that relying on an extension of Cowell Boulevard alone would "constitut[e] a real and substantial danger to the public health in the event of fire, earthquake, flood, or other natural disaster." *Id.*, at 77.

Second, the Board found that appellant's "Tentative Map as presented [did] not provide for sewer service by any governmental entity":

> "The only means for provision of sewer services by the El Macero interceptor sewer require that the proposed subdivision anne[x] to the existing Community Services Area. Said annexation is subject to Local Agency Formation Commission jurisdiction. The Board finds that no proceedings currently are pending before LAFCO for the annexation of the proposed subdivision." *Id.*, at 75.

Third, the Board rejected the development plan because "[t]he level of [police] protection capable of being afforded to the proposed site by the [Yolo County] Sheriff's Department is not intense enough to meet the needs of the proposed subdivision." *Id.*, at 76. Fourth, the Board found inadequate the provision for water service for the reason that there was "no provision made in the proposed subdivision for the provision of water or maintenance of a water system for the subdivision by any governmental entity." *Ibid.*

After this rebuff, appellant filed the present action and, on the same day, a petition for a writ of mandate. The mandate action, which is still pending, seeks to set aside the Board's

decision and to direct the Board to reconsider appellant's subdivision proposal. See *id.*, at 32–33 (amended petition for writ of mandate). This action, in contrast, seeks declaratory and monetary relief. In it, appellant accuses appellees County of Yolo and city of Davis of "restricting the Property to an open-space agricultural use by denying all permit applications, subdivision maps, and other requests to implement any other use," *id.*, at 46, and thereby of appropriating the "entire economic use" of appellant's property "for the sole purpose of [providing] . . . a public, open-space buffer," *id.*, at 51. In particular, the fourth amended complaint challenges the Board's decision with respect to the adequacy of public access, sanitation services, water supplies, and fire and police protection.[2] Because appellees denied these services, according to the complaint, "none of the beneficial uses" allowed even for agricultural land would be suitable for appellant's property. *Id.*, at 52. The complaint alleged, in capital letters and "WITHOUT LIMITATION BY THE FOREGOING ENUMERATION," that "ANY APPLICATION FOR A ZONE CHANGE, VARIANCE OR OTHER RELIEF WOULD BE FUTILE." *Id.*, at 58. The complaint also alleged that appellant had "exhausted all of its administrative remedies" and that its seven causes of action were "ripe" for adjudication. *Id.*, at 58, 59.

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[2] "25. In determining that Plaintiff's land could only be used for agricultural purposes, notwithstanding its general planning and zoning designation for residential use and its suitability therefor, County determined that (i) the Property lacked access by means of suitable public streets, a condition resulting from City's deliberate refusal to permit or approve available access; (ii) the [P]roperty lacked sanitary sewer service, a condition resulting directly from the wrongful acts of City, County and District above alleged[;] (iii) the Property lacked adequate water supply, a finding directly contrary to the fact (in evidence before County) that there are proven sources of supply on the Property and in the vicinity thereof which serve the immediately adjacent residential areas[;] and (iv) that the Property lacked adequate fire and police services, conditions attributable in part to refusal on part of County and City to provide such services." App. 51–52.

In response to these charges appellees demurred.[3] Pointing to "its earlier Order Sustaining Demurrers and Granting Leave to Amend," the California Superior Court contended that "the property had obvious other uses than agriculture under the Yolo County Code," *id.*, at 115, and referenced sections permitting such uses, among others, as ranch and farm dwellings and agricultural storage facilities, see Yolo County Code §§ 8–2.502, 8–2.503. The court rejected appellant's "attemp[t] to overcome that defect by alleging as conclusionary fact that each and every principal use and each and every multiple accessory use is no longer possible so that the property does have no value as zoned." App. 115. It concluded that, irrespective of the insufficiency of appellant's factual allegations, monetary damages for inverse condemnation are foreclosed by the California Supreme Court's decision in

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[3] In California, "those factual allegations of the complaint which are properly pleaded are deemed admitted by defendant's demurrer." *Thompson* v. *County of Alameda*, 27 Cal. 3d 741, 746, 614 P. 2d 728, 730 (1980). "However," a demurrer "does not admit contentions, deductions or conclusions of fact or law alleged therein." *Daar* v. *Yellow Cab Co.*, 67 Cal. 2d 695, 713, 433 P. 2d 732, 745 (1967) (citations omitted). See, *e. g.*, *Serrano* v. *Priest*, 5 Cal. 3d 584, 591, 487 P. 2d 1241, 1245 (1971); *Chicago Title Ins. Co.* v. *Great Western Financial Corp.*, 69 Cal. 2d 305, 327, 444 P. 2d 481, 495 (1968); *Sych* v. *Insurance Co. of North America*, 173 Cal. App. 3d 321, 326, 220 Cal. Rptr. 692, 695 (1985); *Read* v. *City of Lynwood*, 173 Cal. App. 3d 437, 442, 219 Cal. Rptr. 26, 28 (1985). Thus, one intermediate California appellate court has sustained a demurrer to a complaint alleging a regulatory taking on jurisdictional grounds, notwithstanding an "allegation in [appellants'] complaint that they 'have exhausted their administrative remedies'"; for "while a demurrer admits all material facts which are properly pleaded, it does not admit conclusions of fact or law alleged therein. Appellants' conclusionary statement that they exhausted their administrative remedies therefore cannot avail them." *Pan Pacific Properties, Inc.* v. *County of Santa Cruz*, 81 Cal. App. 3d 244, 251, 146 Cal. Rptr. 428, 432 (1978) (citation omitted). Cf. *Hecton* v. *People ex rel. Dept. of Transportation*, 58 Cal. App. 3d 653, 657, 130 Cal. Rptr. 230, 232 (1976) (same; allegations of taking and damage).

Agins v. *City of Tiburon*, 24 Cal. 3d 266, 274–277, 598 P. 2d 25, 29–31 (1979), aff'd, 447 U. S. 255 (1980). App. 116, 118.[4]

The California Court of Appeal affirmed. It "accept[ed] as true all the properly pled factual allegations of the complaint," *id.*, at 126, and did "not consider whether the complaint was barred by the failure to exhaust administrative remedies or by res judicata," *id.*, at 125–126. But it "f[ou]nd the decision in *Agins* to be controlling herein," *id.*, at 130:

> "In that case the [California] Supreme Court specifically and clearly established, for policy reasons, a rule of law which precludes a landowner from recovering in inverse condemnation based upon land use regulation. We emphasize that the Court did not hold that regulation cannot amount to a taking without compensation, it simply held that in such event the remedy is not inverse condemnation. The remedy instead is an action to have the regulation set aside as unconstitutional. Plaintiff has filed a mandate action in the trial court which is currently pending. That is its proper remedy. The claim for inverse condemnation cannot be maintained." *Id.*, at 130–131 (citation and footnote omitted).

In the alternative, the California Court of Appeal determined that appellant would not be entitled to monetary relief even if California law provided for this remedy:

> "In any event, even if an inverse condemnation action were available in a land use regulation situation, we would be constrained to hold that plaintiff has failed to

[4] We understand the Superior Court to have sustained the demurrer both because the complaint failed properly to plead facts amounting to a taking and because California law does not provide a monetary remedy for a regulatory taking. The Superior Court, after explaining these two reasons, concluded simply that "[t]he complaint fails to state a proper cause of action for inverse condemnation." App. 116. Although JUSTICE WHITE's dissent treats the first reason as dicta and the second as the actual basis of decision, see *post*, at 355–356, since the Superior Court did not rest its holding on only one of its two stated reasons, it is appropriate to treat them as alternative bases of decision.

state a cause of action. Pared to their essence, the allegations are that plaintiff purchased property for residential development, the property is zoned for residential development, plaintiff submitted an application for approval of development of the property into 159 residential units, and, in part at the urging of the City, the County denied approval of the application. In these allegations plaintiff is not unlike the plaintiffs in *Agins* . . . [a case in which] both the California Supreme Court and the United States Supreme Court held that the plaintiffs had failed to allege facts which would establish an unconstitutional taking of private property.

"The plaintiff's claim here must fail for the same reasons the claims in *Agins* failed. Here plaintiff applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of that particular plan cannot be equated with a refusal to permit any development, and plaintiff concedes that the property is zoned for residential purposes in the County general plan and zoning ordinance. Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property. Here, as in *Agins*, the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. Accordingly, the complaint fails to state a cause of action." *Id.*, at 132–133 (citation omitted).[5]

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[5] In answer to appellant's 42 U. S. C. § 1983 claim, the California Court of Appeal similarly held that a monetary judgment was foreclosed by *Agins*, and that "[e]ven if a cause of action for monetary damages could be stated under the Civil Rights Act based upon the regulation of the use of property, the allegations would be insufficient in this case:

"Plaintiff seeks compensation because the County refused approval of the intensive development it desires, but that refusal does not mean that other, less intensive uses would also be denied. Accordingly plaintiff has

The California Supreme Court denied appellant's petition for hearing, and appellant perfected an appeal to this Court. Because of the importance of the question whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings, we noted probable jurisdiction. 474 U. S. 917 (1985). On further consideration of our jurisdiction to hear this appeal, aided by briefing and oral argument, we find ourselves unable to address the merits of this question.

II

The regulatory taking claim advanced by appellant has two components. First, appellant must establish that the regulation has in substance "taken" his property[6]—that is, that the regulation "goes too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922). See *Kaiser Aetna* v. *United States*, 444 U. S. 164, 178 (1979). Second, appellant must demonstrate that any proffered compensation is not "just."

It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. As Justice Holmes emphasized throughout his opinion for the Court in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S., at 416, "this is a question of degree—and therefore cannot be disposed of by general propositions." Accord, *id.*, at 413. To this day we have no "set formula to determine where regulation ends and taking begins." *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594

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not alleged facts sufficient to establish an uncompensated taking of its property." App. 135.

[6] We accept for the purposes of deciding this case that any taking was for a public purpose, as alleged in the complaint. See *id.*, at 50. See also *id.*, at 51, 60.

(1962). Instead, we rely "as much [on] the exercise of judgment as [on] the application of logic." *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979). Our cases have accordingly "examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action—that have particular significance." *Kaiser Aetna* v. *United States*, 444 U. S., at 175. See *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978) ("ad hoc, factual inquiries"); *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958) ("question properly turning upon the particular circumstances of each case"). Until a property owner has "obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property," "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed." *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172, 186, 190, n. 11 (1985). As we explained last Term:

> "[T]he difficult problem [is] how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. . . . [R]esolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectation. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property." *Id.*, at 199–200 (footnote omitted).

Accord, *id.*, at 191.

For similar reasons, a court cannot determine whether a municipality has failed to provide "just compensation" until it knows what, if any, compensation the responsible administrative body intends to provide. See *id.*, at 195 ("[T]he State's action here is not 'complete' until the State fails to provide adequate compensation for the taking" (footnote omitted)). The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other. In *Penn Central Transportation Co.* v. *New York City*, for example, we recognized that the Landmarks Preservation Commission, the administrative body primarily responsible for administering New York City's Landmarks Preservation Law, had authority in appropriate circumstances to authorize alterations, remit taxes, and transfer development rights to ensure the landmark owner a reasonable return on its property. See 438 U. S., at 112–115, and n. 13. Because the railroad had "not sought approval for the construction of a smaller structure" than its proposed 50-plus story office building, *id.*, at 137; see *id.*, at 137, n. 34, and because its development rights in the airspace above its Grand Central Station Terminal were transferable "to at least eight parcels in the vicinity of the Terminal, one or two of which ha[d] been found suitable for the construction of a new office building," *id.*, at 137, we concluded that "the application of New York City's Landmarks Law ha[d] not effected a 'taking' of [the railroad's] property," *id.*, at 138. Whether the inquiry asks if a regulation has "gone too far," or whether it seeks to determine if proffered compensation is "just," no answer is possible until a court knows what use, if any, may be made of the affected property.[7]

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[7] A property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination. See *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U. S., at 205–206 (STEVENS, J., concurring in judgment); *United States* v. *Dickinson*, 331 U. S. 745, 749 (1947).

Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it. Thus, in *Agins* v. *Tiburon*, 447 U. S. 255 (1980), we held that zoning ordinances which authorized the development of between one and five single-family residences on appellants' 5-acre tract did not effect a taking of their property on their face, and, because appellants had not made application for any improvements to their property, the constitutionality of any particular application of the ordinances was not properly before us. See *id.*, at 260. Similarly, in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621 (1981), we dismissed the appeal because it did not appear that the city's rezoning and adoption of an open space plan had deprived the utility of all beneficial use of its property. See *id.*, at 631–632, and n. 12. Because the California Court of Appeal had "not decided whether any taking in fact ha[d] occurred, . . . further proceedings [were] necessary to resolve the federal question whether there has been a taking at all." *Id.*, at 633. As a consequence, the judgment was not final for purposes of our jurisdiction under 28 U. S. C. § 1257. *Ibid.* Most recently, in *Williamson Planning Comm'n* v. *Hamilton Bank*, we held that the developer's failure either to seek variances that would have allowed it to develop the property in accordance with its proposed plat, or to avail itself of an available and facially adequate state procedure by which it might obtain "just compensation," meant that its regulatory taking claim was premature.

Here, in comparison to the situations of the property owners in the three preceding cases, appellant has submitted one subdivision proposal and has received the Board's response thereto. Nevertheless, appellant still has yet to receive the Board's "final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U. S., at 191. In *Agins*, *San Diego Gas & Electric*, and *William-*

son Planning Comm'n, we declined to reach the question whether the Constitution requires a monetary remedy to redress some regulatory takings because the records in those cases left us uncertain whether the property at issue had in fact been taken. Likewise, in this case, the holdings of both courts below leave open the possibility that some development will be permitted,[8] and thus again leave us in doubt re-

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[8] Appellant's current complaint—as authoritatively construed by the California Court of Appeal—alleged the denial of only one intense type of residential development. Appellant does not contend that only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking. Rather, the complaint alleged that appellant was deprived of all beneficial use of its property. See App. 51, 60, 65. The California Court of Appeal, whose opinion on matters of local law and local pleading we must respect, cf. *Agins* v. *Tiburon*, 447 U. S. 255, 259–260, n. 5 (1980), apparently rejected what the Superior Court labeled a "conclusionary" allegation of futility, and explained that appellant could seek an administrative application of the Yolo County General Plan and Zoning Ordinances to its property which, for aught that appears, would allow development to proceed.

JUSTICE WHITE's dissent reluctantly concludes that our understanding of the Court of Appeal's decision is "plausible" and "sensible," but insists that the Court of Appeal's decision is "most properly read as taking as true all of the allegations in the complaint, including the allegations of futility, and as rejecting those allegations as insufficient as a matter of substantive takings law." *Post*, at 363. We disagree. Both state courts upheld appellees' demurrer on the ground that not all development had been foreclosed. Thus, the Superior Court apparently accepted appellant's submission that its property was restricted to agricultural use but held that, even so, valuable use might still be made of the land. The Court of Appeal was unwilling to concede even this much: it noted that appellant's property was zoned residential and held that valuable residential development was open to it. These holdings that there is no total prohibition against the productive use of appellant's land cannot possibly be reconciled with the allegations in the complaint that "any beneficial use" is precluded, App. 46, and that future applications would be futile, *id.*, at 58. In view of the fact that these allegations were necessarily rejected by the state courts, and that the parties' briefs disclose a permissible basis for this disposition in settled California demurrer law, see n. 3, *supra;* see also Brief for Respondents in 3 Civil 22306 (Cal. Ct. App., Third App. Dist., July 10, 1984), pp. 25, 27; Memorandum of Points and Authorities in Support of Demurrer to Fourth Amended Complaint in No. 36655 (Cal. Super. Ct., Yolo County, Dec. 18,

garding the antecedent question whether appellant's property has been taken.[9] The judgment is therefore

Affirmed.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins and with whom JUSTICE POWELL and JUSTICE REHNQUIST join as to Parts I, II, and III, dissenting.

The Court acknowledges that we noted probable jurisdiction in this case "[b]ecause of the importance of the ques-

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1981), 4 Clerk's Tr., pp. 888–889, 912, n. 2, 914, it does not matter that the state courts neglected to "expressly disapprove" the deficient allegations or to detail the particular reasons why, see *post*, at 357.

Remarkably, the dissent implies that the Court of Appeal *accepted* the complaint's allegations that local regulations denied appellant all beneficial use of its property and that further regulatory proceedings would be fruitless, but nonetheless required it to file further "useless" applications to state a taking claim. *Ibid.* Whatever purpose such a requirement might serve, futile reapplications are not contemplated by the Court of Appeal. To begin with, this requirement is not, as the dissent maintains, suggested by the Court of Appeal's reliance on the decisions of the California Supreme Court and of this Court in *Agins*. See App. 132. To the contrary, the Court of Appeal relied on the decisions in *Agins* to illustrate that the property owners there—as here—had not "attempt[ed] to obtain approval to . . . develop the land" in accordance with applicable zoning regulations and for this reason had "failed to allege facts which would establish an unconstitutional taking of private property." *Id.*, at 132–133. See 447 U. S., at 259–263; 24 Cal. 3d 266, 277, 598 P. 2d 25, 31 (1979). The implication is not that future applications would be futile, but that a meaningful application has not yet been made. The dissent's supposition that the Court of Appeal accepted the allegations of taking and futility is further contradicted by the court's express denial that submission of a less intensive application would be futile: "the refusal of the [appellees] to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development." App. 133.

[9] Appellant is thus in the same position Mr. and Mrs. Agins would have occupied if they had requested and been denied the opportunity to build five Victorian mansions for their single-family residences, or if San Diego Gas & Electric Co. had asked and been denied the option of building a nuclear powerplant. Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews. In this case, of course, we have statements from both courts below dispelling any doubt on this point.

tion whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings," *ante*, at 348, but avoids this issue by holding that the antecedent question—whether appellant adequately stated a takings claim—should be answered in the negative. I disagree. The factual allegations that we must consider, when the opinion below is correctly read, do state a takings claim and therefore present the remedial question that we have thrice before sought to resolve. See *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172 (1985); *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621 (1981); *Agins* v. *Tiburon*, 447 U. S. 255 (1980).

I

The Court recognizes that "the complaint alleged that appellant was deprived of all beneficial use of its property," *ante*, at 352, n. 8, but concludes:

> "The California Court of Appeal, whose opinion on matters of local law and local pleading we must respect, cf. *Agins* v. *Tiburon*, 447 U. S. 255, 259–260, n. 5 (1980), apparently rejected what the Superior Court labeled a 'conclusionary' allegation of futility, and explained that appellant could seek an administrative application of the Yolo County General Plan and Zoning Ordinances to its property which, for aught that appears, would allow development to proceed." *Ibid.*

The Court thus ignores the allegations in the complaint that the effect of the county's denial of appellant's subdivision application in conjunction with the reasons behind that denial and other actions taken by the appellees has been to deprive the appellant of any use of its property "which is not (a) economically infeasible, (b) prohibited by law, or (c) prevented by actions taken by [the appellees]." Fourth Amended Complaint, App. 46. The Court also disregards appellant's allegation that the actions of the appellees demonstrate "THAT ANY APPLICATION FOR A ZONE CHANGE, VARIANCE OR OTHER

RELIEF WOULD BE FUTILE." *Id.*, at 58. Instead, the Court focuses on the denial of the particular subdivision application alone.

In my view, the Court does not fairly read the record and the opinion below. Appellant's initial complaint filed in Superior Court alleged that although the property was zoned for residential use by the county it was designated an "Agricultural Preserve or Reserve" by the city. The complaint further alleged that even though the property lay in the county outside of the city's boundaries, the county implemented city policy relegating the land to agricultural uses. See Complaint of Oct. 13, 1977, pp. 9–12. Finally, the complaint asserted that the property was agriculturally impaired and could not economically be used for agricultural purposes. See *id.*, at 5, 16.

In sustaining the appellees' demurrer to this complaint, the Superior Court accepted as true the allegation that the property had effectively been rezoned agricultural but noted that there was no allegation that the property could not be used for a variety of nonagricultural purposes explicitly allowed in agricultural zones under the county and city codes. See Order of Mar. 30, 1978, in No. 36655 (Cal. Super. Ct., Yolo County), pp. 6–8. The conclusion was that "[t]he failure to allege the property in question useless for other permitted purposes in an agricultural zone over and above an agricultural use renders the [inverse condemnation cause of action] demurrable." *Id.*, at 8.

In the Fourth Amended Complaint, the complaint that formed the basis for the judgment below, appellant responded to this earlier ruling by specifically alleging that the property was not suitable for the other uses permitted in an agricultural zone and by asserting facts in support of this allegation. See App. 52–58. The Superior Court, however, indicated that it found these allegations "conclusionary," although it did not rely on this determination in sustaining the demurrer to the complaint, relying instead on the California Supreme Court's general ruling in *Agins* v. *City of Tiburon*,

24 Cal. 3d 266, 272–277, 598 P. 2d 25, 28–31 (1979), aff'd on other grounds, 447 U. S. 255 (1980), that no inverse condemnation action may be brought as a result of a land use regulation.[1] The crucial fact here is that the Superior Court denominated "conclusionary" only those allegations in the complaint that rejected the possibility of feasible nonagricultural uses of the property that would be consistent with agricultural zoning. It did not categorize as "conclusionary" appellant's allegations that all economically beneficial residential uses were foreclosed by the appellees' actions.

In reviewing the Superior Court's ruling on the demurrer to the Fourth Amended Complaint, the California Court of Appeal first noted that it would not consider whether the complaint was barred by the failure to exhaust administrative remedies or by res judicata. App. 125–126. It then summarized the allegations of the complaint, including the allegations that the property was not suitable for agricultural use or any of the other uses permitted in the county code and that it was suitable for residential use but that the county and city had acted to prevent this use entirely. *Id.*, at 127–129. The Court of Appeal also noted that appellant had alleged that "[a]ny application for a zone change, variance or other relief would be futile." *Id.*, at 129. Nowhere did the court state that as a matter of California demurrer law it was rejecting any of these allegations as not properly pleaded. And nowhere did it refer to the Superior Court's statement that the allegations as to the infeasibility of the nonagricultural uses that would be consistent with agricultural zoning might not be properly pleaded.

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[1] The Superior Court also sustained the demurrer on the ground that appellant had failed to exhaust administrative and judicial remedies; that the county's denial of appellant's subdivision application was res judicata not subject to collateral attack in the Superior Court; and that no taking in the form of actual "invasion or appropriation of a cognizably valuable property right" had been alleged. App. 111, 116.

Having recited all of these allegations without indicating that it was rejecting any of them, the Court of Appeal first held that no cause of action was stated in inverse condemnation. This holding, it noted, was compelled by the California Supreme Court's ruling in *Agins* that there is no such remedy for takings alleged to result from land use regulation. *Id.*, at 130–132. See *Agins*, 24 Cal. 3d, at 272–277, 598 P. 2d, at 28–31.

In the alternative, however, the Court of Appeal found that even if such a cause of action were available, appellant had not stated a takings claim. The court concluded that "[p]ared to their essence, the allegations are that [appellant] purchased property for residential development, the property is zoned for residential development, [appellant] submitted an application for approval of development of the property into 159 residential units, and, in part at the urging of the City, the County denied approval of the application." App. 132. The court then observed that this situation was "not unlike" that in *Agins*, in which a zoning ordinance that restricted a landowner of five acres to building a maximum of five residences on his property was found not to constitute a taking since on its face the ordinance still allowed that level of development, which was a reasonable use of the property. See *Agins*, 447 U. S., at 262–263; *Agins*, 24 Cal. 3d, at 277, 598 P. 2d, at 31. Citing *Agins*, the Court of Appeal than determined that appellant had not stated a taking cause of action because appellees' refusal to allow the intensive development requested by appellant "does not preclude less intensive, but still valuable development." App. 133.

In my view, given the absence of any expression of disapproval by the Court of Appeal of any of the appellant's allegations summarized in its opinion and given the fact that the Superior Court had not labeled appellant's allegations of futility "conclusionary," there is no reason to read into this last statement by the Court of Appeal a state-law ruling that the allegations of futility were not well pleaded. Instead, the

Court of Appeal's focus on what it termed the essence of appellant's complaint together with its conclusion that with respect to these essential allegations this case was analytically the same as *Agins* imply that it believed that *as a matter of federal takings law* certain allegations controlled in terms of determining if a takings claim had been stated. Specifically, in concluding that the allegations of futility were not material and in determining that under *Agins* further application must be made before a takings claim could be stated, the Court of Appeal held that no takings cause of action had been stated because no reapplication had been made, even if further application would be useless.

II

Whether a regulatory taking has occurred is an inquiry that cannot be completed until a final decision is made as to how the allegedly confiscatory regulations apply to the pertinent property. *Williamson County Regional Planning Comm'n*, 473 U. S., at 190–191. Thus, in *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 136–137 (1978), and in *Agins*, 447 U. S., at 262–263, we considered for takings purposes only the actual regulatory decision that had been made by the governmental decisionmaker; we declined to speculate as to further restrictions that might be imposed. In *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 293–297 (1981), we refused to consider a takings claim based on general regulatory provisions that had not yet been applied to specific properties and that were susceptible of administrative exemption. Most recently, in *Williamson County Regional Planning Comm'n*, the Court determined that the denial of a particular use for a property did not constitute a final decision where variance procedures were available that "[left] open the possibility that [the landowner] may develop the subdivision according to its plat after obtaining the variances." 473 U. S., at 193–194.

These holdings recognize that a regulatory takings determination is closely tied to the facts of a particular case and that there is often an ongoing process by which the relevant regulatory decisions are made. Given these characteristics of a regulatory taking, the final decision requirement is necessary to ensure that "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Id.*, at 193. Nothing in our cases, however, suggests that the decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position.

Moreover, I see no reason for importing such a requirement into the "final decision" analysis. A decisionmaker's definitive position may sometimes be determined by factors other than its actual decision on the issue in question. For example, if a landowner applies to develop its land in a relatively intensive manner that is consistent with the applicable zoning requirements and if the governmental body denies that application, explaining that all development will be barred under its interpretation of the zoning ordinance, I would find that a final decision barring all development has been made—even though the landowner did not apply for a less intensive development. Although a landowner must pursue reasonably available avenues that might allow relief, it need not, I believe, take patently fruitless measures.

The Court of Appeal's reliance on *Agins* in this case was therefore misplaced. Appellant alleged not simply that its application had been denied but that the overall effect of (1) that denial, (2) the reasons given for the denial, and (3) other actions taken by appellees to prevent appellant from ever being able to meet county development requirements was that appellant's property had been taken. When the Court of Appeal purported to reduce appellant's claim to its essence, it ignored a critical distinction between *Agins*, in

which there was no indication that upon application the property owner would not be allowed to develop his property in some economically beneficial manner, and the factual situation here, in which further application would allegedly be futile. In this case, I believe that appellant sufficiently alleged a final decision denying it all reasonable economically beneficial use of its property.[2]

III

Assuming that appellant adequately alleged a final decision, the next question is whether a takings cause of action was stated by the allegations in the complaint. Discerning the answer to this question involves two separate inquiries: Whether a land use regulation restricting the use of property may ever amount to a taking and, if the answer to this first inquiry is affirmative, whether the allegations here are sufficient to state a takings claim.

As to the first question, our cases have long indicated that police-power regulations may rise to the level of a taking if the restrictions they impose are sufficiently severe. See, *e. g.*, *Agins*, 447 U. S., at 260; *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 83 (1980); *Kaiser Aetna* v. *United States*, 444 U. S. 164, 174–175 (1979); *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979); *Penn Central*, 438 U. S., at 130–131, 138, n. 36; *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415–416 (1922). Nevertheless, the California Supreme Court in *Agins* concluded:

> "[A] landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of the Fifth Amendment to the United States Constitu-

[2] I emphasize that the futility of further application would have to be proved at trial for appellant to prevail here on the merits. I address only the question whether appellant's allegations of futility are sufficient support for assuming that a final decision has been made.

> tion. . . . He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." 24 Cal. 3d, at 273, 598 P. 2d, at 28.[3]

In addition to being inconsistent with this Court's statements, this view, as JUSTICE BRENNAN explained in his dissent in *San Diego Gas*, ignores the fact that

> "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property. . . . It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most

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[3] Although the California Supreme Court's ruling in *Agins* rests on the rationale that excessive land use regulation simply cannot constitute a lawful taking, the Court of Appeal in this case seemed to proceed on the assumption that such regulation could constitute a taking but that no inverse condemnation remedy for such a taking would be available. See App. 131. My discussion here follows the reasoning given by the California Supreme Court in *Agins* rather than the somewhat inexact summary of that reasoning given by the Court of Appeal below.

> of his interest in the property." 450 U. S., at 652–653 (citations and footnotes omitted).

I agree that land use restrictions may constitute a taking under the Constitution.

This resolution of the general question brings me to the more specific question whether the allegations in the complaint here were sufficient to state a takings claim. Here, appellant alleged the existence of a final decision denying it all economically beneficial use of its property. It also alleged that it had paid "good and valuable consideration," App. 43, for the property. Factual allegations of interference with reasonable investment-backed expectations and denial of all economically feasible use of the property are certainly sufficient allegations of a regulatory taking to state a cause of action. See, *e. g.*, *Penn Central*, *supra*, at 136–138. Consequently, I would hold that appellant adequately alleged a taking.

IV

The final question presented is whether a State can limit to declaratory and injunctive relief the remedies available to a person whose property has been taken by regulation or whether the State must pay compensation for the interim period between the time that the government first "took" the property and the time that the "taking" is rescinded by amendment of the regulation.[4] On this question, I am again in substantial agreement with JUSTICE BRENNAN's discussion in *San Diego Gas*. See 450 U. S., at 653–660. Even where a property owner is deprived of its property only temporarily, if that deprivation amounts to a taking the Constitu-

[4] I assume here that the normal action by the governmental entity following a determination that a particular regulation constitutes a taking will be to rescind the regulation. I believe that this is a permissible course of action, limiting liability for the taking to the interim period. See *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 658 (1981) (BRENNAN, J., dissenting). Of course, the governmental entity could actually condemn the property and pay permanent compensation for it.

tion requires that just compensation be paid. If the governmental body that has taken the property decides to rescind the taking by amending the regulation, that does not reverse the fact that the property owner has been deprived of its property in the interim. "[I]t is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it." *Id.*, at 656–657. Thus, just compensation must be available for the period between the time of the final decision taking the property and the time that that decision is rescinded.

I recognize that such a constitutional rule admits of problems of administration that are by no means insignificant. Aside from the problems that the Court has already addressed in some measure regarding the determination of when a taking shall be deemed to have occurred, there are questions of valuation and of procedure. As to the latter, the Constitution requires no particular procedures, although as the Court today notes, "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination." *Ante*, at 350, n. 7. As to the former, the issue of what constitutes just compensation in this context is a particularly meaty one, which merits substantial reflection and analysis. Nevertheless, these unsettled questions should not deter us from acting to protect constitutional requirements in this type of case. Consequently, I would vacate the judgment below and remand for further proceedings not inconsistent with the views I have expressed.

V

In sum, I believe that the Court of Appeal's decision is most properly read as taking as true all of the allegations in the complaint, including the allegations of futility, and as rejecting those allegations as insufficient as a matter of substantive takings law. At the very least, the Court's reading of the opinion below, however plausible, is not the only sen-

sible reading of that opinion. Given this arguable ambiguity, I would not, as the Court does, withdraw from appellant all chance of relief at this stage. That is, if the Court of Appeal in fact did reach its judgment by the reasoning I have summarized rather than as the Court hypothesizes, appellant should not be precluded from seeking relief on the facts currently alleged in the complaint. I would at least vacate the judgment below and remand for explanation by the Court of Appeal as to the precise basis for its judgment.

JUSTICE REHNQUIST, with whom JUSTICE POWELL joins, dissenting.

I agree with JUSTICE WHITE that the Court of Appeal's opinion is best read as rejecting appellant's allegations as a matter of substantive takings law; that appellant sufficiently alleged a final decision denying it all beneficial use of its property; that a land use regulation restricting the use of property may amount to a taking; and that the allegations here are sufficient to state a takings claim. Accordingly, I join Parts I, II, and III of his dissenting opinion. As JUSTICE WHITE recognizes in Part IV of his opinion, the questions surrounding what compensation, if any, is due a property owner in the context of "interim" takings are multifaceted and difficult. I would not reach these questions without first permitting the courts below to address them in light of the fact that appellant has sufficiently alleged a taking.

Reporter's Note

The next page is purposely numbered 901. The numbers between 364 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 23 THROUGH JUNE 24, 1986

JUNE 23, 1986

Affirmed on Appeal

No. 85-441. ROBERTS, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK *v.* BURLINGTON INDUSTRIES, INC.; and

No. 85-460. GILBERT ET AL. *v.* BURLINGTON INDUSTRIES, INC. Affirmed on appeals from C. A. 2d Cir. Reported below: 765 F. 2d 320.

No. 85-944. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA *v.* BURLINGTON INDUSTRIES, INC., ET AL. Affirmed on appeal from C. A. 4th Cir. Reported below: 772 F. 2d 1140.

No. 85-1066. MARTIN, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* HAITH. Affirmed on appeal from D. C. E. D. N. C. Reported below: 618 F. Supp. 410.

Appeals Dismissed

No. 84-922. LINEAS AEREAS COSTARRICENSES, S.A., ET AL. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 457 So. 2d 1007.

No. 84-1041. AIR JAMAICA LTD. ET AL. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 455 So. 2d 324.

No. 85-1690. GOODYEAR FARMS ET AL. *v.* CITY OF AVONDALE. Appeal from Sup. Ct. Ariz. Motion of Arizona for leave to intervene granted. Appeal dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE WHITE would postpone further consideration of the question of jurisdiction to a hearing of the case on the merits. Reported below: 148 Ariz. 216, 714 P. 2d 386.

No. 85-1859. LUNDGARD *v.* OHIO. Appeal from Ct. App. Ohio, Miami County, dismissed for want of substantial federal question.

No. 85-6850. HARDESTY *v.* MICHIGAN. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 139 Mich. App. 124, 362 N. W. 2d 787.

Vacated and Remanded on Appeal

No. 85-1165. NANTAHALA POWER & LIGHT CO. ET AL. *v.* THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. Appeal from Sup. Ct. N. C. Judgment vacated and case remanded for further consideration in light of *Nantahala Power & Light Co.* v. *Thornburg*, 476 U. S. 953 (1986). JUSTICE POWELL and JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 314 N. C. 246, 333 S. E. 2d 217.

No. 85-1307. NANTAHALA POWER & LIGHT CO. ET AL. *v.* THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. Appeal from Sup. Ct. N. C. Judgment vacated and case remanded for further consideration in light of *Nantahala Power & Light Co.* v. *Thornburg*, 476 U. S. 953 (1986). JUSTICE POWELL and JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 314 N. C. 122, 333 S. E. 2d 453.

Certiorari Granted—Vacated and Remanded

No. 85-12. POTT INDUSTRIES, INC. *v.* INGRAM RIVER EQUIPMENT, INC. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *East River S.S. Corp.* v. *Transamerica Delaval Inc.*, 476 U. S. 858 (1986). Reported below: 756 F. 2d 649.

No. 85-406. ARIYOSHI, GOVERNOR OF HAWAII, ET AL. *v.* ROBINSON ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172 (1985). Reported below: 753 F. 2d 1468.

Miscellaneous Orders

No. A-944 (85-1975). POLYAK *v.* HULEN ET AL. C. A. 6th Cir. Application for an injunction, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 85-6948. IN RE GAY. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 85-1798. PENNZOIL CO. *v.* TEXACO INC. Appeal from C. A. 2d Cir. Probable jurisdiction noted. Reported below: 784 F. 2d 1133.

Certiorari Granted

No. 85-998. UNITED STATES *v.* DUNN. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 782 F. 2d 1226.

No. 85-1329. YOUNG ET AL. *v.* UNITED STATES EX REL. VUITTON ET FILS S.A. ET AL.; and

No. 85-6207. KLAYMINC *v.* UNITED STATES EX REL. VUITTON ET FILS S.A. ET AL. C. A. 2d Cir. Motion of petitioner in No. 85-6207 for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 780 F. 2d 179.

No. 85-1358. LUKHARD, COMMISSIONER, VIRGINIA DEPARTMENT OF SOCIAL SERVICES *v.* REED ET AL. C. A. 4th Cir. Motion of respondents Reed et al. for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 774 F. 2d 1270.

Certiorari Denied

No. 84-1808. WHITE, DBA BLUE WAVE OYSTER CO., ET AL. *v.* M/V TESTBANK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 752 F. 2d 1019.

No. 84-1966. CWT FARMS, INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 790.

No. 85-873. CAMACHO ET AL. *v.* BUNYAN. C. A. 9th Cir. Certiorari denied Reported below: 770 F. 2d 773.

No. 85-929. SLACK ET AL. *v.* BURLINGTON INDUSTRIES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 772 F. 2d 1140.

No. 85-1030. RADOL ET AL. *v.* THOMAS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 244.

No. 85-1301. HASTINGS, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA *v.* JUDICIAL CONFERENCE OF THE UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 248 U. S. App. D. C. 180, 770 F. 2d 1093.

No. 85-1491. BELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 965.

No. 85-1503. WATTENBARGER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 41.

No. 85-1528. HUBBLE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 509 Pa. 497, 504 A. 2d 168.

No. 85-1540. PRACHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 703.

No. 85-1594. INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES & MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 779 F. 2d 552.

No. 85-1609. HASTINGS, UNITED STATES DISTRICT JUDGE, ET AL. *v.* GODBOLD, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 1488.

No. 85-1628. PAYNE, INDEPENDENT EXECUTOR OF THE ESTATE OF JOHNSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 1123.

No. 85-1648. CALIFORNIA HOSPITAL ASSN. ET AL. *v.* HENNING, LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 856 and 783 F. 2d 946.

No. 85-1650. N. O. C., T/A NOBLE OIL CO. *v.* ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1030.

No. 85-1674. NADWORNY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 396 Mass. 342, 486 N. E. 2d 675.

No. 85-1676. McKee et al. v. United States. C. A. 4th Cir. Certiorari denied. Reported below: 781 F. 2d 1043.

No. 85-1713. Drum v. United States. C. A. 4th Cir. Certiorari denied. Reported below: 783 F. 2d 1179.

No. 85-1761. Holyoke Water Power Co. v. National Labor Relations Board. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 2d 49.

No. 85-1766. Moss v. Municipal Court of the North Orange County Judicial District (California, Real Party in Interest). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-1770. Gibson et al. v. AT&T Technologies, Inc. C. A. 7th Cir. Certiorari denied. Reported below: 782 F. 2d 686.

No. 85-1780. BIC Leisure Products, Inc., et al. v. Windsurfing International, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 782 F. 2d 995.

No. 85-1793. Wainwright, Secretary, Florida Department of Corrections v. Smith. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 609.

No. 85-1803. Slab Fork Coal Co. v. United Virginia Bank et al. C. A. 4th Cir. Certiorari denied. Reported below: 784 F. 2d 1188.

No. 85-1808. Davis v. Ohio. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 85-1811. Ohio Department of Natural Resources v. Spiers, Trustee. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 585.

No. 85-1817. Avery v. Jennings et al. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 233.

No. 85-1846. Shelton et al. v. City of College Station et al. C. A. 5th Cir. Certiorari denied. Reported below: 780 F. 2d 475.

No. 85-1875. Schuchman et ux. v. United States et al. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 54.

No. 85-1898. WAGNER ET AL. v. OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 783 F. 2d 1042.

No. 85-1899. DAVID v. DEFENSE LOGISTICS AGENCY. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1065.

No. 85-1900. EAKES v. UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 499.

No. 85-1917. BILLS ET AL. v. UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1145.

No. 85-1919. PARNESS v. UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 820.

No. 85-1920. BATSON ET AL. v. UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 1307.

No. 85-5901. CLIFTON v. MCCARTHY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1173.

No. 85-6418. ISSA v. MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 90.

No. 85-6535. WILSON ET AL. v. HUDSON COUNTY PROSECUTORS OFFICE ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-6550. OWENS v. LOPEZ, REGIONAL COMMISSIONER, UNITED STATES PAROLE COMMISSION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 5.

No. 85-6581. SOHAPPY ET AL. v. UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 816.

No. 85-6595. METZGER v. UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 778 F. 2d 1195.

No. 85-6602. GARY v. UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 499 A. 2d 815.

No. 85-6616. FERNANDEZ ET AL. v. UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 778 F. 2d 1558.

No. 85-6626. GATES v. ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 493 So. 2d 410.

No. 85-6667. BOAG *v.* RICKETTS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1025.

No. 85-6819. MCCONNELL *v.* WEE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1171.

No. 85-6824. NORTH *v.* EDWARDS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 309.

No. 85-6826. SELLNER *v.* PANAGOULIS, AKA HUDNALL, ET AL. Ct. App. Md. Certiorari denied. Reported below: 304 Md. 631, 500 A. 2d 649.

No. 85-6833. LACY *v.* DISTRICT COURT OF DALLAS COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied.

No. 85-6839. OTIS *v.* SEARS, ROEBUCK & CO. C. A. 7th Cir. Certiorari denied. Reported below: 785 F. 2d 312.

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No. 85-6845. TOLER *v.* NEW HANOVER COUNTY BOARD OF EDUCATION. C. A. 4th Cir. Certiorari denied.

No. 85-6851. DAIGRE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 785 F. 2d 1033.

No. 85-6853. FOWLER ET AL. *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 589.

No. 85-6854. PLIES *v.* LAZARE ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-6855. TATU ET AL. *v.* LAWSON & HARTNELL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-6856. HENDERSON *v.* IDAHO ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 110 Idaho 308, 715 P. 2d 978.

No. 85-6857. WRENN *v.* ST. CHARLES HOSPITAL. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1167.

No. 85-6862. CAMACHO *v.* RITZ-CARLTON WATER TOWER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 786 F. 2d 242.

No. 85-6914. DE ROSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 1401.

No. 85-6962. GEORGALIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 5.

No. 85-6967. CABLE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 65 Md. App. 493, 501 A. 2d 108.

No. 85-6971. EBERWINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 1088.

No. 85-6984. CASTANEDA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 85-6985. TANNOUS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 785 F. 2d 1.

No. 85-6989. GIAQUINTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 584.

No. 85-6995. MEANS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 787 F. 2d 598.

No. 84-1907. KAISER ALUMINUM & CHEMICAL CORP. ET AL. *v.* BONJORNO ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 752 F. 2d 802.

No. 85-6871. BRANTLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 786 F. 2d 1322.

No. 85-1579. BOGGILD ET AL. *v.* KENNER PRODUCTS, A DIVISION OF CPG PRODUCTS CORP. C. A. 6th Cir. Motion of American Intellectual Property Law Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 776 F. 2d 1315.

No. 85-1653. BALISTRIERI ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari limited to Question II presented by the petition. Reported below: 778 F. 2d 1226.

No. 85-1664. ALABAMA *v.* CROWE. Sup. Ct. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 485 So. 2d 373.

No. 85-1683. CITY OF PHOENIX *v.* WEST PUBLISHING CO. Ct. App. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 148 Ariz. 31, 712 P. 2d 944.

No. 85-1792. BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES *v.* RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD CO. C. A. 4th Cir. Certiorari before judgment denied.

No. 85-6523. PHILLIPS, AKA BASHIR *v.* TEXAS. Ct. Crim. App. Tex.;

No. 85-6545. JAMES *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla.;

No. 85-6696. MATHENIA *v.* MISSOURI. Sup. Ct. Mo.;

No. 85-6963. JONES *v.* MISSOURI. Sup. Ct. Mo.; and

No. 85-6974. PEEDE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 85-6523, 701 S. W. 2d 875; No. 85-6545, 484 So. 2d 1235; No. 85-6696, 702 S. W. 2d 840; No. 85-6963, 705 S. W. 2d 19; No. 85-6974, 474 So. 2d 808.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

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No. 84-1942. NATIONWIDE MUTUAL INSURANCE CO. *v.* CLAY, 476 U. S. 1101;

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No. 85-1020. GELLERT *v.* EASTERN AIR LINES, INC., 475 U. S. 1036;

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No. 85-1464. NEWKIRK ET AL. *v.* BIGARD, INDIVIDUALLY AND DBA B & B OIL CO., ET AL., 475 U. S. 1140. Petitions for rehearing denied.

No. 85-6507. KELLER *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER, ET AL., 475 U. S. 1143;

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No. 85-6674. IN RE DYSON, 476 U. S. 1111;

No. 85-6686. MORGAN *v.* UNITED STATES, 476 U. S. 1122; and

No. 85-6702. IN RE MUELLER, 476 U. S. 1113. Petitions for rehearing denied.

JUNE 24, 1986

Certiorari Denied

No. 85-7182 (A-1000). BOWDEN *v.* KEMP, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 793 F. 2d 273.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari, and would vacate the death sentence in this case.

477/pt. 2

PRELIMINARY PRINT

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OFFICIAL REPORTS

OF

THE SUPREME COURT

JUNE 26 THROUGH JUNE 27, 1986

END OF VOLUME

HENRY C. LIND
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

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WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

OFFICERS OF THE COURT

EDWIN MEESE III, Attorney General.
CHARLES FRIED, Solicitor General.
JOSEPH F. SPANIOL, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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NOTE: All undesignated references herein to the United States Code are to the 1982 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

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KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL. v. MORRISON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-1661. Argued March 5, 1986—Decided June 26, 1986

At respondent's bench trial in a New Jersey court resulting in his conviction of rape, a police officer testified that a few hours after the rape she accompanied the victim to respondent's apartment where the rape had occurred; that he was not there but another tenant let them into respondent's apartment; and that the officer seized a sheet from respondent's bed. At such point in the testimony, respondent's counsel sought to suppress introduction of the sheet and any testimony about it on the ground that the officer had seized it without a search warrant in violation of the Fourth Amendment, but the judge ruled that counsel's suppression motion was late under the applicable New Jersey Court Rule. The judge rejected counsel's attempt to justify his omission on the grounds that he had not heard of the seizure until the day before, when the trial began; that it was the State's obligation to inform him of its case, even though he made no pretrial request for discovery, which would have revealed the search and seizure; and that he had not expected to go to trial because he had been told that the victim did not wish to proceed. Respondent retained new counsel after the trial and, on appeal, alleged ineffective assistance of counsel at the trial and error in the trial court's refusal to entertain the suppression motion during the trial. The appellate court rejected the claims and affirmed respondent's conviction. Thereafter respondent unsuccessfully sought postconviction relief from the trial judge on the same grounds. He then obtained habeas corpus relief in Federal District Court, which held, *inter alia*, that he had established his ineffective-assistance claim. The Court of Appeals concluded that *Stone* v. *Powell*, 428 U. S. 465—which held that federal courts should withhold habeas review where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim—should not be extended to bar federal habeas consideration of Sixth Amendment claims based on counsel's alleged failure competently to litigate Fourth Amendment claims. Reviewing the District Court's determination of ineffective assistance under the test established by the intervening decision in *Strickland* v. *Washington*, 466 U. S. 668—which held that, to establish ineffective assistance, the defendant must prove both incompetence of counsel and prejudice—the Court of Appeals determined that

respondent's trial counsel had been "grossly ineffective," but vacated and remanded for the District Court to consider whether, under the standards set forth in *Strickland*, respondent had been prejudiced by his attorney's incompetence.

Held:

1. The restriction on federal habeas review of Fourth Amendment claims announced in *Stone* v. *Powell*, *supra*, does not extend to Sixth Amendment ineffective-assistance-of-counsel claims which are founded primarily on incompetent representation with respect to a Fourth Amendment issue. Federal courts may grant habeas relief in appropriate cases, regardless of the nature of the underlying attorney error. Pp. 373–383.

(a) Respondent's Sixth Amendment claim is not in fact a Fourth Amendment claim directly controlled by *Stone*, as petitioners assert. The two claims are distinct, both in nature and in the requisite elements of proof. Pp. 374–375.

(b) Nor are the rationale and purposes of *Stone* fully applicable to a Sixth Amendment claim that is based principally on defense counsel's failure to litigate a Fourth Amendment claim competently. *Stone* held that the remedy for Fourth Amendment violations provided by the exclusionary rule is not a personal constitutional right, but instead is predominately a judicially created structural remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect; the rule has minimal utility in the context of federal collateral proceedings. Here, respondent sought direct federal habeas protection of his fundamental personal right to effective assistance of counsel, and collateral review is frequently the only means through which an accused can effectuate that right. Moreover, there is no merit to the contention that a defendant should not be allowed to vindicate through federal habeas review his right to effective assistance of counsel where counsel's primary error is failure to make a timely request for the exclusion of illegally seized evidence that is often the most probative information bearing on the defendant's guilt or innocence. The right to counsel is not conditioned upon actual innocence. Pp. 375–380.

(c) Petitioners' prediction that every Fourth Amendment claim that fails in state court will be fully litigated in federal habeas proceedings in Sixth Amendment guise, and that, as a result, many state-court judgments will be disturbed, is incorrect because it ignores the rigorous standard which *Strickland* v. *Washington*, *supra*, erects for ineffective-assistance claims. Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim like respondent's, a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompe-

tence of their attorneys are entitled to the writ and to retrial without the challenged evidence. Pp. 380–382.

2. Respondent satisfied the incompetence prong of the test for ineffective assistance of counsel set forth in *Strickland*, and the Court of Appeals did not err in remanding the case to the District Court for a determination of prejudice under *Strickland*'s standard. Pp. 383–391.

(a) While the failure to file a suppression motion does not constitute *per se* ineffective assistance of counsel, the record clearly reveals that respondent's attorney failed to file a timely suppression motion, not due to trial strategy considerations, but because he was unaware of the search, and of the State's intention to introduce the bedsheet into evidence, due to his failure to conduct any pretrial discovery. Such failure here was not, as required under *Strickland*, reasonable and in accord with prevailing professional norms. Pp. 383–387.

(b) With respect to the prejudice prong of the *Strickland* test, there is no merit to petitioners' contention that a statement made by the trial judge at a post-trial hearing on respondent's motion for bail pending appeal constituted a finding that even if the bedsheet had been excluded, he would have found respondent guilty, and that such finding was a subsidiary finding of historical fact that respondent was not prejudiced by his attorney's incompetence, entitled under 28 U. S. C. § 2254(d) to a presumption of correctness in federal habeas proceedings. The record here is not sufficiently complete to enable this Court to apply *Strickland*'s prejudice prong directly to the facts of the case, and the remand to the District Court for redetermination of prejudice was proper. Pp. 387–391.

752 F. 2d 918, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 391.

Allan J. Nodes argued the cause for petitioners. With him on the brief were *Irwin I. Kimmelman*, Attorney General of New Jersey, and *Catherine A. Foddai*, *Mildred Vallerini Spiller*, and *Arlene R. Weiss*, Deputy Attorneys General.

William E. Staehle, by appointment of the Court 474 U. S. 917, argued the cause and filed a brief for respondent.*

**Leon Friedman*, *Charles S. Sims*, and *Burt Neuborne* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

JUSTICE BRENNAN delivered the opinion of the Court.

The question we address in this case is whether the restrictions on federal habeas review of Fourth Amendment claims announced in *Stone* v. *Powell*, 428 U. S. 465 (1976), should be extended to Sixth Amendment claims of ineffective assistance of counsel where the principal allegation and manifestation of inadequate representation is counsel's failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment.

I

Respondent, Neil Morrison, was convicted by the State of New Jersey of raping a 15-year-old girl. The case presented by the State at respondent's bench trial consisted of scientific evidence and of the testimony of the victim, her mother, and the police officers who handled the victim's complaint.

The victim testified that Morrison, who was her employer, had taken her to his apartment, where he forced her onto his bed and raped her. Upon returning home, the girl related the incident to her mother, who, after first summoning Morrison and asking for his account of events, phoned the police. The police came to the victim's home and transported her to the hospital, where she was examined and tested for indicia of a sexual assault.

The State also called as a witness Detective Dolores Most, one of the officers who investigated the rape complaint. Most testified that she accompanied the victim to Morrison's apartment building a few hours after the rape. Morrison was not at home, but another tenant in the building let them into respondent's one-room apartment. While there, Most stated, she seized a sheet from respondent's bed.

At this point in the testimony respondent's counsel objected to the introduction of the sheet and to any testimony concerning it on the ground that Most had seized it without a search warrant. New Jersey Court Rules, however, require

that suppression motions be made within 30 days of indictment unless the time is enlarged by the trial court for good cause. N. J. Ct. Rule 3:5–7. Because the 30-day deadline had long since expired, the trial judge ruled that counsel's motion was late. Defense counsel explained to the court that he had not heard of the seizure until the day before, when trial began, and that his client could not have known of it because the police had not left a receipt for the sheet. The prosecutor responded that defense counsel, who had been on the case from the beginning, had never asked for *any* discovery. Had trial counsel done so, the prosecutor observed, police reports would have revealed the search and seizure. The prosecutor stated further that one month before trial he had sent defense counsel a copy of the laboratory report concerning the tests conducted on stains and hairs found on the sheets.

Asked repeatedly by the trial court why he had not conducted any discovery, respondent's attorney asserted that it was the State's obligation to inform him of its case against his client, even though he made no request for discovery. The judge rejected this assertion and stated: "I hate to say it, but I have to say it, that you were remiss. I think this evidence was there and available to you for examination and inquiry." 2 Tr. 114. Defense counsel then attempted to justify his omission on the ground that he had not expected to go to trial because he had been told that the victim did not wish to proceed. The judge rejected this justification also, reminding counsel that once an indictment is handed down, the decision to go through with the complaint no longer belongs to the victim, and that it requires a court order to dismiss an indictment. *Id.*, at 115. While the judge agreed that defense counsel had "br[ought] about a very valid basis . . . for suppression . . . if the motion had been brought and timely made," he refused "to entertain a motion to suppress in the middle of the trial." *Id.*, at 110.

The State then called a number of expert witnesses who had conducted laboratory tests on the stains and hairs found on the sheet, on a stain found on the victim's underpants, and on blood and hair samples provided by the victim and the respondent. This testimony established that the bedsheet had been stained with semen from a man with type O blood, that the stains on the victim's underwear similarly exhibited semen from a man with type O blood, that the defendant had type O blood, that vaginal tests performed on the girl at the hospital demonstrated the presence of sperm, and that hairs recovered from the sheet were morphologically similar to head hair of both Morrison and the victim. Defense counsel aggressively cross-examined all of the expert witnesses.

The defense called four friends and acquaintances of the defendant and the defendant himself in an attempt to establish a different version of the facts. The defense theory was that the girl and her mother fabricated the rape in order to punish respondent for being delinquent with the girl's wages. According to Morrison, the girl and her mother had not intended to go through with the prosecution, but ultimately they found it impossible to extricate themselves from their lies. Morrison admitted that he had taken the girl to his apartment, but denied having had intercourse with her. He claimed that his sexual activity with other women accounted for the stains on his sheet, and that a hair from the girl's head was on his sheet because she had seated herself on his bed. Defense counsel also implied that the girl's underwear and vaginal secretions tested positive for semen and sperm because she probably had recently engaged in relations with the father of her baby. Counsel did not, however, call the girl's boyfriend to testify or have him tested for blood type, an omission upon which the prosecution commented in closing argument.

The trial judge, in rendering his verdict, noted: "As in most cases nothing is cut and dry. There are discrepancies in the State's case, there are discrepancies in the defense as

it's presented." 6 Tr. 86. After pointing out some of the more troublesome inconsistencies in the testimony of several of the witnesses, the judge declared his conclusion that the State had proved its case beyond a reasonable doubt.

After trial, respondent dismissed his attorney and retained new counsel for his appeal. On appeal, respondent alleged ineffective assistance of counsel and error in the trial court's refusal to entertain the suppression motion during trial. The appeals court announced summarily that it found no merit in either claim and affirmed respondent's conviction. The Supreme Court of New Jersey subsequently denied respondent's petition for discretionary review. Respondent then sought postconviction relief in the New Jersey Superior Court, from the same judge who had tried his case. There Morrison presented the identical issues he had raised on direct appeal. The court denied relief on the ground that it was bound by the appellate court's resolution of those issues against respondent.

Respondent then sought a writ of habeas corpus in Federal District Court, again raising claims of ineffective assistance of counsel and erroneous admission of illegally seized evidence. The District Court ruled that because respondent did not allege that the State had denied him an opportunity to litigate his Fourth Amendment claim fully and fairly, direct consideration of this claim on federal habeas review was barred by *Stone* v. *Powell*, 428 U. S. 465 (1976). 579 F. Supp. 796 (NJ 1984). The District Court did find respondent's ineffective-assistance claim meritorious.

Because the District Court rendered its decision before this Court announced the standards to be applied to claims of constitutionally deficient representation in *Strickland* v. *Washington*, 466 U. S. 668 (1984), the District Court relied on Third Circuit precedent for guidance, particularly *United States* v. *Baynes*, 687 F. 2d 659 (1982), and *Moore* v. *United States*, 432 F. 2d 730 (1970). Like *Strickland*, these cases required a two-prong inquiry into counsel's competence and

into the prejudicial effect of counsel's unprofessional errors. With respect to trial counsel's competence, the District Court used as its standard the "'customary skill and knowledge which normally prevails at the time and place.'" 579 F. Supp., at 802 (quoting *Moore*, *supra*, at 736). Noting that this standard "'entails a careful inquiry into the particular circumstances surrounding each case,'" 579 F. Supp., at 802 (quoting *Baynes*, *supra*, at 665), the court concluded:

> "[C]ounsel failed to conduct any meaningful pretrial discovery, and thus was totally unaware that certain damaging evidence might have been the appropriate subject for a suppression motion. Counsel seems to have acted on the misapprehension that the State was obligated to turn over anything that the defense might be interested in examining. Little else was offered by way of excuse by [Morrison's] lawyer in the face of repeated criticism by the state trial judge, except for counsel's rather remarkable attempt to justify his conduct by noting that up until trial he had been told that the victim 'didn't want to go ahead with this case.' . . . Based on the unmitigated negligence of petitioner's trial counsel in failing to conduct any discovery, combined with the likelihood of success of a suppression motion had it been timely made, we find that petitioner was deprived of effective representation." 579 F. Supp., at 802–803.

The District Court then determined that, measured by the harmless-beyond-a-reasonable-doubt standard prescribed by *Baynes*, *supra*, respondent had been prejudiced by counsel's ineffectiveness and issued a conditional writ of habeas corpus ordering Morrison's release unless New Jersey should retry him.

Although the District Court did not address the relevance of *Stone*, *supra*, to respondent's Sixth Amendment ineffective-assistance-of-counsel claim, the Court of Appeals did. Relying on both the language of *Stone* and the different natures of Fourth and Sixth Amendment claims, the Court of

Appeals concluded that *Stone* should not be extended to bar federal habeas consideration of Sixth Amendment claims based on counsel's alleged failure competently to litigate Fourth Amendment claims. 752 F. 2d 918 (1985). Because *Strickland* had recently been decided by this Court, the Court of Appeals reviewed the District Court's determination of ineffective assistance under *Strickland*'s test. The Court of Appeals determined that respondent's trial counsel had been "grossly ineffective," 752 F. 2d, at 922, but vacated and remanded for the District Court to consider whether, under the standards set forth in *Strickland*, *supra*, respondent had been prejudiced by his attorney's incompetence.

Petitioners, the Attorney General of New Jersey and the Superintendent of Rahway State Prison, petitioned for certiorari. We granted their petition, 474 U. S. 815 (1985), and now affirm.

II

Petitioners urge that the Sixth Amendment veil be lifted from respondent's habeas petition to reveal what petitioners argue it really is—an attempt to litigate his defaulted Fourth Amendment claim. They argue that because respondent's claim is in fact, if not in form, a Fourth Amendment one, *Stone* directly controls here. Alternatively, petitioners maintain that even if Morrison's Sixth Amendment claim may legitimately be considered distinct from his defaulted Fourth Amendment claim, the rationale and purposes of *Stone* are fully applicable to ineffective-assistance claims where the principal allegation of inadequate representation is counsel's failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment. *Stone*, they argue, will be emasculated unless we extend its bar against federal habeas review to this sort of Sixth Amendment claim. Finally, petitioners maintain that consideration of defaulted Fourth Amendment claims in Sixth Amendment federal collateral proceedings would violate principles of comity and

federalism and would seriously interfere with the State's interest in the finality of its criminal convictions.[1]

A

We do not share petitioners' perception of the identity between respondent's Fourth and Sixth Amendment claims. While defense counsel's failure to make a timely suppression motion is the primary manifestation of incompetence and source of prejudice advanced by respondent, the two claims are nonetheless distinct, both in nature and in the requisite elements of proof.

Although it is frequently invoked in criminal trials, the Fourth Amendment is not a trial right; the protection it affords against governmental intrusion into one's home and affairs pertains to all citizens. The gravamen of a Fourth Amendment claim is that the complainant's legitimate expectation of privacy has been violated by an illegal search or seizure. See, *e. g.*, *Katz* v. *United States*, 389 U. S. 347 (1967). In order to prevail, the complainant need prove only that the search or seizure was illegal and that it violated his reasonable expectation of privacy in the item or place at issue. See, *e. g.*, *Rawlings* v. *Kentucky*, 448 U. S. 98, 104 (1980).

The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process. *E. g.*, *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963). The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. See, *e. g.*, *Strickland* v. *Washington*, 466 U. S., at 686; *United States* v. *Cronic*, 466 U. S. 648,

[1] Petitioners also argue that because respondent's Fourth Amendment claim was procedurally defaulted by his trial lawyer's failure to file a timely suppression motion, any Sixth Amendment claim based on this failure is similarly defaulted. We disagree. Respondent's Sixth Amendment claim is distinct from his Fourth Amendment claim and has never been defaulted.

655–657 (1984). In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness, *Strickland*, 466 U. S., at 688, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*, at 694. Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. Thus, while respondent's defaulted Fourth Amendment claim is one element of proof of his Sixth Amendment claim, the two claims have separate identities and reflect different constitutional values.

B

We also disagree with petitioners' contention that the reasoning and purposes of *Stone* are fully applicable to a Sixth Amendment claim which is based principally on defense counsel's failure to litigate a Fourth Amendment claim competently.

At issue in *Stone* was the proper scope of federal collateral protection of criminal defendants' right to have evidence, seized in violation of the Fourth Amendment, excluded at trial in state court. In determining that federal courts should withhold habeas review where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Court found it crucial that the remedy for Fourth Amendment violations provided by the exclusionary rule "is not a personal constitutional right." 428 U. S., at 486; see also *id.*, at 495, n. 37. The Court expressed the understanding that the rule "is not calculated to redress the injury to the privacy of the victim of the search or seizure," *id.*, at 486; instead, the Court explained, the exclusionary rule is predominately a "'judicially created'" structural rem-

edy "'designed to safeguard Fourth Amendment rights generally through its deterrent effect.'" *Ibid.* (quoting *United States* v. *Calandra*, 414 U. S. 338, 348 (1974)).

The Court further noted that "[a]s in the case of any remedial device, 'the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served,'" 428 U. S., at 486–487 (quoting *Calandra*, *supra*, at 348), and that the rule has not been extended to situations such as grand jury proceedings, 428 U. S., at 486–487, (citing *Calandra*, *supra*), and impeachment of a defendant who testifies broadly in his own behalf, 428 U. S., at 488 (citing *Walder* v. *United States*, 347 U. S. 62 (1954)), where the rule's costs would outweigh its utility as a deterrent to police misconduct. Applying this "pragmatic analysis," 428 U. S., at 488, to the question whether prisoners who have been afforded a full and fair opportunity in state court to invoke the exclusionary rule may raise their Fourth Amendment claims on federal habeas review, the Court determined that they may not. While accepting that the exclusionary rule's deterrent effect outweighs its costs when enforced at trial and on direct appeal, the Court found any "additional contribution . . . of the consideration of search-and-seizure claims . . . on collateral review," *id.*, at 493, to be too small in relation to the costs to justify federal habeas review. *Id.*, at 492–495.

In *Stone* the Court also made clear that its "decision . . . [was] *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally." *Id.*, at 495, n. 37 (emphasis in original). Rather, the Court simply "reaffirm[ed] that the exclusionary rule is a judicially created remedy rather than a personal constitutional right . . . and . . . emphasiz[ed] the minimal utility of the rule" in the context of federal collateral proceedings. *Ibid.* See also *Rose* v. *Mitchell*, 443 U. S. 545, 560 (1979) ("In *Stone* v. *Powell* . . . the Court carefully limited the reach of its opinion . . . to cases involving the judicially created exclu-

sionary rule, which had minimal utility when applied in a habeas corpus proceeding"); *Jackson* v. *Virginia*, 443 U. S. 307, 323 (1979) (declining to extend *Stone* to claims by state prisoners that, in violation of the constitutional standard set forth in *In re Winship*, 397 U. S. 358 (1970), the evidence in support of their convictions was not sufficient to permit a rational trier of fact to find guilt beyond a reasonable doubt).

In contrast to the habeas petitioner in *Stone*, who sought merely to avail himself of the exclusionary rule, Morrison seeks direct federal habeas protection of his personal right to effective assistance of counsel.

The right of an accused to counsel is beyond question a fundamental right. See, *e. g.*, *Gideon*, 372 U. S., at 344 ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours"). Without counsel the right to a fair trial itself would be of little consequence, see, *e. g.*, *Cronic*, *supra*, at 653; *United States* v. *Ash*, 413 U. S. 300, 307–308 (1973); *Argersinger* v. *Hamlin*, 407 U. S. 25, 31–32 (1972); *Gideon*, *supra*, at 343–345; *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938); *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932), for it is through counsel that the accused secures his other rights. *Maine* v. *Moulton*, 474 U. S. 159, 168–170 (1985); *Cronic*, *supra*, at 653; see also, Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have"). The constitutional guarantee of counsel, however, "cannot be satisfied by mere formal appointment," *Avery* v. *Alabama*, 308 U. S. 444, 446 (1940). "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland*, *supra*, at 685. In other words, the right to counsel is the right to effective assistance of counsel. *Evitts* v. *Lucey*, 469 U. S. 387, 395–396 (1985); *Strickland*, *supra*, at

686; *Cronic*, 466 U. S., at 654; *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980); *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970).[2]

Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance, cf. *Powell* v. *Alabama*, *supra*, at 69; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal. Were we to extend *Stone* and hold that criminal defendants may not raise ineffective-assistance claims that are based primarily on incompetent handling of Fourth Amendment issues on federal habeas, we would deny most defendants whose trial attorneys performed incompetently in this regard the opportunity to vindicate their right to effective trial counsel. We would deny all defendants whose appellate counsel performed inadequately with respect to Fourth Amendment issues the opportunity to protect their right to effective appellate counsel. See *Evitts*, *supra*. Thus, we cannot say, as the Court was able to say in *Stone*, that restriction of federal habeas review would not severely interfere with the protection of the constitutional right asserted by the habeas petitioner.[3]

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[2] As we held only last Term, the right to effective assistance of counsel is not confined to trial, but extends also to the first appeal as of right. *Evitts* v. *Lucey*, 469 U. S. 387 (1985).

[3] Moreover, the restriction on federal habeas relief established by *Stone* v. *Powell* was predicated on the existence at trial and on direct review of "an opportunity for full and fair litigation" of the constitutional claim ad-

Furthermore, while the Court may be free, under its analysis in *Stone*, to refuse for reasons of prudence and comity[4] to burden the State with the costs of the exclusionary rule in contexts where the Court believes the price of the rule to exceed its utility, the Constitution constrains our ability to allocate as we see fit the costs of ineffective assistance. The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel. See *Murray* v. *Carrier*, *post*, at 488 (where a "procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State"); *Cuyler*, *supra*, at 344 ("The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance"); see also *Evitts*, *supra*, at 396 ("The constitutional mandate is addressed to the action of the State").

We also reject the suggestion that criminal defendants should not be allowed to vindicate through federal habeas review their right to effective assistance of counsel where counsel's primary error is failure to make a timely request for the exclusion of illegally seized evidence—evidence which is "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." *Stone*, 428 U. S., at 490. While we have recognized that the "'premise of our adversary system of criminal justice . . . that partisan advocacy . . . will best promote the ultimate objective that the guilty be convicted and the innocent go

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vanced by the habeas petitioner. 428 U. S. 465, 494 (1976). In general, no comparable, meaningful opportunity exists for the full and fair litigation of a habeas petitioner's ineffective-assistance claims at trial and on direct review.

[4] The Court made clear in *Stone* that it rested its holding on prudential, rather than jurisdictional, grounds. *Id.*, at 495, n. 37 ("Our decision does not mean that the federal court lacks jurisdiction over . . . [a Fourth Amendment] claim, but only that the application of the [exclusionary] rule is limited").

free,'" *Evitts*, *supra*, at 394, quoting *Herring* v. *New York*, 422 U. S. 853, 862 (1975), underlies and gives meaning to the right to effective assistance, *Cronic*, *supra*, at 655–656, we have never intimated that the right to counsel is conditioned upon actual innocence. The constitutional rights of criminal defendants are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.[5] Furthermore, petitioners do not suggest that an ineffective-assistance claim asserted on direct review would fail for want of actual prejudice whenever counsel's primary error is failure to make a meritorious objection to the admission of reliable evidence the exclusion of which might have affected the outcome of the proceeding. We decline to hold that the scope of the right to effective assistance of counsel is altered in this manner simply because the right is asserted on federal habeas review rather than on direct review.

C

Stone's restriction on federal habeas review, petitioners warn, will be stripped of all practical effect unless we extend it to Sixth Amendment claims based principally on defense counsel's incompetent handling of Fourth Amendment issues. Petitioners predict that every Fourth Amendment claim that fails or is defaulted in state court will be fully litigated in federal habeas proceedings in Sixth Amendment guise and that, as a result, many state-court judgments will be disturbed.

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[5] As we observed in *Powell* v. *Alabama*, 287 U. S. 45 (1932), the layman defendant "requires the guiding hand of counsel at *every* step in the proceedings against him." *Id.*, at 69 (emphasis added). We noted:

"If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one." *Ibid.*

They seem to believe that a prisoner need only allege ineffective assistance, and if he has an underlying, meritorious Fourth Amendment claim, the writ will issue and the State will be obligated to retry him without the challenged evidence. Because it ignores the rigorous standard which *Strickland* erected for ineffective-assistance claims, petitioners' forecast is simply incorrect.

In order to establish ineffective representation, the defendant must prove both incompetence and prejudice.[6] 466 U. S., at 688. There is a strong presumption that counsel's performance falls within the "wide range of professional assistance," *id.*, at 689; the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. *Id.*, at 688–689. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential. *Id.*, at 689. The defendant shows that he was prejudiced by his attorney's ineffectiveness by demonstrating that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. See also, *id.*, at 695 (Where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt"). And, in determining the existence *vel non* of prejudice, the court "must consider the totality of the evidence before the judge or jury." *Ibid.*

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[6] We refer here only to cases in which the defendant alleges "actual" ineffective assistance rather than the few contexts where ineffective assistance is "presumed," such as where counsel is either totally absent or prevented from assisting the accused during a critical stage of the proceeding, see, *e. g.*, *United States* v. *Cronic*, 466 U. S. 648, 659, n. 25 (1984); *Strickland*, 466 U. S., at 692, and where counsel is burdened by an actual conflict of interest. *Ibid.*; *Cuyler* v. *Sullivan*, 446 U. S. 335, 345–350 (1980).

As is obvious, *Strickland*'s standard, although by no means insurmountable, is highly demanding. More importantly, it differs significantly from the elements of proof applicable to a straightforward Fourth Amendment claim. Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim like respondent's, a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial without the challenged evidence.[7]

D

In summary, we reject petitioners' argument that *Stone*'s restriction on federal habeas review of Fourth Amendment

[7] We have no reason to believe that defense attorneys will "sandbag"—that is, consciously default or poorly litigate their clients' Fourth Amendment claims in state court in the hope of gaining more favorable review of these claims in Sixth Amendment federal habeas proceedings. First, it is virtually inconceivable that an attorney would deliberately invite the judgment that his performance was constitutionally deficient in order to win federal collateral review for his client. Second, counsel's client has little, if anything, to gain and everything to lose through such a strategy. It should be remembered that the only incompetently litigated and defaulted Fourth Amendment claims that could lead to a reversal of the defendant's conviction on Sixth Amendment grounds are potentially outcome-determinative claims. No reasonable lawyer would forgo competent litigation of meritorious, possibly decisive claims on the remote chance that his deliberate dereliction might ultimately result in federal habeas review. Furthermore, when an attorney chooses to default a Fourth Amendment claim, he also loses the opportunity to obtain direct review under the harmless-error standard of *Chapman* v. *California*, 386 U. S. 18 (1967), which requires the State to prove that the defendant was not prejudiced by the error. By defaulting, counsel shifts the burden to the defendant to prove that there exists a reasonable probability that, absent his attorney's incompetence, he would not have been convicted. Cf. Comment, Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee, 50 U. Chi. L. Rev. 1380, 1428, n. 223 (1983).

claims should be extended to Sixth Amendment ineffective-assistance-of-counsel claims which are founded primarily on incompetent representation with respect to a Fourth Amendment issue. Where a State obtains a criminal conviction in a trial in which the accused is deprived of the effective assistance of counsel, the "State . . . unconstitutionally deprives the defendant of his liberty." *Cuyler*, 446 U. S., at 343. The defendant is thus "in custody in violation of the Constitution," 28 U. S. C. § 2254(a), and federal courts have habeas jurisdiction over his claim. We hold that federal courts may grant habeas relief in appropriate cases, regardless of the nature of the underlying attorney error.

III

Petitioners also argue that respondent has not satisfied either the performance or the prejudice prong of the test for ineffective assistance of counsel set forth in *Strickland*. We address each component of that test in turn.

A

With respect to the performance component of the *Strickland* test, petitioners contend that Morrison has not overcome the strong presumption of attorney competence established by *Strickland*. While acknowledging that this Court has said that a single, serious error may support a claim of ineffective assistance of counsel, Brief for Petitioners 33, n. 16 (citing *Cronic*, 466 U. S., at 657, n. 20),[8] petitioners argue that the mere failure to file a timely suppression motion alone, does not constitute a *per se* Sixth Amendment violation. They maintain that the record "amply reflects that trial counsel crafted a sound trial strategy" and that, "[v]iewed in its entirety, counsel's pretrial investigation,

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[8] See also *Smith* v. *Murray*, *post*, at 535; *Murray* v. *Carrier*, *post*, at 488.

preparation and trial performance were professionally reasonable." Brief for Petitioners 33 (footnotes and citations omitted). While we agree with petitioners' view that the failure to file a suppression motion does not constitute *per se* ineffective assistance of counsel, we disagree with petitioners' assessment of counsel's performance.

In *Strickland* we explained that "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." 466 U. S., at 685 (quoting *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 275, 276 (1942)). "Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U. S., at 688. Counsel's competence, however, is presumed, *id.*, at 689, and the defendant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. *Id.*, at 688–689. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *Id.*, at 689. In making the competency determination, the court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.*, at 690. Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, we noted that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, at 691. But, we observed, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Ibid.*

The trial record in this case clearly reveals that Morrison's attorney failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence. Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery. Counsel's failure to request discovery, again, was not based on "strategy," but on counsel's mistaken beliefs that, the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned.

Viewing counsel's failure to conduct any discovery from his perspective at the time he decided to forgo that stage of pretrial preparation and applying a "heavy measure of deference," *ibid.*, to his judgment, we find counsel's decision unreasonable, that is, contrary to prevailing professional norms. The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law—or a weak attempt to shift blame for inadequate preparation. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Ibid.* Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pretrial preparation puts at risk both the defendant's right to an "'ample opportunity to meet the case of the prosecution,'" *id.*, at 685 (quoting *Adams*, *supra*, at 275) and the reliability of the adversarial testing process. See 466 U. S., at 688.

Petitioners attempt to minimize the seriousness of counsel's errors by asserting that the State's case turned far more on the credibility of witnesses than on the bedsheet and related testimony. Consequently, they urge, defense counsel's vigorous cross-examination, attempts to discredit witnesses, and effort to establish a different version of the facts

lift counsel's performance back into the realm of professional acceptability.

Strickland requires a reviewing court to "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*, at 690. It will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the "identified acts or omissions" overcome the presumption that counsel rendered reasonable professional assistance. Since "[t]here are countless ways to provide effective assistance in any given case," *id.*, at 689, unless consideration is given to counsel's overall performance, before and at trial, it will be "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Ibid.*

In this case, however, we deal with a total failure to conduct pretrial discovery, and one as to which counsel offered only implausible explanations. Counsel's performance at trial, while generally creditable enough, suggests no better explanation for this apparent and pervasive failure to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, at 691. Under these circumstances, although the failure of the District Court and the Court of Appeals to examine counsel's overall performance was inadvisable, we think this omission did not affect the soundness of the conclusion both courts reached—that counsel's performance fell below the level of reasonable professional assistance in the respects alleged.

Moreover, petitioners' analysis is flawed, however, by their use of hindsight to evaluate the relative importance of various components of the State's case. See, *id.*, at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged con-

duct, and to evaluate the conduct from counsel's perspective at the time"). At the time Morrison's lawyer decided not to request any discovery, he did not—and, because he did not ask, could not—know what the State's case would be. While the relative importance of witness credibility vis-à-vis the bedsheet and related expert testimony is pertinent to the determination whether respondent was prejudiced by his attorney's incompetence, it sheds no light on the reasonableness of counsel's decision not to request any discovery. We therefore agree with the District Court and the Court of Appeals that the assistance rendered respondent by his trial counsel was constitutionally deficient.

B

1

Petitioners also argue that respondent suffered no prejudice from his attorney's failure to make a timely suppression motion and that the Third Circuit erred in remanding the case to the District Court for a determination of prejudice under *Strickland*'s standard. The essence of petitioners' argument is that, at a post-trial hearing on respondent's motion for bail pending appeal, the same judge who presided at respondent's trial made a finding of historical fact, which is entitled to a presumption of correctness under 28 U. S. C. § 2254(d). If that finding were presumed correct, petitioners contend that it would be dispositive of the prejudice issue—that is, no court could find that there exists "a reasonable probability that, absent [Morrison's attorney's] errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U. S., at 695. Thus, petitioners conclude, no ground for a remand exists.

In New Jersey, bail after conviction is appropriate where a substantial issue for review exists and where the defendant poses no threat to the community. N. J. Ct. Rule 2:9–4. At Morrison's bail hearing, the public defender representing him informed the judge that because he had not read the trial

transcript and was not doing the appeal, he was not entirely sure on what grounds Morrison would appeal. Tr. of Motion for Bail Pending Appeal 7. He did, however, argue that the trial court had committed two legal errors that could present substantial issues for appellate review. Specifically, counsel contended that the court erred in refusing to entertain the midtrial motion to suppress the sheet and that respondent may have been prejudiced by the court's awareness of another pending indictment.

With respect to the court's decision to admit the sheet, Morrison's attorney presented what is most accurately characterized as an abuse-of-discretion argument. He suggested that because trial counsel had been surprised by the introduction of the sheet, the court should have waived the pretrial filing requirement for suppression motions and should have permitted the midtrial motion. *Id.*, at 5. The judge responded to this argument by noting:

> "The matter of the sheet and the tests that resulted therefrom obviously were important, they were not the most important phases of this case by any means.
>
> "Obviously, the most important phases of the case were direct testimony from the victim herself as well as from testimony of witnesses, police, medical examinations, and testimony from the defense, testimony by the defendant. The sheet was just one small phase in this whole case. I do not think that it is such a substantial issue for review by the Appellate Division which would cause or be likely to cause a reversal." *Id.*, at 11.

Petitioners direct our attention to the court's statement that "[t]he sheet was just one small phase in this whole case." *Ibid.* While acknowledging this Court's explanation in *Strickland* that both the performance and the prejudice components of the ineffectiveness test are mixed questions of fact and law and that therefore a state court's ultimate conclusions regarding competence and prejudice are not findings of fact binding on the federal court to the extent stated by

§ 2254(d), see *Strickland*, 466 U. S., at 698, petitioners maintain that this statement constitutes a subsidiary finding of historical fact, entitled to § 2254(d)'s presumption of correctness. See *ibid.* Further, petitioners construe the judge's remark to be a finding that even if the sheet had been excluded, he would have found respondent guilty. So construed and accorded the presumption of correctness, this finding of fact, they argue, prevents a federal court from determining that Morrison was prejudiced by his attorney's incompetence.

We do not agree with petitioners that the statement made by the judge at respondent's bail hearing constitutes a finding of fact which is subject to § 2254(d) deference in this case. Section 2254(d)(1) provides that "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct" unless "the merits of the factual dispute were not resolved in the State court hearing."[9] The issue respondent places before the federal habeas courts is substantially different from the issue he presented to the judge in the bail hearing. The question before the federal courts is whether a reasonable probability exists that the trial judge would have had a reasonable doubt concerning respondent's guilt if the sheet and related testimony had been excluded. By contrast, the state court was called upon simply to decide whether the argument that the court had abused its discretion in refusing to entertain respondent's suppression motion midtrial raised a substantial issue for appeal on which Morrison was likely to succeed.

Not only was the judge not asked to answer the question presently before the federal courts, he did not answer it. He stated only that while the sheet was an important aspect of

[9] Subsections (2)–(8) of 28 U. S. C. § 2254(d) establish other exceptions to the general rule that determinations made by a state court after a hearing on the merits of a factual issue are entitled to a presumption of correctness.

the case, it was not the most important aspect. We do not find his remark tantamount to a declaration that he would have found respondent guilty even if the sheet and related expert testimony had not been admitted. If, after saying what he did, the judge had been asked whether he would have had a reasonable doubt concerning Morrison's guilt had the sheet and related testimony been excluded, he could well have answered affirmatively without contradicting his earlier comment. Although the sheet may not have been as important as other components of the State's case, it may have tipped the balance. We simply do not know.

Because it cannot fairly be said that the "merits of the factual dispute," § 2254(d)(1), regarding the existence of prejudice were resolved in the bail hearing, we conclude that the statements of the judge regarding the relative importance of the sheet are not findings of fact subject to § 2254(d) deference.[10]

2

Respondent also criticizes the Court of Appeals' decision to remand for redetermination of prejudice. He argues that the record is sufficiently complete to enable this Court to apply *Strickland*'s prejudice prong directly to the facts of his case and urges that we do so.

We decline respondent's invitation. While the existing record proved adequate for our application of *Strickland*'s competency standard, it is incomplete with respect to prejudice. No evidentiary hearing has ever been held on the merits of respondent's Fourth Amendment claim. Because the State has not conceded the illegality of the search and seizure, Tr. of Oral Arg. 11–12, it is entitled to an opportunity to establish that Officer Most's search came within one of the exceptions we have recognized to the Fourth Amendment's

[10] We do not mean to suggest that the comment made by the judge at the bail hearing has absolutely no relevance to the prejudice inquiry; we hold only that his remark is not a finding of fact subject to § 2254(d)'s presumption of correctness.

prohibition against warrantless searches. Even if not, respondent may be unable to show that absent the evidence concerning the bedsheet there is a reasonable probability that the trial judge would have had a reasonable doubt as to his guilt. If respondent could not make this showing, a matter on which we express no view, there would of course be no need to hold an evidentiary hearing on his Fourth Amendment claim.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in the judgment.

I agree that *Stone* v. *Powell*, 428 U. S. 465 (1976), does not bar consideration of respondent's ineffective-assistance-of-counsel claim on federal habeas corpus. That conclusion flows logically from *Stone* and from *Strickland* v. *Washington*, 466 U. S. 668 (1984). The more difficult question is whether the admission of illegally seized but reliable evidence can ever constitute "prejudice" under *Strickland*. There is a strong argument that it cannot. But that argument has neither been raised by the parties nor discussed by the various courts involved in this case. Consequently, the proper course is to reject petitioners' *Stone* v. *Powell* argument and go no further. Though the Court appears to take this course, it employs unnecessarily broad language that may suggest that we have considered and resolved the broader *Strickland* issue in this case. *E. g.*, *ante*, at 379–380. I write separately because that suggestion is mistaken, and also to express my view of the relationship between *Stone* and the Sixth Amendment right to the effective assistance of counsel.

I

Respondent's ineffective-assistance claim is uncomplicated. Respondent argues that his trial counsel incompetently failed to conduct any pretrial discovery. Had counsel conducted discovery, he would have known that the police had seized a

bedsheet from respondent's apartment without a warrant. The bedsheet contained hair samples matching hair of both respondent and the rape victim. The sheet also contained semen stains matching those found in the victim's underpants. The State introduced the bedsheet and accompanying expert analysis at trial, and the trial judge denied respondent's belated motion to suppress on the ground that it was untimely. Respondent contends that the sheet would have been excluded on Fourth Amendment grounds had the suppression motion been timely filed. Thus, respondent argues, counsel's failure to conduct discovery led to the admission of evidence that was both damning and excludible.

Petitioners, the Attorney General of New Jersey and the Superintendent of Rahway State Prison, argue that because this claim depends on a violation of the Fourth Amendment, the claim cannot be heard by a federal court on habeas corpus. Petitioners' argument rests on *Stone* v. *Powell*, *supra*, in which we held that Fourth Amendment claims are not cognizable on federal habeas corpus as long as the State provided a full and fair opportunity to litigate those claims in state court.

The Court properly rejects petitioners' argument. *Stone*'s holding derives from two propositions, neither of which applies to a claim of ineffective assistance of counsel. First, we reasoned in *Stone* that the exclusionary rule does not exist to remedy any wrong committed against the defendant, but rather to deter violations of the Fourth Amendment by law enforcement personnel. 428 U. S., at 486–489. Second, we concluded that collateral review of Fourth Amendment claims would add little to the exclusionary rule's deterrent value, but would entail significant costs to federal-state relations and particularly to the public interest in convicting and punishing the guilty. *Id.*, at 493–495.

Ineffective-assistance claims stand on a different footing. As *Strickland* makes clear, the right to effective assistance of counsel is personal to the defendant, and is explicitly tied to

the defendant's right to a fundamentally fair trial—a trial in which the determination of guilt or innocence is "just" and "reliable." *Strickland, supra,* at 685–686, 696. See also *United States* v. *Cronic,* 466 U. S. 648, 658 (1984) ("[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial"). A criminal defendant who obtains relief under *Strickland* does not receive a windfall; on the contrary, reversal of such a defendant's conviction is necessary to ensure a fair and just result. *Strickland, supra,* at 685–687. For this reason, *Strickland* explicitly stated that "[t]he principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial." 466 U. S., at 697. *Strickland* thus leaves no room for an argument that *Stone* indirectly bars some ineffective-assistance claims in federal habeas corpus proceedings.

Nor is it possible to conclude that, since the only claimed prejudice is the admission of the illegally seized bedsheet, respondent's claim actually is a Fourth Amendment claim barred by *Stone* directly. As *Strickland* teaches, the right to effective assistance of counsel ensures that defendants have a fair opportunity to contest the charges against them. A defendant has a valid ineffective-assistance claim whenever he has been denied that opportunity, regardless of the law on which counsel's error is based. It follows that respondent's claim must be judged as a Sixth Amendment claim, according to the standards set forth in *Strickland,* and not as a Fourth Amendment claim governed by *Stone.*[1]

[1] For the same reason, petitioners' argument that respondent's claim is barred by *Wainwright* v. *Sykes,* 433 U. S. 72 (1977), lacks merit. The gist of this argument is that respondent failed timely to raise his Fourth Amendment claim on direct appeal, and thereby forfeited the right to rely on any Fourth Amendment violation on collateral review. The argument ignores the fact that respondent's claim is not that evidence was admitted at trial in violation of the Fourth Amendment's exclusionary rule, but rather that his counsel's failure to so argue, together with counsel's failure

II

Applying *Strickland*, respondent must show both that his counsel fell below basic standards of competence and that he was sufficiently prejudiced by the resulting errors. *Strickland*, 466 U. S., at 687. Petitioners contend that trial counsel's errors were not egregious enough to satisfy *Strickland*'s performance prong. In addition, they argue that the trial judge's comments at a bail hearing constitute a factual finding that those errors were not prejudicial. The Court correctly finds that both arguments are mistaken. This holding disposes of the only claims petitioners make with respect to the legal standards for ineffective-assistance claims.

There is a far more serious argument that petitioners do *not* make, and that no court in this case has addressed. Respondent's sole claim of prejudice stems from the admission of evidence that is concededly reliable although arguably inadmissible under *Mapp* v. *Ohio*, 367 U. S. 643 (1961), and its progeny. The parties and the courts below have assumed that if the evidence in question was in fact inadmissible, and if there is a "reasonable probability" that its use at trial affected the verdict, *Strickland*'s prejudice prong is satisfied. Cf. *Strickland*, 466 U. S., at 695. In my view, that assumption is not justified. In *Strickland* we emphasized that ineffective-assistance claims were designed to protect defendants against fundamental unfairness. "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Id.*, at 685. See also *id.*, at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a

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to conduct pretrial discovery, deprived him of his Sixth Amendment right to effective assistance of counsel. The two claims are distinct.

just result"). Accordingly, we cautioned that the "reasonable probability" test should not be applied too mechanically:

> "A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.*" *Id.*, at 696 (emphasis added).

This reasoning strongly suggests that only errors that call into question the basic justice of the defendant's conviction suffice to establish prejudice under *Strickland*. The question, in sum, must be whether the particular harm suffered by the defendant due to counsel's incompetence rendered the defendant's trial fundamentally unfair. See *id.*, at 687 (prejudice "requires [a] showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable").[2]

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[2] Cf. *United States* v. *Cronic*, 466 U. S. 648 (1984). In *Cronic*, we held that prejudice may be presumed in some kinds of extreme circumstances, as when counsel is given no time to prepare a defense. See *id.*, at 660–661 (discussing *Powell* v. *Alabama*, 287 U. S. 45 (1932)). In such circumstances, the defendant is in effect deprived of counsel altogether, and thereby deprived of any meaningful opportunity to subject the State's evidence to adversarial testing. Prejudice is presumed for the same reason as it is presumed under *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). See *Chapman* v. *California*, 386 U. S. 18, 23, n. 8 (1967) (recognizing that denial of counsel at trial could never be harmless error).

As many of our cases indicate, the admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict. We have held repeatedly that such evidence ordinarily is excluded only for deterrence reasons that have no relation to the fairness of the defendant's trial. *United States* v. *Leon*, 468 U. S. 897, 906 (1984); *Stone* v. *Powell*, 428 U. S., at 486–488; *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). Indeed, it has long been clear that exclusion of illegally seized but wholly reliable evidence renders verdicts *less* fair and just, because it "deflects the truthfinding process and often frees the guilty." *Stone* v. *Powell*, 428 U. S., at 490. See also *id.*, at 540 (WHITE, J., dissenting) (noting that often "the only consequence" of exclusion "is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted"). Thus, the harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall.[3] Because the fundamental fairness of the trial is not affected, our reasoning in *Strickland* strongly suggests that such harm does not amount to prejudicial ineffective assistance of counsel under the Sixth Amendment.

Common sense reinforces this conclusion. As we emphasized only last Term, and as the Court recognizes again today, *ante*, at 379–380, "'[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote *the ultimate objective that the guilty be convicted and the innocent go free.*'" *Evitts* v. *Lucey*, 469 U. S. 387, 394 (1985) (emphasis added), quoting *Herring* v. *New York*, 422 U. S. 853, 862 (1975). The right

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[3] See Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 389 (1964) ("Granted that so many criminals must go free as will deter the constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest"), quoted in *Stone* v. *Powell*, 428 U. S., at 487, n. 24.

to effective assistance of counsel flows logically from this premise. But it would shake that right loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall. In this case, for example, the bedsheet may have provided critical evidence of respondent's guilt, evidence whose relevance and reliability cannot seriously be questioned. The admission of the bedsheet thus harmed respondent only in the sense that it helped the factfinder make a well-informed determination of respondent's guilt or innocence. In my view, nothing in *Strickland* compels us to conclude that such an "injury" establishes prejudice for purposes of respondent's ineffective assistance claim.

I nevertheless do not vote to reverse the Court of Appeals, because neither the parties nor the courts below have considered the question I raise here. Nor do the questions presented in the petition for certiorari encompass this aspect of *Strickland*'s application.[4] I raise the issue only because the Court's rhetoric might mistakenly be read to answer a question that has not been asked. *E. g.*, *ante*, at 380 ("[W]e decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt"). Courts and litigants should not be deceived by such pronouncements. Notwithstanding its broad language, the Court explicitly recognizes that the general applicability of *Strickland* in this context has not been discussed by the parties, *ante*, at 380, and limits itself to holding that the right to effective assistance of counsel is equally enforceable on direct

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[4] The questions presented ask (1) "[w]hether *Stone* v. *Powell* bars a claim of ineffective assistance of counsel on habeas corpus" where the basis for the claim is a failure to make a Fourth Amendment suppression motion at trial; (2) whether such a claim is barred by *Wainwright* v. *Sykes* where the Fourth Amendment issue was not preserved at trial; and (3) whether the Court of Appeals gave sufficient weight to certain supposed factual findings of the state trial judge. Pet. for Cert. i.

appeal and on federal collateral review. *Ante*, at 382–383. Thus, the question whether *Strickland* prejudice encompasses the admission of reliable but illegally obtained evidence remains an open one that can be considered on remand in this case.

Because I agree that *Stone* v. *Powell* does not govern this case, I concur in the judgment. I leave the application of *Strickland*'s prejudice prong to claims such as this one to another day.

FORD v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-5542. Argued April 22, 1986—Decided June 26, 1986

In 1974, petitioner was convicted of murder in a Florida state court and sentenced to death. There is no suggestion that he was incompetent at the time of the offense, at trial, or at sentencing. But subsequently he began to manifest changes in behavior, indicating a mental disorder. This led to extensive separate examinations by two psychiatrists at his counsel's request, one of whom concluded that petitioner was not competent to suffer execution. Counsel then invoked a Florida statute governing the determination of a condemned prisoner's competency. Following the statutory procedures, the Governor appointed three psychiatrists, who together interviewed petitioner for 30 minutes in the presence of eight other people, including petitioner's counsel, the State's attorneys, and correctional officials. The Governor's order directed that the attorneys should not participate in the examination in any adversarial manner. Each psychiatrist filed a separate report with the Governor, to whom the statute delegates the final decision. The reports reached conflicting diagnoses but were in accord on the question of petitioner's competency. Petitioner's counsel then attempted to submit to the Governor other written materials, including the reports of the two psychiatrists who had previously examined petitioner, but the Governor's office refused to inform counsel whether the submission would be considered. The Governor subsequently signed a death warrant without explanation or statement. After unsuccessfully seeking a hearing in state court to determine anew petitioner's competency, his counsel filed a habeas corpus proceeding in Federal District Court, seeking an evidentiary hearing, but the court denied the petition without a hearing, and the Court of Appeals affirmed.

Held: The judgment is reversed, and the case is remanded.

752 F. 2d 526, reversed and remanded.

JUSTICE MARSHALL delivered the opinion of the Court with respect to Parts I and II, concluding that the Eighth Amendment prohibits the State from inflicting the death penalty upon a prisoner who is insane. The reasons at common law for not condoning the execution of the insane—that such an execution has questionable retributive value, presents no example to others and thus has no deterrence value, and

simply offends humanity—have no less logical, moral, and practical force at present. Whether the aim is to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment. Pp. 405–410.

JUSTICE MARSHALL, joined by JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded in Parts III, IV, and V, that Florida's statutory procedures for determining a condemned prisoner's sanity provide inadequate assurance of accuracy to satisfy the requirement of *Townsend* v. *Sain*, 372 U. S. 293, and that, having been denied a factfinding procedure "adequate to afford a full and fair hearing" on the critical issue as required by 28 U. S. C. § 2254(d)(2), petitioner is entitled to a *de novo* evidentiary hearing in the District Court on the question of his competence to be executed. Pp. 410–418.

(a) No state court has issued any determination to which the presumption of correctness under § 2254(d) could attach, and indeed no state court played any role in the rejection of petitioner's claim of insanity. P. 410.

(b) The first defect in Florida's procedures is the failure to include the prisoner in the truth-seeking process. Any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate. A related flaw in the procedures is the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions, thus creating a significant possibility that the ultimate decision made in reliance on those experts will be distorted. And perhaps the most striking defect in the procedures is the placement of the ultimate decision wholly within the Executive Branch. The Governor, who appoints the experts and ultimately decides whether the State will be able to carry out the death sentence and whose subordinates have been responsible for initiating every stage of the prosecution, cannot be said to have the neutrality that is necessary for reliability in the factfinding proceedings. Pp. 413–416.

JUSTICE POWELL concluded that the test for whether a prisoner is insane for Eighth Amendment purposes is whether the prisoner is aware of his impending execution and of the reason for it. He further concluded that petitioner's claim falls within this definition, and that because petitioner's claim was not adjudicated fairly within the meaning of due process or of 28 U. S. C. § 2254(d), petitioner is entitled to have his claim adjudicated on remand by the District Court. Finally, he concluded that the States could satisfy due process by providing an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence. Beyond these

requirements, the States retain substantial discretion to create appropriate procedures. Pp. 419–427.

MARSHALL, J., announced the judgment of the Court and delivered an opinion of the Court with respect to Parts I and II, in which BRENNAN, BLACKMUN, POWELL, and STEVENS, JJ., joined, and an opinion with respect to Parts III, IV, and V, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 418. O'CONNOR, J., filed an opinion concurring in the result in part and dissenting in part, in which WHITE, J., joined, *post*, p. 427. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 431.

Richard H. Burr III argued the cause for petitioner. With him on the briefs were *Richard L. Jorandby*, *Craig S. Barnard*, and *Laurin A. Wollan, Jr.*

Joy B. Shearer, Assistant Attorney General of Florida, argued the cause for respondent. With her on the brief was *Jim Smith*, Attorney General.*

JUSTICE MARSHALL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II and an opinion with respect to Parts III, IV, and V, in which JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join.

For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does.

I

Alvin Bernard Ford was convicted of murder in 1974 and sentenced to death. There is no suggestion that he was incompetent at the time of his offense, at trial, or at sentenc-

*Briefs of *amici curiae* urging reversal were filed for the American Psychiatric Association by *Joel I. Klein* and *Robert D. Luskin;* for the American Psychological Association et al. by *Donald N. Bersoff* and *Bruce J. Ennis, Jr.;* and for the Capital Collateral Representative et al. by *Sanford L. Bohrer.*

ing. In early 1982, however, Ford began to manifest gradual changes in behavior. They began as an occasional peculiar idea or confused perception, but became more serious over time. After reading in the newspaper that the Ku Klux Klan had held a rally in nearby Jacksonville, Florida, Ford developed an obsession focused upon the Klan. His letters to various people reveal endless brooding about his "Klan work," and an increasingly pervasive delusion that he had become the target of a complex conspiracy, involving the Klan and assorted others, designed to force him to commit suicide. He believed that the prison guards, part of the conspiracy, had been killing people and putting the bodies in the concrete enclosures used for beds. Later, he began to believe that his women relatives were being tortured and sexually abused somewhere in the prison. This notion developed into a delusion that the people who were tormenting him at the prison had taken members of Ford's family hostage. The hostage delusion took firm hold and expanded, until Ford was reporting that 135 of his friends and family were being held hostage in the prison, and that only he could help them. By "day 287" of the "hostage crisis," the list of hostages had expanded to include "senators, Senator Kennedy, and many other leaders." App. 53. In a letter to the Attorney General of Florida, written in 1983, Ford appeared to assume authority for ending the "crisis," claiming to have fired a number of prison officials. He began to refer to himself as "Pope John Paul, III," and reported having appointed nine new justices to the Florida Supreme Court. *Id.*, at 59.

Counsel for Ford asked a psychiatrist who had examined Ford earlier, Dr. Jamal Amin, to continue seeing him and to recommend appropriate treatment. On the basis of roughly 14 months of evaluation, taped conversations between Ford and his attorneys, letters written by Ford, interviews with Ford's acquaintances, and various medical records, Dr. Amin concluded in 1983 that Ford suffered from "a severe, uncontrollable, mental disease which closely resembles 'Paranoid

Schizophrenia With Suicide Potential'"—a "major mental disorder . . . severe enough to substantially affect Mr. Ford's present ability to assist in the defense of his life." *Id.*, at 91.

Ford subsequently refused to see Dr. Amin again, believing him to have joined the conspiracy against him, and Ford's counsel sought assistance from Dr. Harold Kaufman, who interviewed Ford in November 1983. Ford told Dr. Kaufman that "I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner would be executed." *Id.*, at 65. When asked if he would be executed, Ford replied: "I can't be executed because of the landmark case. I won. Ford v. State will prevent executions all over." *Id.*, at 66. These statements appeared amidst long streams of seemingly unrelated thoughts in rapid succession. Dr. Kaufman concluded that Ford had no understanding of why he was being executed, made no connection between the homicide of which he had been convicted and the death penalty, and indeed sincerely believed that he would not be executed because he owned the prisons and could control the Governor through mind waves. *Id.*, at 67. Dr. Kaufman found that there was "no reasonable possibility that Mr. Ford was dissembling, malingering or otherwise putting on a performance . . . ." *Id.*, at 65. The following month, in an interview with his attorneys, Ford regressed further into nearly complete incomprehensibility, speaking only in a code characterized by intermittent use of the word "one," making statements such as "Hands one, face one. Mafia one. God one, father one, Pope one. Pope one. Leader one." *Id.*, at 72.

Counsel for Ford invoked the procedures of Florida law governing the determination of competency of a condemned inmate, Fla. Stat. § 922.07 (1985). Following the procedures set forth in the statute, the Governor of Florida appointed a panel of three psychiatrists to evaluate whether, under § 922.07(2), Ford had "the mental capacity to understand the nature of the death penalty and the reasons why it was im-

posed upon him." At a single meeting, the three psychiatrists together interviewed Ford for approximately 30 minutes. Each doctor then filed a separate two- or three-page report with the Governor, to whom the statute delegates the final decision. One doctor concluded that Ford suffered from "psychosis with paranoia" but had "enough cognitive functioning to understand the nature and the effects of the death penalty, and why it is to be imposed on him." App. 103. Another found that, although Ford was "psychotic," he did "know fully what can happen to him." *Id.*, at 105–106. The third concluded that Ford had a "severe adaptational disorder," but did "comprehend his total situation including being sentenced to death, and all of the implications of that penalty." *Id.*, at 99–100. He believed that Ford's disorder, "although severe, seem[ed] contrived and recently learned." *Id.*, at 100. Thus, the interview produced three different diagnoses, but accord on the question of sanity as defined by state law.

The Governor's decision was announced on April 30, 1984, when, without explanation or statement, he signed a death warrant for Ford's execution. Ford's attorneys unsuccessfully sought a hearing in state court to determine anew Ford's competency to suffer execution. *Ford* v. *Wainwright*, 451 So. 2d 471, 475 (Fla. 1984). Counsel then filed a petition for habeas corpus in the United States District Court for the Southern District of Florida, seeking an evidentiary hearing on the question of Ford's sanity, proffering the conflicting findings of the Governor-appointed commission and subsequent challenges to their methods by other psychiatrists. The District Court denied the petition without a hearing. The Court of Appeals granted a certificate of probable cause and stayed Ford's execution, *Ford* v. *Strickland*, 734 F. 2d 538 (CA11 1984), and we rejected the State's effort to vacate the stay of execution. *Wainwright* v. *Ford*, 467 U. S. 1220 (1984). The Court of Appeals then addressed the merits of Ford's claim and a divided panel affirmed the Dis-

trict Court's denial of the writ. 752 F. 2d 526 (CA11 1985). This Court granted Ford's petition for certiorari in order to resolve the important issue whether the Eighth Amendment prohibits the execution of the insane and, if so, whether the District Court should have held a hearing on petitioner's claim. 474 U. S. 1019 (1985).

II

Since this Court last had occasion to consider the infliction of the death penalty upon the insane, our interpretations of the Due Process Clause and the Eighth Amendment have evolved substantially. In *Solesbee* v. *Balkom*, 339 U. S. 9 (1950), a condemned prisoner claimed a due process right to a judicial determination of his sanity, yet the Court did not consider the possible existence of a right under the Eighth Amendment, which had not yet been applied to the States. The sole question the Court addressed was whether Georgia's procedure for ascertaining sanity adequately effectuated that State's own policy of sparing the insane from execution. See also *Caritativo* v. *California*, 357 U. S. 549 (1958); *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561 (1953); *Phyle* v. *Duffy*, 334 U. S. 431 (1948); *Nobles* v. *Georgia*, 168 U. S. 398 (1897). Now that the Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty, the question of executing the insane takes on a wholly different complexion. The adequacy of the procedures chosen by a State to determine sanity, therefore, will depend upon an issue that this Court has never addressed: whether the Constitution places a substantive restriction on the State's power to take the life of an insane prisoner.

There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted. See *Solem* v. *Helm*, 463 U. S. 277, 285–286 (1983); *id.*, at 312–313 (BURGER, C. J., joined by

WHITE, REHNQUIST, and O'CONNOR, JJ., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 264 (1972) (BRENNAN, J., concurring); *McGautha* v. *California*, 402 U. S. 183, 226 (1971) (Black, J., concurring). "Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection . . . ." *Solem* v. *Helm*, *supra*, at 286.

Moreover, the Eighth Amendment's proscriptions are not limited to those practices condemned by the common law in 1789. See *Gregg* v. *Georgia*, 428 U. S. 153, 171 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). Not bound by the sparing humanitarian concessions of our forebears, the Amendment also recognizes the "evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion). In addition to considering the barbarous methods generally outlawed in the 18th century, therefore, this Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects. See *Coker* v. *Georgia*, 433 U. S. 584, 597 (1977) (plurality opinion).

A

We begin, then, with the common law. The bar against executing a prisoner who has lost his sanity bears impressive historical credentials; the practice consistently has been branded "savage and inhuman." 4 W. Blackstone, Commentaries *24–*25 (1769) (hereinafter Blackstone). Blackstone explained:

> "[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for

> it: because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." *Ibid.* (footnotes omitted).

Sir Edward Coke had earlier expressed the same view of the common law of England: "[B]y intendment of Law the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others." E. Coke, 3 Institute 6 (6th ed. 1680) (hereinafter Coke). Other recorders of the common law concurred. See 1 M. Hale, The History of the Pleas of the Crown 35 (1736) (hereinafter Hale); 1 W. Hawkins, A Treatise of the Pleas of the Crown 2 (7th ed. 1795) (hereinafter Hawkins); Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 HOW. St. Tr. 474, 477 (1685) (hereinafter Hawles).

As is often true of common-law principles, see O. Holmes, The Common Law 5 (1881), the reasons for the rule are less sure and less uniform than the rule itself. One explanation is that the execution of an insane person simply offends humanity, Coke 6; another, that it provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment. *Ibid.* Other commentators postulate religious underpinnings: that it is uncharitable to dispatch an offender "into another world, when he is not of a capacity to fit himself for it," Hawles 477. It is also said that execution serves no purpose in these cases because madness is its own punishment: *furiosus*

solo furore punitur. Blackstone *395. More recent commentators opine that the community's quest for "retribution"—the need to offset a criminal act by a punishment of equivalent "moral quality"—is not served by execution of an insane person, which has a "lesser value" than that of the crime for which he is to be punished. Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. Rev. 381, 387 (1962). Unanimity of rationale, therefore, we do not find. "But whatever the reason of the law is, it is plain the law is so." Hawles 477. We know of virtually no authority condoning the execution of the insane at English common law.[1]

Further indications suggest that this solid proscription was carried to America, where it was early observed that "the judge is bound" to stay the execution upon insanity of the prisoner. 1 J. Chitty, A Practical Treatise on the Criminal Law *761 (5th Am. ed. 1847); see 1 F. Wharton, A Treatise on Criminal Law § 59 (8th ed. 1880).

B

This ancestral legacy has not outlived its time. Today, no State in the Union permits the execution of the insane.[2] It

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[1] At one point, Henry VIII enacted a law requiring that if a man convicted of treason fell mad, he should nevertheless be executed. 33 Hen. VIII, ch. 20. This law was uniformly condemned. See Blackstone *25; 1 Hale 35; 1 Hawkins 2. The "cruel and inhumane Law lived not long, but was repealed, for in that point also it was against the Common Law . . . ." Coke 6.

[2] Of the 50 States, 41 have a death penalty or statutes governing execution procedures. Of those, 26 have statutes explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence. See Ala. Code § 15-16-23 (1982); Ariz. Rev. Stat. Ann. § 13-4023 (1978); Ark. Stat. Ann. § 43-2622 (1977); Cal. Penal Code Ann. § 3703 (West 1982); Colo. Rev. Stat. § 16-8-112(2) (Supp. 1985); Conn. Gen. Stat. § 54-101 (1985); Fla. Stat. § 922.07 (1985 and Supp. 1986); Ga. Code Ann. § 17-10-62 (1982); Ill. Rev. Stat., ch. 38, ¶ 1005-2-3 (1982); Kan. Stat. Ann. § 22-4006(3) (1981); Ky. Rev. Stat § 431.240(2) (1985); Md. Ann. Code, Art. 27, § 75(c) (Supp. 1985); Miss. Code Ann. § 99-19-57(2) (Supp. 1985);

is clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England. The various reasons put forth in support of the common-law restriction have no less logical, moral, and practical force than they did when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. See Note, The Eighth Amendment and the Execution of the Presently Incompetent, 32 Stan. L. Rev. 765, 777, n. 58 (1980). Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment

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Mo. Rev. Stat § 552.060 (1978); Mont. Code Ann. § 46-14-221 (1984); Neb. Rev. Stat. § 29-2537 (1979); Nev. Rev. Stat. § 176.445 (1985); N. J. Stat. Ann. § 30:4-82 (West 1981); N. M. Stat. Ann. § 31-14-6 (1984); N. Y. Correc. Law § 656 (McKinney Supp. 1986); N. C. Gen. Stat. § 15A-1001 (1983); Ohio Rev. Code Ann. § 2949.29 (1982); Okla. Stat., Tit. 22, § 1008 (1986); S. D. Codified Laws § 23A-27A-24 (1979); Utah Code Ann. § 77-19-13 (1982); Wyo. Stat. § 7-13-901 (Supp. 1986). Others have adopted the common-law rule by judicial decision. See *State* v. *Allen*, 204 La. 513, 515, 15 So. 2d 870, 871 (1943); *Commonwealth* v. *Moon*, 383 Pa. 18, 22-23, 117 A. 2d 96, 99 (1955); *Jordan* v. *State*, 124 Tenn. 81, 89-90 135 S. W. 327, 329 (1911); *State* v. *Davis*, 6 Wash. 2d 696, 717, 108 P. 2d 641, 651 (1940). Still others have more discretionary statutory procedures providing for the suspension of sentence and transfer to mental facilities for convicted prisoners who have developed mental illness. See Del. Code Ann., Tit. 11, § 406 (1979); Ind. Code § 11-10-4-2 (1982); Mass. Gen. Laws, ch. 279, § 62 (1984); R. I. Gen. Laws § 40.1-5.3-7 (1984); S. C. Code § 44-23-220 (1985); Tex. Code Crim. Proc. Ann., Art. 46.01 (1979); Va. Code § 19.2-177 (1983). The remaining four States having a death penalty have no specific procedure governing insanity, but have not repudiated the common-law rule.

prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.

III

The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane. Petitioner's allegation of insanity in his habeas corpus petition, if proved, therefore, would bar his execution. The question before us is whether the District Court was under an obligation to hold an evidentiary hearing on the question of Ford's sanity. In answering that question, we bear in mind that, while the underlying social values encompassed by the Eighth Amendment are rooted in historical traditions, the manner in which our judicial system protects those values is purely a matter of contemporary law. Once a substantive right or restriction is recognized in the Constitution, therefore, its enforcement is in no way confined to the rudimentary process deemed adequate in ages past.

A

In a habeas corpus proceeding, "a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." *Townsend* v. *Sain*, 372 U. S. 293, 312–313 (1963). The habeas corpus statute, following this Court's decision in *Townsend*, provides that, in general, "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . , shall be presumed to be correct," and an evidentiary hearing not required. 28 U. S. C. § 2254(d). In this case, it is clear that no state court has issued any determination to which that presumption of correctness could be said to attach; indeed, no court played any role in the rejection of petitioner's claim of insanity. Thus, quite simply,

Townsend and § 2254 require the District Court to grant a hearing *de novo* on that question.

But our examination does not stop there. For even when a state court has rendered judgment, a federal court is obliged to hold an evidentiary hearing on habeas corpus if, among other factors, "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing," § 2254(d)(2); or "the material facts were not adequately developed at the State court hearing," § 2254(d)(3); or "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding." § 2254(d)(6). If federal factfinding is to be avoided, then, in addition to providing a court judgment on the constitutional question, the State must also ensure that its procedures are adequate for the purpose of finding the facts.

B

The adequacy of a state-court procedure under *Townsend* is largely a function of the circumstances and the interests at stake. In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. See, *e. g.*, *Spaziano* v. *Florida*, 468 U. S. 447, 456 (1984). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different. See *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).

Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any

other aspect of a capital proceeding. Indeed, a particularly acute need for guarding against error inheres in a determination that "in the present state of the mental sciences is at best a hazardous guess however conscientious." *Solesbee* v. *Balkom*, 339 U. S., at 23 (Frankfurter, J., dissenting). That need is greater still because the ultimate decision will turn on the finding of a single fact, not on a range of equitable considerations. Cf. *Woodson* v. *North Carolina*, *supra*, at 304. In light of these concerns, the procedures employed in petitioner's case do not fare well.

C

Florida law directs the Governor, when informed that a person under sentence of death may be insane, to stay the execution and appoint a commission of three psychiatrists to examine the prisoner. Fla. Stat. § 922.07 (1985 and Supp. 1986). "The examination of the convicted person shall take place with all three psychiatrists present at the same time." *Ibid.* After receiving the report of the commission, the Governor must determine whether "the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed on him." *Ibid.* If the Governor finds that the prisoner has that capacity, then a death warrant is issued; if not, then the prisoner is committed to a mental health facility. The procedure is conducted wholly within the Executive Branch, *ex parte*, and provides the exclusive means for determining sanity. *Ford* v. *Wainwright*, 451 So. 2d, at 475.

Petitioner received the statutory process. The Governor selected three psychiatrists, who together interviewed Ford for a total of 30 minutes, in the presence of eight other people, including Ford's counsel, the State's attorneys, and correctional officials. The Governor's order specifically directed that the attorneys should not participate in the examination in any adversarial manner. This order was consistent with the present Governor's "publicly announced pol-

icy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane." *Goode* v. *Wainwright*, 448 So. 2d 999, 1001 (Fla. 1984).

After submission of the reports of the three examining psychiatrists, reaching conflicting diagnoses but agreeing on the ultimate issue of competency, Ford's counsel attempted to submit to the Governor some other written materials, including the reports of the two other psychiatrists who had examined Ford at greater length, one of whom had concluded that the prisoner was not competent to suffer execution. The Governor's office refused to inform counsel whether the submission would be considered. The Governor subsequently issued his decision in the form of a death warrant. That this most cursory form of procedural review fails to achieve even the minimal degree of reliability required for the protection of any constitutional interest, and thus falls short of adequacy under *Townsend*, is self-evident.

IV

A

The first deficiency in Florida's procedure lies in its failure to include the prisoner in the truth-seeking process. Notwithstanding this Court's longstanding pronouncement that "[t]he fundamental requisite of due process of law is the opportunity to be heard," *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914), state practice does not permit any material relevant to the ultimate decision to be submitted on behalf of the prisoner facing execution. In all other proceedings leading to the execution of an accused, we have said that the factfinder must "have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (plurality opinion). And we have forbidden States to limit the capital defendant's submission of relevant evidence in mitigation of the sentence. *Skipper* v. *South Carolina*, 476 U. S. 1, 8

(1986); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (joint opinion). It would be odd were we now to abandon our insistence upon unfettered presentation of relevant information, before the final fact antecedent to execution has been found.

Rather, consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate. "[T]he minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected." *Solesbee* v. *Balkom*, 339 U. S., at 23 (Frankfurter, J., dissenting).

We recently had occasion to underscore the value to be derived from a factfinder's consideration of differing psychiatric opinions when resolving contested issues of mental state. In *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), we recognized that, because "psychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms," the factfinder must resolve differences in opinion within the psychiatric profession "on the basis of the evidence offered by each party" when a defendant's sanity is at issue in a criminal trial. *Id.*, at 81. The same holds true after conviction; without any adversarial assistance from the prisoner's representative—especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission—the factfinder loses the substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision.

B

A related flaw in the Florida procedure is the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions. "[C]ross-examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, Evidence § 1367 (Chadbourn rev. 1974). Cross-examination of the psychiatrists, or perhaps a less formal equivalent, would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the bases for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report. Without some questioning of the experts concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent. See *Barefoot* v. *Estelle*, 463 U. S. 880, 899 (1983). The failure of the Florida procedure to afford the prisoner's representative any opportunity to clarify or challenge the state experts' opinions or methods creates a significant possibility that the ultimate decision made in reliance on those experts will be distorted.[3]

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[3] The adequacy of the factfinding procedures is further called into question by the cursory nature of the underlying psychiatric examination itself. While this Court does not purport to set substantive guidelines for the development of expert psychiatric opinion, cf. *Barefoot* v. *Estelle*, 463 U. S. 880, 903 (1983), we can say that the goal of reliability is unlikely to be served by a single group interview, with no provision for the exercise of the psychiatrists' professional judgment regarding the possible need for different or more comprehensive evaluative techniques. The inconsistency and vagueness of the conclusions reached by the three examining psychiatrists in this case attest to the dubious value of such an examination.

C

Perhaps the most striking defect in the procedures of Fla. Stat. § 922.07 (1985 and Supp. 1986), as noted earlier, is the State's placement of the decision wholly within the Executive Branch. Under this procedure, the person who appoints the experts and ultimately decides whether the State will be able to carry out the sentence that it has long sought is the Governor, whose subordinates have been responsible for initiating every stage of the prosecution of the condemned from arrest through sentencing. The commander of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding.

Historically, delay of execution on account of insanity was not a matter of executive clemency *(ex mandato regis)* or judicial discretion *(ex arbitrio legis);* rather, it was required by law *(ex necessitate legis).* 1 N. Walker, Crime and Insanity in England 196 (1968). Thus, history affords no better basis than does logic for placing the final determination of a fact, critical to the trigger of a constitutional limitation upon the State's power, in the hands of the State's own chief executive. In no other circumstance of which we are aware is the vindication of a constitutional right entrusted to the unreviewable discretion of an administrative tribunal.

V

A

Having identified various failings of the Florida scheme, we must conclude that the State's procedures for determining sanity are inadequate to preclude federal redetermination of the constitutional issue. We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction

upon its execution of sentences.[4] It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity. Cf. *Pate* v. *Robinson*, 383 U. S. 375, 387 (1966) (hearing on competency to stand trial required if "sufficient doubt" of competency exists). Other legitimate pragmatic considerations may also supply the boundaries of the procedural safeguards that feasibly can be provided.

Yet the lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination. The stakes are high, and the "evidence" will always be imprecise. It is all the more important that the adversary presentation of relevant information be as unrestricted as possible. Also essential is that the manner of selecting and using the experts responsible for producing that "evidence" be conducive to the formation of neutral, sound, and professional judgments as to the prisoner's ability to comprehend the nature of the penalty. Fidelity to these principles is the solemn obligation of a civilized society.

B

Today we have explicitly recognized in our law a principle that has long resided there. It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications. In light of the

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[4] Instructive analogies may be found in the State's own procedures for determining whether a defendant is competent to stand trial, Fla. Stat. §§ 916.11–916.12 (1985 and Supp. 1986), or in the comprehensive safeguards that Florida ensures to those subjected to involuntary commitment proceedings, Fla. Stat. § 394.467 (1986). The parties' interests are of course somewhat different in those contexts; nevertheless, all such inquests share the common goal of reaching a fair assessment of the subject's mental state.

clear need for trustworthiness in any factual finding that will prevent or permit the carrying out of an execution, we hold that Fla. Stat. § 922.07 (1985 and Supp. 1986) provides inadequate assurances of accuracy to satisfy the requirements of *Townsend* v. *Sain*, 372 U. S. 293 (1963). Having been denied a factfinding procedure "adequate to afford a full and fair hearing" on the critical issue, 28 U. S. C. § 2254(d)(2), petitioner is entitled to an evidentiary hearing in the District Court, *de novo*, on the question of his competence to be executed. *Townsend* v. *Sain*, *supra*, at 312.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, concurring in part and concurring in the judgment.

I join Parts I and II of the Court's opinion. As JUSTICE MARSHALL ably demonstrates, execution of the insane was barred at common law precisely because it was considered cruel and unusual. In *Solem* v. *Helm*, 463 U. S. 277 (1983), we explained that while the Framers "may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection." *Id.*, at 286. It follows that the practice of executing the insane is barred by our own Constitution.

That conclusion leaves two issues for our determination: (i) the meaning of insanity in this context, and (ii) the procedures States must follow in order to avoid the necessity of *de novo* review in federal courts under 28 U. S. C. § 2254(d). The Court's opinion does not address the first of these issues, and as to the second, my views differ substantially from JUSTICE MARSHALL's. I therefore write separately.

I

The Court holds today that the Eighth Amendment bars execution of a category of defendants defined by their mental state. The bounds of that category are necessarily governed by federal constitutional law. I therefore turn to the same sources that give rise to the substantive right to determine its precise definition: chiefly, our common-law heritage and the modern practices of the States, which are indicative of our "evolving standards of decency." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion). See *Solem* v. *Helm*, *supra*, at 284–286; *Gregg* v. *Georgia*, 428 U. S. 153, 175–176 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).

A

As the Court recognizes, *ante*, at 407–408, the ancient prohibition on execution of the insane rested on differing theories. Those theories do not provide a common answer when it comes to defining the mental awareness required by the Eighth Amendment as a prerequisite to a defendant's execution. On the one hand, some authorities contended that the prohibition against executing the insane was justified as a way of preserving the defendant's ability to make arguments on his own behalf. See 1 M. Hale, Pleas of the Crown 35 (1736) ("if after judgment he become of *non sane memory*, his execution shall be spared; for were he of sound memory he might allege somewhat in stay of judgment or execution"); accord 4 W. Blackstone, Commentaries *388–*389. Other authorities suggest, however, that the prohibition derives from more straightforward humanitarian concerns. Coke expressed the view that execution was intended to be an "example" to the living, but that the execution of "a mad man" was such "a miserable spectacle . . . of extream inhumanity and cruelty" that it "can be no example to others." 3 E. Coke, Institute 6 (1794). Hawles added that it is "against christian charity to send a great offender quick . . . into another world, when he is not of a capacity to fit himself for it."

Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 How. St. Tr. 474, 477 (1685).

The first of these justifications has slight merit today. Modern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal collateral review.[1] Throughout this process, the defendant has access to counsel, by constitutional right at trial, and by employment or appointment at other stages of the process whenever the defendant raises substantial claims. Nor does the defendant merely have the right to counsel's assistance; he also has the right to the *effective* assistance of counsel at trial and on appeal. *Evitts* v. *Lucey*, 469 U. S. 387 (1985); *Strickland* v. *Washington*, 466 U. S. 668 (1984). See *Kimmelman* v. *Morrison*, *ante*, at 392–393 (POWELL, J., concurring in judgment). These guarantees are far broader than those enjoyed by criminal defendants at common law. It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free.

In addition, in cases tried at common law execution often followed fairly quickly after trial, so that incompetence at the

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[1] Petitioner offers a good example. Petitioner was convicted of first-degree murder in 1974. On direct appeal, his conviction and sentence were affirmed, *Ford* v. *State*, 374 So. 2d 496 (Fla. 1979), and this Court denied certiorari. 445 U. S. 972 (1980). Petitioner then joined 122 other death row inmates in seeking extraordinary relief from the Florida Supreme Court, based on that court's allegedly improper procedure for review of capital cases. This petition for relief was denied, *Brown* v. *Wainwright*, 392 So. 2d 1327 (Fla. 1981), and this Court again denied certiorari. 454 U. S. 1000 (1981). Petitioner filed a motion for postconviction relief in state court, and relief was again denied. *Ford* v. *State*, 407 So. 2d 907 (Fla. 1981). Following these unsuccessful attempts to obtain relief from his conviction or execution in state court, petitioner filed a petition for habeas corpus in federal court. Relief was again denied, *Ford* v. *Strickland*, 696 F. 2d 804 (CA11) (en banc), cert. denied, 464 U. S. 865 (1983). Only after all of these challenges had been resolved against him did petitioner challenge his impending execution on the ground of insanity.

time of execution was linked as a practical matter with incompetence at the trial itself. Our decisions already recognize, however, that a defendant must be competent to stand trial, and thus the notion that a defendant must be able to assist in his defense is largely provided for. See *Drope* v. *Missouri*, 420 U. S. 162 (1975).[2]

B

The more general concern of the common law—that executions of the insane are simply cruel—retains its vitality. It is as true today as when Coke lived that most men and women value the opportunity to prepare, mentally and spiritually, for their death. Moreover, today as at common law, one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose. Thus, it remains true that executions of the insane both impose a uniquely cruel penalty and are inconsistent with one of the chief purposes of executions generally. For precisely these reasons, Florida requires the Governor to stay executions of those who "d[o] not have the mental capacity to understand the nature of the death penalty and why it was imposed" on them. Fla. Stat. § 922.07 (1985). See also Ill. Rev. Stat., ch. 38, ¶ 1005-2-3(a) (1985) ("A person is unfit to be executed if because of a mental condition he is unable to understand the nature and purpose of such sentence"); *State* v. *Pastet*, 169 Conn. 13, 28, 363 A. 2d 41, 49 (question is "whether the defendant was able to understand the nature of the sentencing proceedings, i. e., why he was being punished and the nature of his punishment"), cert. denied, 423 U. S. 937 (1975). A number of

[2] Moreover, a standard that focused on the defendant's ability to assist in his defense would give too little weight to the State's interest in finality, since it implies a constitutional right to raise new challenges to one's criminal conviction until sentence has run its course. Such an implication is false: we have made clear that States have a strong and legitimate interest in avoiding repetitive collateral review through procedural bars. See *Kuhlmann* v. *Wilson*, *post*, at 452–454 (plurality opinion).

States have more rigorous standards,[3] but none disputes the need to require that those who are executed know the fact of their impending execution and the reason for it.

Such a standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition. If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.

Petitioner's claim of insanity plainly fits within this standard. According to petitioner's proffered psychiatric examination, petitioner does not know that he is to be executed, but rather believes that the death penalty has been invalidated. App. 65–67. If this assessment is correct, petitioner

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[3] A number of States have remained faithful to Blackstone's view that a defendant cannot be executed unless he is able to assist in his own defense. *E. g.*, Miss. Code Ann. § 99–19–57(2)(b) (Supp. 1985); Mo. Rev. Stat. § 552.060(1) (1978); Utah Code Ann. § 77–15–2 (1982). The majority of States appear not to have addressed the issue in their statutes. Modern case authority on this question is sparse, and while some older cases favor the Blackstone view, see 24 C. J. S., Criminal Law § 1619 (1961), those cases largely antedate the recent expansion of both the right to counsel and the availability of federal and state collateral review. Moreover, other cases suggest that the prevailing test is "whether the condemned man was aware of his conviction and the nature of his impending fate"—essentially the same test stated by Florida's statute. Note, Insanity of the Condemned, 88 Yale L. J. 533, 540 (1979); See Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. Rev. 381, 394, and n. 44 (1962) (discussing cases). Under these circumstances, I find no sound basis for constitutionalizing the broader definition of insanity, with its requirement that the defendant be able to assist in his own defense. States are obviously free to adopt a more expansive view of sanity in this context than the one the Eighth Amendment imposes as a constitutional minimum.

cannot connect his execution to the crime for which he was convicted. Thus, the question is whether petitioner's evidence entitles him to a hearing in Federal District Court on his claim.

II

Petitioner concedes that the Governor of Florida has determined that he is not insane under the standard prescribed by Florida's statute, which is the same as the standard just described. Petitioner further concedes that there is expert evidence that supports the Governor's finding. Thus, if that finding is entitled to a presumption of correctness under 28 U. S. C. § 2254(d), there is no ground for holding a hearing on petitioner's federal habeas corpus petition.

I agree with JUSTICE MARSHALL that the Governor's finding is not entitled to a presumption of correctness under § 2254(d). I reach this conclusion for two independent reasons. First, § 2254(d) requires deference to the factual findings of "a State court of competent jurisdiction." The term "State court" may have a certain amount of flexibility,[4] but no amount of stretching can extend it to include the Governor. The essence of a "court" is independence from the prosecutorial arm of government and, as JUSTICE MARSHALL correctly notes, the Governor is "[t]he commander of the State's corps of prosecutors." *Ante*, at 416. Unless the relevant language is to be read out of the statute, I see no basis for affording any deference to the Governor's determination.

Second, the presumption of correctness does not attach to the Governor's implicit finding of sanity because the State did not give petitioner's claim "a full and fair hearing," 28 U. S. C. § 2254(d)(2). This statutory phrase apparently was drawn from the Court's opinion in *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963). There, the Court concluded that where the state court's "fact-finding procedure . . . was not

[4] Although we need not decide the issue in this case, the term "State court" may well encompass an independent panel of psychiatric experts who might both examine the defendant and determine his legal sanity.

adequate for reaching reasonably correct results," or where the process "appear[ed] to be seriously inadequate for the ascertainment of the truth," no presumption of correctness would attach to the state court's findings when those findings were challenged on federal habeas corpus. *Id.*, at 316.

At least in the context of competency determinations prior to execution, this standard is no different from the protection afforded by procedural due process. It is clear that an insane defendant's Eighth Amendment interest in forestalling his execution unless or until he recovers his sanity cannot be deprived without a "fair hearing." Indeed, fundamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause. See *Lassiter* v. *Department of Social Services of Durham County*, 452 U. S. 18, 24–25 (1981). Thus, the question in this case is whether Florida's procedures for determining petitioner's sanity comport with the requirements of due process.

Together with JUSTICE MARSHALL and JUSTICE O'CONNOR, I would hold that they do not. As JUSTICE O'CONNOR states, "[i]f there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard.'" *Post*, at 430 (quoting *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914)). In this case, petitioner was deprived of that opportunity. The Florida statute does not require the Governor to consider materials submitted by the prisoner, and the present Governor has a "publicly announced policy of excluding" such materials from his consideration. *Goode* v. *Wainwright*, 448 So. 2d 999, 1001 (Fla. 1984). Thus, the determination of petitioner's sanity appears to have been made *solely* on the basis of the examinations performed by state-appointed psychiatrists. Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations. It does not, therefore, comport with due process. It follows that the State's procedure was not "fair," and that the Dis-

trict Court on remand must consider the question of petitioner's competency to be executed.

III

While the procedures followed by Florida in this case do not comport with basic fairness, I would not require the kind of full-scale "sanity trial" that JUSTICE MARSHALL appears to find necessary. See *ante*, at 413–416, 418. Due process is a flexible concept, requiring only "such procedural protections as the particular situation demands." *Mathews* v. *Eldridge*, 424 U. S. 319, 334 (1976); *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). See also *post*, at 429 (O'CONNOR, J., concurring in result in part and dissenting in part). In this instance, a number of considerations support the conclusion that the requirements of due process are not as elaborate as JUSTICE MARSHALL suggests.

First, the Eighth Amendment claim at issue can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death. Thus, in this case the State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime. That interest is not called into question by petitioner's claim. Rather, the only question raised is not *whether*, but *when*, his execution may take place.[5] This question is important, but it is not comparable to the antecedent question whether petitioner should be executed at all. It follows that this Court's decisions imposing heightened procedural requirements on capital trials and sentencing proceedings—*e. g.*, *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion); *Turner* v. *Murray*, 476 U. S. 28 (1986)—do not apply in this context.

Second, petitioner does not make his claim of insanity against a neutral background. On the contrary, in order to

[5] It is of course true that some defendants may lose their mental faculties and never regain them, and thus avoid execution altogether. My point is only that if petitioner is cured of his disease, the State is free to execute him.

have been convicted and sentenced, petitioner must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court. The State therefore may properly presume that petitioner remains sane at the time sentence is to be carried out,[6] and may require a substantial threshold showing of insanity merely to trigger the hearing process. Cf. *Ake* v. *Oklahoma*, 470 U. S. 68, 82–83 (1985).

Finally, the sanity issue in this type of case does not resemble the basic issues at trial or sentencing. Unlike issues of historical fact, the question of petitioner's sanity calls for a basically subjective judgment. See *Addington* v. *Texas*, 441 U. S. 418, 429–430 (1979); cf. *Barefoot* v. *Estelle*, 463 U. S. 880, 898–901 (1983). And unlike the determination of whether the death penalty is appropriate in a particular case, the competency determination depends substantially on expert analysis in a discipline fraught with "subtleties and nuances." *Addington*, *supra*, at 430. This combination of factors means that ordinary adversarial procedures—complete with live testimony, cross-examination, and oral argument by counsel—are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity. Cf. *Parham* v. *J. R.*, 442 U. S. 584, 609 (1979) ("Common human experience and scholarly opinions suggest that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real").

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[6] Cf. *Addington* v. *Texas*, 441 U. S. 418 (1979). In *Addington*, the Court held that States must require proof by clear and convincing evidence in order to involuntarily commit an individual to a mental hospital for treatment. In this context, it is the defendant and not the State who seeks to overcome the presumption that he is sane; moreover, he does so following a trial and sentencing at which his sanity was either conceded or determined by the court.

We need not determine the precise limits that due process imposes in this area. In general, however, my view is that a constitutionally acceptable procedure may be far less formal than a trial. The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. Beyond these basic requirements, the States should have substantial leeway to determine what process best balances the various interests at stake. As long as basic fairness is observed, I would find due process satisfied, and would apply the presumption of correctness of § 2254(d) on federal habeas corpus.

IV

Because petitioner has raised a viable claim under the Eighth Amendment, and because that claim was not adjudicated fairly within the meaning of due process or of § 2254(d), petitioner is entitled to have his claim adjudicated by the District Court on federal habeas corpus. I therefore join the Court's judgment.

JUSTICE O'CONNOR, with whom JUSTICE WHITE joins, concurring in the result in part and dissenting in part.

I am in full agreement with JUSTICE REHNQUIST's conclusion that the Eighth Amendment does not create a substantive right not to be executed while insane. Accordingly, I do not join the Court's reasoning or opinion. Because, however, the conclusion is for me inescapable that Florida positive law has created a protected liberty interest in avoiding execution while incompetent, and because Florida does not provide even those minimal procedural protections required by due process in this area, I would vacate the judgment and remand to the Court of Appeals with directions that the case be returned to the Florida system so that a hearing can be held in a manner consistent with the requirements of the Due Process Clause. I cannot agree, however, that the federal

courts should have any role whatever in the substantive determination of a defendant's competency to be executed.

As we explained in *Hewitt* v. *Helms*, 459 U. S. 460, 466 (1983), "[l]iberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States." See also *Meachum* v. *Fano*, 427 U. S. 215, 223–227 (1976). With JUSTICE REHNQUIST, I agree that the Due Process Clause does not independently create a protected interest in avoiding the execution of a death sentence during incompetency. See also *Solesbee* v. *Balkcom*, 339 U. S. 9 (1950). The relevant provision of the Florida statute, however, provides that the Governor "*shall*" have the prisoner committed to a "Department of Corrections mental health treatment facility" if the prisoner "does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him." Fla. Stat. § 922.07(3) (1985). Our cases leave no doubt that where a statute indicates with "language of an unmistakable mandatory character," that state conduct injurious to an individual will not occur "absent specified substantive predicates," the statute creates an expectation protected by the Due Process Clause. *Hewitt* v. *Helms*, *supra*, at 471–472. See also *Vitek* v. *Jones*, 445 U. S. 480, 488–491 (1980); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 10 (1979) (entitlement created where under state law "there is [a] set of facts which, if shown, mandate a decision favorable to the individual"). That test is easily met here. Nor is it relevant that the statute creating the interest also specifies the procedures to be followed when the State seeks to deprive the individual of that interest. As we reaffirmed last Term, "[t]he categories of substance and procedure are distinct." *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532, 541 (1985). Thus, regardless of the procedures the State deems adequate for determining the preconditions to adverse official action, federal law defines the kind of proc-

ess a State must afford prior to depriving an individual of a protected liberty or property interest. *Id.*, at 541.

Although the state created entitlement to avoid execution while insane unquestionably triggers the demands of the Due Process Clause, in my judgment those demands are minimal in this context. "It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation [requires].'" *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, at 12, quoting *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). And there are any number of reasons for concluding that this "particular situation" warrants substantial caution before reading the Due Process Clause to mandate anything like the full panoply of trial-type procedures. The prisoner's interest in avoiding an erroneous determination is, of course, very great. But I consider it self-evident that once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly. *Meachum* v. *Fano*, *supra*, at 224. Moreover, the potential for false claims and deliberate delay in this context is obviously enormous. *Nobles* v. *Georgia*, 168 U. S. 398, 405–406 (1897). This potential is exacerbated by a unique feature of the prisoner's protected interest in suspending the execution of a death sentence during incompetency. By definition, this interest can *never* be conclusively and finally determined: Regardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary. G. Hazard & D. Louisell, Death, the State and the Insane: Stay of Execution, 9 UCLA L. Rev. 381, 399–400 (1962). These difficulties, together with the fact that the issue arises only after conviction and sentencing, convince me that the Due Process Clause imposes few requirements on the States in this context.

Even given the broad latitude I would leave to the States in this area, however, I believe that one aspect of the Florida

procedure for determining competency to be executed renders that procedure constitutionally deficient. If there is one "fundamental requisite" of due process, it is that an individual is entitled to an "opportunity to be heard." *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914). As currently implemented, the Florida procedure for determining competency violates this bedrock principle. By Executive Order, the present Governor has provided that "[c]ounsel for the inmate and the State Attorney may be present [at the competency hearing] but shall not participate in the examination in any adversarial manner." Exec. Order No. 83-137 (Dec. 9, 1983). See also *Goode* v. *Wainwright*, 448 So. 2d 999, 1001 (Fla. 1984) (describing the Governor's "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane"). Indeed, respondent does not dispute that the Governor's office has steadfastly refused to acknowledge whether it would even review the extensive psychiatric materials submitted by petitioner concerning his present mental state. While I would not invariably require oral advocacy or even cross-examination, due process at the very least requires that the decisionmaker consider the prisoner's written submissions.

I conclude therefore that Florida law has created a protected expectation that no execution will be carried out while the prisoner lacks the "mental capacity to understand the nature of the death penalty and why it was imposed on him." Fla. Stat. § 922.07(3) (1985). Because Florida's procedures are inadequate to satisfy even the minimal requirements of due process in this context, I would vacate the judgment below with instructions that the case be returned to Florida so that it might assess petitioner's competency in a manner that accords with the command of the Fourteenth Amendment. In my view, however, the only federal question presented in cases such as this is whether the State's positive law has created a liberty interest and whether its procedures

are adequate to protect that interest from arbitrary deprivation. Once satisfied that the procedures were adequate, a federal court has no authority to second-guess a State's substantive competency determination.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court today holds that the Eighth Amendment prohibits a State from carrying out a lawfully imposed sentence of death upon a person who is currently insane. This holding is based almost entirely on two unremarkable observations. First, the Court states that it "know[s] of virtually no authority condoning the execution of the insane at English common law." *Ante*, at 408. Second, it notes that "[t]oday, no State in the Union permits the execution of the insane." *Ibid.* Armed with these facts, and shielded by the claim that it is simply "keep[ing] faith with our common-law heritage," *ante*, at 401, the Court proceeds to cast aside settled precedent and to significantly alter both the common-law and current practice of not executing the insane. It manages this feat by carefully ignoring the fact that the Florida scheme it finds unconstitutional, in which the Governor is assigned the ultimate responsibility of deciding whether a condemned prisoner is currently insane, is fully consistent with the "common-law heritage" and current practice on which the Court purports to rely.

The Court places great weight on the "impressive historical credentials" of the common-law bar against executing a prisoner who has lost his sanity. *Ante*, at 406–408. What it fails to mention, however, is the equally important and unchallenged fact that at common law it was the *executive* who passed upon the sanity of the condemned. See 1 N. Walker, Crime and Insanity in England 194–203 (1968). So when the Court today creates a constitutional right to a determination of sanity outside of the Executive Branch, it does so not in keeping with but at the expense of "our common-law heritage."

In *Solesbee* v. *Balkcom*, 339 U. S. 9 (1950), a condemned prisoner claimed that he had a constitutional right to a judicial determination of his sanity. There, as here, the State did not approve the execution of insane persons and vested in the Governor the responsibility for determining, with the aid of experts, the sanity *vel non* of persons sentenced to death. In rejecting the prisoner's claim, this Court stated:

> "Postponement of execution because of insanity bears a close affinity not to trial for a crime but rather to reprieves of sentences in general. The power to reprieve has usually sprung from the same source as the power to pardon. Power of executive clemency in this country undoubtedly derived from the practice as it had existed in England. Such power has traditionally rested in governors or the President, although some of that power is often delegated to agencies such as pardon or parole boards. Seldom, if ever, has this power of executive clemency been subjected to review by the courts." *Id.*, at 11–12.

Despite references to "evolving standards of decency," *ante*, at 406, and "the jurisprudence of today," *ante*, at 409, the Court points to no change since *Solesbee* in the States' approach to determining the sanity of a condemned prisoner. Current statutes quite often provide that initiation of inquiry into and/or final determination of postsentencing insanity is a matter for the Executive or the prisoner's custodian.* The Court's profession of "faith to our common-law heritage" and

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*See Ariz. Rev. Stat. Ann. § 13–4021 (1978); Ark. Stat. Ann. § 43–2622 (1977); Cal. Penal Code Ann. § 3701 (West 1982); Conn. Gen. Stat. § 54–101 (1985); Ga. Code Ann. § 17–10–61 (1982); Kan. Stat. Ann. § 22–4006 (1981); Md. Ann. Code, Art. 27, § 75(c) (Supp. 1985); Mass. Gen Laws § 279:62 (1984); Miss. Code Ann. § 99–19–57 (Supp. 1985); Neb. Rev. Stat. § 29–2537 (1979); Nev. Rev. Stat. § 176.425 (1985); N. M. Stat. Ann. § 31–14–4 (1984); N. Y. Correc. Law § 655 (McKinney Supp. 1986); Ohio Rev. Code Ann. § 2949.28 (1982); Okla Stat., Tit. 22, § 1005 (1986); Utah Code Ann. § 77–19–13(1) (1982); Wyo. Stat. § 7–13–901 (Supp. 1986).

"evolving standards of decency" is thus at best a half-truth. It is Florida's scheme—which combines a prohibition against execution of the insane with Executive-Branch procedures for evaluating claims of insanity—that is more faithful to both traditional and modern practice. And no matter how long-standing and universal, laws providing that the State should not execute persons the Executive finds insane are not themselves sufficient to create an Eighth Amendment right that sweeps away as inadequate the procedures for determining sanity crafted by those very laws.

Petitioner makes the alternative argument, not reached by the Court, that even if the Eighth Amendment does not prohibit execution of the insane, Florida's decision to bar such executions creates a right in condemned persons to trial-type procedures to determine sanity. Here, too, *Solesbee* is instructive:

> "Recently we have pointed out the necessary and inherent differences between trial procedures and post-conviction procedures such as sentencing. *Williams* v. *New York*, 337 U. S. 241. In that case we emphasized that certain trial procedure safeguards are not applicable to the process of sentencing. This principle applies even more forcefully to an effort to transplant every trial safeguard to a determination of sanity after conviction. As was pointed out in [*Nobles* v. *Georgia*, 168 U. S. 398 (1897)], to require judicial review every time a convicted defendant suggested insanity would make the possibility of carrying out a sentence depend upon 'fecundity in making suggestion after suggestion of insanity.' *Nobles* v. *Georgia*, *supra*, at 405–406. See also *Phyle* v. *Duffy*, [334 U. S. 431 (1948)]. To protect itself society must have power to try, convict, and execute sentences. Our legal system demands that this governmental duty be performed with scrupulous fairness to the accused. We cannot say that it offends due process to leave the question of a convicted person's sanity to the solemn respon-

> sibility of a state's highest executive with authority to invoke the aid of the most skillful class of experts on the crucial questions involved." 339 U. S., at 12–13.

Even the sole dissenter in *Solesbee*, Justice Frankfurter, agreed that if the Constitution afforded condemned prisoners no substantive right not to be executed when insane, then the State would be free to place on the Governor the responsibility for determining sanity. *Id.*, at 15.

Petitioner argues that *Solesbee* is no longer controlling because it was decided "at a time when due process analysis still turned on the right-privilege distinction." Brief for Petitioner 8. But as petitioner concedes, his due process claim turns on a showing that the Florida statute at issue here created an individual right not to be executed while insane. Even a cursory reading of the statute reveals that the only right it creates in a condemned prisoner is to inform the Governor that the prisoner may be insane. Fla. Stat. § 922.07(1) (1985). The only legitimate expectation it creates is that "*[i]f the Governor decides* that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to a Department of Corrections mental health treatment facility." § 922.07(3) (Supp. 1986) (emphasis added). Our recent cases in this area of the law may not be wholly consistent with one another. See *Olim* v. *Wakinekona*, 461 U. S. 238 (1983); *Hewitt* v. *Helms*, 459 U. S. 460 (1983); *Vitek* v. *Jones*, 445 U. S. 480 (1980); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979); *Meachum* v. *Fano*, 427 U. S. 215 (1976). I do not think this state of the law requires the conclusion that Florida has granted petitioner the sort of entitlement that gives rise to the procedural protections for which he contends.

In any event, I see no reason to reject the *Solesbee* Court's conclusion that wholly Executive procedures can satisfy due process in the context of a post-trial, postappeal, postcollateral-attack challenge to a State's effort to carry out

a lawfully imposed sentence. Creating a constitutional right to a judicial determination of sanity before that sentence may be carried out, whether through the Eighth Amendment or the Due Process Clause, needlessly complicates and postpones still further any finality in this area of the law. The defendant has already had a full trial on the issue of guilt, and a trial on the issue of penalty; the requirement of still a third adjudication offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity. A claim of insanity may be made at any time before sentence and, once rejected, may be raised again; a prisoner found sane two days before execution might claim to have lost his sanity the next day, thus necessitating another judicial determination of his sanity and presumably another stay of his execution. See *Nobles* v. *Georgia*, 168 U. S. 398, 405–406 (1897).

Since no State sanctions execution of the insane, the real battle being fought in this case is over what procedures must accompany the inquiry into sanity. The Court reaches the result it does by examining the common law, creating a constitutional right that no State seeks to violate, and then concluding that the common-law procedures are inadequate to protect the newly created but common-law based right. I find it unnecessary to "constitutionalize" the already uniform view that the insane should not be executed, and inappropriate to "selectively incorporate" the common-law practice. I therefore dissent.

KUHLMANN, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY *v.* WILSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84-1479. Argued January 14, 1986—Decided June 26, 1986

After his arraignment on charges arising from a 1970 robbery and murder in New York, respondent was confined in a cell with a prisoner, named Benny Lee, who had previously agreed to act as a police informant. Respondent made incriminating statements, and Lee reported them to the police. Prior to trial in a New York court, respondent moved to suppress the statements on the ground that they were obtained in violation of his Sixth Amendment right to counsel. After an evidentiary hearing, the trial court denied the motion, finding that Lee had obeyed a police officer's instructions only to listen to respondent for the purpose of identifying his confederates in the robbery and murder, but not to question respondent about the crimes. The court also found that respondent's statements to Lee were "spontaneous" and "unsolicited." In 1972, respondent was convicted of, and sentenced to imprisonment for, common-law murder and felonious possession of a weapon, and the Appellate Division affirmed. In 1973, respondent sought federal habeas corpus relief, asserting that his statements to Lee were obtained by police investigative methods that violated his Sixth Amendment rights. The District Court denied the writ, and the Court of Appeals affirmed. After the 1980 decision in *United States* v. *Henry*, 447 U. S. 264—which applied the "deliberately elicited" test of *Massiah* v. *United States*, 377 U. S. 201, to suppress statements made to a paid jailhouse informant—respondent unsuccessfully sought to have his conviction vacated by the state courts on the basis of his Sixth Amendment claim. In 1982, respondent filed the instant habeas corpus petition in Federal District Court, again asserting his Sixth Amendment claim. The District Court denied relief, but the Court of Appeals reversed. As an initial matter, the Court of Appeals concluded that under *Sanders* v. *United States*, 373 U. S. 1, the "ends of justice" required consideration of this petition for habeas corpus, notwithstanding the adverse determination on the merits of respondent's Sixth Amendment claim in the earlier federal habeas corpus proceedings. The court then held that under *Henry* respondent was entitled to relief.

Held: The judgment is reversed, and the case is remanded.

742 F. 2d 741, reversed and remanded.

JUSTICE POWELL delivered the opinion of the Court with respect to Parts I, IV, and V, concluding that the Court of Appeals erred in holding that respondent was entitled to relief under *United States* v. *Henry*, *supra*, which left open the question whether the Sixth Amendment forbids admission in evidence of an accused's statements to a jailhouse informant who was placed in close proximity but made no effort to stimulate conversations about the crime charged. Pp. 456–461.

(a) The primary concern of the *Massiah* and *Henry* line of decisions was secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached, a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. Pp. 456–459.

(b) Under the circumstances of this case, the Court of Appeals' conclusion that respondent's right to counsel was violated because the police "deliberately elicited" incriminating statements was clear error in light of the provisions and intent of 28 U. S. C. § 2254(d), which requires that the state trial court's factual findings be accorded a presumption of correctness. Pp. 459–461.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR, delivered an opinion with respect to Parts II and III, concluding that the Court of Appeals erred in holding that the "ends of justice" would be served by entertaining respondent's present "successive" petition for habeas corpus, and that the District Court and the Court of Appeals should have dismissed this successive petition under 28 U. S. C. § 2244(b) on the ground that the prior judgment denying relief on respondent's identical Sixth Amendment claim was final. *Sanders* v. *United States* derived its "ends of justice" test directly from language of the then-applicable statute and left for another day the task of defining the considerations that properly support a decision to entertain a successive petition. Although § 2244(b) makes no reference to the "ends of justice," that phrase still may be used generally to describe the standard for identifying those cases where successive review may be appropriate. However, specific guidance should be given to the federal courts as to the kind of proof that a state prisoner must offer to establish that the "ends of justice" will be served by relitigation

of claims previously decided against him. Balancing the State's interests in finality of convictions and the prisoner's interest in access to a forum compels the conclusion that the "ends of justice" are served by successive review only where the petitioner supplements his constitutional claim with a colorable showing of factual innocence. The prisoner must make his evidentiary showing even though—as argued in this case—the evidence of guilt may have been unlawfully admitted. Here, the Court of Appeals conceded that the evidence of respondent's guilt "was nearly overwhelming," and respondent's constitutional claim did not itself raise any question as to his guilt or innocence. Pp. 444–455.

POWELL, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, IV, and V, in which BURGER, C. J., and WHITE, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined, and an opinion with respect to Parts II and III, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 461. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 461. STEVENS, J., filed a dissenting opinion, *post*, p. 476.

Steven R. Kartagener argued the cause for petitioner. With him on the briefs were *Mario Merola* and *Jeremy Gutman*.

Philip S. Weber argued the cause and filed a brief for respondent.

JUSTICE POWELL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, IV, and V, and an opinion with respect to Parts II and III in which THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join.

This case requires us to define the circumstances under which federal courts should entertain a state prisoner's petition for writ of habeas corpus that raises claims rejected on a prior petition for the same relief.

I

In the early morning of July 4, 1970, respondent and two confederates robbed the Star Taxicab Garage in the Bronx, New York, and fatally shot the night dispatcher. Shortly

before, employees of the garage had observed respondent, a former employee there, on the premises conversing with two other men. They also witnessed respondent fleeing after the robbery, carrying loose money in his arms. After eluding the police for four days, respondent turned himself in. Respondent admitted that he had been present when the crimes took place, claimed that he had witnessed the robbery, gave the police a description of the robbers, but denied knowing them. Respondent also denied any involvement in the robbery or murder, claiming that he had fled because he was afraid of being blamed for the crimes.

After his arraignment, respondent was confined in the Bronx House of Detention, where he was placed in a cell with a prisoner named Benny Lee. Unknown to respondent, Lee had agreed to act as a police informant. Respondent made incriminating statements that Lee reported to the police. Prior to trial, respondent moved to suppress the statements on the ground that they were obtained in violation of his right to counsel. The trial court held an evidentiary hearing on the suppression motion, which revealed that the statements were made under the following circumstances.

Before respondent arrived in the jail, Lee had entered into an arrangement with Detective Cullen, according to which Lee agreed to listen to respondent's conversations and report his remarks to Cullen. Since the police had positive evidence of respondent's participation, the purpose of placing Lee in the cell was to determine the identities of respondent's confederates. Cullen instructed Lee not to ask respondent any questions, but simply to "keep his ears open" for the names of the other perpetrators. Respondent first spoke to Lee about the crimes after he looked out the cellblock window at the Star Taxicab Garage, where the crimes had occurred. Respondent said, "someone's messing with me," and began talking to Lee about the robbery, narrating the same story that he had given the police at the time of his arrest. Lee advised respondent that this explanation "didn't

sound too good,"[1] but respondent did not alter his story. Over the next few days, however, respondent changed details of his original account. Respondent then received a visit from his brother, who mentioned that members of his family were upset because they believed that respondent had murdered the dispatcher. After the visit, respondent again described the crimes to Lee. Respondent now admitted that he and two other men, whom he never identified, had planned and carried out the robbery, and had murdered the dispatcher. Lee informed Cullen of respondent's statements and furnished Cullen with notes that he had written surreptitiously while sharing the cell with respondent.

After hearing the testimony of Cullen and Lee,[2] the trial court found that Cullen had instructed Lee "to ask no questions of [respondent] about the crime but merely to listen as to what [respondent] might say in his presence." The court determined that Lee obeyed these instructions, that he "at no time asked any questions with respect to the crime," and that he "only listened to [respondent] and made notes regarding what [respondent] had to say." The trial court also found that respondent's statements to Lee were "spontaneous" and "unsolicited." Under state precedent, a defendant's volunteered statements to a police agent were admissible in evidence because the police were not required to prevent talkative defendants from making incriminating statements. See *People* v. *Kaye*, 25 N. Y. 2d 139, 145, 250 N. E. 2d 329, 332 (1969). The trial court accordingly denied the suppression motion.

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[1] At the suppression hearing, Lee testified that, after hearing respondent's initial version of his participation in the crimes, "I think I remember telling him that the story wasn't—it didn't sound too good. Things didn't look too good for him." At trial, Lee testified to a somewhat different version of his remark: "Well, I said, look, you better come up with a better story than that because that one doesn't sound too cool to me, that's what I said."

[2] Respondent did not testify at the suppression hearing.

The jury convicted respondent of common-law murder and felonious possession of a weapon. On May 18, 1972, the trial court sentenced him to a term of 20 years to life on the murder count and to a concurrent term of up to 7 years on the weapons count. The Appellate Division affirmed without opinion, *People* v. *Wilson*, 41 App. Div. 2d 903, 343 N. Y. S. 2d 563 (1973), and the New York Court of Appeals denied respondent leave to appeal.

On December 7, 1973, respondent filed a petition for federal habeas corpus relief. Respondent argued, among other things, that his statements to Lee were obtained pursuant to police investigative methods that violated his constitutional rights. After considering *Massiah* v. *United States*, 377 U. S. 201 (1964), the District Court for the Southern District of New York denied the writ on January 7, 1977. The record demonstrated "no interrogation whatsoever" by Lee and "only spontaneous statements" from respondent. In the District Court's view, these "fact[s] preclude[d] any Sixth Amendment violation."

A divided panel of the Court of Appeals for the Second Circuit affirmed. *Wilson* v. *Henderson*, 584 F. 2d 1185 (1978). The court noted that a defendant is denied his Sixth Amendment rights when the trial court admits in evidence incriminating statements that state agents "'had deliberately elicited from him after he had been indicted and in the absence of counsel.'" *Id.*, at 1189, quoting *Massiah* v. *United States*, *supra*, at 206. Relying in part on *Brewer* v. *Williams*, 430 U. S. 387 (1977), the court reasoned that the "deliberately elicited" test of *Massiah* requires something more than incriminating statements uttered in the absence of counsel. On the facts found by the state trial court, which were entitled to a presumption of correctness under 28 U. S. C. § 2254(d), the court held that respondent had not established a violation of his Sixth Amendment rights.[1] We denied a

[1] The Court of Appeals observed that suppression of respondent's statements would serve "no useful purpose" because Cullen had not engaged in

petition for a writ of certiorari. *Wilson* v. *Henderson*, 442 U. S. 945 (1979).

Following this Court's decision in *United States* v. *Henry*, 447 U. S. 264 (1980), which applied the *Massiah* test to suppress statements made to a paid jailhouse informant, respondent decided to relitigate his Sixth Amendment claim. On September 11, 1981, he filed in state trial court a motion to vacate his conviction. The judge denied the motion, on the grounds that *Henry* was factually distinguishable from this case,[4] and that under state precedent *Henry* was not to be given retroactive effect, see *People* v. *Pepper*, 53 N. Y. 2d 213, 423 N. E. 2d 366 (1981). The Appellate Division denied respondent leave to appeal.

On July 6, 1982, respondent returned to the District Court for the Southern District of New York on a habeas petition, again arguing that admission in evidence of his incriminating statements to Lee violated his Sixth Amendment rights. Respondent contended that the decision in *Henry* constituted a new rule of law that should be applied retroactively to this case. The District Court found it unnecessary to consider retroactivity because it decided that *Henry* did not undermine the Court of Appeals' prior disposition of respondent's Sixth Amendment claim. Noting that *Henry* reserved the question whether the Constitution forbade admission in evidence of an accused's statements to an informant who made "no effort to stimulate conversations about the crime charged," see *United States* v. *Henry*, *supra*, at 271, n. 9,

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"reprehensible police behavior," but rather had made a "conscious effort" to protect respondent's "constitutional rights [under *Massiah*] while pursuing a crucial homicide investigation." *Wilson* v. *Henderson*, 584 F. 2d, at 1191.

Judge Oakes dissented, arguing that the "deliberately elicited" test of *Massiah* proscribed admission in evidence of an accused's statements obtained pursuant to the investigatory tactics used here. *Id.*, at 1194–1195.

[4] The trial judge found that *United States* v. *Henry* was distinguishable because the jailhouse informant in that case was paid for reporting the defendant's statements to the police.

the District Court believed that this case presented that open question and that the question must be answered negatively. The District Court noted that the trial court's findings were presumptively correct, see 28 U. S. C. § 2254(d), and were fully supported by the record. The court concluded that these findings were "fatal" to respondent's claim under *Henry* since they showed that Lee made no "affirmative effort" of any kind "to elicit information" from respondent.

A different, and again divided, panel of the Court of Appeals reversed. *Wilson* v. *Henderson*, 742 F. 2d 741 (1984). As an initial matter, the court stated that, under *Sanders* v. *United States*, 373 U. S. 1 (1963), the "ends of justice" required consideration of this petition, notwithstanding the fact that the prior panel had determined the merits adversely to respondent. 742 F. 2d, at 743. The court then reasoned that the circumstances under which respondent made his incriminating statements to Lee were indistinguishable from the facts of *Henry*. Finally, the court decided that *Henry* was fully applicable here because it did not announce a new constitutional rule, but merely applied settled principles to new facts. 742 F. 2d, at 746–747. Therefore, the court concluded that all of the judges who had considered and rejected respondent's claim had erred, and remanded the case to the District Court with instructions to order respondent's release from prison unless the State elected to retry him.[4]

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[4] Judge Van Graafeiland, dissenting, observed that the majority conceded that there had been no change in the law that had "transformed conduct that we formerly held to be constitutional into conduct that is now unconstitutional." 742 F. 2d, at 749. Thus, the majority's rejection of the conclusion reached by the judges who previously had considered respondent's claim was based on its refusal to accept the trial court's factual determinations. *Id.*, at 748. The dissent criticized the majority for disregarding "the presumption that the State court's factual findings are correct, 28 U. S. C. § 2254(d), without an adequate explanation as to why the findings are not fairly supported by the record." *Id.*, at 749. In Judge Van Graafeiland's view, "[a] boilerplate statement that the 'ends of justice'

We granted certiorari, 472 U. S. 1026 (1985), to consider the Court of Appeals' decision that the "ends of justice" required consideration of this successive habeas corpus petition and that court's application of our decision in *Henry* to the facts of this case. We now reverse.

II

A

In concluding that it was appropriate to entertain respondent's successive habeas corpus petition, the Court of Appeals relied upon *Sanders* v. *United States*, 373 U. S. 1 (1963), which announced guidelines for the federal courts to follow when presented with habeas petitions or their equivalent claimed to be "successive" or an "abuse of the writ."[6] The narrow question in *Sanders* was whether a federal prisoner's motion under 28 U. S. C. § 2255 was properly denied without a hearing on the ground that the motion constituted a successive application. *Id.*, at 4–6. The Court undertook not only to answer that question, but also to explore the standard that should govern district courts' consideration of successive petitions. *Sanders* framed the inquiry in terms of the requirements of the "ends of justice," advising district courts to dismiss habeas petitions or their equivalent raising claims determined adversely to the prisoner on a prior petition if

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justify reconsideration on the merits does not warrant rejection of all that has gone on before." *Ibid.* (citations omitted).

[6] The terms "successive petition" and "abuse of the writ" have distinct meanings. A "successive petition" raises grounds identical to those raised and rejected on the merits on a prior petition. See *Sanders* v. *United States*, 373 U. S., at 15–17. Our decision today concerns the circumstances under which district courts properly should entertain the merits of such a petition. The concept of "abuse of the writ" is founded on the equitable nature of habeas corpus. Thus, where a prisoner files a petition raising grounds that were available but not relied upon in a prior petition, or engages in other conduct that "disentitle[s] him to the relief he seeks," the federal court may dismiss the subsequent petition on the ground that the prisoner has abused the writ. *Id.*, at 17–19.

"the ends of justice would not be served by reaching the merits of the subsequent application." *Id.*, at 15, 16–17. While making clear that the burden of proof on this issue rests on the prisoner, *id.*, at 17, the Court in *Sanders* provided little specific guidance as to the kind of proof that a prisoner must offer to establish that the "ends of justice" would be served by relitigation of the claims previously decided against him.

The Court of Appeals' decision in this case demonstrates the need for this Court to provide that guidance. The opinion of the Court of Appeals sheds no light on this important threshold question, merely declaring that the "ends of justice" required successive federal habeas corpus review. Failure to provide clear guidance leaves district judges "at large in disposing of applications for a writ of habeas corpus," creating the danger that they will engage in "the exercise not of law but of arbitrariness." *Brown* v. *Allen*, 344 U. S. 443, 497 (1953) (opinion of Frankfurter, J.). This Court therefore must now define the considerations that should govern federal courts' disposition of successive petitions for habeas corpus.

B

Since 1867, when Congress first authorized the federal courts to issue the writ on behalf of persons in state custody,[7] this Court often has been called upon to interpret the language of the statutes defining the scope of that jurisdiction. It may be helpful to review our cases construing these frequently used statutes before we answer the specific question before us today.

Until the early years of this century, the substantive scope of the federal habeas corpus statutes was defined by refer-

[7] The Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81, the first grant of jurisdiction to the federal courts, included authority to issue the writ of habeas corpus *ad subjiciendum* on behalf of federal prisoners. In 1867, Congress authorized the federal courts to grant habeas relief to persons in the custody of the States. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. See *Stone* v. *Powell*, 428 U. S. 465, 474–475 (1976).

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ence to the scope of the writ at common law, where the courts' inquiry on habeas was limited exclusively "to the jurisdiction of the sentencing tribunal." *Stone* v. *Powell*, 428 U. S. 465, 475 (1976). See *Wainwright* v. *Sykes*, 433 U. S. 72, 78, 79 (1977); see also Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 458–468 (1966). Thus, the finality of the judgment of a committing court of competent jurisdiction was accorded absolute respect on habeas review. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 254–256 (1973) (POWELL, J., concurring). During this century, the Court gradually expanded the grounds on which habeas corpus relief was available, authorizing use of the writ to challenge convictions where the prisoner claimed a violation of certain constitutional rights. See *Wainwright* v. *Sykes*, *supra*, at 79–80; *Stone* v. *Powell*, *supra*, at 475–478. The Court initially accomplished this expansion while purporting to adhere to the inquiry into the sentencing court's jurisdiction. *Wainwright* v. *Sykes*, 433 U. S., at 79. Ultimately, the Court abandoned the concept of jurisdiction and acknowledged that habeas "review is available for claims of 'disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.'" *Ibid.*, quoting *Waley* v. *Johnston*, 316 U. S. 101, 104–105 (1942).

Our decisions have not been limited to expanding the scope of the writ. Significantly, in *Stone* v. *Powell*, we removed from the reach of the federal habeas statutes a state prisoner's claim that "evidence obtained in an unconstitutional search or seizure was introduced at his trial" unless the prisoner could show that the State had failed to provide him "an opportunity for full and fair litigation" of his Fourth Amendment claim. 428 U. S., at 494 (footnotes omitted). Although the Court previously had accepted jurisdiction of search and seizure claims, *id.*, at 480, we were persuaded that any "advance of the legitimate goal of furthering Fourth Amendment rights" through application of the judicially cre-

ated exclusionary rule on federal habeas was "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Id.*, at 494. Among those costs were diversion of the attention of the participants at a criminal trial "from the ultimate question of guilt or innocence," and exclusion of reliable evidence that was "often the most probative information bearing on the guilt or innocence of the defendant." *Id.*, at 490. Our decision to except this category of claims from habeas corpus review created no danger that we were denying a "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." *Id.*, at 491–492, n. 31. Rather, a convicted defendant who pressed a search and seizure claim on collateral attack was "usually asking society to redetermine an issue that ha[d] no bearing on the basic justice of his incarceration." *Id.*, at 492, n. 31.

In decisions of the past two or three decades construing the reach of the habeas statutes, whether reading those statutes broadly or narrowly, the Court has reaffirmed that "habeas corpus has traditionally been regarded as governed by equitable principles." *Fay* v. *Noia*, 372 U. S. 391, 438 (1963), citing *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561, 573 (1953) (dissenting opinion). See *Stone* v. *Powell*, *supra*, at 478, n. 11. The Court uniformly has been guided by the proposition that the writ should be available to afford relief to those "persons whom society has grievously wronged" in light of modern concepts of justice. *Fay* v. *Noia*, *supra*, at 440–441. See *Stone* v. *Powell*, *supra*, at 492, n. 31. Just as notions of justice prevailing at the inception of habeas corpus were offended when a conviction was issued by a court that lacked jurisdiction, so the modern conscience found intolerable convictions obtained in violation of certain constitutional commands. But the Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error. Rather, the Court has performed its

statutory task through a sensitive weighing of the interests implicated by federal habeas corpus adjudication of constitutional claims determined adversely to the prisoner by the state courts. *E. g., Engle* v. *Isaac*, 456 U. S. 107, 126–129 (1982); *Stone* v. *Powell, supra*, at 489–495; *Fay* v. *Noia, supra*, at 426–434.[8]

III

A

The Court in *Sanders* drew the phrase "ends of justice" directly from the version of 28 U. S. C. § 2244 in effect in 1963. The provision, which then governed petitions filed by both federal and state prisoners, stated in relevant part that no federal judge "shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person . . . , if it appears that the legality of such detention has been determined" by a federal court "on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge . . . is satisfied that the *ends of justice will not be served by such inquiry*." 28 U. S. C. § 2244 (1964 ed.) (emphasis added). Accordingly, in describing guidelines for suc-

[8] Contrary to the suggestion of JUSTICE BRENNAN's dissent, our cases deciding that federal habeas review ordinarily does not extend to procedurally defaulted claims plainly concern the "general scope of the writ." *Post*, at 464. The point of those decisions is that, on balancing the competing interests implicated by affording federal collateral relief to persons in state custody, federal courts should not exercise habeas corpus jurisdiction over a certain category of constitutional claims, whether or not those claims are meritorious. Whether one characterizes those decisions as carving out an "exception" to federal habeas jurisdiction, as the dissent apparently prefers to do, *post*, at 465, n. 3, or as concerning the scope of that jurisdiction, the result is the same, and was reached under a framework of analysis that weighed the pertinent interests. Similarly, in *Fay* v. *Noia*, JUSTICE BRENNAN's opinion for the Court expressly made a "practical appraisal of the state interest" in a system of procedural forfeitures, weighing that interest against the other interests implicated by federal collateral review of procedurally defaulted claims. 372 U. S., at 433. Of course, that the Court in *Noia* adopted an expansive reading of the scope of the writ does not undercut the fact that it did so by balancing competing interests.

cessive petitions, *Sanders* did little more than quote the language of the then-pertinent statute, leaving for another day the task of giving that language substantive content.

In 1966, Congress carefully reviewed the habeas corpus statutes and amended their provisions, including § 2244. Section 2244(b), which we construe today, governs successive petitions filed by state prisoners. The section makes no reference to the "ends of justice,"[9] and provides that the federal courts "need not" entertain "subsequent applications" from state prisoners "unless the application alleges and is predicated on a factual or other ground not adjudicated on" the prior application "and unless the court . . . is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."[10] In construing this language, we are cognizant that Congress adopted the section in light of the need—often recognized by this Court—to weigh the interests of the individual prisoner against the sometimes contrary interests of the State in administering a fair and rational system of criminal laws.[11]

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[9] In § 2244(a), which now governs successive petitions filed by federal prisoners, Congress preserved virtually intact the language of former § 2244, including the reference to the "ends of justice."

[10] Title 28 U. S. C. § 2244(b) provides:

"When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."

[11] Sensitivity to the interests implicated by federal habeas corpus review is implicit in the statutory command that the federal courts "shall . . . dis-

The legislative history demonstrates that Congress intended the 1966 amendments, including those to § 2244(b), to introduce "a greater degree of finality of judgments in habeas corpus proceedings." S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966) (Senate Report). Congress was concerned with the "steadily increasing" burden imposed on the federal courts by "applications by State prisoners for writs of habeas corpus."[12] *Id.*, at 1; see H. R. Rep. No. 1892, 89th Cong., 2d Sess., 5–6 (1966) (House Report). In many instances, the "heavy burden" created by these applications was "unnecessary" because state prisoners "have been filing applications either containing allegations identical to those asserted in a previous application that has been denied, or predicated upon grounds obviously well known to them when they filed the preceding application." Senate Report, at 2; see House Report, at 5. The Senate Report explicitly states that the "purpose" of the amendments was to "alleviate the unnecessary burden" by adding "to section 2244 . . . provisions for a qualified application of the doctrine of res judicata." Senate Report, at 2; see House Report, at 8. The House also

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pose of the matter as law *and justice* require." 28 U. S. C. § 2243 (emphasis added).

[12] The Senate Report incorporates a letter from Senior Circuit Judge Orie L. Phillips to Senator Joseph D. Tydings that states:

"The need for this legislation . . . is demonstrated by the fact that the number of applications for writs of habeas corpus in Federal courts by State court prisoners increased from 134 in 1941 to 814 in 1957. In fiscal 1963, 1,692 applications for the writ were filed by State court prisoners; in fiscal 1964, 3,248 such applications were filed; in fiscal 1965, 4,845 such applications were filed; and in the first 9 months of fiscal 1966, 3,773 such applications were filed, yet less than 5 percent of such applications were decided by the Federal district courts in favor of the applicant for the writ. More than 95 percent were held to be without merit." Senate Report, at 4, 5–6.

Since 1966, the burden imposed by applications for federal habeas corpus filed by state prisoners has continued to increase. In 1966, a total of 5,339 such applications was filed. In 1985, 8,534 applications were filed. Annual Report of the Director of the Administrative Office of the U. S. Courts (1985).

expressed concern that the increasing number of habeas applications from state prisoners "greatly interfered with the procedures and processes of the State courts by delaying, in many cases, the proper enforcement of their judgments." *Id.*, at 5.

Based on the 1966 amendments and their legislative history, petitioner argues that federal courts no longer must consider the "ends of justice" before dismissing a successive petition. We reject this argument. It is clear that Congress intended for district courts, as the general rule, to give preclusive effect to a judgment denying on the merits a habeas petition alleging grounds identical in substance to those raised in the subsequent petition. But the permissive language of § 2244(b) gives federal courts discretion to entertain successive petitions under some circumstances. Moreover, Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, which was amended in 1976, contains similar permissive language, providing that the district court "may" dismiss a "second or successive petition" that does not "allege new or different grounds for relief." Consistent with Congress' intent in enacting § 2244(b), however, the Advisory Committee Note to Rule 9(b), 28 U. S. C., p. 358, states that federal courts should entertain successive petitions only in "rare instances."[13] Unless those "rare instances" are to be identified by whim or caprice, district judges must be given guidance for determining when to exercise the limited discretion granted them by § 2244(b). Accordingly, as a means of identifying the rare case in which federal courts should exercise their discretion to hear a successive petition, we continue to rely on the reference in *Sanders* to the "ends of justice." Our task is to provide a definition of the "ends of justice" that will accommodate Congress' intent to give finality to federal habeas judgments with

[13] The Advisory Committee Note relies on the "ends of justice" inquiry described in *Sanders* to identify the unusual case where a successive petition should be heard.

the historic function of habeas corpus to provide relief from unjust incarceration.

B

We now consider the limited circumstances under which the interests of the prisoner in relitigating constitutional claims held meritless on a prior petition may outweigh the countervailing interests served by according finality to the prior judgment. We turn first to the interests of the prisoner.

The prisoner may have a vital interest in having a second chance to test the fundamental justice of his incarceration. Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated. That interest does not extend, however, to prisoners whose guilt is conceded or plain. As Justice Harlan observed, the guilty prisoner himself has "an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders* v. *United States*, 373 U. S., at 24–25 (dissenting).

Balanced against the prisoner's interest in access to a forum to test the basic justice of his confinement are the interests of the State in administration of its criminal statutes. Finality serves many of those important interests. Availability of unlimited federal collateral review to guilty defendants frustrates the State's legitimate interest in deterring crime, since the deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment

through repetitive collateral attacks.[14] See *Engle* v. *Isaac*, 456 U. S., at 127–128, n. 32. Similarly, finality serves the State's goal of rehabilitating those who commit crimes because "[r]ehabilitation demands that the convicted defendant realize that 'he is justly subject to sanction, that he stands in need of rehabilitation.'" *Id.*, at 128, n. 32 (quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 452 (1963)). See *Schneckloth* v. *Bustamonte*, 412 U. S., at 262 (POWELL, J., concurring). Finality also serves the State's legitimate punitive interests. When a prisoner is freed on a successive petition, often many years after his crime, the State may be unable successfully to retry him.[15] *Peyton* v. *Rowe*, 391 U. S. 54, 62 (1968). This result is unacceptable if the State must forgo conviction of a guilty defendant through the "erosion of memory" and "dispersion of witnesses" that occur with the passage of time that invariably attends collateral attack.[16]

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[14] "Deterrence depends upon the expectation that 'one violating the law will swiftly and certainly become subject to punishment, just punishment.'" *Engle* v. *Isaac*, 456 U. S. 107, 127–128, n. 32 (1982), quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 452 (1963).

[15] Where the prisoner secures his release on a successive petition, the delay between the crime and retrial following issuance of the writ often will be substantial. The delay in this case is illustrative. Respondent committed the robbery and murder in 1970, and was convicted in 1972. Direct appeal was completed in 1973. The intervening years have been largely consumed by federal habeas corpus review, with the past four years devoted to relitigation of respondent's claim that admission in evidence of his statements to Lee violated the Sixth Amendment.

[16] Finality serves other goals important to our system of criminal justice and to federalism. Unlimited availability of federal collateral attack burdens our criminal justice system as successive petitions divert the "time of judges, prosecutors, and lawyers" from the important task of trying criminal cases. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 148–149 (1970). See *Engle* v. *Isaac*, *supra*, at 127. Federal habeas review creates friction between our state and federal courts, as state judges—however able and thorough—know that their judgments may be set aside by a single federal judge,

Engle v. *Isaac*, *supra*, at 127–128; Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 146–148 (1970).

In the light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction, we conclude that the "ends of justice" require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence. This standard was proposed by Judge Friendly more than a decade ago as a prerequisite for federal habeas review generally. Friendly, *supra*. As Judge Friendly persuasively argued then, a requirement that the prisoner come forward with a colorable showing of innocence identifies those habeas petitioners who are justified in again seeking relief from their incarceration. We adopt this standard now to effectuate the clear intent of Congress that successive federal habeas review should be granted only in rare cases, but that it should be available when the ends of justice so require. The prisoner may make the requisite showing by establishing that under the probative evidence he has a colorable claim of factual innocence. The prisoner must make his evidentiary showing even though—as argued in this case—the evidence of guilt may have been unlawfully admitted.[17]

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years after it was entered and affirmed on direct appeal. See 456 U. S., at 128. Moreover, under our federal system the States "possess primary authority for defining and enforcing the criminal law," and "hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Ibid.*, citing *Schneckloth* v. *Bustamonte*, 412 U. S., at 263–265 (POWELL, J., concurring). Despite those costs, Congress has continued to afford federal habeas relief in appropriate cases, "recognizing the need in a free society for an additional safeguard against compelling an innocent [person] to suffer an unconstitutional loss of liberty." *Stone* v. *Powell*, 428 U. S., at 491–492, n. 31.

[17] As Judge Friendly explained, a prisoner does not make a colorable showing of innocence "by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been uncon-

C

Applying the foregoing standard in this case, we hold that the Court of Appeals erred in concluding that the "ends of justice" would be served by consideration of respondent's successive petition. The court conceded that the evidence of respondent's guilt "was nearly overwhelming." 742 F. 2d, at 742. The constitutional claim argued by respondent does not itself raise any question as to his guilt or innocence. The District Court and the Court of Appeals should have dismissed this successive petition under § 2244(b) on the ground that the prior judgment denying relief on this identical claim was final.[18]

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stitutionally obtained." Friendly, *supra*, at 160. Rather, the prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt." *Ibid.* (footnote omitted). Thus, the question whether the prisoner can make the requisite showing must be determined by reference to *all* probative evidence of guilt or innocence.

[18] JUSTICE BRENNAN's dissenting opinion mischaracterizes our opinion in several respects. The dissent states that the plurality "*implies* that federal habeas review is not available as a matter of right to a prisoner who alleges in his *first* federal petition a properly preserved [constitutional claim]." *Post*, at 462 (emphasis added). This case involves, and our opinion describes, *only* the standard applicable to *successive* petitions for federal habeas corpus relief. Thus, the first six pages of the dissent have little, if any, relevance to this case. There, JUSTICE BRENNAN merely reiterates at length his views as to the general scope of federal habeas corpus jurisdiction, with no explanation of how those views apply when a district judge is required to consider a habeas corpus petition presenting an issue decided on the merits in a previous federal habeas proceeding.

The dissent further mistakenly asserts that we reject *Sanders*' holding that the question whether successive review is proper should be decided under a "'sound discretion' standard." *Post*, at 462. As we have stated, the permissive language of § 2244(b) of course gives the federal courts discretion to decide whether to entertain a successive petition, and since *Sanders* those courts have relied on the phrase "ends of justice" as a general standard for identifying cases in which successive review may be appropriate. What *Sanders* left open—and the dissent today ignores—is the

IV

Even if the Court of Appeals had correctly decided to entertain this successive habeas petition, we conclude that it erred in holding that respondent was entitled to relief under *United States* v. *Henry*, 447 U. S. 264 (1980). As the District Court observed, *Henry* left open the question whether the Sixth Amendment forbids admission in evidence of an accused's statements to a jailhouse informant who was "placed in close proximity but [made] no effort to stimulate conversations about the crime charged." *Id.*, at 271, n. 9.[19] Our review of the line of cases beginning with *Massiah* v. *United States*, 377 U. S. 201 (1964), shows that this question must, as the District Court properly decided, be answered negatively.

A

The decision in *Massiah* had its roots in two concurring opinions written in *Spano* v. *New York*, 360 U. S. 315 (1959). See *Maine* v. *Moulton*, 474 U. S. 159, 172 (1985). Following his indictment for first-degree murder, the defendant in *Spano* retained a lawyer and surrendered to the authorities. Before leaving the defendant in police custody, counsel cautioned him not to respond to interrogation. The prosecutor and police questioned the defendant, persisting in the face of his repeated refusal to answer and his repeated request to speak with his lawyer. The lengthy interrogation involved improper police tactics, and the defendant ultimately con-

critical question of what considerations should inform a court's decision that successive review of an issue previously decided will serve the "ends of justice." While the dissent today purports to provide some substance to the *Sanders* standard by requiring a "good justification" for relitigation of a claim previously decided, its standard provides no real guidance to federal courts confronted with successive claims for habeas corpus relief. As to the need for a standard, see *supra*, at 445.

[19] In *Maine* v. *Moulton*, 474 U. S. 159 (1985), we again reserved this question, declining to reach the situation where the informant acts simply as a "'listening post'" without "participat[ing] in active conversation and prompt[ing] particular replies." *Id.*, at 177, n. 13.

fessed. Following a trial at which his confession was admitted in evidence, the defendant was convicted and sentenced to death. 360 U. S., at 316–320. Agreeing with the Court that the confession was involuntary and thus improperly admitted in evidence under the Fourteenth Amendment, the concurring Justices also took the position that the defendant's right to counsel was violated by the secret interrogation. *Id.*, at 325 (Douglas, J., concurring). As Justice Stewart observed, an indicted person has the right to assistance of counsel throughout the proceedings against him. *Id.*, at 327. The defendant was denied that right when he was subjected to an "all-night inquisition," during which police ignored his repeated requests for his lawyer. *Ibid.*

The Court in *Massiah* adopted the reasoning of the concurring opinions in *Spano* and held that, once a defendant's Sixth Amendment right to counsel has attached, he is denied that right when federal agents "deliberately elicit" incriminating statements from him in the absence of his lawyer. 377 U. S., at 206. The Court adopted this test, rather than one that turned simply on whether the statements were obtained in an "interrogation," to protect accused persons from "'indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.'" *Ibid.*, quoting *United States* v. *Massiah*, 307 F. 2d 62, 72–73 (1962) (Hays, J., dissenting in part). Thus, the Court made clear that it was concerned with interrogation or investigative techniques that were equivalent to interrogation, and that it so viewed the technique in issue in *Massiah*.[20]

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[20] The defendant in *Massiah* made the incriminating statements in a conversation with one of his confederates, who had secretly agreed to permit Government agents to listen to the conversation over a radio transmitter. The agents instructed the confederate to "engage Massiah in conversation relating to the alleged crimes." *United States* v. *Massiah*, 307 F. 2d, at 72 (Hays, J., dissenting in part).

In *United States* v. *Henry*, the Court applied the *Massiah* test to incriminating statements made to a jailhouse informant. The Court of Appeals in that case found a violation of *Massiah* because the informant had engaged the defendant in conversations and "had developed a relationship of trust and confidence with [the defendant] such that [the defendant] revealed incriminating information." 447 U. S., at 269. This Court affirmed, holding that the Court of Appeals reasonably concluded that the Government informant "deliberately used his position to secure incriminating information from [the defendant] when counsel was not present." *Id.*, at 270. Although the informant had not questioned the defendant, the informant had "stimulated" conversations with the defendant in order to "elicit" incriminating information. *Id.*, at 273; see *id.*, at 271, n. 9. The Court emphasized that those facts, like the facts of *Massiah*, amounted to "'indirect and surreptitious interrogatio[n]'" of the defendant. 447 U. S., at 273.

Earlier this Term, we applied the *Massiah* standard in a case involving incriminating statements made under circumstances substantially similar to the facts of *Massiah* itself. In *Maine* v. *Moulton*, 474 U. S. 159 (1985), the defendant made incriminating statements in a meeting with his accomplice, who had agreed to cooperate with the police. During that meeting, the accomplice, who wore a wire transmitter to record the conversation, discussed with the defendant the charges pending against him, repeatedly asked the defendant to remind him of the details of the crime, and encouraged the defendant to describe his plan for killing witnesses. *Id.*, at 165–166, and n. 4. The Court concluded that these investigatory techniques denied the defendant his right to counsel on the pending charges.[21] Significantly, the Court emphasized that, because of the relationship between the defendant

[21] The Court observed, however, that where the defendant makes "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached," those statements "are, of course, admissible at a trial of those offenses." 474 U. S., at 180, n. 16.

and the informant, the informant's engaging the defendant "in active conversation about their upcoming trial was certain to elicit" incriminating statements from the defendant. *Id.*, at 177, n. 13. Thus, the informant's participation "in this conversation was 'the functional equivalent of interrogation.'" *Ibid.* (quoting *United States* v. *Henry*, 447 U. S., at 277 (POWELL, J., concurring)).

As our recent examination of this Sixth Amendment issue in *Moulton* makes clear, the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached," 474 U. S., at 176, citing *United States* v. *Henry*, *supra*, at 276 (POWELL, J., concurring), a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

B

It is thus apparent that the Court of Appeals erred in concluding that respondent's right to counsel was violated under the circumstances of this case. Its error did not stem from any disagreement with the District Court over appropriate resolution of the question reserved in *Henry*, but rather from its implicit conclusion that this case did not present that open question. That conclusion was based on a fundamental mistake, namely, the Court of Appeals' failure to accord to the state trial court's factual findings the presumption of correctness expressly required by 28 U. S. C. § 2254(d). *Patton* v. *Yount*, 467 U. S. 1025 (1984); *Sumner* v. *Mata*, 449 U. S. 539 (1981).

The state court found that Officer Cullen had instructed Lee only to listen to respondent for the purpose of determining the identities of the other participants in the robbery and murder. The police already had solid evidence of respondent's participation.[22] The court further found that Lee followed those instructions, that he "at no time asked any questions" of respondent concerning the pending charges, and that he "only listened" to respondent's "spontaneous" and "unsolicited" statements. The only remark made by Lee that has any support in this record was his comment that respondent's initial version of his participation in the crimes "didn't sound too good." Without holding that any of the state court's findings were not entitled to the presumption of correctness under § 2254(d),[23] the Court of Appeals focused on that one remark and gave a description of Lee's interaction with respondent that is completely at odds with the facts found by the trial court. In the Court of Appeals' view, "[s]ubtly and slowly, but surely, Lee's ongoing verbal intercourse with [respondent] served to exacerbate [respondent's] already troubled state of mind."[24] 742 F. 2d, at 745. After thus revising some of the trial court's findings, and ignoring other more relevant findings, the Court of Appeals concluded that the police "deliberately elicited" respondent's incriminating statements. *Ibid.* This conclusion conflicts with the

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[22] Eyewitnesses had identified respondent as the man they saw fleeing from the garage with an armful of money.

[23] The majority did not respond to Judge Van Graafeiland's criticism that the court could not "dispense with the presumption that the State court's factual findings are correct without an adequate explanation as to why the findings are not fairly supported by the record." 742 F. 2d, at 749 (citations omitted).

[24] Curiously, the Court of Appeals expressed concern that respondent was placed in a cell that overlooked the scene of his crimes. *Id.*, at 745. For all the record shows, however, that fact was sheer coincidence. Nor do we perceive any reason to require police to isolate one charged with crime so that he cannot view the scene, whatever it may be, from his cell window.

decision of every other state and federal judge who reviewed this record, and is clear error in light of the provisions and intent of § 2254(d).

V

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE BURGER, concurring.

I agree fully with the Court's opinion and judgment. This case is clearly distinguishable from *United States* v. *Henry*, 447 U. S. 264 (1980). There is a vast difference between placing an "ear" in the suspect's cell and placing a voice in the cell to encourage conversation for the "ear" to record.

Furthermore, the abuse of the Great Writ needs to be curbed so as to limit, if not put a stop to, the "sporting contest" theory of criminal justice so widely practiced today.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Because I believe that the Court of Appeals correctly concluded that the "ends of justice" would be served by plenary consideration of respondent's second federal habeas petition and that *United States* v. *Henry*, 447 U. S. 264 (1980), directly controls the merits of this case, I dissent.

I

In *Sanders* v. *United States*, 373 U. S. 1, 15 (1963), we held that a federal court may refuse to entertain a successive petition for habeas relief or its equivalent under 28 U. S. C. § 2255 where "the ends of justice would not be served by reaching the merits of the subsequent application." The decision whether to hear a successive petition, we stated, was committed "to the sound discretion of the federal trial judges." *Id.*, at 18. We declined to define precisely "the

ends of justice," observing that the phrase "cannot be too finely particularized." *Id.*, at 17.

Today four Members of the Court argue that we should reject *Sanders'* "sound discretion" standard and contend that the ends of justice are served by reconsideration of issues raised in previous federal habeas petitions *only* where the prisoner can make a colorable showing of factual innocence.[1] *Ante*, at 454, and n. 17. In support of this standard for consideration of successive petitions, the plurality advances a revisionist theory of this Court's habeas corpus jurisprudence. The plurality implies that federal habeas review is not available as a matter of right to a prisoner who alleges in his first federal petition a properly preserved claim that his conviction was obtained in violation of constitutional commands. Rather, the plurality suggests that a prisoner is entitled to habeas relief only if his interest in freedom from unconstitutional incarceration outweighs the State's interests in the administration of its criminal laws. *Ante*, at 452–453, and nn. 14–16. The plurality further intimates that federal review of state-court convictions under 28 U. S. C. § 2254 is predicated solely on the need to prevent the incarceration of an innocent person, stating that "[d]espite [the substantial] costs [federal habeas review imposes upon the States], Congress has continued to afford federal habeas relief in appropriate cases, 'recognizing the need in a free society for an additional safeguard against compelling an innocent [person] to suffer an unconstitutional loss of liberty.'" *Ante*, at 454, n. 16 (quoting *Stone* v. *Powell*, 428 U. S. 465, 491–492, n. 31 (1976)). Having thus implied that factual innocence is central to our habeas jurisprudence generally, the plurality declares that it is fundamental to the proper interpretation of "the ends of justice." Neither the plurality's standard for

[1] While a majority of the Court today rejects, either implicitly or explicitly, this argument, I believe it appropriate to explain why the plurality's view is incorrect.

consideration of successive petitions nor its theory of habeas corpus is supported by statutory language, legislative history, or our precedents.[2]

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[2] The plurality asserts, *ante*, at 455–456, n. 18, that it addresses *only* the standard applicable to successive habeas petitions and that I mischaracterize its opinion by suggesting that the dictum, contained in Part II–B of the plurality's opinion, regarding the purpose and the scope of the Great Writ has any significance. While the plurality correctly states that what would have been the holding of Part III of its opinion, had that Part commanded a Court, would have directly governed only successive petitions, methinks my Brothers and Sister protest too much about their general discussion of the writ. In order to mask the fact that it fashions its actual innocence standard from whole cloth, the plurality attempts to justify that standard by reference to the plurality's view of "the historic purpose of habeas corpus." *Ante*, at 454; see also *ante*, at 448–452. Consequently, in order to comment upon the plurality's standard for successive petitions, I find it necessary first to address the plurality's treatment of the general scope and purposes of the Great Writ. Thus, the "first six pages of the dissent" has as much "relevance" to this case as does Part II–B of the plurality's opinion. *Ante*, at 455–456, n. 18.

The plurality further chastises me for failing to propose a precise definition of the "ends of justice" standard of *Sanders* v. *United States*, 373 U. S. 1, 15 (1963), and for adhering to *Sanders* by leaving the decision whether to hear successive petitions to the "sound discretion of the federal trial judges." *Id.*, at 18. The plurality argues that *Sanders* left open "the critical question of what considerations should inform a court's decision that successive review of an issue previously decided will serve the 'ends of justice.'" *Ante*, at 455–456, n. 18. *Sanders* did leave that question open, but in a different sense than the plurality suggests. In *Sanders*, we acknowledged that the meaning of the phrase "the ends of justice . . . cannot be too finely particularized," 373 U. S., at 17, and, in recognition of this fact, we left it to the "sound discretion" of federal trial judges to make case-by-case determinations of what the ends of justice require. The plurality, while purporting merely to elucidate *Sanders* "sound discretion" standard, would replace discretion with a single legal standard—actual innocence. And, while the plurality asserts that there is a need for a more refined standard, it offers no evidence that, over the 23 years since *Sanders* was decided, federal trial courts have had difficulty applying the "sound discretion" standard or have so abused their discretion with respect to successive petitions that revision of our longstanding interpretation of § 2244(b) is warranted.

At least since the middle of this century, when we decided *Waley* v. *Johnston*, 316 U. S. 101 (1942), and *Brown* v. *Allen*, 344 U. S. 443 (1953), it has been clear that "habeas lies to inquire into every constitutional defect in any criminal trial," *Mackey* v. *United States*, 401 U. S. 667, 685–686 (1971) (opinion of Harlan, J.), that has not been procedurally defaulted, with the narrow exception of Fourth Amendment exclusionary rule claims. *Stone* v. *Powell*, *supra*. As we stated just two Terms ago, there is "no doubt that in enacting § 2254, Congress sought to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.'" *Reed* v. *Ross*, 468 U. S. 1, 10 (1984) (quoting *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972)).

Contrary to the plurality's assertions, the Court has never delineated the general scope of the writ by weighing the competing interests of the prisoner and the State. Our cases addressing the propriety of federal collateral review of constitutional error made at trial or on appeal have balanced these interests solely with respect to claims that were procedurally defaulted in state court. See, *e. g.*, *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), *Engle* v. *Isaac*, 456 U. S. 107 (1982); *Murray* v. *Carrier*, *post*, p. 478. Recognizing that "the State's interest in the integrity of its rules and proceedings and the finality of its judgments . . . would be undermined if the federal courts were too free to ignore procedural forfeitures in state court," *Reed* v. *Ross*, *supra*, at 10, we held in *Wainwright* v. *Sykes*, *supra*, that a state prisoner generally must show cause and actual prejudice in order to obtain federal habeas corpus relief of a procedurally defaulted claim. See also *Engle* v. *Isaac*, *supra*. But even as we established the cause-and-prejudice standard in *Wainwright* v. *Sykes*, *supra*, we emphasized that the "rule" of *Brown* v. *Allen*, *supra*, "that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the

federal habeas court make its own independent determination of his federal claim . . . is in no way changed," by our adoption of special rules for procedurally defaulted claims. *Wainwright* v. *Sykes*, *supra*, at 87.[3]

Furthermore, *Stone* v. *Powell*, *supra*, on which the plurality heavily relies, did not establish a new regime for federal habeas corpus under which the prisoner's interests are weighed against the State's interests and under which he usually forfeits habeas review unless he can make out a colorable showing of factual innocence or unless the constitutional right he seeks to protect generally furthers the accuracy of factfinding at trial. Indeed, in *Stone* v. *Powell*, the Court expressly stated that its "decision . . . [was] *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally." *Id.*, at 495, n. 37 (emphasis in original). Rather, the Court simply "reaffirm[ed] that the exclusionary rule is a judicially created remedy rather than a personal constitutional right . . . and . . . emphasiz[ed] the minimal utility of the [exclusionary] rule" in the context of federal collateral proceedings. *Ibid.* Subsequent cases have uniformly construed *Stone* v. *Powell* as creating a special rule only for Fourth Amendment exclusionary rule claims and have repeatedly refused to extend its limitations on federal habeas review to any other context. *Kimmelman* v. *Morrison*, *ante*, p. 365 (declining to extend *Stone* v. *Powell* to Sixth Amendment right to effective-assistance-of-counsel claims where the principal allegation and manifestation of inadequate representation is counsel's

[3] In other words, we have recognized an exception to the exercise of federal jurisdiction in the unusual cases where respect for the procedures of state courts make this appropriate; such an exception is similar to abstention rules. See, *e. g.*, *Younger* v. *Harris*, 401 U. S. 37 (1971); *Burford* v. *Sun Oil Co.* 319 U. S. 315 (1943). However, like other judicially created exceptions to federal jurisdiction conferred by Congress, it is a narrow exception to the "virtually unflagging obligation" to exercise that jurisdiction. *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817 (1976).

failure to litigate adequately a Fourth Amendment claim); *Rose* v. *Mitchell*, 443 U. S. 545 (1979) (declining to extend *Stone* v. *Powell* to claims of racial discrimination in the selection of grand jury foremen); *Jackson* v. *Virginia*, 443 U. S. 307 (1979) (declining to extend *Stone* v. *Powell* to claims by state prisoners that the evidence in support of their convictions was not sufficient to permit a rational trier of fact to find guilt beyond a reasonable doubt, as required under *In re Winship*, 397 U. S. 358 (1970)).

Despite the plurality's intimations, we simply have never held that federal habeas review of properly presented, nondefaulted constitutional claims is limited either to constitutional protections that advance the accuracy of the factfinding process at trial or is available solely to prisoners who can make out a colorable showing of factual innocence. On the contrary, we have stated expressly that on habeas review "what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved." *Moore* v. *Dempsey*, 261 U. S. 86, 87–88 (1923) (Holmes, J.). Congress has vested habeas jurisdiction in the federal courts over all cases in which the petitioner claims he has been detained "in violation of the Constitution or laws . . . of the United States," 28 U. S. C. § 2241(c)(3), and, "[t]he constitutional rights of criminal defendants are granted to the innocent and the guilty alike." *Kimmelman* v. *Morrison*, *ante*, at 380. Thus:

> "Even if punishment of the 'guilty' were society's highest value . . . in a constitution that [some] Members of this Court would prefer, that is not the ordering of priorities under the Constitution forged by the Framers . . . . Particular constitutional rights that do not affect the fairness of factfinding procedures cannot for that reason be denied at the trial itself. What possible justification then can there be for denying vindication of such rights on federal habeas when state courts do deny those rights

at trial?" *Stone* v. *Powell*, 428 U. S., at 523–525 (BRENNAN, J., dissenting).

The habeas statute itself certainly does not provide any justification, either for limiting the scope of habeas review generally or for narrowly defining the ends of justice to make habeas relief available on a successive petition only to prisoners who can make a colorable showing of factual innocence.

With respect to the general scope of federal habeas review, § 2241, which grants federal courts the statutory authority to issue writs of habeas corpus, makes no mention of guilt and innocence or of the need to balance the interests of the State and the prisoner. In pertinent part, it states simply that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2241(c)(3). Nor does anything in the legislative history of the habeas statute support the view that Congress intended to limit habeas review in the manner proposed by the Court. For more than 30 years, our construction of the habeas statute to permit federal collateral review of virtually all nondefaulted constitutional claims—with the narrow exception, over dissent, of Fourth Amendment claims—without reference to actual guilt or innocence or to the competing interests of the State and the prisoner, has been unmistakably clear. See *Brown* v. *Allen*, 344 U. S. 443 (1953). Several times during this period, Congress has had the Court's interpretation expressly brought to its attention through bills proposing drastic revision of federal habeas jurisdiction. See L. Yackle, Postconviction Remedies § 19, pp. 91–92 (1981) (describing relevant bills introduced in past several Congresses). Each of those times, Congress steadfastly refused to make any significant changes in this Court's construction of that jurisdiction. *Id.*, § 19, at 92 ("[S]ince 1948 the only amendments to the [habeas] statutes that the Congress has approved have . . . simply tracked contemporaneous Supreme Court decisions") (footnote omitted). The fact that

Congress has been made aware of our longstanding construction and has chosen to leave it undisturbed, "lends powerful support to [its] continued viability." *Square D. Co.* v. *Niagara Frontier Tariff Bur.*, 476 U. S. 409, 419 (1986).

With regard to the specific question whether factual innocence is a precondition for review of a successive habeas petition, neither § 2244(b)—which governs applications for writs of habeas corpus to state courts that are filed subsequent to the disposition of a prior federal habeas petition, its legislative history, nor the Rules Governing Section 2254 Cases in the United States District Courts (hereafter Rules Governing Section 2254), support the plurality's position. Section 2244(b), as amended in 1966, states in relevant part that a subsequent petition "*need not be entertained* . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court . . . is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." (Emphasis added.) By its very terms, then, § 2244(b) merely informs district courts that they *need not* consider successive petitions; that is, the statute gives district courts the *discretion* not to hear such petitions. Similarly, Rule 9(b) of the Rules Governing Section 2254, which were adopted in 1976, states that a "second or successive petition *may* be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." (Emphasis added.)

Congress clearly intended that courts continue to determine which successive petitions they may choose not to hear by reference to the *Sanders* ends-of-justice standard. First, nothing in the House or Senate Reports accompanying the bill that amended § 2244 in 1966 suggests that Congress

wished to abandon the *Sanders* standard. See H. R. Rep. No. 1892, 89th Cong., 2d Sess. (1966); S. Rep. No. 1797, 89th Cong., 2d Sess. (1966). Second, the legislative history of the Rules Governing Section 2254 demonstrates that in adopting Rule 9(b) Congress expressly endorsed the existing case law governing subsequent petitions and cited *Sanders*.[4] H. R. Rep. No. 94-1471, pp. 5-6 (1976). Third, the Advisory Committee's Notes relating to Rule 9(b) state that *Sanders* provides the relevant standards for subsequent petitions and indicate that the district courts have the discretion to refuse to entertain vexatious and meritless subsequent petitions:

> "In *Sanders* v. *United States*, 373 U. S. 1 (1963), the court, in dealing with the problem of successive applications, stated:
>
> "'Controlling weight *may* be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.' [Emphasis added]."
>
> . . . . .
>
> "*Sanders*, [28] U. S. C. § 2244, and [Rule 9(b)] make it clear that the court has the discretion to entertain a successive application.
>
> . . . . .
>
> "Subdivision (b) is consistent with the important and well established purpose of habeas corpus. It does not

[4] While the discussion in the House Report regarding Rule 9(b) focuses on that portion of the Rule that governs abuse of the writ, rather than petitions that repeatedly allege the same claims, it is clear that the Committee intended Rule 9(b) to conform in its entirety to existing case law, particularly to *Sanders* v. *United States*. See H. R. Rep. No. 94-1471, pp. 5-6 (1976).

eliminate a remedy to which the petitioner is rightfully entitled. However, in *Sanders*, the court pointed out:

"'Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.' 373 U. S. at 18.

". . . In rare instances, the court may feel a need to entertain a petition alleging grounds that have already been decided on the merits. *Sanders*, 373 U. S. at 1, 16. However, abusive use of the writ should be discouraged, and instances of abuse are frequent enough to require a means of dealing with them. For example, a successive application, already decided on the merits, may be submitted in the hope of getting before a different judge in multijudge courts. . . . This subdivision is aimed at screening out the abusive petitions . . . so that the more meritorious petitions can get quicker and fuller consideration." 28 U. S. C., p. 358.

The Advisory Committee gave no indication that the problem Rule 9(b), or § 2244(b), seek to correct is that of a *guilty* prisoner seeking repeated federal review of the same constitutional claim. Rather, it is apparent that the Rule attempts to remedy only the problem posed by vexatious and meritless subsequent petitions. The Committee explicitly contemplated, though, that nonabusive, "meritorious [subsequent] petitions" would receive "full[ ] consideration." *Ibid.*

When we review habeas cases, our task is "to give fair effect to the habeas corpus jurisdiction enacted by Congress." *Brown* v. *Allen*, 344 U. S., at 500 (opinion of Frankfurter, J.). With respect to successive habeas petitions, giving "fair effect" to the intent of Congress is to construe "the ends of justice" as *Sanders* did—to mean that it is within the sound discretion of the court *to refuse to hear* abusive, meritless petitions and *to hear* petitions in which the prisoner advances a potentially meritorious claim and provides a good justifi-

cation for returning to court a second time with the same claim.[5]

In the instant case, respondent alleged a potentially meritorious Sixth Amendment claim. He also advanced a complete justification for returning to federal court a second time with this claim. Between his first and second federal habeas petitions, this Court decided *United States* v. *Henry*, 447 U. S. 264 (1980), a case in which the facts were substantially similar to the facts of respondent's case[6] and in which we elaborated on the Sixth Amendment's prohibition against government interference with an accused's right to counsel, a prohibition that we had previously recognized in *Massiah* v. *United States*, 377 U. S. 201 (1964), and *Brewer* v. *Williams*, 430 U. S. 387 (1977). The intervention of *Henry*, *supra*, clarified the appropriate analysis for Sixth Amendment claims like respondent's; thus the Court of Appeals did not abuse its discretion by granting reconsideration of respondent's constitutional claim under the dispositive legal standard.[7]

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[5] I agree with the plurality that actual innocence constitutes a sufficient justification for returning to court a second time with the same claim. I do not agree, though, that a prisoner's inability to make a showing of actual innocence negates an otherwise good justification, such as respondent's.

[6] The facts of this case demonstrate the arbitrariness of the Court's rule. The initial federal habeas petitions filed by respondent and by Henry presented virtually identical claims. Because our decision in *United States* v. *Henry* may have altered the law of the Circuit in which respondent's prior petition failed, it is only just that respondent's claim be reviewed under the proper constitutional standards.

[7] The plurality's factual-innocence standard also presents some significant institutional problems. First, this standard requires the federal courts to function in much the same capacity as the state trier of fact—the federal courts must make a rough decision on the question of guilt or innocence. This requirement diverts the federal courts from the central purpose of habeas review—the evaluation of claims that convictions were obtained in violation of the Constitution. Second, it is unclear what relevance the plurality's standard would have in a case in which a prisoner alleges constitutional error in the sentencing phase of a capital case. Guilt

II

The Court holds that the Court of Appeals erred with respect to the merits of respondent's habeas petition. According to the Court, the Court of Appeals failed to accord § 2254(d)'s presumption of correctness to the state trial court's findings that respondent's cellmate, Lee, "at no time asked any questions" of respondent concerning the pending charges, and that Lee only listened to respondent's "spontaneous" and "unsolicited" statements, App. 62–63. As a result, the Court concludes, the Court of Appeals failed to recognize that this case presents the question, reserved in *Henry*, *supra*, whether the Sixth Amendment forbids the admission into evidence of an accused's statements to a jailhouse informant who was "placed in close proximity but [made] no effort to stimulate conversations about the crime charged." *Id.*, at 271, n. 9. I disagree with the Court's characterization of the Court of Appeals' treatment of the state court's findings and, consequently, I disagree with the Court that the instant case presents the "listening post" question.

The state trial court simply found that Lee did not ask respondent any direct questions about the crime for which respondent was incarcerated. App. 62–63. The trial court considered the significance of this fact only under state precedents, which the court interpreted to require affirmative "interrogation" by the informant as a prerequisite to a constitutional violation. *Id.*, at 63. The court did not indicate whether it referred to a Fifth Amendment or to a Sixth Amendment violation in identifying "interrogation" as a precondition to a violation; it merely stated that "the utterances made by [respondent] to Lee were unsolicited, and volun-

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or innocence is irrelevant in that context; rather, there is only a decision made by representatives of the community whether the prisoner shall live or die. Presumably, then, the plurality's test would not be applicable to such claims.

tarily made and did not violate the defendant's Constitutional rights." *Ibid.*

The Court of Appeals did not disregard the state court's finding that Lee asked respondent no direct questions regarding the crime. Rather, the Court of Appeals *expressly accepted* that finding, *Wilson* v. *Henderson*, 742 F. 2d 741, 745 (CA2 1984) ("[e]ven accepting that Lee did not ask Wilson any direct questions . . ."), but concluded that, as a matter of law, the deliberate elicitation standard of *Henry*, *supra*, and *Massiah*, *supra*, encompasses other, more subtle forms of stimulating incriminating admissions than overt questioning. The court suggested that the police deliberately placed respondent in a cell that overlooked the scene of the crime, hoping that the view would trigger an inculpatory comment to respondent's cellmate.[8] The court also observed that, while Lee asked respondent no questions, Lee nonetheless stimulated conversation concerning respondents' role in the Star Taxicab Garage robbery and murder by remarking that respondent's exculpatory story did not "'sound too good'" and that he had better come up with a better one. 742 F. 2d, at 745. Thus, the Court of Appeals concluded that the respondent's case did not present the situation reserved in *Henry*, where an accused makes an incriminating remark within the hearing of a jailhouse informant, who "makes no effort to stimulate conversations about the crime charged." 447 U. S., at 271, n. 9. Instead, the court determined this case to be virtually indistinguishable from *Henry*.

The Sixth Amendment guarantees an accused, at least after the initiation of formal charges, the right to rely on counsel as the "medium" between himself and the State. *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985). Accordingly, the Sixth Amendment "imposes on the State an affirmative obligation to respect and preserve the accused's choice to

[8] The Court of Appeals noted that "[a]s soon as Wilson arrived and viewed the garage, he became upset and stated that "someone's messing with me.'" 742 F. 2d, at 745.

seek [the assistance of counsel]," *id.*, at 171, and therefore "[t]he determination whether particular action by state agents violates the accused's right to . . . counsel must be made in light of this obligation." *Id.*, at 176. To be sure, the Sixth Amendment is not violated whenever, "by luck or happenstance," the State obtains incriminating statements from the accused after the right to counsel has attached. It is violated, however, when "the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Id.*, at 176 (footnote omitted). As we explained in *Henry*, where the accused has not waived his right to counsel, the government knowingly circumvents the defendant's right to counsel where it "deliberately elicit[s]" inculpatory admissions, 447 U. S., at 270, that is, "intentionally creat[es] a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel." *Id.*, at 274.

In *Henry*, we found that the Federal Government had "deliberately elicited" incriminating statements from Henry based on the following circumstances. The jailhouse informant, Nichols, had apparently followed instructions to obtain information without directly questioning Henry and without initiating conversations concerning the charges pending against Henry. We rejected the Government's argument that because Henry initiated the discussion of his crime, no Sixth Amendment violation had occurred. We pointed out that under *Massiah* v. *United States*, 377 U. S. 201 (1964), it is irrelevant whether the informant asks pointed questions about the crime or "merely engage[s] in general conversation about it." 447 U. S., at 271–272, and n. 10. Nichols, we noted, "was not a passive listener; . . . he had 'some conversations with Mr. Henry' while he was in jail and Henry's incriminatory statements were 'the product of this conversation.'" *Id.*, at 271.

In deciding that Nichols' role in these conversations amounted to deliberate elicitation, we also found three other factors important. First, Nichols was to be paid for any information he produced and thus had an incentive to extract inculpatory admissions from Henry. *Id.*, at 270. Second, Henry was not aware that Nichols was acting as an informant. *Ibid.* "Conversation stimulated in such circumstances," we observed, "may elicit information that an accused would not intentionally reveal to persons known to be Government agents." *Id.*, at 273. Third, Henry was in custody at the time he spoke with Nichols. This last fact is significant, we stated, because "custody imposes pressures on the accused [and] confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." *Id.*, at 274. We concluded that by "intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Ibid.* (footnote omitted).

In the instant case, as in *Henry*, the accused was incarcerated and therefore was "susceptible to the ploys of undercover Government agents." *Ibid.* Like Nichols, Lee was a secret informant, usually received consideration for the services he rendered the police, and therefore had an incentive to produce the information which he knew the police hoped to obtain. Just as Nichols had done, Lee obeyed instructions not to question respondent and to report to the police any statements made by the respondent in Lee's presence about the crime in question. App. 62. And, like Nichols, Lee encouraged respondent to talk about his crime by conversing with him on the subject over the course of several days and by telling respondent that his exculpatory story would not convince anyone without more work. However, unlike the situation in *Henry*, a disturbing visit from respondent's brother, rather than a conversation with the informant, seems to have been the immediate catalyst for respondent's

confession to Lee. *Ante*, at 440; *Wilson* v. *Henderson*, 82 Civ. 4397 (SDNY, Mar. 30, 1983), App. to Pet. for Cert. 25a–26a. While it might appear from this sequence of events that Lee's comment regarding respondent's story and his general willingness to converse with respondent about the crime were not the *immediate* causes of respondent's admission, I think that the deliberate-elicitation standard requires consideration of the entire course of government behavior.

The State intentionally created a situation in which it was forseeable that respondent would make incriminating statements without the assistance of counsel, *Henry*, 447 U. S., at 274—it assigned respondent to a cell overlooking the scene of the crime and designated a secret informant to be respondent's cellmate. The informant, while avoiding direct questions, nonetheless developed a relationship of cellmate camaraderie with respondent and encouraged him to talk about his crime. While the *coup de grace* was delivered by respondent's brother, the groundwork for respondent's confession was laid by the State. Clearly the State's actions had a sufficient nexus with respondent's admission of guilt to constitute deliberate elicitation within the meaning of *Henry*. I would affirm the judgment of the Court of Appeals.

JUSTICE STEVENS, dissenting.

When a district court is confronted with the question whether the "ends of justice" would be served by entertaining a state prisoner's petition for habeas corpus raising a claim that has been rejected on a prior federal petition for the same relief, one of the facts that may properly be considered is whether the petitioner has advanced a "colorable claim of innocence." But I agree with JUSTICE BRENNAN that this is not an essential element of every just disposition of a successive petition. More specifically, I believe that the District Court did not abuse its discretion in entertaining the petition in this case, although I would also conclude that this is one of those close cases in which the District Court could have properly decided that a second review of the same contention was

not required despite the intervening decision in *United States* v. *Henry*, 447 U. S. 264 (1980).

On the merits, I agree with the analysis in Part II of JUSTICE BRENNAN's dissent. Accordingly, I also would affirm the judgment of the Court of Appeals.

MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS *v.* CARRIER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1554. Argued January 21, 1986—Decided June 26, 1986

Respondent was convicted by a jury in a Virginia state court of rape and abduction. The trial judge denied respondent's counsel's pretrial motion to discover the victim's statements to police describing her assailants, their vehicle, and the location of the alleged rape. Without consulting respondent, counsel filed a petition for appeal that failed to include any claim that the trial judge erred in not permitting counsel to examine the victim's statements, notwithstanding a Virginia Supreme Court Rule providing that only errors assigned in the petition for appeal will be noticed and that no error not so assigned will be admitted as a ground for reversal. The Virginia Supreme Court refused the appeal, and this Court denied certiorari. Thereafter, respondent filed a *pro se* state habeas corpus petition, claiming that he had been denied due process of law by the prosecution's withholding of the victim's statements. The state court denied the petition on the ground that the claim was barred because respondent failed to raise it on appeal, and the Virginia Supreme Court denied certiorari. Respondent then filed a *pro se* habeas petition in Federal District Court, which also held that the discovery claim was barred by procedural default. On appeal, respondent disavowed any claim of ineffective assistance of counsel, but asserted that counsel had mistakenly omitted his discovery claim from the state petition for appeal and that this error was cause for his default. The Court of Appeals reversed, holding that a federal habeas petitioner need only satisfy the district court that the procedural default resulted from his attorney's ignorance or inadvertence, rather than from a deliberate tactical decision. Accordingly, the Court of Appeals remanded to the District Court to resolve the question of respondent's counsel's motivation for failing to appeal the discovery claim.

Held: A federal habeas petitioner, such as respondent, cannot show cause for a procedural default by establishing that competent defense counsel's failure to raise a substantive claim of error was inadvertent rather than deliberate. Pp. 485-497.

(a) The mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default. *Engle* v. *Isaac*, 456 U. S.

107. The question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland* v. *Washington*, 466 U. S. 668, there is no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. While ineffective assistance of counsel constitutes cause for a procedural default, the exhaustion doctrine generally requires that an ineffective assistance claim be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default in federal habeas proceedings. Pp. 485–490.

(b) There is no merit to respondent's argument that even if counsel's ignorance or inadvertence does not constitute cause for a procedural default at trial, it does constitute cause for a procedural default on appeal. A State's procedural rules serve vital purposes on appeal as well as at trial and on state collateral attack, and the standard for cause should not vary depending on the timing of a procedural default. The frustration of the State's interests that occurs when an appellate procedural rule is broken is not significantly diminished when counsel's breach results from ignorance or inadvertence rather than from a deliberate decision, tactical or not, to abstain from raising the claim. Failure to raise a claim on appeal reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and undercuts the State's ability to enforce its procedural rules. As with procedural defaults at trial, these costs are imposed on the State regardless of the kind of attorney error that led to the procedural default. Whatever may be the case where counsel has failed to take an appeal at all, counsel's failure to raise a *particular* claim on appeal is to be scrutinized under the cause and prejudice standard when that failure is treated as a procedural default by the state courts. Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial. To the contrary, cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim. Pp. 490–492.

(c) Adherence to the cause and prejudice test in the conjunctive will not prevent federal habeas corpus courts from ensuring the fundamental fairness that is the central concern of the writ of habeas corpus. That test is a sound and workable means of channeling the discretion of federal habeas courts. However, in an extraordinary case, where a con-

stitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default. Pp. 492–497.

(d) Respondent has never alleged any external impediment that might have prevented counsel from raising his discovery claim in his state petition for review, and has disavowed any claim that counsel's performance on appeal was so deficient as to make out an ineffective assistance claim. Accordingly, respondent's petition for federal habeas review of his procedurally defaulted discovery claim must be dismissed for failure to establish cause for the default, unless it is determined on remand that the victim's statements contain material that would establish respondent's actual innocence. P. 497.

754 F. 2d 520, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 497. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 516.

Jerry P. Slonaker, Senior Assistant Attorney General of Virginia, argued the cause for petitioner. With him on the briefs were *William G. Broaddus*, Attorney General, and *Donald R. Curry*, Assistant Attorney General.

Deputy Solicitor General Frey argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Fried*, *Assistant Attorney General Trott*, *Edwin S. Kneedler*, and *Kathleen A. Felton*.

Sherman L. Cohn, by appointment of the Court, 474 U. S. 898, argued the cause for respondent. With him on the brief was *Steven H. Goldblatt*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Idaho et al. by *James Thomas Jones*, Attorney General of Idaho, and *Lynn E. Thomas*, Solicitor General, *Charles A. Graddick*, Attorney General of Alabama, *Harold M. Brown*, Attorney General of Alaska, *Robert K. Corbin*, Attorney General of Arizona, *John Steven Clark*, Attorney General of Arkansas, *Duane Woodward*, Attorney General of Colorado, *John J. Kelley*, Chief State's Attorney of Connecticut, *Charles M. Oberly*,

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certoriari in this case to consider whether a federal habeas petitioner can show cause for a procedural default by establishing that competent defense counsel inad-

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Attorney General of Delaware, *Michael J. Bowers*, Attorney General of Georgia, *Richard Opper*, Attorney General of Guam, *Corinne K. A. Watanabe*, Attorney General of Hawaii, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *David L. Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *Stephen H. Sachs*, Attorney General of Maryland, *Francis X. Bellotti*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Edwin L. Pittman*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Mike Greely*, Attorney General of Montana, *Robert M. Spire*, Attorney General of Nebraska, *Brian McKay*, Attorney General of Nevada, *Stephen E. Merrill*, Attorney General of New Hampshire, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Paul Bardacke*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas Spaeth*, Attorney General of North Dakota, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Michael Turpen*, Attorney General of Oklahoma, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Hector Rivera Cruz*, Attorney General of Puerto Rico, *Arlene Violet*, Attorney General of Rhode Island, *T. Travis Medlock*, Attorney General of South Carolina, *Mark V. Meierhenry*, Attorney General of South Dakota, *W. J. Michael Cody*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, *David L. Wilkinson*, Attorney General of Utah, *Jeffrey Amestoy*, Attorney General of Vermont, *Victor D. Schneider*, Acting Attorney General of The Virgin Islands, *William G. Broaddus*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, *Charlie Brown*, Attorney General of West Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, and *Archie G. McClintock*, Attorney General of Wyoming; for the State of Florida by *Jim Smith*, Attorney General, and *Raymond L. Marky* and *Gregory G. Costas*, Assistant Attorneys General; and for the Legal Foundation of America et al. by *Susan Crump*, *David Crump*, and *James P. Manak*.

Larry W. Yackle, *Charles S. Sims*, and *Burt Neuborne* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

vertently failed to raise the substantive claim of error rather than deliberately withholding it for tactical reasons.

I

Respondent Clifford Carrier was convicted of rape and abduction by a Virginia jury in 1977. Before trial, respondent's court-appointed counsel moved for discovery of the victim's statements to police describing "her assailants, the vehicle the assailants were driving, and the location of where the alleged rape took place." 2 Record 11. The presiding judge denied the motion by letter to counsel after examining the statements *in camera* and determining that they contained no exculpatory evidence. *Id.*, at 31. Respondent's counsel made a second motion to discover the victim's statements immediately prior to trial, which the trial judge denied for the same reason after conducting his own *in camera* examination. Tr. 151–152.

After respondent was convicted, his counsel filed a notice of appeal to the Virginia Supreme Court assigning seven errors, of which the fifth was:

> "Did the trial judge err by not permitting defendant's counsel to examine the written statements of the victim prior to trial, and during the course of the trial?" 2 Record 83.

Without consulting respondent, counsel subsequently submitted the required petition for appeal but failed to include this claim, notwithstanding that Virginia Supreme Court Rule 5:21 provides that "[o]nly errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below." The Virginia Supreme Court refused the appeal and this Court denied certiorari. *Carrier* v. *Virginia*, 439 U. S. 1076 (1979).

A year later respondent, by this time proceeding *pro se*, filed a state habeas corpus petition claiming that he had been denied due process of law by the prosecution's withholding of the victim's statements. The State sought dismissal of his

petition on the ground that respondent was barred from presenting his due process discovery claim on collateral review because he failed to raise that claim on appeal. The state habeas court dismissed the petition "for the reasons stated in the Motion to Dismiss," 1 Record, Doc. No. 12, and the Virginia Supreme Court denied certiorari.

Respondent next filed a *pro se* habeas petition in the District Court for the Eastern District of Virginia, renewing his due process discovery claim as grounds for relief. The State filed a motion to dismiss asserting that respondent's failure to raise the issue on direct appeal was a procedural default barring federal habeas review under *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), and that respondent had not exhausted his state remedies because he could bring an ineffective assistance of counsel claim in the state courts to establish that his procedural default should be excused. 1 Record, Doc. No. 3. The United States Magistrate to whom the case was referred recommended dismissal by virtue of the procedural default and also ruled that respondent had not exhausted his state remedies. In reply to the Magistrate's report, respondent alleged that his procedural default was "due to ineffective assistance of counsel during the filing of his appeal." App. 11. The District Court approved the Magistrate's report, holding the discovery claim barred by the procedural default and indicating that respondent should establish cause for that default in the state courts.

At oral argument on appeal to the Court of Appeals for the Fourth Circuit, respondent abandoned any claim of ineffective assistance of counsel but asserted that counsel had mistakenly omitted his discovery claim from the petition for appeal and that this error was cause for his default. A divided panel of the Court of Appeals reversed and remanded. *Carrier* v. *Hutto*, 724 F. 2d 396 (1983). The court construed respondent's objection to the denial of discovery as having rested throughout on a contention that *Brady* v. *Maryland*, 373 U. S. 83 (1963), requires the prosecution to disclose any evidence that might be material to guilt whether or not it is

exculpatory, and concluded that when respondent's counsel omitted this discovery claim from the petition for review "the issue was lost for purposes of direct and collateral review." 724 F. 2d, at 399. The court framed the issue before it as whether "a single act or omission by counsel, insufficient by itself to contravene the sixth amendment, [can] satisfy the 'cause' prong of the exception to preclusive procedural default discussed in *Wainwright?*" *Id.*, at 400. In answering this question, the court drew a dispositive distinction between procedural defaults resulting from deliberate tactical decisions and those resulting from ignorance or inadvertence. *Id.*, at 401. The court determined that only in the latter category does an attorney's error constitute cause because, whereas a tactical decision implies that counsel has, at worst, "reasonably but incorrectly exercise[d] her judgment," ignorance or oversight implies that counsel "fail[ed] to exercise it at all, in dereliction of the duty to represent her client." *Ibid.* Thus, in order to establish cause a federal habeas petitioner need only satisfy the district court "that the failure to object or to appeal his claim was the product of his attorney's ignorance or oversight, not a deliberate tactic." *Ibid.* Accordingly, the Court of Appeals remanded to the District Court:

> "[A]lthough the likelihood of attorney error appears very great in this case, we lack testimony from Carrier's counsel which might disclose a strategic reason for failing to appeal the *Brady* issue. The question of counsel's motivation is one of fact for the district court to resolve upon taking further evidence." *Id.*, at 402.

The court also ruled that the District Court erred in suggesting that respondent should establish cause for the default in the state courts. "The exhaustion requirement of 28 U. S. C. § 2254 pertains to independent claims for habeas relief, not to the proffer of *Wainwright* cause and prejudice." *Ibid.* Since respondent did not allege ineffective assistance

of counsel as an independent basis for habeas relief, the case presented no exhaustion question.

The dissenting judge believed that the petition should have been dismissed for failure to exhaust state remedies because respondent had never presented his discovery claim as a denial of due process in the state courts, *id.*, at 403–404 (Hall, J., dissenting), and differed with the majority's interpretation of the cause standard because "[it] will ultimately allow the exception to swallow the rule." *Id.*, at 405. The State sought rehearing, and the en banc Court of Appeals adopted the panel majority's decision, with four judges dissenting. *Carrier* v. *Hutto*, 754 F. 2d 520 (1985). We now reverse and remand.

II

Wainwright v. *Sykes* held that a federal habeas petitioner who has failed to comply with a State's contemporaneous-objection rule at trial must show cause for the procedural default and prejudice attributable thereto in order to obtain review of his defaulted constitutional claim. 433 U. S., at 87. See also *Francis* v. *Henderson*, 425 U. S. 536 (1976). In so holding, the Court explicitly rejected the standard described in *Fay* v. *Noia*, 372 U. S. 391 (1963), under which a federal habeas court could refuse to review a defaulted claim only if "an applicant ha[d] deliberately by-passed the orderly procedure of the state courts," *id.*, at 438, by personal waiver of the claim amounting to "'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.*, at 439 (quoting *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938)). See *Wainwright* v. *Sykes*, 433 U. S., at 87–88. At a minimum, then, *Wainwright* v. *Sykes* plainly implied that default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision would, absent extraordinary circumstances, bind the habeas petitioner even if he had not personally waived that claim. See *id.*, at 91, n. 14; *Reed* v. *Ross*, 468 U. S. 1, 13 (1984). Beyond that, the Court left open "for

resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard." 433 U. S., at 87.

We revisited the cause and prejudice test in *Engle* v. *Isaac*, 456 U. S. 107 (1982). Like *Wainwright* v. *Sykes*, *Engle* involved claims that were procedurally defaulted at trial. In seeking to establish cause for their defaults, the prisoners argued that "they could not have known at the time of their trials" of the substantive basis for their constitutional claims, which were premised on *In re Winship*, 397 U. S. 358 (1970). *Engle*, 456 U. S., at 130. Without deciding "whether the novelty of a constitutional claim ever establishes cause for a failure to object," *id.*, at 131, we rejected this contention because we could not conclude that the legal basis for framing the prisoners' constitutional claims was unavailable at the time. *Id.*, at 133. In language that bears directly on the present case, we said:

> "We do not suggest that every astute counsel would have relied upon *Winship* to assert the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense. Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as a cause for a procedural default." *Id.*, at 133–134 (footnote omitted).

The thrust of this part of our decision in *Engle* is unmistakable: the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural de-

fault. At least with respect to defaults that occur at trial, the Court of Appeals' holding that ignorant or inadvertent attorney error is cause for any resulting procedural default is plainly inconsistent with *Engle*. It is no less inconsistent with the purposes served by the cause and prejudice standard. That standard rests not only on the need to deter intentional defaults but on a judgment that the costs of federal habeas review "are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts." *Engle*, 456 U. S., at 128. Those costs, which include a reduction in the finality of litigation and the frustration of "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *ibid.*, are heightened in several respects when a trial default occurs: the default deprives the trial court of an opportunity to correct any error without retrial, detracts from the importance of the trial itself, gives state appellate courts no chance to review trial errors, and "exacts an extra charge by undercutting the State's ability to enforce its procedural rules." *Id.*, at 129. Clearly, these considerable costs do not disappear when the default stems from counsel's ignorance or inadvertence rather than from a deliberate decision, for whatever reason, to withhold a claim.

Indeed, the rule applied by the Court of Appeals would significantly increase the costs associated with a procedural default in many cases. In order to determine whether there was cause for a procedural default, federal habeas courts would routinely be required to hold evidentiary hearings to determine what prompted counsel's failure to raise the claim in question. While the federal habeas courts would no doubt strive to minimize the burdens to all concerned through the use of affidavits or other simplifying procedures, we are not prepared to assume that these costs would be negligible, particularly since, as we observed in *Strickland* v. *Washington*, 466 U. S. 668, 690 (1984), "[i]ntensive scrutiny of counsel . . . could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases,

and undermine the trust between attorney and client." Nor will it always be easy to classify counsel's behavior in accordance with the deceptively simple categories propounded by the Court of Appeals. Does counsel act out of "ignorance," for example, by failing to raise a claim for tactical reasons after mistakenly assessing its strength on the basis of an incomplete acquaintance with the relevant precedent? The uncertain dimensions of any exception for "inadvertence" or "ignorance" furnish an additional reason for rejecting it.

We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland* v. *Washington*, *supra*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see *Reed* v. *Ross*, 468 U. S., at 16, or that "some interference by officials," *Brown* v. *Allen*, 344 U. S. 443, 486 (1953), made compliance impracticable, would constitute cause under this standard.

Similarly, if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not "conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance." *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980). Ineffective assistance of counsel, then, is cause for a procedural default. However, we think that the exhaustion

doctrine, which is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings," *Rose* v. *Lundy*, 455 U. S. 509, 518 (1982), generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. The question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause—a question of federal law—without deciding an independent and unexhausted constitutional claim on the merits. But if a petitioner could raise his ineffective assistance claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available. The principle of comity that underlies the exhaustion doctrine would be ill-served by a rule that allowed a federal district court "to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," *Darr* v. *Burford*, 339 U. S. 200, 204 (1950), and that holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief.

It is clear that respondent failed to show or even allege cause for his procedural default under this standard for cause, which *Engle* squarely supports. Respondent argues nevertheless that his case is not controlled by *Engle* because it involves a procedural default on appeal rather than at trial. Respondent does not dispute, however, that the cause and prejudice test applies to procedural defaults on appeal, as we plainly indicated in *Reed* v. *Ross*, 468 U. S., at 11. *Reed*, which involved a claim that was defaulted *on appeal*, held that a habeas petitioner could establish cause for a procedural default if his claim is "so novel that its legal basis is not rea-

sonably available to counsel," *id.*, at 16. That holding would have been entirely unnecessary to the disposition of the prisoner's claim if the cause and prejudice test were inapplicable to procedural defaults on appeal.

The distinction respondent would have us draw must therefore be made, if at all, in terms of the content of the cause requirement as applied to procedural defaults on appeal. Accordingly, respondent asks us to affirm the Court of Appeals' judgment on the narrow ground that even if counsel's ignorance or inadvertence does not constitute cause for a procedural default at trial, it does constitute cause for a procedural default on appeal. In support of this distinction, respondent asserts that the concerns that underlie the cause and prejudice test are not present in the case of defaults on appeal. A default on appeal, he maintains, does not detract from the significance of the trial or from the development of a full trial record, or deprive the trial court of an opportunity to correct error without the need for retrial. Moreover, unlike the rapid pace of trial, in which it is a matter of necessity that counsel's decisions bind the defendant, "the appellate process affords the attorney time for reflection, research, and full consultation with his client." Brief for Respondent 19. Finally, respondent suggests that there is no likelihood that an attorney will preserve an objection at trial yet choose to withhold it on appeal in order to "sandbag" the prosecution by raising the claim on federal habeas if relief is denied by the state courts.

These arguments are unpersuasive. A State's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack. The important role of appellate procedural rules is aptly captured by the Court's description in *Reed* v. *Ross* of the purposes served by the procedural rule at issue there, which required the defendant initially to raise his legal claims on appeal rather than on postconviction review:

> "It affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still avail-

> able both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 147 (1970). This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." 468 U. S., at 10–11.

These legitimate state interests, which are manifestly furthered by the comparable procedural rule at issue in this case, warrant our adherence to the conclusion to which they led the Court in *Reed* v. *Ross*– that the cause and prejudice test applies to defaults on appeal as to those at trial.

We likewise believe that the standard for cause should not vary depending on the timing of a procedural default or on the strength of an uncertain and difficult assessment of the relative magnitude of the benefits attributable to the state procedural rules that attach at each successive stage of the judicial process. "Each State's complement of procedural rules . . . channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Id.*, at 10. It is apparent that the frustration of the State's interests that occurs when an appellate procedural rule is broken is not significantly diminished when counsel's breach results from ignorance or inadvertence rather than a deliberate decision, tactical or not, to abstain from raising the claim. Failure to raise a claim on appeal reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and "undercut[s] the State's ability to enforce its procedural rules." *Engle*, 456 U. S., at 129. As with procedural defaults at trial, these costs are imposed on the State regardless of the kind of attorney error that led to the procedural default. Nor do we

agree that the possibility of "sandbagging" vanishes once a trial has ended in conviction, since appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review should the appeal be unsuccessful. Moreover, we see little reason why counsel's failure to detect a colorable constitutional claim should be treated differently from a deliberate but equally prejudicial failure by counsel to raise such a claim. The fact that the latter error can be characterized as a misjudgment, while the former is more easily described as an oversight, is much too tenuous a distinction to justify a regime of evidentiary hearings into counsel's state of mind in failing to raise a claim on appeal.

The real thrust of respondent's arguments appears to be that on appeal it is inappropriate to hold defendants to the errors of their attorneys. Were we to accept that proposition, defaults on appeal would presumably be governed by a rule equivalent to *Fay* v. *Noia*'s "deliberate bypass" standard, under which only personal waiver by the defendant would require enforcement of a procedural default. We express no opinion as to whether counsel's decision not to take an appeal at all might require treatment under such a standard, see *Wainwright* v. *Sykes*, 433 U. S., at 88, n. 12, but, for the reasons already given, we hold that counsel's failure to raise a *particular* claim on appeal is to be scrutinized under the cause and prejudice standard when that failure is treated as a procedural default by the state courts. Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial. To the contrary, cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim.

III

Concurring in the judgment, JUSTICE STEVENS contends that our decision today erects an unwarranted procedural

barrier to the correction through federal habeas corpus of violations of fundamental constitutional rights that have resulted in a miscarriage of justice. The cause and prejudice test, in his view, "must be considered within an overall inquiry into justice," *post*, at 504, which requires consideration in every case of the character of the constitutional claim. If the federal right asserted is of "fundamental importance," *post*, at 499, or if a violation of that right "calls into question the accuracy of the determination of . . . guilt," *post*, at 499, JUSTICE STEVENS would then balance "the nature and strength of the constitutional claim" and "the nature and strength of the state procedural rule that has not been observed." *Post*, at 506.

At the outset, it should be noted that this balancing is more apparent than real, for the concurrence makes plain that the controlling consideration must be whether the petitioner was denied "'fundamental fairness in the state-court proceedings.'" *Post*, at 506, n. 13 (quoting *Rose* v. *Lundy*, 455 U. S. 509, 547, n. 17 (1982) (STEVENS, J., dissenting). And, while JUSTICE STEVENS argues at some length that an appellate default should be given less weight than a trial default in applying the balancing process he proposes, it is hard to believe that this distinction would make any difference given his simultaneous insistence on "carefully preserv[ing] the exception which enables the federal writ to grant relief in cases of manifest injustice," *post*, at 515—an exception that he clearly would endorse regardless of the timing of the default.

The effect of such a reworking of the cause and prejudice test would essentially be to dispense with the requirement that the petitioner show cause and instead to focus exclusively on whether there has been a "manifest injustice" or a denial of "fundamental fairness." We are not told whether this inquiry would require the same showing of actual prejudice that is required by the cause and prejudice test as interpreted in *Engle* and in *United States* v. *Frady*, 456 U. S. 152 (1982), but the thrust of the concurrence leaves little doubt that this is so. The showing of prejudice required under

Wainwright v. *Sykes* is significantly greater than that necessary under "the more vague inquiry suggested by the words 'plain error.'" *Engle, supra,* at 135; *Frady, supra,* at 166. See also *Henderson* v. *Kibbe,* 431 U. S. 145. 154 (1977). The habeas petitioner must show "not merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Frady, supra,* at 170. Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied "fundamental fairness" at trial. Since, for JUSTICE STEVENS, a "constitutional claim that implicates 'fundamental fairness' . . . compels review regardless of possible procedural defaults," *post,* at 501, n. 8, it follows that a showing of prejudice would invariably make a showing of cause unnecessary.

As the concurrence acknowledges, *Engle* expressly rejected this contention that a showing of actual prejudice "should permit relief even in the absence of cause." 456 U. S., at 134, n. 43. It may be true that the former Rule 12(b)(2) of the Federal Rules of Criminal Procedure, as interpreted in *Shotwell Mfg. Co.* v. *United States,* 371 U. S. 341 (1963), and *Davis* v. *United States,* 411 U. S. 233 (1973), treated prejudice as a component of the inquiry into whether there was cause for noncompliance with that rule. But, while the cause and prejudice test adopted in *Wainwright* v. *Sykes* finds its antecedents in cases interpreting Rule 12(b)(2), the Court in *Wainwright* v. *Sykes* declared that it was applying "the rule of *Francis* v. *Henderson* . . . barring federal habeas review absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver." 433 U. S., at 87. In *Francis,* the Court could not have been clearer that *both* cause and prejudice must be shown, at least in a habeas corpus proceeding challenging a state court conviction. 425 U. S., at 542 (requiring "not only a showing of 'cause' for the defendant's failure to challenge the composition of the grand

jury before trial, but also a showing of actual prejudice"). We deal here with habeas review of a state court conviction, and at least three decisions of this Court—*Francis*, *Sykes*, and *Engle*—are unambiguously contrary to the approach taken in the concurrence. We are unprepared, in the face of this weight of authority and in view of the principles of comity and finality these decisions reflect, to reduce the cause requirement to the vestigial role JUSTICE STEVENS envisions for it.

Moreover, although neither *Francis* nor *Wainwright* v. *Sykes* involved a constitutional claim that directly called into question the accuracy of the determination of the petitioner's guilt, the defaulted claims in *Engle*, no less than respondent's claim in this case, did involve issues bearing on the reliability of the verdict. *In re Winship*, 397 U. S. 358 (1970), which was "the basis for [the prisoners'] constitutional claim" in *Engle*, 456 U. S., at 131, holds that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, *supra*, at 364. In *Ivan V.* v. *City of New York*, 407 U. S. 203, 205 (1972) *(per curiam)*, the Court held the rule in *Winship* to be retroactive, because "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." Consequently, our rejection in *Engle* of the contention advanced today—that cause need not be shown if actual prejudice is shown—is fully applicable to constitutional claims that call into question the reliability of an adjudication of legal guilt.

However, as we also noted in *Engle*, "[i]n appropriate cases" the principles of comity and finality that inform the concepts of cause and prejudice "must yield to the imperative of correcting a fundamentally unjust incarceration." 456 U. S., at 135. We remain confident that, for the most part, "victims of a fundamental miscarriage of justice will meet the

cause-and-prejudice standard." *Ibid.* But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.

There is an additional safeguard against miscarriages of justice in criminal cases, and one not yet recognized in state criminal trials when many of the opinions on which the concurrence relies were written. That safeguard is the right to effective assistance of counsel, which, as this Court has indicated, may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial. *United States* v. *Cronic*, 466 U. S. 648, 657, n. 20 (1984). See also *Strickland* v. *Washington*, 466 U. S., at 693–696. The presence of such a safeguard may properly inform this Court's judgment in determining "[w]hat standards should govern the exercise of the habeas court's equitable discretion" with respect to procedurally defaulted claims, *Reed* v. *Ross*, 468 U. S., at 9. The ability to raise ineffective assistance claims based in whole or in part on counsel's procedural defaults substantially undercuts any predictions of unremedied manifest injustices. We therefore remain of the view that adherence to the cause and prejudice test "in the conjunctive," *Engle*, 456 U. S., at 134, n. 43, will not prevent federal habeas courts from ensuring the "fundamental fairness [that] is the central concern of the writ of habeas corpus." *Strickland* v. *Washington*, *supra*, at 697.

The cause and prejudice test may lack a perfect historical pedigree. But the Court acknowledged as much in *Wainwright* v. *Sykes*, noting its "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." 433 U. S., at 81. The cause and prejudice test as interpreted in *Engle* and in our decision

today is, we think, a sound and workable means of channeling the discretion of federal habeas courts.

IV

Respondent has never alleged any external impediment that might have prevented counsel from raising his discovery claim in his petition for review, and has disavowed any claim that counsel's performance on appeal was so deficient as to make out an ineffective assistance claim. See generally *Evitts* v. *Lucey*, 469 U. S. 387 (1985) (right to effective assistance of counsel applies on an appeal as of right). Respondent's petition for federal habeas review of his procedurally defaulted discovery claim must therefore be dismissed for failure to establish cause for the default, unless it is determined on remand that the victim's statements contain material that would establish respondent's actual innocence.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

The heart of this case is a prisoner's claim that he was denied access to material that might have established his innocence. The significance of such a claim can easily be lost in a procedural maze of enormous complexity.

The nature of the prisoner's claim, and its importance, would be especially easy to overlook in this case because the case involves at least four possible procedural errors. A Virginia trial judge may have erroneously denied respondent's counsel access to statements that the victim had made to the police. The Virginia Supreme Court did not address this issue because, although respondent's counsel included it in the assignment of errors in his "notice of appeal," he omitted it from his "petition for appeal." In a subsequent federal habeas corpus proceeding, the District Court held that the

procedural default in the state appellate court effected a waiver of any right to federal relief and therefore dismissed the petition without examining the victim's statements. The Court of Appeals, however, concluded that there was no waiver if counsel's omission was the consequence of inadvertence and ordered a remand for a hearing to determine whether the lawyer had made a deliberate decision to omit the error from the petition for appeal. We granted certiorari to review that decision.

This Court now reverses, holding that there is no need for a hearing on counsel's motivation and that, instead, the District Court should determine whether there is merit to the habeas corpus application by making an examination of the victim's statements. I concur in its judgment remanding the case for further proceedings on the substance of the claim, and dispensing with the procedural hearing ordered by the Court of Appeals; I disagree, however, with much of what the Court has written about "cause and prejudice," as well as with its announcement of a new standard to govern the District Court's ultimate disposition of the case.

I

The character of respondent's constitutional claim should be central to an evaluation of his habeas corpus petition. Before and during his trial on charges of rape and abduction, his counsel made timely motions for discovery of the statements made by the victim to the police. By denying those motions, the trial court significantly curtailed the defendant's ability to cross-examine the prosecution's most important witness, and may well have violated the defendant's right to review "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment." *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963). That right is unquestionably protected by the Due Process Clause. *Ibid.* See also *United States* v. *Bagley*, 473 U. S. 667 (1985); *United States* v. *Agurs*, 427 U. S. 97 (1976). Indeed, the

Court has repeatedly emphasized the fundamental importance of that federal right.[1]

The constitutional claim advanced by respondent calls into question the accuracy of the determination of his guilt. On the record before us, however, we cannot determine whether or not he is the victim of a miscarriage of justice. Respondent argues that the trial court's analysis was severely flawed.[2] Even if the trial judge applied the correct standard, the conclusion that there was no "exculpatory" material in the victim's statements does not foreclose the possibility that inconsistencies between the statements and the direct testimony would have enabled an effective cross-examination to demonstrate that respondent is actually innocent.[3] On the other hand, it is possible that other evidence of guilt in the record is so overwhelming that the trial judge's decision was clearly not prejudicial to the defendant. The important point is that we cannot evaluate the possibility that respondent may be the victim of a fundamental miscarriage of justice without any knowledge about the contents of the victim's statements.

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[1] See *Brady* v. *Maryland*, 373 U. S., at 87 ("The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly"); *United States* v. *Bagley*, 473 U. S., at 675 ("The *Brady* rule is based on the requirement of due process. Its purpose is . . . to ensure that a miscarriage of justice does not occur").

[2] See *Carrier* v. *Hutto*, 724 F. 2d 396, 399 (CA4 1983) ("Carrier urges that the standard which should have been employed by the court in delimiting discovery was whether the evidence specifically requested was 'material . . . to guilt,' *Brady*, 373 U. S., at 87 . . . not whether it was exculpatory").

[3] Indeed, a major element of respondent's defense was precisely that the victim's identification was mistaken. See Tr. 152–207 (cross-examination of victim); *id.*, at 554–560 (defense closing argument's discussion of problems with victim's identification).

In deciding whether the District Court should have examined these statements before dismissing respondent's habeas corpus petition, it is useful to recall the historic importance of the Great Writ. "The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris* v. *Nelson*, 394 U. S. 286, 290–291 (1969). Its well-known history bears repetition. The writ emerged in England several centuries ago,[4] and was given explicit protection in our Constitution.[5] The first Judiciary Act provided federal habeas corpus for federal prisoners.[6] In 1867, Congress provided the writ of habeas corpus for state prisoners; the Act gave federal courts "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States."[7] The current statute confers similar power, 28 U. S. C. § 2241(c)(3), and provides: "The court shall . . . dispose of the matter as law and justice require." 28 U. S. C. § 2243.

As the statute suggests, the central mission of the Great Writ should be the substance of "justice," not the form of procedures. As Justice Frankfurter explained in his separate opinion in *Brown* v. *Allen*, 344 U. S. 443, 498 (1953):

> "The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities. The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others."

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[4] See 3 W. Blackstone, Commentaries *129–*138.

[5] Art. I, § 9, cl. 2.

[6] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81–82.

[7] Judiciary Act of Feb. 5, 1867, ch. 28, 14 Stat. 385–386.

In *Hensley* v. *Municipal Court*, 411 U. S. 345, 349–350 (1973), the Court similarly emphasized this approach, stating:

> "Our recent decisions have reasoned from the premise that habeas corpus is not 'a static, narrow, formalistic remedy,' *Jones* v. *Cunningham*, [371 U. S. 236,] 243 [(1963)], but one which must retain the 'ability to cut through barriers of form and procedural mazes.' *Harris* v. *Nelson*, 394 U. S. 286, 291 (1969). See *Frank* v. *Mangum*, 237 U. S. 309, 346 (1915) (Holmes, J., dissenting). 'The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.' *Harris* v. *Nelson*, *supra*, at 291.
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> "Thus, we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements."

Accordingly, the statutory mandate to "dispose of the matter as law and justice require" clearly requires at least some consideration of the character of the constitutional claim.[8]

II

In my opinion, the "cause and prejudice" formula that the Court explicates in such detail today is not dispositive when the fundamental fairness of a prisoner's conviction is at issue. That formula is of recent vintage, particularly in comparison to the writ for which it is invoked. It is, at most, part of a broader inquiry into the demands of justice.

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[8] See also *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984) ("fundamental fairness is the central concern of the writ of habeas corpus"). Although a constitutional claim that may establish innocence is clearly the most compelling case for habeas review, it is by no means the only type of constitutional claim that implicates "fundamental fairness" and that compels review regardless of possible procedural defaults. See *Rose* v. *Lundy*, 455 U. S. 509, 543–544 (1982) (STEVENS, J., dissenting).

The Court cites *Wainwright* v. *Sykes*, 433 U. S. 72 (1977) as authority for its "cause and prejudice" standard. The actual source of the standard, however, is Rule 12(b)(2) of the Federal Rules of Criminal Procedure. For *Wainwright* relied on cases construing that Rule in announcing the standard. See *id.*, at 84–85.

Rule 12(b)(2) specifies the procedure for asserting defenses and objections based on defects in the institution of a federal prosecution. Until part of the Rule was shifted to Rule 12(f), Rule 12(b)(2) expressly provided that the failure to follow the specified procedure in presenting any such defense or objection "constitutes waiver thereof"; the Rule included a proviso authorizing the court to grant relief from the waiver "for cause shown."[9] Under the terms of the Rule, the inquiry into "cause" was not made to ascertain whether a waiver occurred; rather, its function was to determine whether a waiver should be excused.

The term "prejudice" was not used in Rule 12(b)(2). In construing the rule in *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341 (1963), however, the Court decided that a consideration of the prejudice to the defendant, or the absence thereof, was an appropriate component of the inquiry into whether there was "cause" for excusing the waiver that had resulted from the failure to follow the Rule.[10] Thus, under

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[9] In 1963, when the Court decided *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, Rule 12(b)(2) provided in relevant part:

"Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." See 371 U. S., at 362.

Rule 12 has been amended since 1963 but it retains the provision for an express waiver subject to the proviso that "the court for cause shown may grant relief from the waiver." See Rule 12(f).

[10] "Finally, both courts below have found that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the ju-

the reasoning of the *Shotwell* case—as well as the text of the Rule itself—"cause" and "prejudice" were not separate obstacles that a defendant was required to overcome to avoid a waiver. Rather, the cause component explicitly included an inquiry into "prejudice"—into the nature of the claim and its effect.

In *Davis* v. *United States*, 411 U. S. 233 (1973), the Court held that "the sort of express waiver provision contained in Rule 12(b)(2) which specifically provides for the waiver of a particular kind of constitutional claim if it be not timely asserted," *id.*, at 239–240, bars a challenge, absent "cause," to the composition of the grand jury not only on direct federal review, but also in a federal habeas challenge to a federal conviction. Thus, in *Davis*, as in *Shotwell*, the Court simply enforced a federal rule that contained an express waiver provision. Notably, in *Davis*, the Court again considered both cause *and* prejudice as part of a single inquiry. 411 U. S., at 243–245.

The *Davis* holding, in turn, provided the basis for the Court's decision in *Francis* v. *Henderson*, 425 U. S. 536 (1976). In that case, the Court reviewed a Louisiana rule similar to the Federal Rule at issue in *Davis* and a similar constitutional claim. Relying on *Davis*, the Court held that the state prisoner, having failed to make a timely challenge to the grand jury that indicted him, could not challenge his state conviction in a federal habeas corpus proceeding without making a showing of both "cause" for the failure and "actual prejudice." The Court cited the *Davis* cause-and-prejudice

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ries. Nor do petitioners point to any resulting prejudice. In *Ballard* it was said (at p. 195) that 'reversible error does not depend on a showing of prejudice in an individual case.' However, where, as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule." 371 U. S., at 363 (footnote omitted).

analysis in determining that prejudice had not been established. 425 U. S., at 542, and n. 6.

Davis and *Francis* then provided the basis for the conclusion in *Wainwright* v. *Sykes*, *supra*, that the failure to make a contemporaneous objection to the admission of evidence at trial will ordinarily bar a postconviction attack on the use of such evidence absent an appropriate showing of cause and prejudice. However, the Court's opinion in *Wainwright* v. *Sykes* carefully avoided any rigid definition of the terms "cause" and "prejudice"—terms which under Rule 12 had been used to identify two components of a single inquiry to determine whether an express waiver should be excused. Indeed, in *Wainwright*, the Court made very clear that, although "cause and prejudice" structured a court's inquiry, they were not rigid procedural rules that prevented the writ's fundamental mission—serving justice—from being realized: "The 'cause-and-prejudice' exception of the *Francis* rule will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." 433 U. S., at 90–91. In *Wainwright* itself, the Court inquired into *both* cause and prejudice; the prejudice inquiry, of course, required some inquiry into the nature of the claim and its effect on the trial. *Id.*, at 91.

In a recent exposition of the "cause and prejudice" standard, moreover, the Court again emphasized that "cause and prejudice" must be considered within an overall inquiry into justice. In *Engle* v. *Isaac*, 456 U. S. 107 (1982), the Court closed its opinion with the assurance that it would not allow its judge-made "cause" and "actual prejudice" standard to become so rigid that it would foreclose a claim of this kind:

> "The terms 'cause' and 'actual prejudice' are not rigid concepts; they take their meaning from the principles of comity and finality discussed above. In appropriate

> cases those principles must yield to the imperative of correcting a fundamentally unjust incarceration. Since we are confident that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard, see *Wainwright* v. *Sykes*, 433 U. S., at 91; *id.*, at 94–97 (STEVENS, J., concurring), we decline to adopt the more vague inquiry suggested by the words 'plain error.'" *Id.*, at 135.[11]

In order to be faithful to that promise, we must recognize that cause and prejudice are merely components of a broader inquiry which, in this case, cannot be performed without an examination of the victim's statements.[12]

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[11] In the concurring opinion cited by the Court, presumably with approval, I had written:

"The notion that a client must always consent to a tactical decision not to assert a constitutional objection to a proffer of evidence has always seemed unrealistic to me. Conversely, if the constitutional issue is sufficiently grave, even an express waiver by the defendant himself may sometimes be excused. Matters such as the competence of counsel, the procedural context in which the asserted waiver occurred, *the character of the constitutional right at stake*, and the overall fairness of the entire proceeding, may be more significant than the language of the test the Court purports to apply." *Wainwright* v. *Sykes*, 433 U. S., at 94–96 (footnotes omitted; emphasis added).

[12] Inconsistently, in *Engle* v. *Isaac*, alongside its references to fundamental fairness, the Court also emphasized that a failure to show cause could bar review regardless of the character of the claim. See, *e. g.*, 456 U. S., at 134, n. 43 ("Since we conclude that these respondents lacked cause for their default, we do not consider whether they also suffered actual prejudice. Respondents urge that their prejudice was so great that it should permit relief even in the absence of cause. *Sykes*, however, stated these criteria in the conjunctive and the facts of these cases do not persuade us to depart from that approach"); *id.*, at 129 ("The costs outlined above do not depend upon the type of claim raised by the prisoner. While the nature of a constitutional claim may affect the calculation of cause and prejudice, it does not alter the need to make that threshold showing"). The Court's rigid invocation of the "cause" obstacle in an opinion that also emphasized the demands of "fundamental fairness" illustrates the confusion that has accompanied the Court's creation and imposition of the cause-

III

An inquiry into the requirements of justice requires a consideration, not only of the nature and strength of the constitutional claim, but also of the nature and strength of the state procedural rule that has not been observed. In its opinion today, the Court relies heavily on cases in which the defendant failed to make a contemporaneous objection to an error that occurred during a trial. Most of the reasons for finding a waiver in that setting simply do not apply to the appellate process. Of special importance is the fact that the state interest in enforcing its contemporaneous-objection rule is supported, not merely by the concern with finality that characterizes state appellate rules, but also by the concern with making the trial the "main event" in which the issue of guilt or innocence can be fairly resolved.[13]

This Court has not often considered procedural defaults that have occurred at the appellate, rather than trial, level.

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and-prejudice standard. See also *id.*, at 126 ("Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness'") (quoting *Wainwright* v. *Sykes*, 433 U. S., at 97 (STEVENS, J., concurring)).

[13] See *Wainwright* v. *Sykes*, 433 U. S., at 90. Cf. *Engle* v. *Isaac*, 456 U. S., at 136, n. 1 (STEVENS, J., concurring in part and dissenting in part) ("The failure to object generally indicates that defense counsel felt that the trial error was not critical to his client's case; presumably, therefore, the error did not render the trial fundamentally unfair"). Even in the trial context, however, the lack of objection should not be completely preclusive. See *Rose* v. *Lundy*, 455 U. S., at 547–548, n. 17 (STEVENS, J., dissenting):

"The failure of otherwise competent defense counsel to raise an objection at trial is often a reliable indication that the defendant was not denied fundamental fairness in the state-court proceedings. The person best qualified to recognize such error is normally a defendant's own lawyer. Thus, in searching for fundamental unfairness in a trial record, I attach great importance to the character of the objection, if any, asserted by the defendant's counsel. But if such error is manifest, I would not wrestle with terms such as 'cause' and 'prejudice' to determine whether habeas corpus relief should be granted."

In my view, it is not a coincidence that three of the most forceful and incisive analyses of the relationship between federal habeas corpus and state procedural defaults have emerged in the few cases involving appellate defaults. For, with an appellate default, the state interest in procedural rigor is weaker than at trial, and the transcendence of the Great Writ is correspondingly clearer. The opinions to which I refer are the dissenting opinions in *Daniels* v. *Allen*, 344 U. S. 443 (1953), and the Court's opinions in *Fay* v. *Noia*, 372 U. S. 391 (1963), and *Reed* v. *Ross*, 468 U. S. 1 (1984).

In *Daniels*, one of the three cases that gave rise to the opinions in *Brown* v. *Allen*, 344 U. S. 443 (1953), two petitioners challenged their convictions and death sentences on the ground that the trial judge had erroneously denied their timely objection to the admission of allegedly coerced confessions and to the alleged discrimination against blacks in the selection of both grand and petit jurors. See *id.*, at 453. After the trial court entered judgment and pronounced its sentence, the petitioners filed a notice of appeal and were granted 60 days in which to serve a statement of the case on opposing counsel. As a result of the negligence or inadvertence of petitioners' counsel, the statement was not served on the prosecutor until the 61st day and petitioners' right to appeal was lost. The State Supreme Court declined to exercise its discretion to review the merits of their appeal.

For reasons that are ambiguous at best,[14] the Court held that the procedural default barred a subsequent federal habeas corpus petition unless the opportunity to appeal had

[14] Commenting on the holding in *Daniels*, Justice Harlan wrote:

"Language in Mr. Justice Reed's opinion for the Court appeared to support the result alternatively in terms of waiver, failure to exhaust state remedies, and the existence of an adequate state ground. But while the explanation may have been ambiguous, the result was clear: habeas corpus would not lie for a prisoner who was detained pursuant to a state judgment which, in the view of the majority in *Daniels*, rested on a reasonable application of the State's own procedural requirements." *Fay* v. *Noia*, 372 U. S. 391, 461–462 (1963) (dissenting opinion) (footnotes omitted).

been lost "because of lack of counsel, incapacity, or some interference by officials." *Id.*, at 485–486. Because the *Daniels* holding was repudiated in *Fay* v. *Noia*, 372 U. S. 391 (1963), Justice Black's penetrating dissent commands greater respect than Justice Reed's ambiguous opinion for the Court.[15] Justice Black wrote:

> "*Fourth. Daniels* v. *Allen*, No. 20. Here also evidence establishes an unlawful exclusion of Negroes from juries because of race. The State Supreme Court refused to review this evidence on state procedural grounds. Absence of state court review on this ground is now held to cut off review in federal habeas corpus proceedings. But in the two preceding cases where the State Supreme Court did review the evidence, this Court has also reviewed it. I find it difficult to agree with the soundness of a philosophy which prompts this Court to grant a second review where the state has granted one but to deny any review at all where the state has granted none.
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> . . . . .
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> "The Court thinks that to review this question and grant petitioners the protections guaranteed by the Constitution would 'subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime.' I cannot agree. State systems are not so feeble. And the object of habeas corpus is to search records to prevent illegal imprisonments. To hold it unavailable under the circumstances here is to degrade it. I think *Moore* v. *Dempsey*, 261 U. S. 86, forbids this. In that case Negroes had been convicted and sentenced to death by an all-white jury selected under a

[15] Indeed, even the dissenters in *Fay* v. *Noia* did not defend the specific analysis in *Daniels*. See 372 U. S., at 462 (Harlan, J., dissenting) ("I do not pause to reconsider here the question whether the state ground in *Daniels* was an adequate one; persuasive arguments can be made that it was not").

practice of systematic exclusion of Negroes from juries. The State Supreme Court had refused to consider this discrimination on the ground that the objection to it had come too late. This Court had denied certiorari. Later a federal district court summarily dismissed a petition for habeas corpus alleging the foregoing and other very serious acts of trial unfairness, all of which had been urged upon this Court in the prior certiorari petition. This Court nevertheless held that the District Court had committed error in refusing to examine the facts alleged. I read *Moore* v. *Dempsey*, *supra*, as standing for the principle that it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution. Cf. *United States* v. *Kennedy*, 157 F. 2d 811, 813. Perhaps there is no more exalted judicial function. I am willing to agree that it should not be exercised in cases like these except under special circumstances or in extraordinary situations. But I cannot join in any opinion that attempts to confine the Great Writ within rigid formalistic boundaries." *Brown* v. *Allen*, 344 U. S., at 552–554.

With respect to the specific argument that the Court should not permit federal habeas corpus to be used as a substitute for a state appeal, Justice Frankfurter similarly responded:

"The basic reason for closing both the federal and State courts to the petitioners on such serious claims and under these circumstances is the jejune abstraction that habeas corpus cannot be used for an appeal. Judge Soper dealt with the deceptiveness of this formula by quoting what Judge Learned Hand had found to be the truth in regard to this generality thirty years ago:

"'We shall not discuss at length the occasions which will justify resort to the writ, where the objection has been

> open on appeal. After a somewhat extensive review of the authorities twenty-four years ago, I concluded that the law was in great confusion; and the decisions since then have scarcely tended to sharpen the lines. We can find no more definite rule than that the writ is available, not only to determine points of jurisdiction, stricti juris, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice.' *Kulick* v. *Kennedy*, 157 F. 2d 811, 813." *Id.*, at 558 (dissenting opinion).

Thus, in their *Daniels* dissents, both Justice Black and Justice Frankfurter vigorously disagreed with the Court's view that the petitioners' appellate default—their failure to file a timely appeal—barred review of a meritorious constitutional claim.

As noted, the view of the *Daniels* Court on the propriety of federal habeas proceedings after a procedural default was repudiated in *Fay* v. *Noia*, 372 U. S. 391 (1963), a case which also concerned an appellate default. Noia had made a timely objection to the admissibility of his confession in his trial on a charge of felony murder, but he allowed the time for a direct appeal to lapse without seeking review by a New York appellate court. In response to his subsequent application for a federal writ of habeas corpus, the State admitted that his conviction rested on a confession that had been obtained from him in violation of the Fourteenth Amendment, but contended that his failure to appeal foreclosed any relief in the federal courts. This Court rejected that contention. In a comprehensive opinion the Court restated three propositions of law that have not thereafter been questioned; the *Noia* opinion also, however, contained certain dicta that has been qualified by later opinions.

The propositions that *Noia* firmly established are these: First, the *power* of the federal district court to issue the writ of habeas corpus survives an adverse decision by a state court, whether the state judgment is based on a review of the

merits of the federal claim or on the applicant's procedural default.[16] Second, although a State's interest in orderly appellate procedure justifies a denial of appellate review *in the state system* when the inadvertence or neglect of defense counsel causes a procedural default, that state interest is not sufficient to bar a federal remedy in appropriate cases.[17]

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[16] "We have reviewed the development of habeas corpus at some length because the question of the instant case has obvious importance to the proper accommodation of a great constitutional privilege and the requirements of the federal system. Our survey discloses nothing to suggest that the Federal District Court lacked the *power* to order Noia discharged because of a procedural forfeiture he may have incurred under state law. On the contrary, the nature of the writ at common law, the language and purpose of the Act of February 5, 1867, and the course of decisions in this Court extending over nearly a century are wholly irreconcilable with such a limitation. At the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was embodied in the written Constitution. Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum. Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy." 372 U. S., at 426–427.

[17] "A man under conviction for crime has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state court proceeding. See *Rogers* v. *Richmond*, 365 U. S. 534, 547–548. And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, appellate and collateral, as well as direct review thereof in this Court, those consequences should be sufficient to vindicate the State's valid interest in orderly procedure. Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy, drawn from the ancient principles of the writ of habeas corpus, embodied both in the Federal Constitution and in the habeas corpus provisions of the Judicial Code, and consistently upheld by this

Third, as the converse of the second proposition, *Noia* also holds that the federal district court has discretion to deny relief based on state procedural defaults in appropriate cases.[18] None of these propositions has been questioned in any subsequent case.

The dicta in the *Noia* opinion that has been questioned was an attempt to prescribe a rather rigid limitation on the District Court's discretion to deny habeas corpus relief based on the applicant's procedural default. The opinion set forth a standard that seemingly required federal judges to excuse every procedural default unless the habeas applicant had personally approved of his lawyer's deliberate decision to bypass an available state procedure.[19] The breadth of that dicta was

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Court, of affording an effective remedy for restraints contrary to the Constitution." *Id.*, at 433–434.

[18] "Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, 'dispose of the matter as law and justice require,' 28 U. S. C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable." *Id.*, at 438.

[19] "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. Cf. *Price* v. *Johnston*, 334 U. S. 266, 291. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. Cf. *Carnley* v. *Cochran*, 369 U. S. 506, 513–517; *Moore* v. *Michigan*, 355 U. S. 155,

ultimately disavowed in *Wainwright* v. *Sykes*, 433 U. S., at 87–88,[20] but the Court has remained faithful to the specific holding in *Noia*—that appellate default in the state system need not bar federal habeas review—as well as to the basic principles announced in that opinion.

Finally, in *Reed* v. *Ross*, 468 U. S. 1 (1984), we again considered the consequences of an appellate procedural default. The defendant had not raised the constitutional error in his appeal to the North Carolina Supreme Court. Relying on *Fay* v. *Noia*, we reaffirmed that the federal court has power to look beyond the state procedural default and entertain the state prisoner's application for a writ of habeas corpus.[21] In determining whether the power should be exercised, we found that the requirements of "cause" and "prejudice" that had been discussed in *Wainwright* v. *Sykes* had both been satisfied. The "cause" for the failure to object was the fact that counsel had not anticipated later decisions from this Court that supported the claim. We explained:

162–165. A choice made by counsel not participated in by the petitioner does not automatically bar relief." *Id.*, at 439 (footnote omitted).

[20] "It is the sweeping language of *Fay* v. *Noia*, going far beyond the facts of the case eliciting it, which we today reject." 433 U. S., at 87–88.

"We have no occasion today to consider the *Fay* rule as applied to the facts there confronting the Court. . . .

"The Court in *Fay* stated its knowing-and-deliberate-waiver rule in language which applied not only to the waiver of the right to appeal, but to failures to raise individual substantive objections in the state trial." *Id.*, at 88, n. 12.

[21] "Our decisions have uniformly acknowledged that federal courts are empowered under 28 U. S. C. § 2254 to look beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated. See, *e. g.*, *Francis* v. *Henderson*, 425 U. S. 536, 538 (1976); *Fay* v. *Noia*, 372 U. S. 391, 398–399 (1963). See generally W. Duker, A Constitutional History of Habeas Corpus 181–211 (1980). The more difficult question, and the one that lies at the heart of this case is: What standards should govern the exercise of the habeas court's equitable discretion in the use of this power?" 468 U. S., at 9.

> "[T]he cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. And the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met." *Reed* v. *Ross*, 468 U. S., at 14.

In the *Reed* opinion we carefully identified the valid state interest that is served by enforcing a procedural default that forecloses state appellate review of a federal constitutional claim, *id.*, at 10–11; *ante*, at 490–491. But we squarely held that this interest is not sufficient to defeat a meritorious federal claim:

> "It is true that finality will be disserved if the federal courts reopen a state prisoner's case, even to review claims that were so novel when the cases were in state court that no one would have recognized them. *This Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254.*" 468 U. S., at 15 (emphasis added).

We thus concluded that the appellate default would not bar federal consideration of the constitutional claim.

Like the *Daniels* dissenters, then, in *Fay* and in *Reed*, against the backdrop of appellate defaults, the Court stressed that the State's interest in finality does not preclude review of the federal constitutional claim in a federal habeas court. To be sure, these opinions suggested that the *power* to hear claims which had been defaulted on appeal should be used sparingly—in "special circumstances," in the absence of "deliberate bypass," upon a showing of "cause." Even under such terms, however, our holding in *Reed* governs the case before us today. If the State's interest in the finality of its judgment is not sufficient to defeat a meritorious federal claim that was not raised on appeal because the prisoner's

lawyer did not have the ability to anticipate a later development in the law, there is no reason why the same state interest should defeat a meritorious federal claim simply because the prisoner's lawyer did not exercise due care in prosecuting an appeal. There is no more reason to saddle an innocent prisoner with counsel's omission in one case than in the other.

IV

Procedural default that is adequate to foreclose appellate review of a claim of constitutional error in a state criminal trial should ordinarily also bar collateral review of such a claim in a federal district court. But the history of the Court's jurisprudence interpreting the Acts of Congress authorizing the issuance of the writ of habeas corpus unambiguously requires that we carefully preserve the exception which enables the federal writ to grant relief in cases of manifest injustice. That exception cannot be adequately defined by a simply stated rule. The procedural default is always an important factor to be carefully reviewed; as Justice Frankfurter explained: "All that has gone before is not to be ignored as irrelevant." *Brown* v. *Allen*, 344 U. S., at 500. But it is equally clear that the prisoner must always have some opportunity to reopen his case if he can make a sufficient showing that he is the victim of a fundamental miscarriage of justice. Whether the inquiry is channeled by the use of the terms "cause" and "prejudice"—or by the statutory duty to "dispose of the matter as law and justice require," 28 U. S. C. § 2243—it is clear to me that appellate procedural default should not foreclose habeas corpus review of a meritorious constitutional claim that may establish the prisoner's innocence.

The Court is therefore entirely correct in its decision to remand the case for further proceedings on the substance of respondent's claim. *Ante*, at 497. Because we did not grant certiorari to consider the proper standard that should govern the further proceedings in the District Court, and because we

have not had the benefit of briefs or argument concerning that standard, I express no opinion on the Court's suggestion that the absence of "cause" for his procedural default requires respondent to prove that the "constitutional violation has probably resulted in the conviction of one who is actually innocent," *ante*, at 496, or on the relationship of that standard to the principles explicated in *United States* v. *Bagley*, 473 U. S. 667 (1985); *United States* v. *Agurs*, 427 U. S. 97 (1976); and *Brady* v. *Maryland*, 373 U. S. 83 (1963). There will be time enough to consider the proper standard after the District Court has examined the victim's statements and made whatever findings may be appropriate to determine whether "law and justice require" the issuance of the Great Writ in this case.

Accordingly, I concur in the judgment but not in the Court's opinion.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.*

I

A

Like the Great Writ from which it draws its essence, see *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982), the root principle underlying 28 U. S. C. § 2254 is that government in a civilized society must always be accountable for an individual's imprisonment; if the imprisonment does not conform to the fundamental requirements of law, the individual is entitled to his immediate release. Of course, the habeas corpus relief available under § 2254 differs in many respects from its common-law counterpart. Most significantly, the scope of the writ has been adjusted to meet changed conceptions of the kind of criminal proceedings so fundamentally defective as to make imprisonment under them unacceptable. See, *e. g.*, *Moore* v. *Dempsey*, 261 U. S. 86 (1923); *Johnson* v.

*[This opinion applies also to No. 85-5487, *Smith* v. *Murray, Director, Virginia Department of Corrections*, *post*, p. 527.]

Zerbst, 304 U. S. 458 (1938); *Waley* v. *Johnston*, 316 U. S. 101 (1942); *Brown* v. *Allen*, 344 U. S. 443 (1953); *Fay* v. *Noia*, 372 U. S. 391 (1963). At the same time, statutory habeas relief has become more difficult to obtain as a result of certain procedural limitations created to reflect the unique character of our federal system. See, *e. g.*, 28 U. S. C. § 2254(b) (exhaustion of state remedies).

The "cause and prejudice" rule of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), is one such procedural limitation. A judicially created restriction that is not required—or even suggested—by the habeas statute itself, the "cause and prejudice" rule is sometimes thought to represent an application of the familiar principle that this Court will decline to review state-court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions. To be sure, the fact that a state-court judgment rests on a purely procedural ground may preclude direct Supreme Court review of that judgment where, as applied, the state procedural rule furthers a legitimate interest. See *Henry* v. *Mississippi*, 379 U. S. 443, 447–449 (1965). However, in *Fay* v. *Noia*, *supra*, the doctrine that procedural defaults may constitute an independent and adequate state-law ground was held not to limit the jurisdiction of the federal courts under the habeas corpus statute. *Id.*, at 426–435. That conclusion has subsequently been reaffirmed on several occasions. See *Francis* v. *Henderson*, 425 U. S. 536, 538 (1976); *Wainwright* v. *Sykes*, *supra*, at 83; *Reed* v. *Ross*, 468 U. S. 1, 9 (1984).

Despite the existence of federal *power* to entertain a habeas petition in the face of a procedural default, the Court in *Fay* v. *Noia* acknowledged "a limited discretion" in the federal court to refuse to exercise its jurisdiction on behalf of "an applicant who has deliberately by-passed the orderly procedure of the state courts and in doing so has forfeited his state court remedies." 372 U. S., at 438. This exception was recognized "[a]s a matter of comity," *Wainwright* v. *Sykes*,

supra, at 83, in order to accord state courts and state procedures the respect due them in a federal system. See *Reed* v. *Ross*, *supra*, at 10–11; *Engle* v. *Isaac*, *supra*, at 126–129; *Francis* v. *Henderson*, *supra*, at 539. Thus, the withholding of federal habeas jurisdiction for certain procedurally defaulted claims is a form of abstention. Cf., *e. g.*, *Younger* v. *Harris*, 401 U. S. 37 (1971); *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943).[1]

The general principles for deciding whether abstention is proper are well established. "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, 813 (1976). As we have previously noted, "'[t]he doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'" *Ibid.* (quoting *Allegheny County* v. *Frank Mashuda Co.*, 360 U. S. 185, 188 (1959)). Where Congress has granted individuals the right to a federal forum, we cannot deny that right simply because we disagree with Congress' determination that federal review is desirable. Rather, abstention must be justified by weighty concerns of comity and judicial administration, and even then abstention should not be ordered without a careful balancing of those concerns against concerns favoring the exercise of federal jurisdiction. Cf. *Steffel* v. *Thompson*, 415 U. S. 452,

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[1] There is one important difference between abstention in the habeas context and in other contexts. In our other abstention cases, federal jurisdiction has been withheld partly because of ongoing proceedings or the possibility of future proceedings in the state courts; in the habeas context, the state proceedings have already taken place and the petitioner's federal claim has not been considered on the merits. If anything, however, this difference makes the practice of abstaining more suspect in the habeas context, and suggests that the federal courts should adhere even more closely to the principle—discussed in text—that abstention is a narrow exception to the general rule requiring federal courts to exercise power conferred upon them by Congress.

460–462 (1974); *Wooley* v. *Maynard*, 430 U. S. 705, 709–712 (1977); *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922 (1975).

These principles apply as much to abstention from the exercise of federal habeas corpus jurisdiction as to any other area of federal jurisdiction. For while Congress did leave the federal courts considerable latitude to shape the availability of the writ, Congress did not issue this Court a mandate to sharpen its skills at ad hoc legislating. The same rules of construction that guide interpretation of other statutes apply to the federal habeas corpus statute. Accordingly, the decision whether to direct federal courts to withhold habeas jurisdiction clearly conferred upon them by Congress must be made with the understanding that such abstention doctrines constitute "'extraordinary and narrow'" exceptions to the "virtually unflagging obligation" of federal courts to exercise their jurisdiction, *Colorado River Water Construction District* v. *United States*, *supra*, at 813, 817 (quoting *Allegheny County* v. *Frank Mashuda Co.*, *supra*, at 188). Moreover, judicial renouncement of federal habeas corpus jurisdiction can take place only after careful consideration of the competing interests militating for and against the exercise of federal jurisdiction, and the presumption is heavily in favor of exercising federal jurisdiction. 424 U. S., at 817.

B

The competing interests implicated by a prisoner's petition to a federal court to review the merits of a procedurally defaulted constitutional claim are easily identified. On the one hand, "there is Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners." *Reed* v. *Ross*, 468 U. S., at 10. In enacting § 2254, "Congress sought to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.'" *Ibid.* (quoting *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972)). This interest is at its strongest

where the state court has declined to consider the merits of a constitutional claim, for without habeas review no court will ever consider whether the petitioner's constitutional rights were violated.

These interests must be weighed against the State's interest in maintaining the integrity of its rules and proceedings, an interest that would be undermined if the federal courts were too free to ignore procedural forfeitures in state court. 468 U. S., at 10. The criminal justice system in each State is structured both to determine the guilt or innocence of defendants and to resolve all questions incident to that determination, including the constitutionality of the procedures leading to the verdict. Each State's complement of procedural rules facilitates this process by "channeling, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Ibid.* Procedural default rules protect the integrity of this process by imposing a forfeiture sanction for failure to follow applicable state procedural rules, thereby deterring litigants from deviating from the State's scheme. Generally, the threat of losing the right to raise a claim in state proceedings will be sufficient to ensure compliance with the State's procedural rules: a defendant loses nothing by raising all of his claims at trial since the state-court judgment will have no res judicata effect in later habeas proceedings, *Brown* v. *Allen*, 344 U. S. 443 (1953), while he retains the possibility of obtaining relief in the state courts. See *Wainwright* v. *Sykes*, 433 U. S., at 103–104, and n. 5 (BRENNAN, J., dissenting). Nonetheless, to the extent that federal habeas review of a procedurally defaulted claim is available, the broad deterrent effect of these procedural default rules is somewhat diminished.[2]

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[2] The Court has often suggested, as it does again today, that the "reduction in the finality of litigation" caused by habeas review justifies a broad construction of the cause-and-prejudice test. *Ante*, at 486–487 (citing *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982)). In fact, "finality" concerns

The Court's view of how properly to balance these competing concerns has changed over time. In *Fay* v. *Noia*, we concluded that the State's interest "in an airtight system of forfeitures" was generally insufficient to require federal courts to refrain from exercising their habeas jurisdiction. 372 U. S., at 432, 438–440. We held that federal courts should refuse to exercise their jurisdiction only "[i]f a habeas applicant . . . understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures." *Id.*, at 439. This holding sensibly ac-

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have no bearing on the question whether a federal court should refuse to exercise its habeas jurisdiction because of a procedural default. From the standpoint of the State's finality interests, there is no difference whatever between making habeas review available after the state court has denied a claim on the merits, and making such review available after the state court has denied the claim on procedural default grounds. In both situations, the State has determined that the litigation is at an end, and the federal court has reopened the case to consider releasing the petitioner from custody. No one questions the availability of habeas relief where the state court has denied the claim on the merits. Accordingly, treating likes alike, such relief should also be available where the claim is denied because of a procedural default *unless the State's interest in enforcing its default rules requires a different result.* General "finality" concerns simply are not relevant.

The same is true of the Court's other habeas corpus bogeymen, such as the tendency of habeas review to detract from the importance of the trial as the "main event," *Wainwright* v. *Sykes*, 433 U. S., at 90, and to frustrate the State's "good-faith attempts to honor constitutional rights," *Engle* v. *Isaac*, *supra*, at 128. These "costs" are present whenever a claim has been denied by the state court on the merits in precisely the same way and to precisely the same extent as where that claim is denied on procedural default grounds. Indeed, if anything, these "costs" are present to a *greater* extent where a federal court reviews a constitutional claim that the state court has considered and rejected. Therefore, if federal jurisdiction is to be renounced where there has been a procedural default, it must be because of some particular need to enforce the State's procedural default rules.

commodated the competing interests described above: on the one hand, the State's interest in preventing litigants from ignoring its procedural rules is at its strongest where the decision not to raise a claim is made knowingly and deliberately; correspondingly, the prisoner's entitlement to a federal forum is at its weakest since it may well be only the deliberate failure to submit the claim to the state courts that has necessitated federal review. Under these circumstances, the affront to comity principles is at its greatest: by its indifference in entertaining the petition to the prisoner's trial strategy, the federal court in effect ratifies the deliberate circumvention of state procedural rules. If refusal to exercise federal habeas power to upset a state-court conviction is ever appropriate, it is under circumstances such as these.

The Court struck a somewhat different balance 14 years later when it revisited the question of withholding federal habeas jurisdiction of procedurally defaulted claims in *Wainwright* v. *Sykes*. Police officers testified at Sykes' trial about inculpatory statements he had made in their presence. No objection was made at the time this testimony was offered, which meant, under a state procedural rule, that any objections were forfeited. Subsequently, Sykes filed a petition for a writ of habeas corpus in the federal court, asserting that his statements were inadmissible because he had not understood his *Miranda* warnings. The District Court granted the writ, but this Court reversed, holding that the District Court should never have entertained Sykes' habeas petition at all. Rejecting "the sweeping language of *Fay* v. *Noia*," the Court concluded that *Fay*'s deliberate bypass test paid insufficient respect to the State's interests—viewed through the prism of federalism and comity concerns—in seeing its procedural default rules enforced. 433 U. S., at 87–88. The Court held instead that federal courts should decline to exercise their habeas jurisdiction absent a stronger showing by the prisoner that federal review is appropriate. Specifically, the Court held that federal habeas review of a procedurally defaulted claim should ordinarily be withheld unless the peti-

tioner shows "cause" for the procedural default and "prejudice" to his case from the underlying error. *Id.*, at 87.

The Court left open "for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard," *ibid.*, noting only that "it is narrower than the standard set forth," *ibid.*, in *Fay* v. *Noia*, and suggesting that, as such, it would provide a better balance between the interests of a petitioner and those of the State, *id.*, at 88–91. I thought then that *Wainwright* v. *Sykes* was wrongly decided, and I continue to believe so for the reasons I stated there and in subsequent cases. See *Wainwright* v. *Sykes*, *supra*, at 99–118 (BRENNAN, J., dissenting); *Engle* v. *Isaac*, 456 U. S., at 137–151 (BRENNAN, J., dissenting); *United States* v. *Frady*, 456 U. S. 152, 178–187 (1982) (BRENNAN, J., dissenting). But at least the Court in *Wainwright* v. *Sykes* was prudent enough to leave the task of defining "cause" and "prejudice" to subsequent cases. For, to the extent that the availability of federal habeas review of procedurally defaulted claims turns on the cause-and-prejudice test,[3] then it is in the context of giving that test meaning that the Court must undertake the careful evaluation of the interests of the State and defendant that is required to determine whether federal courts may properly decline to exercise jurisdiction conferred upon them by Congress.

II

A

The particular question we must decide in this case is whether counsel's inadvertent failure to raise a substantive claim of error can constitute "cause" for the procedural de-

[3] Although *Wainwright* v. *Sykes* held only that the cause-and-prejudice test should be applied to violations of contemporaneous-objection rules, subsequent cases have extended the cause-and-prejudice test well beyond that narrow holding. See *Engle* v. *Isaac*, 456 U. S. 107 (1982); *United States* v. *Frady*, 456 U. S. 152 (1982); *Reed* v. *Ross*, 468 U. S. 1 (1984). It is still an open question "whether counsel's decision not to take an appeal at all"—the question presented on the facts of *Fay* v. *Noia*—is governed by the deliberate bypass rule or the cause-and-prejudice test. *Ante*, at 492.

fault. *Wainwright* v. *Sykes* held that defense counsel's tactical decision to bypass a state procedure does not constitute cause. 433 U. S., at 91, n. 14; see also *ante*, at 485; *Reed* v. *Ross*, 468 U. S., at 13. That result may arguably be defended on grounds similar to those which justified the result in *Fay* v. *Noia*, *i. e.*, that the deterrent interests underlying the State's procedural default rule are at their apogee where counsel's decision to bypass a state procedure is deliberate. However, to say that the petitioner should be bound to his lawyer's tactical decisions is one thing; to say that he must also bear the burden of his lawyer's inadvertent mistakes is quite another. Where counsel is unaware of a claim or of the duty to raise it at a particular time, the procedural default rule cannot operate as a specific deterrent to noncompliance with the State's procedural rules. Consequently, the State's interest in ensuring that the federal court help prevent circumvention of the State's procedural rules by imposing the same forfeiture sanction is much less compelling. To be sure, applying procedural default rules even to inadvertent defaults furthers the State's deterrent interests in a general sense by encouraging lawyers to be more conscientious on the whole. However, as the Court has pointed out in another context, such general deterrent interests are weak where the failure to follow a rule is accidental rather than intentional. See *United States* v. *Leon*, 468 U. S. 897, 908–917 (1984).

I believe that this incremental state interest simply is not sufficient to overcome the heavy presumption against a federal court's refusing to exercise jurisdiction clearly granted by Congress. This is especially so where the petitioner has satisfied the prejudice prong of the *Wainwright* v. *Sykes* test. That is, where a petitioner's constitutional rights have been violated and that violation may have affected the verdict, a federal court should not decline to entertain a habeas petition solely out of deference to the State's weak interest in punishing lawyers' inadvertent failures to comply with state

procedures. I would therefore hold that "cause" is established where a procedural default resulted from counsel's inadvertence, and I respectfully dissent from the Court's decisions in both *Murray* v. *Carrier*, No. 84-1554, and *Smith* v. *Murray*, No. 85-5487.[4]

B

Even if I did not believe that this difference in the *State*'s interests was sufficient to require holding that counsel's inadvertence constitutes cause, there is an additional difference in the *defendant*'s interests that compels this conclusion in *Smith* v. *Murray*: the fact that it is a capital case. To the extent that, as I have argued above, the definition of cause requires consideration of the interests of the defendant as well as of the State, it strikes me as cruelly unfair to bind a defendant to his lawyer's inadvertent failure to prevent prejudicial constitutional error—thus barring access to federal

[4] I do not mean to suggest by this that I accept the Court's decision in *Wainwright* v. *Sykes* or that I think that a habeas petitioner should ever have to show "cause" and "prejudice" to gain access to the federal courts under § 2254. As noted above, I continue to believe that *Wainwright* v. *Sykes* represented an illegitimate exercise of this Court's very limited discretion to order federal courts to decline to entertain habeas petitions. My point is simply that, even accepting the validity of *Wainwright*'s "cause and prejudice" test, the Court must still carefully balance the relevant interests, and, when this balancing is done properly, it is apparent that counsel's inadvertence should constitute "cause." Accordingly, I would affirm the decision of the Court of Appeals in *Murray* v. *Carrier*.

While reversing the holding of the Court of Appeals that counsel's inadvertence establishes "cause," the Court goes on to declare that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal court may grant the writ even in the absence of a showing of cause for the procedural default." *Ante*, at 496. Under such circumstances, the Court explains, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Ante*, at 495 (quoting *Engle* v. *Isaac*, *supra*, at 135). Although I believe that principles of "comity" and "finality" yield upon far less than a showing of actual innocence, because this inquiry represents a narrowing of the "cause and prejudice" test, I agree that it is proper.

review—where the consequence to the defendant is death. With the understanding that "execution is the most irremediable and unfathomable of penalties; that death is different," *Ford* v. *Wainwright*, *ante*, at 411; see also *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.), this Court has been particularly scrupulous in demanding that the proceedings which condemn an individual to death not be marred by constitutional error. Against this background of special concern, "comity" and "federalism" concerns simply do not require such an exercise of this Court's discretion in capital cases.

SMITH v. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-5487. Argued March 4, 1986—Decided June 26, 1986

Prior to petitioner's trial in a Virginia state court for murder of a woman, he was examined by a psychiatrist appointed by the court at the request of his counsel. During the examination, the psychiatrist asked petitioner both about the murder and prior incidents of deviant sexual conduct, and petitioner stated that he once tore the clothes off a girl on a school bus before deciding not to rape her. Following a jury trial, petitioner was convicted. At the sentencing phase, the prosecution called the psychiatrist to the stand, and, over the defense's objection, he described the incident on the school bus. After further evidence was presented both for the prosecution and petitioner, the jury recommended the death sentence. On appeal to the Supreme Court of Virginia, petitioner raised a number of claims but did not assign any error concerning the admission of the psychiatrist's testimony, his counsel later explaining at a postconviction hearing that he had decided not to pursue that claim after determining that Virginia case law would not support his position at the time. The Supreme Court affirmed the conviction and sentence, not addressing any issues concerning the prosecution's use of the psychiatric testimony because under a rule of the court only errors assigned by the appellant would be considered. After exhausting state remedies, petitioner sought a writ of habeas corpus in Federal District Court, which denied the petition. The Court of Appeals affirmed.

Held: Petitioner defaulted his underlying constitutional claim as to the admission of the psychiatrist's testimony by failing to press it before the Supreme Court of Virginia on direct appeal. *Murray* v. *Carrier*, *ante*, p. 478. Pp. 533–539.

(a) Petitioner has not carried his burden of showing cause for his noncompliance with Virginia's rules of procedure. A deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a State's rules for the fair and orderly disposition of its criminal cases. Here, counsel's decision not to press the claim in question was not an error of such magnitude that it rendered his performance constitutionally deficient under the test of *Strickland* v. *Washington*, 466

U. S. 668. Nor can petitioner rely on the novelty of the claim as "cause" for noncompliance with Virginia's rules, where it appears that various forms of such a claim had been percolating in the lower courts for years at the time of petitioner's original appeal. Pp. 533–537.

(b) It is clear on the record that application of the cause and prejudice test will not result in a "fundamental miscarriage of justice," where the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. Thus, even assuming that, as a legal matter, the psychiatrist's testimony should not have been presented to the jury, its admission did not pervert the jury's deliberations concerning the ultimate question of whether *in fact* petitioner constituted a continuing threat to society. Pp. 537–539.

769 F. 2d 170, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *ante*, p. 516. STEVENS, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, and in Parts II and III of which BRENNAN, J., joined, *post*, p. 539.

J. Lloyd Snook III, by appointment of the Court, 474 U. S. 993, argued the cause for petitioner. With him on the briefs was *Richard J. Bonnie*.

James E. Kulp, Senior Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief were *William G. Broaddus*, Attorney General, and *Frank S. Ferguson*, Assistant Attorney General.*

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari to decide whether and, if so, under what circumstances, a prosecutor may elicit testimony from a mental health professional concerning the content of an interview conducted to explore the possibility of presenting psychiatric defenses at trial. We also agreed to review the

*Briefs of *amici curiae* urging reversal were filed for the American Psychiatric Association et al. by *Joel I. Klein*, *Joseph N. Onek*, and *Peter E. Scheer*; for the American Psychological Association by *Bruce J. Ennis, Jr.*, and *Donald N. Bersoff*; and for the New Jersey Department of the Public Advocate by *Linda G. Rosenzweig*.

Court of Appeals' determination that any error in the admission of the psychiatrist's evidence in this case was irrelevant under the holding of *Zant* v. *Stephens*, 462 U. S. 862 (1983). On examination, however, we conclude that petitioner defaulted his underlying constitutional claim by failing to press it before the Supreme Court of Virginia on direct appeal. Accordingly, we decline to address the merits of petitioner's claims and affirm the judgment dismissing the petition for a writ of habeas corpus.

I

Following a jury trial, petitioner was convicted of the May 1977 murder of Audrey Weiler. According to his confession, petitioner encountered Ms. Weiler in a secluded area near his home and raped her at knifepoint. Fearing that her testimony could send him back to prison, he then grabbed her by the neck and choked her until she fell unconscious. When he realized that she was still alive, he dragged her into a nearby river, submerged her head, and repeatedly stabbed her with his knife. A subsequent medical examination indicated that the death was attributable to three clusters of lethal injuries: asphyxia from strangulation, drowning, and multiple stab wounds.

Prior to the trial, petitioner's appointed counsel, David Pugh, had explored the possibility of presenting a number of psychiatric defenses. Towards that end, Mr. Pugh requested that the trial court appoint a private psychiatrist, Dr. Wendell Pile, to conduct an examination of petitioner. Aware that psychiatric reports were routinely forwarded to the court and that such reports were then admissible under Virginia law, Mr. Pugh had advised petitioner not to discuss any prior criminal episodes with anyone. App. 134. See *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S. E. 2d 845 (1975). Although that general advice was intended to apply to the forthcoming psychiatric examination, Mr. Pugh later testified that he "did not specifically tell [petitioner] not to say anything to Doctor Pile about the offense or any of-

fenses." App. 132. During the course of the examination, Dr. Pile did in fact ask petitioner both about the murder and about prior incidents of deviant sexual conduct. Tr. of State Habeas Hearing 19. Although petitioner initially declined to answer, he later stated that he had once torn the clothes off a girl on a school bus before deciding not to carry out his original plan to rape her. App. 44. That information, together with a tentative diagnosis of "Sociopathic Personality; Sexual Deviation (rape)," was forwarded to the trial court, with copies sent both to Mr. Pugh and to the prosecutor who was trying the case for the Commonwealth. *Id.*, at 43–45. At no point prior to or during the interview did Dr. Pile inform petitioner that his statements might later be used against him or that he had the right to remain silent and to have counsel present if he so desired. *Id.*, at 90. Cf. *Estelle* v. *Smith*, 451 U. S. 454 (1981).

At the sentencing phase of the trial, the Commonwealth called Dr. Pile to the stand. Over the defense's objection, Dr. Pile described the incident on the school bus. Tr. 934–935. On cross-examination, he repeated his earlier conclusion that petitioner was a "sociopathic personality." *Id.*, at 936. After examining a second psychiatrist, the Commonwealth introduced petitioner's criminal record into evidence. It revealed that he had been convicted of rape in 1973 and had been paroled from the penitentiary on that charge less than four months prior to raping and murdering Ms. Weiler. The defense then called 14 character witnesses, who testified that petitioner had been a regular church goer, a member of the choir, a conscientious student in high school, and a good soldier in Vietnam. After lengthy deliberation, the jury recommended that petitioner be sentenced to death.

Petitioner appealed his conviction and sentence to the Supreme Court of Virginia. In his brief he raised 13 separate claims, including a broad challenge to the constitutionality of Virginia's death penalty provisions, objections to several of the trial court's evidentiary rulings, and a challenge to

the exclusion of a prospective juror during *voir dire*. Petitioner did not, however, assign any error concerning the admission of Dr. Pile's testimony. At a subsequent state postconviction hearing, Mr. Pugh explained that he had consciously decided not to pursue that claim after determining that "Virginia case law would [not] support our position at that particular time." App. 143. Various objections to the Commonwealth's use of Dr. Pile's testimony were raised, however, in a brief filed by *amicus curiae* Post-Conviction Assistance Project of the University of Virginia Law School.

The Supreme Court of Virginia affirmed the conviction and sentence in all respects. *Smith* v. *Commonwealth*, 219 Va. 455, 248 S. E. 2d 135 (1978). In a footnote, it noted that, pursuant to a rule of the court, it had considered only those arguments advanced by *amicus* that concerned errors specifically assigned by the defendant himself. *Id.*, at 460, n. 1, 248 S. E. 2d, at 139, n. 1. Accordingly, it did not address any issues concerning the prosecution's use of the psychiatric testimony. This Court denied the subsequent petition for certiorari, which, again, did not urge the claim that admission of Dr. Pile's testimony violated petitioner's rights under the Federal Constitution. 441 U. S. 967 (1979).

In 1979, petitioner sought a writ of habeas corpus in the Circuit Court for the City of Williamsburg and the County of James City. For the first time since the trial, he argued that the admission of Dr. Pile's testimony violated his privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Federal Constitution. The court ruled, however, that petitioner had forfeited the claim by failing to press it in earlier proceedings. At a subsequent evidentiary hearing, conducted solely on the issue of ineffective assistance of counsel, the court heard testimony concerning the reasons underlying Mr. Pugh's decision not to pursue the Fifth Amendment claim on appeal. On the basis of that testimony, the court found that Pugh and his assistant had researched the question, but had determined that the claim was

unlikely to succeed. Thus, the court found, "counsel exercised reasonable judgment in deciding not to preserve the objection on appeal, and . . . this decision resulted from informed, professional deliberation." App. to Pet. for Cert. 71. Petitioner appealed the denial of his habeas petition to the Supreme Court of Virginia, contending that the Circuit Court had erred in finding that his objection to the admission of Dr. Pile's testimony had been defaulted. The Supreme Court declined to accept the appeal, *Smith* v. *Morris*, 221 Va. cxliii (1981), and we again denied certiorari. 454 U. S. 1128 (1981).

Having exhausted state remedies, petitioner sought a writ of habeas corpus in the United States District Court for the Eastern District of Virginia. In an unpublished order, the court denied the petition, holding that the objection to the admission of Dr. Pile's testimony was "clearly barred" under this Court's decision in *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). App. 158. In reaching that conclusion, the District Judge noted that "the default resulted not from the trial attorney's ignorance or inadvertence, but because of a deliberate tactical decision." *Ibid.*

The Court of Appeals for the Fourth Circuit affirmed, but on different grounds. *Smith* v. *Procunier*, 769 F. 2d 170 (1985). Finding it unnecessary to rely on procedural default or to address the merits of the substantive constitutional claim, the court held that admission of Dr. Pile's testimony, even if erroneous, could not be the basis for invalidating petitioner's sentence. It noted that the jury had relied on two distinct aggravating factors in its decision to recommend the death penalty. The psychiatric testimony, however, only bore on one of those factors, the likelihood that petitioner would "constitute a continuing serious threat to society." Va. Code § 19.2-264.2 (1983); Tr. 1102. In that circumstance, the Court of Appeals believed, our decision in *Zant* v. *Stephens*, 462 U. S., at 884, required the conclusion that the error, if any, was irrelevant to the overall validity of the sen-

tence. We granted certiorari, *Smith* v. *Sielaff*, 474 U. S. 918 (1985), and now affirm on the authority of our decision in *Murray* v. *Carrier*, *ante*, p. 478.

II

Under Virginia law, failure to raise a claim on direct appeal from a criminal conviction ordinarily bars consideration of that claim in any subsequent state proceeding. See, *e. g.*, *Coppola* v. *Warden of Virginia State Penitentiary*, 222 Va. 369, 282 S. E. 2d 10 (1981); *Slayton* v. *Parrigan*, 215 Va. 27, 205 S. E. 2d 680 (1974). In the present case, the Virginia courts have enforced that rule by declining to consider petitioner's objection to the admission of Dr. Pile's testimony, a claim concededly not included in his initial appeal from his conviction and sentence. Consistent with our earlier intimations in *Reed* v. *Ross*, 468 U. S. 1, 11 (1984), we held in *Murray* v. *Carrier*, *ante*, p. 478, that a federal habeas court must evaluate appellate defaults under the same standards that apply when a defendant fails to preserve a claim at trial. Accordingly, although federal courts at all times retain the power to look beyond state procedural forfeitures, the exercise of that power ordinarily is inappropriate unless the defendant succeeds in showing both "cause" for noncompliance with the state rule and "actual prejudice resulting from the alleged constitutional violation." *Wainwright* v. *Sykes*, 433 U. S., at 84; *Murray* v. *Carrier*, *ante*, at 485. As we explained more fully in *Carrier*, this congruence between the standards for appellate and trial default reflects our judgment that concerns for finality and comity are virtually identical regardless of the timing of the defendant's failure to comply with legitimate state rules of procedure.

We need not determine whether petitioner has carried his burden of showing actual prejudice from the allegedly improper admission of Dr. Pile's testimony, for we think it self-evident that he has failed to demonstrate cause for his noncompliance with Virginia's procedures. We have declined in

the past to essay a comprehensive catalog of the circumstances that would justify a finding of cause. *Reed* v. *Ross*, *supra*, at 13; see also *Wainwright* v. *Sykes*, *supra*, at 91. Our cases, however, leave no doubt that a deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a State's legitimate rules for the fair and orderly disposition of its criminal cases. As the Court explained in *Reed:*

> "[D]efense counsel may not make a tactical decision to forgo a procedural opportunity—for instance, to object at trial or to raise an issue on appeal—and then when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court. The encouragement of such conduct by a federal court on habeas corpus review would not only offend generally accepted principles of comity, but would undermine the accuracy and efficiency of the state judicial systems to the detriment of all concerned. Procedural defaults of this nature are, therefore, inexcusable, and cannot qualify as 'cause' for purposes of federal habeas corpus review." 468 U. S., at 14 (internal quotation and citation omitted).

Here the record unambiguously reveals that petitioner's counsel objected to the admission of Dr. Pile's testimony at trial and then consciously elected not to pursue that claim before the Supreme Court of Virginia. The basis for that decision was counsel's perception that the claim had little chance of success in the Virginia courts. With the benefit of hindsight, petitioner's counsel in this Court now contends that this perception proved to be incorrect. Cf. *Gibson* v. *Zahradnick*, 581 F. 2d 75 (CA4 1978) (repudiating reasoning of *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S. E. 2d 845 (1975)). Even assuming that to be the case, however, a State's subsequent acceptance of an argument deliberately abandoned on direct appeal is irrelevant to the question whether the default should be excused on federal habeas.

Indeed, it is the very prospect that a state court "may decide, upon reflection, that the contention is valid" that undergirds the established rule that "perceived futility alone cannot constitute cause," *Engle* v. *Isaac*, 456 U. S. 107, 130, and n. 36 (1982); for "[a]llowing criminal defendants to deprive the state courts of [the] opportunity" to reconsider previously rejected constitutional claims is fundamentally at odds with the principles of comity that animate *Sykes* and its progeny. *Id.*, at 130.

Notwithstanding the deliberate nature of the decision not to pursue his objection to Dr. Pile's testimony on appeal—a course of conduct virtually dispositive of any effort to satisfy *Syke*'s "cause" requirement—petitioner contends that the default should be excused because Mr. Pugh's decision, though deliberate, was made in ignorance. Had he investigated the claim more fully, petitioner maintains, "it is inconceivable that he would have concluded that the claim was without merit or that he would have failed to raise it." Reply Brief for Petitioner 3.

The argument is squarely foreclosed by our decision in *Carrier*, which holds that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Ante*, at 486–487. See also *Engle* v. *Isaac*, *supra*, at 133–134. Nor can it seriously be maintained that the decision not to press the claim on appeal was an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of *Strickland* v. *Washington*, 466 U. S. 668 (1984). *Carrier* reaffirmed that "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error . . . if that error is sufficiently egregious and prejudicial." *Ante*, at 496; see also *United States* v. *Cronic*, 466 U. S. 648, 657, n. 20 (1984). But counsel's deliberate decision not to pursue his objection to the admission of Dr. Pile's testimony falls far short of meeting that rigorous standard. After con-

ducting a vigorous defense at both the guilt and sentencing phases of the trial, counsel surveyed the extensive transcript, researched a number of claims, and decided that, under the current state of the law, 13 were worth pursuing on direct appeal. This process of "winnowing out weaker arguments on appeal and focusing on" those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. *Jones* v. *Barnes*, 463 U. S. 745, 751–752 (1983). It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as *Strickland* v. *Washington* made clear, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U. S., at 689. Viewed in light of Virginia law at the time Mr. Pugh submitted his opening brief to the Supreme Court of Virginia, the decision not to pursue his objection to the admission of Dr. Pile's testimony fell well within the "wide range of professionally competent assistance" required under the Sixth Amendment to the Federal Constitution. *Id.*, at 690.

Nor can petitioner rely on the novelty of his legal claim as "cause" for noncompliance with Virginia's rules. See *Reed* v. *Ross*, 468 U. S., at 18, ("[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures"). Petitioner contends that this Court's decisions in *Estelle* v. *Smith*, 451 U. S. 454 (1981), and *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), which were decided well after the affirmance of his conviction and sentence on direct appeal, lend support to his position that Dr. Pile's testimony should have been excluded.

But, as a comparison of *Reed* and *Engle* makes plain, the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was "available" at all. As petitioner has candidly conceded, various forms of the claim he now advances had been percolating in the lower courts for years at the time of his original appeal. Brief for Petitioner 20–21, n. 12; Reply Brief for Petitioner 3. Moreover, in this very case, an *amicus* before the Supreme Court of Virginia specifically argued that admission of Dr. Pile's testimony violated petitioner's rights under the Fifth and Sixth Amendments. Brief for Post-Conviction Assistance Project of the University of Virginia Law School as *Amicus Curiae* in No. 780293, pp. 53–62. Under these circumstances, it simply is not open to argument that the legal basis of the claim petitioner now presses on federal habeas was unavailable to counsel at the time of the direct appeal.

We conclude, therefore, that petitioner has not carried his burden of showing cause for noncompliance with Virginia's rules of procedure. That determination, however, does not end our inquiry. As we noted in *Engle* and reaffirmed in *Carrier*, "'[i]n appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Murray* v. *Carrier*, *ante*, at 495, quoting *Engle* v. *Isaac*, 456 U. S., at 135. Accordingly, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray* v. *Carrier*, *ante*, at 496.

We acknowledge that the concept of "actual," as distinct from "legal," innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense. Nonetheless, we think it clear on this record that application of the cause and prejudice test will not result

in a "fundamental miscarriage of justice." *Engle, supra*, at 135. There is no allegation that the testimony about the school bus incident was false or in any way misleading. Nor can it be argued that the prospect that Dr. Pile might later testify against him had the effect of foreclosing meaningful exploration of psychiatric defenses. While that concern is a very real one in the abstract, here the record clearly shows that Dr. Pile did ask petitioner to discuss the crime he stood accused of committing as well as prior incidents of deviant sexual conduct. Although initially reluctant to do so, ultimately petitioner was forthcoming on both subjects. In short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. Thus, even assuming that, as a legal matter, Dr. Pile's testimony should not have been presented to the jury, its admission did not serve to pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat to society. Under these circumstances, we do not believe that refusal to consider the defaulted claim on federal habeas carries with it the risk of a manifest miscarriage of justice.

Nor can we concur in JUSTICE STEVENS' suggestion that we displace established procedural default principles with an amorphous "fundamental fairness" inquiry. *Post*, at 542–543. Precisely which parts of the Constitution are "fundamental" and which are not is left for future elaboration. But, for JUSTICE STEVENS, when a defendant in a capital case raises a "substantial, colorable" constitutional claim, a federal court should entertain it no matter how egregious the violation of state procedural rules, and regardless of the fairness of the opportunity to raise that claim in the course of his trial and appeal. *Post*, at 546. We reject the suggestion that the principles of *Wainwright* v. *Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws. We similarly reject the suggestion that there is anything "fundamentally unfair"

about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination. In view of the profound societal costs that attend the exercise of habeas jurisdiction, such exercise "carries a serious burden of justification." H. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 146 (1970); see also *Engle* v. *Isaac*, *supra*, at 126–129. When the alleged error is unrelated to innocence, and when the defendant was represented by competent counsel, had a full and fair opportunity to press his claim in the state system, and yet failed to do so in violation of a legitimate rule of procedure, that burden has not been carried.

Accordingly, we affirm the judgment of the Court of Appeals upholding the dismissal of petitioner's application for a writ of habeas corpus.

Affirmed.

[For dissenting opinion of JUSTICE BRENNAN, see *ante*, p. 516.]

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join and with whom JUSTICE BRENNAN joins as to Parts II and III, dissenting.

The record in this case unquestionably demonstrates that petitioner's constitutional claim is meritorious, and that there is a significant risk that he will be put to death *because* his constitutional rights were violated.

The Court does not take issue with this conclusion. It is willing to assume that (1) petitioner's Fifth Amendment right against compelled self-incrimination was violated; (2) his Eighth Amendment right to a fair, constitutionally sound sentencing proceeding was violated by the introduction of the evidence from that Fifth Amendment violation; and (3) those constitutional violations made the difference between life and death in the jury's consideration of his fate. Although the constitutional violations and issues were sufficiently serious

that this Court decided to grant certiorari, and although the Court of Appeals for the Fourth Circuit decided the issue on the merits, this Court concludes that petitioner's presumably meritorious constitutional claim is procedurally barred and that petitioner must therefore be executed.

In my opinion, the Court should reach the merits of petitioner's argument. To the extent that there has been a procedural "default," it is exceedingly minor—perhaps a kind of "harmless" error. Petitioner's counsel raised a timely objection to the introduction of the evidence obtained in violation of the Fifth Amendment. A respected friend of the Court—the University of Virginia Law School's Post-Conviction Assistance Project—brought the issue to the attention of the Virginia Supreme Court in an extensive *amicus curiae* brief. Smith's counsel also raised the issue in state and federal habeas corpus proceedings, and, as noted, the Court of Appeals decided the case on the merits. Consistent with the well-established principle that appellate arguments should be carefully winnowed,[1] however, Smith's counsel did not raise the Fifth Amendment issue in his original appeal to the Virginia Supreme Court—an unsurprising decision in view of the fact that a governing Virginia Supreme Court precedent, which was then entirely valid and only two years old, decisively barred the claim.[2]

Nevertheless, the Court finds the lawyer's decision not to include the constitutional claim "virtually dispositive." *Ante*, at 535. The Court offers the remarkable explanation that "[u]nder these circumstances"—in which petitioner's death penalty will stand despite serious Fifth and Eighth Amendment violations that played a critical role in the determination that death is an appropriate penalty—"we do not believe that refusal to consider the defaulted claim on federal

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[1] See *Jones* v. *Barnes*, 463 U. S. 745, 751–752 (1983); *ante*, at 536.

[2] See *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S. E. 2d 845 (1975), cert. denied, 425 U. S. 994 (1976).

habeas carries with it the risk of a manifest miscarriage of justice." *Ante*, at 538.

I fear that the Court has lost its way in a procedural maze of its own creation and that it has grossly misevaluated the requirements of "law and justice" that are the federal court's statutory mission under the federal habeas corpus statute.[3] To understand the nature of the Court's error, it is necessary to assess the Court's conclusion that the claim is procedurally defaulted; to consider the Fifth Amendment violation; and to consider the Eighth Amendment violation.

I

We begin with the common ground. The historic office of the Great Writ as the ultimate protection against fundamental unfairness is well known.[4] That mission is reflected in the statutory requirement that the federal court "dispose of the matter as law and justice require." 28 U. S. C. § 2243. It is by now equally clear that the application of the Court's "cause and prejudice" formulation as a rigid bar to review of fundamental constitutional violations has no support in the statute, or in Federal Rule of Criminal Procedure 12 (b)(2), from which it was initially imported;[5] the standard thus represents judicial lawmaking of the most unabashed form. The Court nonetheless reaffirms today, as it has consistently held in the past,[6] that federal courts retain the

[3] See 28 U. S. C. § 2243 ("The court shall . . . dispose of the matter as law and justice require").

[4] See, *e. g.*, *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982) ("The writ of habeas corpus indisputably holds an honored position in our jurisprudence. . . . Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness'").

[5] See *Murray* v. *Carrier*, *ante*, at 501–505 (STEVENS, J., concurring in judgment). Indeed, the Court in *Murray* conceded that "[t]he cause and prejudice test may lack a perfect historical pedigree," *ante*, at 496, and noted that "the Court acknowledged as much in *Wainwright* v. *Sykes*." *Ibid.*

[6] See, *e. g.*, *Reed* v. *Ross*, 468 U. S. 1, 9 (1984); *Francis* v. *Henderson*, 425 U. S. 536, 538 (1976); *Fay* v. *Noia*, 372 U. S. 391, 398–399 (1963).

power to entertain federal habeas corpus requests despite the absence of "cause and prejudice," *ante*, at 537; the only question is whether to exercise that power. Despite the rigor of its cause-and-prejudice standard, moreover, the Court continues to commit itself to maintaining the availability of habeas corpus under certain circumstances, even in the absence of "cause," *ibid.;* indeed, this Term, the Court has emphasized the importance of that availability by remanding a case to consider the merits of a prisoner's claim even though the prisoner failed to show "cause" for the default. *Murray* v. *Carrier*, *ante*, p. 478.

The Court concludes in this case that no miscarriage of justice will result from a refusal to entertain Smith's challenge to his death sentence. This conclusion is flawed in three respects. First, the Court mistakenly assumes that only a claim implicating "actual innocence" rises to the level of a miscarriage of justice. Second, the Court does not properly assess the force of a claim that a death penalty is invalid. Finally, the Court vastly exaggerates the state interest in refusing to entertain this claim.

The Court accurately quotes the holding in *Murray* v. *Carrier:* "'[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.'" *Ante*, at 537. The Court then seeks to transfer this "actual innocence" standard to capital sentencing proceedings, and concludes that, in petitioner's sentencing hearing, "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." *Ante*, at 538. The Court does not explain, however, why *Carrier*'s clearly correct holding about the propriety of the writ in a case of innocence must also be a *limiting* principle on the federal court's ability to exercise its statutory authority to entertain federal habeas corpus actions; more specifically, the Court

does not explain why the same principle should not apply when a constitutional violation is claimed to have resulted in a lack of fundamental fairness, either in a conviction or in a death sentence.

This analysis is far removed from the traditional understanding of habeas corpus. For instance, in *Moore* v. *Dempsey*, 261 U. S. 86 (1923), the Court considered a claim that the murder convictions and death sentences of five black defendants were unconstitutional. The Federal District Court had dismissed the writ of habeas corpus. In his opinion for the Court, Justice Holmes explained that in view of the allegations—systematic exclusion of blacks from the jury and threatened mob violence—the Federal District Court should not have dismissed the writ without considering the factual allegations. The Court noted the presence of a clear procedural default—the Arkansas Supreme Court had refused to entertain the challenge to discrimination in the jury because the objection "came too late." *Id.*, at 91. The Court nevertheless held that the Federal District Court should have entertained the petition. *Id.*, at 92.

Although the allegations clearly implicated questions about the accuracy of the truth-finding process, the Court's opinion cannot be fairly read to rest on the kind of "innocence" inquiry that the Court propounds today. For the Court specifically rejected the notion that its inquiry into the presence of a serious constitutional violation was actually an inquiry into the guilt or innocence of the petitioners: "The petitioners say that [the victim] must have been killed by other whites [rather than by the black petitioners], but that we leave on one side *as what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved.*" *Id.*, at 87–88 (emphasis added). Today, the Court adopts the converse of Justice Holmes' proposition: it leaves to one side the question

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whether constitutional rights have been preserved, and considers only the petitioner's innocence or guilt.[7]

The majority's reformulation of the traditional understanding of habeas corpus appears to be premised on the notion that only constitutional violations which go to guilt or innocence are sufficiently serious to implicate the "fundamental fairness" alluded to in *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982).[8] If accuracy in the determination of guilt or innocence were the only value of our criminal justice system, then the Court's analysis might have a great deal of force. If accuracy is the only value, however, then many of our constitutional protections—such as the Fifth Amendment right against compelled self-incrimination and the Eighth Amendment right against cruel and unusual punishment, the very claims asserted by petitioner—are not only irrelevant, but possibly counterproductive.[9] Our Constitution, however, and

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[7] In doing so, the Court goes a long way toward eliminating the distinction, in procedural default cases, between the request for habeas relief and the ultimate issue for a trial court—a distinction that has long been central to our understanding of the Great Writ. See, *e. g.*, *Ex parte Bollman*, 4 Cranch 75, 101 (1807) (Marshall, C. J.) ("It has been demonstrated at the bar, that the question brought forward on a *habeas corpus*, is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts").

[8] See n. 4, *supra*.

[9] Expressing this view, William Howard Taft once observed that, precisely because of the central value of accuracy in guilt or innocence determinations, the Fifth Amendment might have been ill-advised. See Taft, The Administration of Criminal Law, 15 Yale L. J. 1, 8 (1905) ("When examined as an original proposition, the prohibition that the defendant in a criminal case shall not be compelled to testify seems, in some aspects, to be of doubtful utility. If the administration of criminal law is for the purpose of convicting those who are guilty of crime, then it seems natural to follow in such a process the methods that obtain in ordinary life").

our decision to adopt an "accusatorial," rather than an "inquisitorial" system of justice,[10] reflect a different choice. That choice is to afford the individual certain protections—the right against compelled self-incrimination and the right against cruel and unusual punishment among them—even if those rights do not necessarily implicate the accuracy of the truth-finding proceedings. Rather, those protections are an aspect of the fundamental fairness, liberty, and individual dignity that our society affords to all, even those charged with heinous crimes.

In my opinion, then, the Court's exaltation of accuracy as the only characteristic of "fundamental fairness" is deeply flawed. Our criminal justice system, and our Constitution, protect other values in addition to the reliability of the guilt or innocence determination, and the statutory duty to serve "law and justice" should similarly reflect those values.

Thus, the Court begins with a conception of "fundamental fairness" that is far too narrow and that conflicts with the nature of our criminal justice system. The Court similarly fails to give appropriate weight to the fact that capital punishment is at stake in this case. It is now well settled that "death is a different kind of punishment from any other which may be imposed in this country." *Gardner* v. *Florida*, 430 U. S. 349, 357 (1977) (STEVENS, J.).[11] It is of vital importance to

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[10] See *Moran* v. *Burbine*, 475 U. S. 412, 434, and n. 1 (1986) (STEVENS, J., dissenting); *Miller* v. *Fenton*, 474 U. S. 104, 110 (1985); *Malloy* v. *Hogan*, 378 U. S. 1, 7–8 (1964); *Rogers* v. *Richmond*, 365 U. S. 534, 540–541 (1961); *Bram* v. *United States*, 168 U. S. 532, 543–545 (1897).

[11] See also *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983) ("The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination"); *Zant* v. *Stephens*, 462 U. S. 862, 884 (1983) ("[T]here is a qualitative difference between death and any other permissible form of punishment"); *Rummel* v. *Estelle*, 445 U. S. 263, 272 (1980) ("This theme, the unique nature of the death penalty for purposes

the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures. When a condemned prisoner raises a substantial, colorable Eighth Amendment violation, there is a special obligation, consistent with the statutory mission to "dispose of the matter as law and justice require," to consider whether the prisoner's claim would render his sentencing proceeding fundamentally unfair. Indeed, it was precisely this concern that prompted the Court of Appeals to consider petitioner's argument on the merits: "[W]e give weight to the consideration that we have before us a matter of life and death. The imminent execution of Smith serves as sufficient grounds to review the issue." *Smith* v. *Procunier*, 769 F. 2d 170, 172 (1985).

Finally, as in every habeas corpus decision, the magnitude of the State's interest must be considered. In this case, sev-

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of Eighth Amendment analysis, has been repeated time and time again in our opinions. . . . [A] sentence of death differs in kind from any sentence of imprisonment"); *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (BURGER, C. J.) ("[T]he imposition of death by public authority is . . . profoundly different from all other penalties"). Cf. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1222 (1986) ("[W]hen a capital defendant raises a nonfrivolous constitutional question, neither state nor federal courts should be free to refuse to decide it simply because it was not raised in accordance with state procedural requirements. Rather, federal law should expressly provide that in matters of procedural default, as in other matters, death is different").

Indeed, the Court has recognized that even the *threat* of a death penalty may, in certain circumstances, exert a special pull in favor of the exercise of the federal court's undisputed statutory power to entertain a habeas corpus writ on a claim that was procedurally defaulted. In *Fay* v. *Noia*, 372 U. S., at 440, the Court was willing to excuse Noia's deliberate decision not to appeal because Noia perceived that a death sentence might result: "His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence." See also *Wainwright* v. *Sykes*, 433 U. S. 72, 83 (1977) (emphasizing Noia's "'grisly choice' between acceptance of his life sentence and pursuit of an appeal which might culminate in a sentence of death").

eral factors suggest that the State's interest is not adequate to obstruct federal habeas corpus consideration of petitioner's claim. First, petitioner made a timely objection at trial, and the state interest in enforcing procedural default rules at trial is far greater than the State's interest in enforcing procedural default rules on appeal.[12] Second, the issue was raised before the state court in an *amicus curiae* brief.[13] Since this is a matter on which courts ordinarily may exercise discretion,[14] the discretionary decision not to address the issue hardly rises to a state interest of sufficient magnitude that a man should die even though his Fifth and Eighth Amendment rights were violated to achieve that objective. Third, the issue was presented to the state courts in state habeas proceedings—*after* the precedent blocking petitioner's claim had been repudiated[15]—and the state habeas court, while finding that the decision by Smith's counsel not to raise the issue with a governing Virginia precedent squarely against

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[12] See *Murray* v. *Carrier*, *ante*, at 506–515 (STEVENS, J., concurring in judgment); Meltzer, *supra*, at 1223–1225; Note, Procedural Defaults at the Appellate Stage and Federal Habeas Corpus Review, 38 Stan. L. Rev. 463 (1986).

[13] See Brief for Post-Conviction Assistance Project of the University of Virginia Law School as *Amicus Curiae* in No. 780293, pp. 56–61 (arguing that the Fifth Amendment required suppression of psychiatrist's testimony).

[14] Cf. *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3 (1961) (addressing issue raised by *amicus*); *Schwinden* v. *Burlington Northern, Inc.*, —— Mont. ——, ——, 691 P. 2d 1351, 1358 (1984) ("We determine here not to follow the usual rule that issues raised by amici that are part of the underlying action will not be considered by this Court").

[15] See *Gibson* v. *Zahradnick*, 581 F. 2d 75 (CA4) (holding that the *Gibson* v. *Commonwealth* analysis violates Constitution and that writ of habeas corpus should issue), cert. denied, 439 U. S. 996 (1978). In fact, although the Court of Appeals for the Fourth Circuit decided *Gibson* after the briefs in petitioner's case had been filed, the *Gibson* opinion was issued *before* the initial Virginia Supreme Court opinion refusing to address the issue.

him was entirely reasonable,[16] concluded that the Fifth Amendment claim was procedurally barred and thus did not address it.[17] Fourth, the Court of Appeals for the Fourth Circuit addressed the merits and did not rest on any notion of procedural default; this Court customarily defers to federal courts of appeals on questions of state law,[18] including questions about "cause" for failure to comply with state procedural rules.[19] Finally, and most importantly, the inadequacy of the state interest in this death penalty context is decisively shown by the prevailing practice in many States that appellate courts have a special duty in capital cases to overlook procedural defaults and review the trial record for reversible error, before affirming that most severe of all sentences.[20]

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[16] See state habeas opinion, App. 147 ("[B]oth *Gibson* v. *Zahradnick* and *Smith* v. *Estelle* were decided after petitioner's trial. Thus, regardless of their usefulness in theory to sustain an appeal, neither was in fact available to counsel when needed. . . . In light of these facts and of the differences noted above, I find sufficient reason for counsel not to have raised on appeal the arguments presented here. I thus conclude that counsel exercised reasonable judgment in deciding not to preserve the objection on appeal").

[17] State habeas order, Record 204 (Fifth Amendment issue "was waived and forfeited and cannot now be considered").

[18] See, *e. g.*, *Pembaur* v. *Cincinnati*, 475 U. S. 469, 484–485, n. 13 (1986); *Regents of University of Michigan* v. *Ewing*, 474 U. S. 214, 224, n. 10 (1985); *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U. S. 797, 815, n. 12 (1984); *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976); *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949).

[19] See *Jenkins* v. *Anderson*, 447 U. S. 231, 234, n. 1 (1980) ("The applicability of the *Sykes* 'cause'-and-'prejudice' test may turn on an interpretation of state law. . . . This Court's resolution of such a state-law question would be aided significantly by views of other federal courts that may possess greater familiarity with [state] law"); *Rummel* v. *Estelle*, 445 U. S., at 267, n. 7 ("Deferring to the Court of Appeals' interpretation of Texas law, we decline to hold that *Wainwright* bars Rummel from presenting his claim").

[20] See, *e. g.*, Ala. Rule App. Proc. 39(k) ("In all cases in which the death penalty has been imposed, . . . the supreme court may notice any plain error or defect in the proceeding under review, whether or not brought to

Thus, the Court is mistaken in its narrow definition of fundamental fairness, in its failure to appreciate the significance of a challenge to a death penalty, and in its exaggeration of

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the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner"); Arkansas Rev. Stat. Ann. § 43-2725 (1977) ("[W]here either a sentence for life imprisonment or death [is present], the Supreme Court shall review all errors prejudicial to the rights of the appellant"); *Cave* v. *State*, 476 So. 2d 180, 183, n. 1 (Fla. 1985) (In capital cases, "[w]e will, of course, continue to review every issue presented and to conduct our own review in accordance with Florida Rule of Appellate Procedure 9.140(f)"); Georgia Unified Appeal Rule IV B(2) (In capital cases, "[t]he Supreme Court shall review each of the assertions of error timely raised by the defendant during the proceedings in the trial court regardless of whether or not an assertion of error was presented to the trial court by motion for new trial, and regardless of whether error is enumerated in the Supreme Court"); *State* v. *Osborn*, 102 Idaho 405, 410-411, 631 P. 2d 187, 192-193 (1981) ("Death is clearly a different kind of punishment from any other that [might] be imposed, and [Idaho Code] § 19-2827 mandates that we examine not only the sentence but the procedure followed in imposing that sentence regardless of whether an appeal is even taken. This indicates to us that we may not ignore unchallenged errors. Moreover, the gravity of a sentence of death and the infrequency with which it is imposed outweighs any rationale that might be proposed to justify refusal to consider errors not objected to below"); *People* v. *Holman*, 103 Ill. 2d 133, 176, 469 N. E. 2d 119, 140 (1984) ("Ordinarily, a contention not made in the trial court is waived on appeal. . . . However, because of the qualitative difference between death and other forms of punishment . . . this court has elected to address errors in death penalty cases which might have affected the decision of the sentencing jury"), cert. denied, 469 U. S. 1220 (1985); *Lowery* v. *State*, 478 N. E. 2d 1214, 1229 (Ind. 1985) ("The failure to properly raise issues in the Motion to Correct Errors generally results in a waiver of the claimed errors. . . . Since the death penalty was imposed in this case, however, we will review the state of the record concerning these questions"); *Ice* v. *Commonwealth*, 667 S. W. 2d 671, 674 (Ky. 1984) ("[I]n a death penalty case every prejudicial error must be considered, whether or not an objection was made in the trial court"), cert. denied, 469 U. S. 860 (1984); *State* v. *Hamilton*, 478 So. 2d 123, 127, n. 7 (La. 1985) ("In death penalty cases, this court has reviewed assignments of error, despite the absence of a contemporaneous objection, in order to determine whether the error 'render[ed] the result unreliable,'

the State's interest in refusing to entertain a claim that was raised at trial, on appeal by an *amicus*, and in state habeas proceedings; that was addressed on the merits by the Court of Appeals (and briefed and argued on the merits in this Court); and that must be assumed to make the difference between life and death. Because I disagree with the Court's evaluation of these matters, I would address the merits of petitioner's argument that constitutional violations render his sentence of death fundamentally unfair.

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thus avoiding later consideration of the error in the context of ineffective assistance of counsel"); *State* v. *Nave*, 694 S. W. 2d 729, 735 (Mo. 1985) ("Several states hold that the general rule that allegations of court error not assigned in a motion for new trial are not preserved for appellate review, codified in Missouri Rule 29.11(d) with exceptions not applicable here, is inapplicable in death penalty cases. Even though the assignment of error has been improperly preserved, we review, ex gratia, the point relied on for plain error . . . to determine if manifest injustice or a miscarriage of justice resulted from the denial of Nave's request for continuance"); *Commonwealth* v. *McKenna*, 476 Pa. 428, 440–441, 383 A. 2d 174, 181 (1978) ("Because imposition of the death penalty is irrevocable in its finality, it is imperative that the standards by which that sentence is fixed be constitutionally beyond reproach. . . . The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue—the propriety of allowing the state to conduct an illegal execution"); *State* v. *Patterson*, 278 S. C. 319, 320–321, 295 S. E. 2d 264, 264–265 (1982) ("On appeal from a murder conviction in which the death penalty is imposed, this Court reviews the entire record for prejudicial error *in favorem vitae*, regardless of whether the error was properly preserved for review"); *State* v. *Brown*, 607 P. 2d 261, 265 (Utah 1980) ("[N]o objection was made to the omission. Nevertheless, as this is a capital case, we consider the defendant's contention on appeal").

Indeed, Virginia law itself recognizes the special obligations attendant on reviewing death penalties by providing for automatic Virginia Supreme Court review of the death penalty, Va. Code § 17–110.1A (1982), and giving capital cases priority on the court's docket, § 17–110.2. Some State Supreme Courts interpret such statutes to impose an obligation on the court to review the transcript for all possible errors. See, *e. g.*, *State* v. *Osborn*, *supra*.

II

The introduction of petitioner's comments to the court-appointed psychiatrist clearly violated the Fifth Amendment. As the majority points out, psychiatric reports by court-appointed psychiatrists "were routinely forwarded to the court and . . . were then admissible under Virginia law." *Ante*, at 529. However, "[a]t no point prior to or during the interview did Dr. Pile inform petitioner that his statements might later be used against him or that he had the right to remain silent and to have counsel present if he so desired." *Ante*, at 530. Moreover, the court-appointed psychiatrist related petitioner's description of an earlier sexual assault in a letter to the court and to the prosecution, as well as to the defense, and testified about the description, at the State's request, at petitioner's capital sentencing hearing. The State thus relied on Dr. Pile's testimony as evidence of "future dangerousness," one of the two aggravating circumstances found by the jury to justify a sentence of death.[21]

CHIEF JUSTICE BURGER's opinion for the Court in *Estelle* v. *Smith*, 451 U. S. 454 (1981), makes it absolutely clear that the introduction of this evidence by the prosecution at the sentencing stage violated the Fifth Amendment. As THE CHIEF JUSTICE explained, the Fifth Amendment fully applies to a capital sentencing proceeding: "Just as the Fifth Amendment prevents a criminal defendant from being made '"the deluded instrument of his own conviction,"' *Culombe* v. *Connecticut*, 367 U. S. [568,] 581, quoting 2 Hawkins, Pleas

[21] See Prosecutor's Closing Argument at Sentencing Phase, App. 30–31 ("Now, as I said, you all, the Court has instructed you that you all may fix his punishment at death, if the Commonwealth proved its case—proved the prior history that he would commit criminal acts of violence that would constitute a continuous serious threat to society. Now, what has the Commonwealth proved? The Commonwealth has proved that prior to the crime you all convicted him of yesterday, that he assaulted a person on the bus. He said he did it. . . . Tore her clothes off, and then decided not to do it").

of the Crown 595 (8th ed. 1824), it protects him as well from being made 'the deluded instrument' of his own execution." *Id.*, at 462. As THE CHIEF JUSTICE also explained, prosecutorial use of evidence from a psychiatric interrogation in a capital sentencing proceeding requires the protections, and warnings, accorded the Fifth Amendment right in other contexts: "Because [the defendant] did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to [the psychiatrist] to establish his future dangerousness." *Id.*, at 468.

Thus, the use of petitioner's statements clearly violated the Fifth Amendment.[2] In view of the majority's willingness to assume that the constitutional violation is present but that the failure to address it does not affect the fundamental fairness of petitioner's sentence, moreover, it is instructive to recall the importance of the Fifth Amendment right at issue. Again, THE CHIEF JUSTICE's opinion in *Estelle* v. *Smith* provides guidance:

> "*Miranda* held that 'the prosecution may not use statements, whether exculpatory or inculpatory stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.' . . . The purpose of these admonitions is to combat what the Court saw as 'inherently compelling pressures' at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it, which is the prerequisite for 'an intelligent decision as to its exercise.'
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> . . . . .

[2] The state trial court's rejection of petitioner's trial objection to the psychiatrist's testimony stands in sharp contrast to THE CHIEF JUSTICE's *Estelle* analysis: "I don't believe that Doctor Pile has any duty to inform him that anything he may say to him may be used for or against him in a Court of Law, as a police officer does under the Miranda." App. 5.

"The Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard,' *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty . . . for such silence.' *Malloy* v. *Hogan*, 378 U. S., at 1, 8 (1964)." *Id.*, at 466–468.

Given the historic importance of the Fifth Amendment, and the fact that the violation of this right made a significant difference in the jury's evaluation of petitioner's "future dangerousness" (and consequent death sentence), it is not only proper, but imperative, that the federal courts entertain petitioner's entirely meritorious argument that the introduction of the psychiatrist's testimony at his sentencing hearing violated that fundamental protection.[22]

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[22] The State argues that petitioner's case is distinguishable from *Estelle* because the defense requested the psychiatric examination. In view of the fact that Dr. Pile related the account to the prosecution and the court, and testified for the prosecution, he was quite clearly an "agent of the State" in the same sense in which the psychiatrist in *Estelle* was an agent of the State. See 451 U. S., at 467 ("When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting").

Petitioner and *amici*, in turn, argue that, because the examination was to assist the defense, an absolute guarantee of confidentiality, rather than *Miranda* warnings, should have been required. They contend that such confidentiality is especially important to effectuate the due process right to consult with a psychiatrist that was recognized in *Ake* v. *Oklahoma*, 470 U. S. 68 (1985). Since, at a minimum, *Estelle* required that Dr. Pile give *Miranda* warnings, we need not consider the possibility that disclosure would have been inappropriate in any circumstances. For it is at least clear that, under *these* circumstances, his testimony violated petitioner's Fifth Amendment right. Moreover, we need not decide whether, under these circumstances, in which the psychiatrist may have actually been act-

III

It is also quite clear that the introduction of the evidence violated his Eighth Amendment right to a fair sentencing proceeding. In this respect, I disagree with the Court of Appeals' reading of the opinion that I authored for the Court in *Zant* v. *Stephens*, 462 U. S. 862 (1983). The Court of Appeals concluded that, because the jury also found an aggravating circumstance of "vileness," the death sentence could stand even if Dr. Pile's testimony represented a flagrant Fifth Amendment violation.

In *Zant*, we held that the Georgia Supreme Court's invalidation of one of the three aggravating circumstances found by the jury did not require that the death penalty be set aside. But that conclusion was reached only after we satisfied ourselves that the evidence relating to the invalid aggravating circumstance had been properly admitted.[24] We

ing as an agent of the defense, his transformation into an agent of the State was itself constitutionally invalid under the Sixth Amendment.

[24] "But the invalid aggravating circumstance found by the jury in this case was struck down in *Arnold* because the Georgia Supreme Court concluded that it fails to provide an adequate basis for distinguishing a murder case in which the death penalty may be imposed from those cases in which such a penalty may not be imposed. See nn. 5 and 16, *supra*. *The underlying evidence is nevertheless fully admissible at the sentencing phase*. . . .

. . . . .

"Thus, any evidence on which the jury might have relied in this case to find that respondent had previously been convicted of a substantial number of serious assaultive offenses, as he concedes he has been, was properly adduced at the sentencing hearing and was fully subject to explanation by the defendant." 462 U. S., at 886–887 (emphasis added).

We continued:

"Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. We accept that court's view that the subsequent invalidation of one of several statutory aggravating circumstances does not automatically require reversal of the death penalty, having been assured that a death sentence will be set aside if the invalidation of an aggravating circumstance makes the penalty arbitrary and capricious. 250 Ga., at 101,

did not conclude, as the Court of Appeals seems to have assumed, that any evidence concerning the invalid circumstance was simply irrelevant because the valid circumstances were, in all events, sufficient to support the death penalty. The fact that the record adequately establishes one valid aggravating circumstance may make the defendant eligible for the death penalty but it does not justify the conclusion that a death sentence should stand even though highly prejudicial inadmissible evidence was presented to the jury at the sentencing hearing. The introduction of such highly prejudicial, inadmissible evidence—evidence that itself represents an independent constitutional violation—quite clearly undermines the validity of the capital sentencing proceeding and violates the Eighth Amendment.

IV

Thus, I would not only reach the merits of petitioner's constitutional claim but also would conclude that it has merit. The question that remains is the one the Court addresses in the last two paragraphs of its opinion—whether the constitutional error warrants the conclusion that the death penalty should be set aside in this habeas corpus proceeding. I think that question should be answered by reference to the language of the governing statute—the writ should issue "as law and justice require." To hold, as the Court does today, that petitioner's death sentence must stand despite the fact that blatant constitutional violations presumably made the difference between the jury's recommendation of life or death, violates not only "law," but, quite clearly, "justice" as well.

I respectfully dissent.

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297 S. E. 2d, at 4. The Georgia Supreme Court, in its response to our certified question, expressly stated: 'A different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance *which was not otherwise admissible* and thereafter the circumstance failed.' *Ibid.*" *Id.*, at 890 (emphasis added).

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* GALIOTO

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 84-1904. Argued March 26, 1986—Decided June 27, 1986

Appellee, who had been involuntarily committed to a mental hospital for a period of several days in 1971, was unable to purchase a firearm from a store in 1982 because of the provisions of 18 U. S. C. § 922(d) prohibiting sales of firearms to such persons. Section 922(d) and other federal statutes prohibiting persons who have been committed to mental institutions from possessing, receiving, or transporting firearms also apply to felons. However, under 18 U. S. C. § 925(c), certain felons could apply to the Bureau of Alcohol, Tobacco and Firearms for administrative relief from the disabilities imposed by federal firearms laws, but no such relief was permitted for former mental patients. After unsuccessfully seeking a special exemption from the Bureau, appellee brought suit in Federal District Court, challenging the constitutionality of the firearms legislation. The court held that the statutory scheme was unconstitutional as violating equal protection principles because there was no rational basis for singling out mental patients for permanent disabled status, particularly as compared to convicts. The court also concluded that the statutory scheme unconstitutionally created an "irrebuttable presumption" that one who has been committed, no matter what the circumstances, is forever mentally ill and dangerous.

Held: The equal protection and "irrebuttable presumption" issues are now moot because, after this Court noted probable jurisdiction over this appeal and heard arguments, Congress amended § 925(c) to afford the administrative remedy contained therein to former mental patients ineligible to purchase firearms. Since appellee's complaint appears to raise other issues best addressed in the first instance by the District Court, the case is remanded for further proceedings. Pp. 559–560.

602 F. Supp. 682, vacated and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Charles A. Rothfeld argued the cause for appellant. With him on the briefs were *Solicitor General Fried, Assistant*

Attorney General Willard, Deputy Solicitor General Geller, and *Nicholas S. Zeppos.*

Michael A. Casale argued the cause and filed a brief for appellee.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to decide whether Congress may, consistent with the Fifth Amendment, forbid all involuntarily committed former mental patients to purchase firearms while permitting some felons to do so.

In 1982 appellee attempted to purchase a firearm at Ray's Sport Shop in North Plainfield, New Jersey. The Sport Shop gave appellee a standard questionnaire, which asked, *inter alia:* "Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution?" Appellee had been involuntarily committed to a mental hospital for a period of several days in 1971, and accordingly answered "yes" to this question. The store then refused to sell him a gun by reason of 18 U. S. C. § 922(d)(4), which makes it unlawful for a licensed dealer in firearms "to sell . . . any firearm . . . to any person knowing or having reasonable cause to believe that such person . . . has been adjudicated as a mental defective or had been committed to any mental institution." Federal firearms laws also forbid "any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport any firearm or ammunition in interstate or foreign commerce," 18 U. S. C. § 922(g), or to "receive any firearm or ammunition which has been shipped or transported in in-

*Briefs of *amici curiae* urging affirmance were filed for the American Psychological Association by *Margaret Farrell Ewing, Donald N. Bersoff,* and *Arlene S. Kanter;* for the Coalition for the Fundamental Rights and Equality of Ex-Patients by *Richard E. Gardiner* and *Robert Dowlut;* and for the New Jersey Department of the Public Advocate, Division of Mental Health Advocacy, et al. by *Linda G. Rosenzweig, Penelope A. Boyd,* and *Peter Margulies.*

terstate or foreign commerce," § 922(h). Partially overlapping provisions of 18 U. S. C. App. §§ 1202(a)(1) and (3) prohibit any person who has "been adjudged by a court . . . of being mentally incompetent" from receiving, possessing, or transporting firearms.

After unsuccessfully seeking a special exemption from the Bureau of Alcohol, Tobacco and Firearms, appellee brought suit in the United States District Court for the District of New Jersey, challenging the constitutionality of the firearms legislation. The District Court concluded that those portions of the federal firearms statutes that deprived appellee of his ability to purchase a firearm were constitutionally infirm. 602 F. Supp. 682, 683 (1985). Both felons and persons who have been committed to mental institutions, *inter alia*, are subject to the firearms disabilities contained in 18 U. S. C. § 922(d). Under 18 U. S. C. § 925(c), however, felons who have committed crimes not involving firearms may apply to the Bureau for administrative relief from these disabilities. No such relief is permitted for former mental patients.

Section 925(c) provides in relevant part:

> "A person who has been convicted for a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."

The District Court held that this scheme violated equal protection principles because, in its view, "[t]here is no rational basis for thus singling out mental patients for permanent disabled status, particularly as compared to convicts." 602 F. Supp., at 689. The court also concluded that the statutory scheme was unconstitutional because it "in effect creates an irrebuttable presumption that one who has been committed, no matter the circumstances, is forever mentally ill and dangerous." *Id.*, at 690. We noted probable jurisdiction over the Government's appeal, 474 U. S. 943 (1985), and the case was argued on March 26, 1986.

Meanwhile, Congress came to the conclusion, as a matter of legislative policy, that the firearms statutes should be redrafted. On May 19, 1986, while this case was under consideration here, the President signed into law Pub. L. 99-308, 100 Stat. 449. Section 105 of the statute amends the provision providing for administrative relief from firearms disabilities, 18 U. S. C. § 925(c), by striking out the language limiting the provision to certain felons and changing the statute to read that any person who "is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition" may apply to the Secretary of the Treasury for relief. Section 110 of the statute provides that the amendment made by § 105 "shall be applicable to any action, petition, or appellate proceeding pending on the date of the enactment of this Act."

This enactment significantly alters the posture of this case. The new statutory scheme permits the Secretary to grant relief in some circumstances to former involuntarily committed mental patients such as appellee. The new approach affords an administrative remedy to former mental patients like that Congress provided for others prima facie ineligible to purchase firearms. Thus, it can no longer be contended that such persons have been "singled out." Also, no "irrebuttable presumption" now exists since a hearing is afforded to anyone subject to firearms disabilities. Accordingly, the equal protection and "irrebuttable presumption" issues dis-

cussed by the District Court are now moot. See *United Building and Construction Trades Council of Camden County and Vicinity* v. *Mayor and Council of Camden*, 465 U. S. 208, 213 (1984).

In such circumstances, "it is the duty of the appellate court to set aside the decree below . . . ." *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 267 (1936); see also *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39–40 (1950). We therefore vacate the judgment of the District Court. However, since appellee's complaint appears to raise other issues best addressed in the first instance by the District Court, we also remand the case for further proceedings consistent with this opinion.

Vacated and remanded.

CITY OF RIVERSIDE ET AL. *v.* RIVERA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-224. Argued March 31, 1986—Decided June 27, 1986

Respondents, eight Chicano individuals, attended a party at the home of two of the respondents. A large number of officers of petitioner city's police force, acting without a warrant, broke up the party by using tear gas and unnecessary physical force, and many of the guests, including four of the respondents, were arrested. Criminal charges were ultimately dismissed. Respondents filed suit in Federal District Court against the city, its Chief of Police, and 30 individual police officers under various federal Civil Rights Acts, alleging violations of respondents' First, Fourth, and Fourteenth Amendment rights as well as numerous state-law claims. Ultimately the jury returned 37 individual verdicts in favor of respondents and against the city and five individual officers, finding 11 violations of 42 U. S. C. § 1983, 4 instances of false arrest and imprisonment, and 22 instances of negligence. Respondents were awarded $33,350 in compensatory and punitive damages. They also sought attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, in the amount of $245,456.25, based on 1,946.75 hours expended by their two attorneys at $125 per hour and 84.5 hours expended by law clerks at $25 per hour. Finding both the hours and rates reasonable, the District Court awarded respondents the requested amount, and the Court of Appeals affirmed. This Court remanded for reconsideration in light of the intervening decision in *Hensley* v. *Eckerhart*, 461 U. S. 424, and the District Court, after additional hearings and review of the matter, made extensive findings of fact and conclusions of law, and again concluded that respondents were entitled to an award of the requested amount of attorney's fees. The Court of Appeals again affirmed, ruling, *inter alia*, that the fee award was not excessive merely because it exceeded the amount of damages awarded by the jury.

Held: The judgment is affirmed.

763 F. 2d 1580, affirmed.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded that:

1. Under *Hensley* v. *Eckerhart*, *supra*, which announced certain guidelines for calculating a "reasonable" attorney's fee under § 1988, the "lodestar" figure, obtained by multiplying the number of hours reason-

ably expended on the litigation by a reasonable hourly rate, is presumed to be the reasonable fee contemplated by § 1988, and an important factor, among others, for consideration in adjusting the lodestar figure upward or downward is the "results obtained." Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee, and the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. The record here establishes that the District Court correctly applied the factors announced in *Hensley* and did not abuse its discretion in awarding attorney's fees for all time reasonably spent litigating the case. Pp. 567–573.

2. There is no merit to the argument that *Hensley*'s lodestar approach is inappropriate in civil rights cases where a plaintiff recovers only monetary damages, and that, in such cases, fees in excess of the amount of damages recovered are necessarily unreasonable. Although the amount of damages recovered is relevant to the amount of attorney's fees to be awarded under § 1988, it is only one of many factors that a court should consider in calculating an award of attorney's fees. Pp. 573–580.

(a) A civil rights action for damages does not constitute merely a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief, but instead recognized that reasonable attorney's fees under § 1988 are not conditioned upon and need not be proportionate to an award of money damages. Pp. 574–576.

(b) A rule limiting attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988. Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts, and would be totally inconsistent with Congress' purpose of ensuring sufficiently vigorous enforcement of civil rights. In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case. Pp. 576–580.

3. Although Congress did not intend that statutory fee awards produce "windfalls" to attorneys, neither did it intend that attorney's fees be proportionate to the amount of damages a civil rights plaintiff

might recover. Rather, there already exists a wide range of safeguards that are designed to protect civil rights defendants against the possibility of excessive fee awards, and that adequately protect against the possibility that § 1988 might produce a "windfall" to civil rights attorneys. Pp. 580–581.

JUSTICE POWELL concluded that the District Court's detailed findings concerning the fee award, which were accepted by the Court of Appeals, were not "clearly erroneous" for purposes of Federal Rule of Civil Procedure 52(a), and that the District Court did not abuse its discretion in making the fee award. JUSTICE POWELL also concluded that neither the decisions of this Court nor the legislative history of § 1988 support a rule of proportionality between fees awarded and damages recovered in a civil rights case, and rejected the argument that the prevailing contingent fee rate charged by counsel in personal injury cases should be considered the reasonable fee for purposes of § 1988. Pp. 581–586.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, *post*, p. 581. BURGER, C. J., filed a dissenting opinion, *post*, p. 587. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined, *post*, p. 588.

Jonathan Kotler argued the cause and filed briefs for petitioners.

Gerald P. Lopez argued the cause and filed a brief for respondents.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller, William Kanter,* and *Michael Jay Singer;* for Americans for Effective Law Enforcement, Inc., et al. by *Jack E. Yelverton, David Crump, Daniel B. Hales, Fred E. Inbau, Wayne W. Schmidt,* and *James P. Manak;* for Concerned Women for American Education and Legal Defense Foundation by *Michael P. Farris* and *Jordan W. Lorence;* for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Thomas R. Bagby;* and for Congressman Thomas J. Bliley, Jr., et al. by *Daniel J. Popeo* and *George C. Smith.*

Briefs of *amici curiae* urging affirmance were filed for Lambda Legal Defense and Education Fund, Inc., et al. by *Abby R. Rubenfeld;* and for the NAACP Legal Defense and Educational Fund, Inc., by *Julius LeVonne Chambers* and *Charles Stephen Ralston.*

Paul M. Smith and *Joseph N. Onek* filed a brief for the Washington Council of Lawyers et al. as *amici curiae.*

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join.

The issue presented in this case is whether an award of attorney's fees under 42 U. S. C. § 1988 is *per se* "unreasonable" within the meaning of the statute if it exceeds the amount of damages recovered by the plaintiff in the underlying civil rights action.

I

Respondents, eight Chicano individuals, attended a party on the evening of August 1, 1975, at the Riverside, California, home of respondents Santos and Jennie Rivera. A large number of unidentified police officers, acting without a warrant, broke up the party using tear gas and, as found by the District Court, "unnecessary physical force." Many of the guests, including four of the respondents, were arrested. The District Court later found that "[t]he party was not creating a disturbance in the community at the time of the break-in." App. 188. Criminal charges against the arrestees were ultimately dismissed for lack of probable cause.

On June 4, 1976, respondents sued the city of Riverside, its Chief of Police, and 30 individual police officers under 42 U. S. C. §§ 1981, 1983, 1985(3), and 1986 for allegedly violating their First, Fourth, and Fourteenth Amendment rights. The complaint, which also alleged numerous state-law claims, sought damages, and declaratory and injunctive relief. On August 5, 1977, 23 of the individual police officers moved for summary judgment; the District Court granted summary judgment in favor of 17 of these officers. The case against the remaining defendants proceeded to trial in September 1980. The jury returned a total of 37 individual verdicts in favor of the respondents and against the city and five individual officers, finding 11 violations of § 1983, 4 instances of false arrest and imprisonment, and 22 instances of negligence. Respondents were awarded $33,350 in compensatory and pu-

nitive damages: $13,300 for their federal claims, and $20,050 for their state-law claims.[1]

Respondents also sought attorney's fees and costs under § 1988. They requested compensation for 1,946.75 hours expended by their two attorneys at a rate of $125 per hour, and for 84.5 hours expended by law clerks at a rate of $25 per hour, a total of $245,456.25. The District Court found both the hours and rates reasonable, and awarded respondents $245,456.25 in attorney's fees. The court rejected respondents' request for certain additional expenses, and for a multiplier sought by respondents to reflect the contingent nature of their success and the high quality of their attorneys' efforts.

Petitioners appealed only the attorney's fees award, which the Court of Appeals for the Ninth Circuit affirmed. *Rivera* v. *City of Riverside*, 679 F. 2d 795 (1982). Petitioners sought a writ of certiorari from this Court. We granted the writ, vacated the Court of Appeals' judgment, and remanded the case for reconsideration in light of *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983). 461 U. S. 952 (1983). On remand, the District Court held two additional hearings, reviewed additional briefing, and reexamined the record as a whole. The court made extensive findings of fact and conclusions of law, and again concluded that respondents were entitled to an

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[1] Counsel for respondents explained to the District Court that respondents had not pursued their request for injunctive relief because "the bottom line of what we would ask for is that the police officers obey the law. And that is virtually always denied by a court because a court properly, I think, says that for the future we will assume that all police officers will abide by the law, including the Constitution." App. 219. The District Court's response to this explanation is significant:

"[I]f you [respondents] had asked for [injunctive relief] against some of the officers I think I would have granted it. . . . I would agree with you that there is a problem about telling the officers that they have to obey the law. But if you want to know what the Court thought about some of the behavior, it was—it would have warranted an injunction." *Ibid.*

award of $245,456.25 in attorney's fees, based on the same total number of hours expended on the case and the same hourly rates.[2] The court again denied respondents' request for certain expenses and for a multiplier.

Petitioners again appealed the fee award. And again, the Court of Appeals affirmed, finding that "the district court correctly reconsidered the case in light of *Hensley* . . . ." 763 F. 2d 1580, 1582 (1985). The Court of Appeals rejected three arguments raised by petitioners. First, the court rejected petitioners' contention that respondents' counsel should not have been compensated for time spent litigating claims other than those upon which respondents ultimately prevailed. Emphasizing that the District Court had determined that respondents' attorneys had "spent no time on claims unrelated to the successful claims," *ibid.*, the Court of Appeals concluded that "[t]he record supports the district court's findings that all of the plaintiffs' claims involve a 'common core of facts' and that the claims involve related legal theories." *Ibid.* The court also observed that, consistent with *Hensley*, the District Court had "considered the degree of success [achieved by respondents' attorneys] and found a reasonable relationship between the extent of that success and the amount of the fee award." 763 F. 2d, at 1582. Second, the Court of Appeals rejected the argument that the fee award was excessive because it exceeded the amount of damages awarded by the jury. Examining the legislative history of § 1988, the court found no support for the proposition that an award of attorney's fees may not exceed the amount of damages recovered by a prevailing plaintiff. Finally, the

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[2] The District Court determined that $125 per hour was the "rate typical of the prevailing market rate for similar services by lawyers of comparable skill, experience and reputation within the Central District at the time these services were performed," *id.*, at 190, and that "[t]he rate of $25 per hour, which counsel seeks as compensation for the time expended by two law clerks, was lower than the customary hourly rate for such services at the time those services were performed." *Ibid.*

court found that the District Court's "extensive findings of fact and conclusions of law" belied petitioners' claim that the District Court had not reviewed the record to determine whether the fee award was justified. The Court of Appeals concluded:

> "In short, the district court applied the necessary criteria to justify the attorney's fees awarded and explained the reasons for the award clearly and concisely. As required by *Hensley*, the district court adequately discussed the extent of the plaintiffs' success and its relationship to the amount of the attorney's fees awarded. The award is well within the discretion of the district court." *Id.*, at 1583 (citation omitted).

Petitioners again sought a writ of certiorari from this Court, alleging that the District Court's fee award was not "reasonable" within the meaning of § 1988, because it was disproportionate to the amount of damages recovered by respondents. We granted the writ, 474 U. S. 917 (1985), and now affirm the Court of Appeals.

II

A

In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975), the Court reaffirmed the "American Rule" that, at least absent express statutory authorization to the contrary, each party to a lawsuit ordinarily shall bear its own attorney's fees. In response to *Alyeska*, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, which authorized the district courts to award reasonable attorney's fees to prevailing parties in specified civil rights litigation. While the statute itself does not explain what constitutes a reasonable fee, both the House and Senate Reports accompanying § 1988 expressly endorse the analysis set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (CA5 1974). See S. Rep. No. 94-1011, p. 6 (1976) (hereafter Senate Report); H. R.

Rep. No. 94-1558, p. 8 (1976) (hereafter House Report). *Johnson* identifies 12 factors to be considered in calculating a reasonable attorney's fee.[3]

Hensley v. *Eckerhart*, *supra*, announced certain guidelines for calculating a reasonable attorney's fee under § 1988. *Hensley* stated that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.*, at 433. This figure, commonly referred to as the "lodestar," is presumed to be the reasonable fee contemplated by § 1988. The opinion cautioned that "[t]he district court . . . should exclude from this initial fee calculation hours that were not 'reasonably expended'" on the litigation. *Id.*, at 434 (quoting Senate Report, at 6).

Hensley then discussed other considerations that might lead the district court to adjust the lodestar figure upward or downward, including the "important factor of the 'results obtained.'" 461 U. S., at 434. The opinion noted that where a prevailing plaintiff has succeeded on only some of his claims, an award of fees for time expended on unsuccessful claims may not be appropriate. In these situations, the Court held that the judge should consider whether or not the plaintiff's unsuccessful claims were related to the claims on which he succeeded, and whether the plaintiff achieved a level of success that makes it appropriate to award attorney's fees for hours reasonably expended on unsuccessful claims:

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[3] These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F. 2d, at 717-719.

> "In [some] cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.*, at 435.

Accordingly, *Hensley* emphasized that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee," and that "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Ibid.*

B

Petitioners argue that the District Court failed properly to follow *Hensley* in calculating respondents' fee award. We disagree. The District Court carefully considered the results obtained by respondents pursuant to the instructions set forth in *Hensley*, and concluded that respondents were entitled to recover attorney's fees for all hours expended on the litigation. First, the court found that "[t]he amount of time expended by counsel in conducting this litigation was reasonable and reflected sound legal judgment under the circumstances." App. 190.[4] The court also determined that

[4] *Hensley* stated that a fee applicant should "exercise 'billing judgment' with respect to hours worked." 461 U. S., at 437. Petitioners maintain that respondents failed to exercise "billing judgment" in this case, since they sought compensation for all time spent litigating this case. We think this argument misreads the mandate of *Hensley*. *Hensley* requires a fee applicant to exercise "billing judgment" not because he should necessarily be compensated for less than the actual number of hours spent litigating a case, but because the hours he does seek compensation for must be *reasonable*. "Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or other-

counsel's excellent performances in this case entitled them to be compensated at prevailing market rates, even though they were relatively young when this litigation began. See *Johnson*, *supra*, at 718–719 ("If a young attorney demonstrates the skill and ability, he should not be penalized for only recently being admitted to the bar").

The District Court then concluded that it was inappropriate to adjust respondents' fee award downward to account for the fact that respondents had prevailed only on some of their claims, and against only some of the defendants. The court first determined that "it was never actually clear what officer did what until we had gotten through with the whole trial," App. 236, so that "[u]nder the circumstances of this case, it was reasonable for plaintiffs initially to name thirty-one individual defendants . . . as well as the City of Riverside as defendants in this action." *Id.*, at 188. The court remarked:

> "I think every one of the claims that were made were related and if you look at the common core of facts that we had here that you had total success. . . . There was a problem about who was responsible for what and that problem was there all the way through to the time that we concluded the case. Some of the officers couldn't agree about who did what and it is not at all suprising that it would, in my opinion, have been wrong for you

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wise unnecessary . . . ." *Id.*, at 434. In this case, the District Court found that the number of hours expended by respondents' counsel was *reasonable*. Thus, counsel did, in fact, exercise the "billing judgment" recommended in *Hensley*.

Hensley also stated that a fee applicant should "maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Id.*, at 437. Petitioners submit that the time records submitted by respondents' attorneys made it difficult for the District Court to identify and separate distinct claims. The District Court, however, does not appear to have shared this view. In any event, while it is true that some of the disputed time records do not identify the precise claims worked on at the time, we find this lapse unimportant, in light of the District Court's finding that all of respondents' claims were interrelated.

> not to join all those officers since you yourself did not know precisely who were the officers that were responsible." *Id.*, at 235–236.

The court then found that the lawsuit could not "be viewed as a series of discrete claims," *Hensley*, 461 U. S., at 435:

> "All claims made by plaintiffs were based on a common core of facts. The claims on which plaintiffs did not prevail were closely related to the claims on which they did prevail. The time devoted to claims on which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail." App. 189.

The District Court also considered the amount of damages recovered, and determined that the size of the damages award did not imply that respondents' success was limited:

> "[T]he size of the jury award resulted from (a) the general reluctance of jurors to make large awards against police officers, and (b) the dignified restraint which the plaintiffs exercised in describing their injuries to the jury. For example, although some of the actions of the police would clearly have been insulting and humiliating to even the most insensitive person and were, in the opinion of the Court, intentionally so, plaintiffs did not attempt to play up this aspect of the case." *Id.*, at 188–189.[5]

The court paid particular attention to the fact that the case "presented complex and interrelated issues of fact and law,"

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[5] At the second hearing on remand, the court also remarked:

"I have tried several civil rights violation cases in which police officers have figured and in the main they prevailed because juries do not bring in verdicts against police officers very readily nor against cities. The size of the verdicts against the individuals is not at all surprising because juries are very reluctant to bring in large verdicts against police officers who don't have the resources to answer those verdicts. The relief here I think was absolutely complete." App. 235.

id., at 187, and that "[a] fee award in this civil rights action will . . . advance the public interest," *id.*, at 191:

> "Counsel for plaintiffs . . . served the public interest by vindicating important constitutional rights. Defendants had engaged in lawless, unconstitutional conduct, and the litigation of plaintiffs' case was necessary to remedy defendants' misconduct. Indeed, the Court was shocked at some of the acts of the police officers in this case and was convinced from the testimony that these acts were motivated by a general hostility to the Chicano community in the area where the incident occured. The amount of time expended by plaintiffs' counsel in conducting this litigation was clearly reasonable and necessary to serve the public interest as well as the interests of plaintiffs in the vindication of their constitutional rights." *Id.*, at 190.

Finally, the District Court "focus[ed] on the significance of the overall relief obtained by [respondents] in relation to the hours reasonably expended on the litigation." *Hensley, supra*, at 435. The court concluded that respondents had "achieved a level of success in this case that makes the total number of hours expended by counsel a proper basis for making the fee award," App. 192:

> "Counsel for plaintiffs achieved excellent results for their clients, and their accomplishment in this case was outstanding. The amount of time expended by counsel in conducting this litigation was reasonable and reflected sound legal judgment under the circumstances." *Id.*, at 190.

Based on our review of the record, we agree with the Court of Appeals that the District Court's findings were not clearly erroneous. We conclude that the District Court correctly applied the factors announced in *Hensley* in calculating respondents' fee award, and that the court did not abuse its

discretion in awarding attorney's fees for all time reasonably spent litigating the case.[6]

III

Petitioners, joined by the United States as *amicus curiae*, maintain that *Hensley*'s lodestar approach is inappropriate in civil rights cases where a plaintiff recovers only monetary damages. In these cases, so the argument goes, use of the lodestar may result in fees that exceed the amount of damages recovered and that are therefore unreasonable. Likening such cases to private tort actions, petitioners and the United States submit that attorney's fees in such cases should be proportionate to the amount of damages a plaintiff recovers. Specifically, they suggest that fee awards in damages cases should be modeled upon the contingent fee arrangements commonly used in personal injury litigation. In this case, assuming a 33% contingency rate, this would enti-

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[6] In addition to the amount involved and the results obtained, the District Court also discussed several of the other factors identified in *Johnson*, including: the time and labor required; the novelty and difficulty of the questions presented; the skill requisite to perform the legal service properly; the customary fee; the experience, reputation, and ability of the attorneys; and the undesirability of the case.

With respect to the time and labor required to litigate the case, petitioners suggest that much of the time for which respondents' counsel received compensation was not "reasonable." See Brief for Petitioners 12–13. However, the District Court considered, and properly rejected, these arguments. For example, petitioners object to fees being awarded for the 59 hours respondents' counsel spent preparing jury instructions which, according to petitioners, "were subsequently mostly discarded by the trial court." *Id.*, at 12. The District Court, however, denied having discarded respondents' jury instructions. App. 215. Similarly, petitioners object to fees being awarded for 197 hours of conversation between respondents' two attorneys. The District Court however, noted: "I haven't got any doubt that it probably took 250 hours of conversation about the case between the two of them." *Ibid.* We believe that the District Court was in the best position to determine whether the time expended by respondents' counsel was reasonable.

tle respondents to recover approximately $11,000 in attorney's fees.

The amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded under § 1988. See *Johnson*, 488 F. 2d, at 718. It is, however, only one of many factors that a court should consider in calculating an award of attorney's fees. We reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers.

A

As an initial matter, we reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. See *Carey* v. *Piphus*, 435 U. S. 247, 266 (1978). And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff. . . ." *Hensley*, 461 U. S., at 444, n. 4 (BRENNAN, J., concurring in part and dissenting in part). Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards. In this case, for example, the District Court found that many of petitioners' unlawful acts were "motivated by a general hostility to the Chicano community," App. 190, and that this litigation therefore served the public interest:

> "The institutional behavior involved here . . . had to be stopped and . . . nothing short of having a lawsuit like this would have stopped it. . . . [T]he improper motivation which appeared as a result of all of this seemed to

me to have pervaded a very broad segment of police officers in the department." *Id.*, at 237.[7]

In addition, the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future. See *McCann* v. *Coughlin*, 698 F. 2d 112, 129 (CA2 1983). This deterrent effect is particularly evident in the area of individual police misconduct, where injunctive relief generally is unavailable.

Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit "'does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance.'" House Report, at 2 (quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968)). "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney).

Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief. Rather, Congress made clear that it "intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and *not be reduced because the rights involved may be nonpecuniary in nature.*" Senate Report, at 6 (emphasis added). "[C]ounsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, '*for all time reasonably expended on a matter.*'" *Ibid.* (quoting *Van Davis*

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[7] The District Court also observed that even though respondents ultimately dropped their request for injunctive relief, petitioners' misconduct clearly "would have warranted an injunction." *Id.*, at 219; see n. 1, *supra*.

v. *County of Los Angeles*, 8 EPD ¶ 9444 (CD Cal. 1974) (emphasis added)). The Senate Report specifically approves of the fee awards made in cases such as *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680 (ND Cal. 1974); *Van Davis* v. *County of Los Angeles, supra;* and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F. R. D. 483 (WDNC 1975). In each of these cases, counsel received substantial attorney's fees despite the fact the plaintiffs sought no monetary damages. Thus, Congress recognized that reasonable attorney's fees under § 1988 are not conditioned upon and need not be proportionate to an award of money damages. The lower courts have generally eschewed such a requirement.[8]

B

A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988. Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. See House Report, at 3. These victims ordinarily cannot afford to purchase legal services at the rates set by the private market. See *id.*, at 1 ("Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts"); Senate Report, at 2 ("In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer"); see

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[8] See *DeFilippo* v. *Morizio*, 759 F. 2d 231, 235 (CA2 1985); *Ramos* v. *Lamm*, 713 F. 2d 546, 557 (CA10 1983); *McCann* v. *Coughlin*, 698 F. 2d 112, 128–129 (CA2 1983); *Jones* v. *MacMillan Bloedel Containers, Inc.*, 685 F. 2d 236, 238–239 (CA8 1982); *Basiardanes* v. *City of Galveston*, 682 F. 2d 1203, 1220 (CA5 1982); *Furtado* v. *Bishop*, 635 F. 2d 915, 917–918 (CA1 1980); *Coop* v. *City of South Bend*, 635 F. 2d 652, 655 (CA7 1980); *Perez* v. *University of Puerto Rico*, 600 F. 2d 1, 2 (CA1 1979); *Walston* v. *School Board*, 566 F. 2d 1201, 1204–1205 (CA4 1977).

also 122 Cong. Rec. 35127 (1976) (remarks of Rep. Holtzman) ("Plaintiffs who suffer discrimination and other infringements of their civil rights are usually not wealthy people"); *id.*, at 35128 (remarks of Rep. Seiberling) ("Most Americans . . . cannot afford to hire a lawyer if their constitutional rights are violated or if they are the victims of illegal discrimination"); *id.*, at 31832 (remarks of Sen. Hathaway) ("[R]ight now the vindication of important congressional policies in the vital area of civil rights is made to depend upon the financial resources of those least able to promote them"). Moreover, the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries. As the House Report states:

> "[W]hile damages are theoretically available under the statutes covered by [§ 1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude *or severely limit the damage remedy.* Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and consitutional rights are to be adequately protected." House Report, at 9. (emphasis added; footnote omitted).

See also 122 Cong. Rec., at 33314 (remarks of Sen. Kennedy) ("[C]ivil rights cases—unlike tort or antitrust cases—do not provide the prevailing plaintiff with a large recovery from which he can pay his lawyer"). Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so:

> "[F]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vin-

dicate the important Congressional policies which these laws contain.

". . . If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." Senate Report, at 2.

See also *Kerr* v. *Quinn*, 692 F. 2d 875, 877 (CA2 1982) ("The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel").

A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting § 1988. Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights. In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case.[9]

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[9] Of course, we do not mean to suggest that private-sector comparisons are irrelevant to fee calculations under § 1988. We have suggested that in determining an appropriate hourly rate for a lawyer's services, "the rates charged in private representations may afford relevant comparisons." *Blum* v. *Stenson*, 465 U. S. 886, 896, n. 11 (1984). We have also indicated that "[c]ounsel for a prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley*, 461 U. S., at 434. However, while private-market considerations are not irrelevant, Congress clearly rejected the notion that attorney's fees under § 1988 should be based on private-sector fee arrangements.

This case illustrates why the enforcement of civil rights laws cannot be entrusted to private-sector fee arrangements. The District Court observed that "[g]iven the nature of this lawsuit and the type of defense presented, many attorneys in the community would have been reluctant to institute and to continue to prosecute this action." App. 189. The court concluded, moreover, that "[c]ounsel for plaintiffs achieved excellent results for their clients, and their accomplishment in this case was outstanding. The amount of time expended by counsel in conducting this litigation was reasonable and reflected sound legal judgment under the circumstances." *Id.*, at 190. Nevertheless, petitioners suggest that respondents' counsel should be compensated for only a small fraction of the actual time spent litigating the case. In light of the difficult nature of the issues presented by this lawsuit and the low pecuniary value of many of the rights respondents sought to vindicate, it is highly unlikely that the prospect of a fee equal to a fraction of the damages respondents might recover would have been sufficient to attract competent counsel.[10] Moreover, since counsel might not have found it economically feasible to expend the amount of time respondents' counsel found necessary to litigate the case properly, it is even less likely that counsel would have achieved the excellent results that respondents' counsel obtained here. Thus, had respondents had to rely on private-sector fee arrangements, they might well have been unable to obtain redress for their

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[10] The United States suggests that "[t]he prospect of recovering $11,000 for representing [respondents] in a damages suit (assuming a contingency rate of 33%) is likely to attract a substantial number of attorneys." Brief for United States as *Amicus Curiae* 22–23. However, the District Court found that the 1,946.75 hours respondents' counsel spent litigating the case were reasonable and that "[t]here was not any possible way that you could have avoided putting in that amount of time . . . ." App. 238. We reject the United States' suggestion that the prospect of working nearly 2,000 hours at a rate of $5.65 an hour, to be paid more than 10 years after the work began, is "likely to attract a substantial number of attorneys." Brief for United States as *Amicus Curiae* 23.

grievances. It is precisely for this reason that Congress enacted § 1988.

IV

We agree with petitioners that Congress intended that statutory fee awards be "adequate to attract competent counsel, but . . . not produce windfalls to attorneys." Senate Report, at 6. However, we find no evidence that Congress intended that, in order to avoid "windfalls to attorneys," attorney's fees be proportionate to the amount of damages a civil rights plaintiff might recover. Rather, there already exists a wide range of safeguards designed to protect civil rights defendants against the possibility of excessive fee awards. Both the House and Senate Reports identify standards for courts to follow in awarding and calculating attorney's fees, see *ibid.;* House Report, at 8; these standards are designed to ensure that attorneys are compensated only for time *reasonably expended* on a case. The district court has the discretion to deny fees to prevailing plaintiffs under special circumstances, see *Hensley*, 461 U. S., at 429 (citing Senate Report, at 4), and to award attorney's fees against plaintiffs who litigate frivolous or vexatious claims. See *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 416–417 (1978), *Hughes* v. *Rowe*, 449 U. S. 5, 14–16 (1980) *(per curiam);* House Report, at 6–7. Furthermore, we have held that a civil rights defendant is not liable for attorney's fees incurred after a pretrial settlement offer, where the judgment recovered by the plaintiff is less than the offer. *Marek* v. *Chesny*, 473 U. S. 1 (1985).[11] We believe that

[11] Thus, petitioners could have avoided liability for the bulk of the attorney's fees for which they now find themselves liable by making a reasonable settlement offer in a timely manner. While petitioners did offer respondents $25,000 in settlement at the time the jury was deliberating the case, this offer was made, as the District Court noted, "well after [respondents' counsel] had spent thousands of dollars on preparation for trial . . . ." App. 237–238. "The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in re-

these safeguards adequately protect against the possibility that § 1988 might produce a "windfall" to civil rights attorneys.

In the absence of any indication that Congress intended to adopt a strict rule that attorney's fees under § 1988 be proportionate to damages recovered, we decline to adopt such a rule ourselves.[12] The judgment of the Court of Appeals is hereby

Affirmed.

JUSTICE POWELL, concurring in the judgment.

I join only the Court's judgment. The plurality opinion reads our decision in *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983), more expansively than I would, and more expansively than is necessary to decide this case. For me affirmance—quite simply—is required by the District Court's detailed findings of fact, which were approved by the Court of Appeals. On its face, the fee award seems unreasonable. But I find no basis for this Court to reject the findings made and approved by the courts below.

I

Because the history of the case is relevant to my views, I summarize it. City police officers, without warrants, forcibly entered a private residence where respondents were attending a party and arrested four of them. Criminal charges were lodged against those arrested, but later were dismissed. Respondents instituted this action on June 4, 1976, against petitioners city of Riverside, its Chief of Police, and

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sponse." *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 414, 641 F. 2d 880, 904 (1980) (en banc).

[12] We note that Congress has been urged to amend § 1988 to prohibit the award of attorney's fees that are disproportionate to monetary damages recovered. See *e. g.*, The Legal Fees Equity Act, S. 2802, 98th Cong., 2d Sess. (1984); S. 1580, 99th Cong., 1st Sess. (1985). These efforts have thus far not been persuasive.

30 police officers. In addition to compensatory and punitive damages, the complaint sought preliminary and permanent injunctions against the city and its police force to prevent further alleged "discriminatory harassment" against Mexican Americans. At some point in the proceedings, respondents abandoned their claims for injunctive relief. On January 10, 1978, the District Court granted summary judgment in favor of 17 of the defendant police officers. Following extensive discovery, the case finally went to trial on September 16, 1980. After nine days of trial, and seven days of deliberations, the jury returned verdicts against the city and only five of the officers.

Specifically, the jury found that the city and three of the officers had violated 42 U. S. C. § 1983, and awarded $13,300 in compensatory and punitive damages for these civil rights violations. The jury also concluded that the city and five of the officers, including the three found to have violated § 1983, had committed numerous acts of common-law negligence, false arrest, and false imprisonment. For these state-law claims, the jury awarded damages of $20,050, bringing total damages to $33,350. Respondents sought attorney's fees under 42 U. S. C. § 1988. Their two lawyers, each having been admitted to practice for approximately five years, claimed compensation for 1,946.75 hours at a rate of $125 per hour each, and for 84.5 hours by law clerks at $25 per hour, for a total of $245,456.25. As emphasized by petitioners, this award was some seven times the amount of compensatory and punitive damages awarded.

The District Court approved in full the requested amount.[1] On appeal, petitioners challenged only the fee award, and the Court of Appeals for the Ninth Circuit affirmed. *Rivera* v. *City of Riverside*, 679 F. 2d 795 (1982). On May 31, 1983, we granted certiorari, vacated the Court of Appeals' judgment, and remanded the case for reconsideration in light of *Hensley*

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[1] The District Court did refuse a request to double the award.

v. *Eckerhart*, *supra*. 461 U. S. 952 (1983). On remand, the District Court heard oral argument and "reconsidered the memoranda, affidavits, and exhibits previously filed by the parties, as well the record as a whole." App. to Pet. for Cert. 2–2. That court then made explicit findings of fact, including the following that are relevant to the fee award:

1. "All claims made by plaintiffs were based on a common core of facts. The claims on which plaintiffs did not prevail were closely related to the claims on which they did prevail. The time devoted to claims on which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail."

2. "Counsel demonstrated outstanding skill and experience in handling this case."

3. "[M]any attorneys in the community would have been reluctant to institute and to continue to prosecute this action."

4. The number of hours claimed to have been expended by the two lawyers was "fair and reasonable."

5. "Counsel for plaintiffs achieved excellent results for their clients, and their accomplishment in this case was outstanding. The amount of time expended by counsel . . . was reasonable and reflected sound legal judgment under the circumstances."

6. Counsel "also served the public interest by vindicating important constitutional rights."

7. The "hourly rate [of $125 per hour is] typical of the prevailing market rate for similar services by lawyers of comparable skill, experience and reputation within the Central District at the time these services were performed."

8. Finally, in view of the level of success attained in this case, "the total number of hours expended by counsel [is] a proper basis for making the fee award." *Id.*, at 2–6 to 2–10.

Federal Rule of Civil Procedure 52(a) provides that "[f]indings of fact [by a district court] shall not be set aside unless clearly erroneous . . . ." The Court of Appeals did not disagree with any of the foregoing findings by the District Court. I see no basis on which this Court now could hold that these findings are clearly erroneous. See *Anderson* v. *Bessemer City*, 470 U. S. 564 (1985). To be sure, some of the findings fairly can be viewed as conclusions or matters of opinion, but the findings that are critical to the judgments of the courts below are objective facts. JUSTICE REHNQUIST's arguments in dissent suggest that the District Court may have been mistaken. But, as we observed in *Bessemer City*, "a reviewing court [may not] reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Id.*, at 573.

II

I comment briefly on the principal arguments made by petitioners. They emphasize that although suit was instituted against the city, its Chief of Police, and 30 police officers, respondents prevailed only against the city and 5 of the officers. It is true that under *Hensley* fees should not be awarded for hours spent on claims as to which the plaintiffs were unsuccessful. *Hensley* also teaches, however, that where a "law suit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." 461 U. S., at 440. Here, the District Judge who presided throughout this protracted litigation found that the claims of respondents rested on a "common core of facts," and involved related legal theories. Since the suit was premised on one episode, the only significant variation in the facts supporting the claims against the several defendants concerned the extent of the participation by the var-

ious police officers.[2] Petitioners offer no persuasive reason to question the District Court's express finding that "[t]he time devoted to claims on which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail." App. to Pet. for Cert. 2–6 to 2–7.

Petitioners argue for a rule of proportionality between the fee awarded and the damages recovered in a civil rights case. Neither the decisions of this Court nor the legislative history of § 1988 support such a "rule." The facts and circumstances of litigation are infinitely variable. Under *Hensley*, of course, "the most critical factor [in the final determination of fee awards] is the degree of success obtained." 461 U. S., at 436. Where recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought. In some civil rights cases, however, the court may consider the vindication of constitutional rights in addition to the amount of damages recovered. In this case, for example, the District Court made an explicit finding that the "public interest" had been served by the jury's verdict that the warrantless entry

[2] A district court should be alert in a case such as this one to consider whether counsel, without adequate basis, may have included as defendants persons whose conduct was too peripheral to support liability or even irrelevant to the substantive allegations of the complaint. In this case, for example, of the 30 defendant officers originally named, 17 were dismissed prior to trial, and 8 more were cleared by the jury's verdict. Thus, only five—a small fraction of the number sued—were held liable. Such a wide difference between the number of defendants named and the number ultimately found to have any responsibility for the alleged injury could raise serious doubt as to whether counsel had reasonable grounds for suing certain defendants. Overstating the number of defendants readily could lead to inflation of billable hours and thus of the fee requested. Here, however, the District Court expressly found that "[u]nder the circumstances of this case, it was reasonable for plaintiffs initially to name thirty-one individual defendants (thirty police officers and the chief of police)." App. to Pet. for Cert. 2–4.

was lawless and unconstitutional. Although the finding of a Fourth Amendment violation hardly can be considered a new constitutional ruling, in the special circumstances of this case, the vindication of the asserted Fourth Amendment right may well have served a public interest, supporting the amount of the fees awarded.[3] As the District Court put it, there were allegations that the police misconduct was "motivated by a general hostility to the Chicano community in the area . . . ." App. to Pet. for Cert. 2–8. The record also contained evidence of racial slurs by some of the police.

Finally, petitioners also contend that in determining a proper fee under § 1988 in a suit for damages the court should consider the prevailing contingent fee rate charged by counsel in personal injury cases. The use of contingent fee arrangements in many types of tort cases was customary long before Congress enacted § 1988. It is clear from the legislative history that § 1988 was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers particularly to represent plaintiffs in unpopular civil rights cases. I therefore find petitioners' asserted analogy to personal injury claims unpersuasive in this context. Cf. *Memphis Community School Dist.* v. *Stachura*, *ante*, p. 299.

III

In sum, despite serious doubts as to the fairness of the fees awarded in this case, I cannot conclude that the detailed findings made by the District Court, and accepted by the Court of Appeals, were clearly erroneous, or that the District Court abused its discretion in making this fee award.[4]

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[3] It probably will be the rare case in which an award of *private damages* can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case.

[4] In Part III–B of its opinion, the plurality emphasizes that a primary purpose of § 1988 was to assure the availability of counsel in civil rights cases. This was an expressed and proper purpose of Congress when § 1988 was enacted a decade ago. Although the tables in the Annual Re-

CHIEF JUSTICE BURGER, dissenting.

I join JUSTICE REHNQUIST's dissenting opinion. I write only to add that it would be difficult to find a better example of legal nonsense than the fixing of attorney's fees by a judge at $245,456.25 for the recovery of $33,350 damages.

The two attorneys receiving this nearly quarter-million-dollar fee graduated from law school in 1973 and 1974; they brought this action in 1975, which resulted in the $33,350 jury award in 1980. Their total professional experience when this litigation began consisted of Gerald Lopez' 1-year service as a law clerk to a judge and Roy Cazares' two years' experience as a trial attorney in the Defenders' Program of San Diego County. For their services the District Court found that an hourly rate of $125 per hour was reasonable.

Can anyone doubt that no private party would ever have dreamed of paying these two novice attorneys $125 per hour in 1975, which, considering inflation, would represent perhaps something more nearly a $250 per hour rate today? For example, as JUSTICE REHNQUIST points out, *post*, at 590, would any private litigant be willing to pay a total of $17,875 simply for preparation of a pretrial order?

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port of the Director of the Administrative Office are not explicit in this respect, it is clear that the increased filings of civil rights cases that began following *Monroe* v. *Pape*, 365 U. S. 167 (1961), particularly § 1983 cases, have continued and even accelerated since 1976. See 1985 Annual Report of the Director of the Administrative Office 284–299 (identifying a category of "civil rights" cases, and also a category of state prisoner petitions, many of which are § 1983 cases). These facts suggest that § 1988 is serving well Congress' purpose to assure availability of counsel, and that this purpose does not justify more generous fee awards than otherwise would be viewed as fair and reasonable.

I know of no empirical study supporting the view that aggrieved persons now have difficulty in obtaining counsel in civil rights cases. Moreover, since 1976 the number of lawyers licensed in the United States has increased from approximately 396,000, 24 Employment and Earnings 8, Table 1, United States Dept. of Labor, Bureau of Labor Statistics (1977), to an estimated 675,000, B. Curran, The Lawyer Statistical Report 4 (1985).

This fee award plainly constitutes a grave abuse of discretion which should be rejected by this Court—particularly when we have already vacated and remanded this *identical* fee award previously—rather than simply affirming the District Court's findings as not being either "clearly erroneous" or an "abuse of discretion." See *ante*, at 572–573. The Court's result will unfortunately only add fuel to the fires of public indignation over the costs of litigation.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, dissenting.

In *Hensley* v. *Eckerhart*, 461 U. S. 424, 433 (1983), our leading case dealing with attorney's fees awarded pursuant to 42 U. S. C. § 1988, we said that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." As if we had foreseen the case now before us, we went on to emphasize that "[t]he district court . . . should exclude from this initial fee calculation hours that were not 'reasonably expended'" on the litigation. *Id.*, at 434, quoting S. Rep. No. 94–1011, p. 6 (1976). Today, despite its adoption of a revisionist interpretation of *Hensley*, the plurality nonetheless acknowledges that "*Hensley* requires a fee applicant to exercise 'billing judgment' not because he should necessarily be compensated for less than the actual number of hours spent litigating a case, but because the hours he does seek compensation for must be *reasonable*." *Ante*, at 569, n. 4 (emphasis in original). I see no escape from the conclusion that the District Court's finding that respondents' attorneys "reasonably" spent 1,946.75 hours to recover a money judgment of $33,350 is clearly erroneous, and that therefore the District Court's award of $245,456.25 in attorney's fees to respondents should be reversed. The Court's affirmance of the fee award emasculates the principles laid down in *Hensley*, and turns § 1988 into a relief Act for lawyers.

A brief look at the history of this case reveals just how "unreasonable" it was for respondents' lawyers to spend so much time on it. Respondents filed their initial complaint in 1976, seeking injunctive and declaratory relief and compensatory and punitive damages from the city of Riverside, its Chief of Police, and 30 police officers, based on 256 separate claims allegedly arising out of the police breakup of a single party. Prior to trial, 17 of the police officers were dismissed from the case on motions for summary judgment, and respondents dropped their requests for injunctive and declaratory relief. More significantly, respondents also dropped their original allegation that the police had acted with discriminatory intent. The action proceeded to trial, and the jury completely exonerated nine additional police officers. Respondents ultimately prevailed against only the city and five police officers on various § 1983, false arrest and imprisonment, and common negligence claims. No restraining orders or injunctions were ever issued against petitioners, nor was the city ever compelled to change a single practice or policy as a result of respondents' suit. The jury awarded respondents a total of $33,350 in compensatory and punitive damages. Only about one-third of this total, or $13,300, was awarded to respondents based on violations of their federal constitutional rights.

Respondents then filed a request for $495,713.51 in attorney's fees, representing approximately 15 times the amount of the underlying money judgment. In April 1981, the District Court made its initial fee award of $245,456.25, declining to apply respondents' requested "multiplier," but awarding, to the penny, the entire "lodestar" claimed by respondents and their attorneys. The Ninth Circuit affirmed, *Rivera* v. *City of Riverside*, 679 F. 2d 795 (1982). We granted certiorari, vacated, and remanded, 461 U. S. 952 (1983), in light of *Hensley*, *supra*. On remand, the District Court convened a hearing, at which the court promptly announced: "I tell you now that I will not change the award. I will simply go back and be more specific about it." App. 230. The court ulti-

mately proved true to its word. After reviewing the record and the submissions of the parties, the court convened a second hearing, at which it approved exactly the same award as before: $245,456.25 in attorney's fees. The only noticeable change was that, the second time around, the court created a better "paper trail" by including in its order a discussion of those factors in *Hensley* and *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (CA5 1974), which it believed supported such a huge fee award. See App. 187–192. The Ninth Circuit again affirmed, 763 F. 2d 1580 (1985).

It is obvious to me that the District Court viewed *Hensley* not as a constraint on its discretion, but instead as a blueprint for justifying, in an after-the-fact fashion, a fee award it had already decided to enter solely on the basis of the "lodestar." In fact, the District Court failed at almost every turn to apply any kind of "billing judgment," or to seriously consider the "results obtained," which we described in *Hensley* as "the important factor" in determining a "reasonable" fee award. 461 U. S., at 434. A few examples should suffice: (1) The court approved almost 209 hours of "prelitigation time," for a total of $26,118.75. (2) The court approved some 197 hours of time spent in conversations between respondents' two attorneys, for a total of $24,625. (3) The court approved 143 hours for preparation of a pretrial order, for a total of $17,875. (4) Perhaps most egregiously, the court approved 45.50 hours of "stand-by time," or time spent by one of respondents' attorneys, who was then based in San Diego, to wait in a Los Angeles hotel room for a jury verdict to be rendered in Los Angeles, where his co-counsel was then employed by the U. C. L. A. School of Law, less than 40 minutes' driving time from the courthouse. The award for "stand-by time" totaled $5,687.50. I find it hard to understand how any attorney can be said to have exercised "billing judgment" in spending such huge amounts of time on a case ultimately worth only $33,350.

Indeed, on the basis of some of the statements made by the District Court in this case, I reluctantly conclude that the court may have attempted to make up to respondents in attorney's fees what it felt the jury had wrongfully withheld from them in damages. As the court noted in its opinion, apparently believing that the observation supported the entry of a huge award of attorney's fees:

> "[T]he size of the jury award resulted from (a) the general reluctance of jurors to make large awards against police officers, and (b) the dignified restraint which the plaintiffs exercised in describing their injuries to the jury. For example, although some of the actions of the police would clearly have been insulting and humiliating to even the most insensitive person and were, in the opinion of the Court, intentionally so, plaintiffs did not attempt to play up this aspect of the case." App. 188–189.

But a district court, in awarding attorney's fees under § 1988, does not sit to retry questions submitted to and decided by the jury. If jurors are reluctant to make large awards against police officers, this is a fact of life that plaintiffs, defendants, and district courts must live with, and a district court simply has no business trying to correct what it regards as an unfortunate tendency in the award of damages by granting inflated attorney's fees.

The analysis of whether the extraordinary number of hours put in by respondents' attorneys in this case was "reasonable" must be made in light of both the traditional billing practices in the profession, and the fundamental principle that the award of a "reasonable" attorney's fee under § 1988 means a fee that would have been deemed reasonable if billed to affluent plaintiffs by their own attorneys. This latter principle was stressed in the legislative history of § 1988, see

S. Rep. No. 94-1011, p. 6 (1976),* and by this Court in *Hensley:*

> "Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. 'In the private sector, "billing judgment" is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.'" 461 U. S., at 434, quoting *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 401, 641 F. 2d 880, 891 (1980) (en banc) (emphasis in original).

I think that this analysis, which appears nowhere in the plurality's opinion, leads inexorably to the conclusion that the District Court's fee award of $245,456.25, based on a prevailing hourly rate of $125 multiplied by the number of hours which respondents' attorneys claim to have spent on the case, is not a "reasonable" attorney's fee under § 1988.

Suppose that A offers to sell Blackacre to B for $10,000. It is commonly known and accepted that Blackacre has a fair market value of $10,000. B consults an attorney and requests a determination whether A can convey good title to Blackacre. The attorney writes an elaborate memorandum concluding that A's title to Blackacre is defective, and submits a bill to B for $25,000. B refuses to pay the bill, the attorney sues, and the parties stipulate that the attorney spent 200 hours researching the title issue because of an extraordinarily complex legal and factual situation, and that

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* "In computing the fee, counsel for prevailing parties should be paid, *as is traditional with attorneys compensated by a fee-paying client*, 'for all time *reasonably* expended on a matter.'" S. Rep. No. 94-1011, p. 6 (1976) (emphasis added), quoting *Van Davis* v. *County of Los Angeles*, 8 EPD ¶ 9444 (CD Cal. 1974); *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680, 684 (ND Cal. 1974).

the prevailing rate at which the attorney billed, which was also a "reasonable" rate, was $125. Does anyone seriously think that a court should award the attorney the full $25,000 which he claims? Surely a court would start from the proposition that, unless special arrangements were made between the client and the attorney, a "reasonable" attorney's fee for researching the title to a piece of property worth $10,000 could not exceed the value of the property. Otherwise the client would have been far better off never going to an attorney in the first place, and simply giving A $10,000 for a worthless deed. The client thereby would have saved himself $15,000.

Obviously the billing situation in a typical litigated case is more complex than in this bedrock example of a defective title claim, but some of the same principles are surely applicable. If A has a claim for contract damages in the amount of $10,000 against B, and retains an attorney to prosecute the claim, it would be both extraordinary and unjustifiable, in the absence of any special arrangement, for the attorney to put in 200 hours on the case and send the client a bill for $25,000. Such a bill would be "unreasonable," regardless of whether A obtained a judgment against B for $10,000 or obtained a take-nothing judgment. And in such a case, where the prospective recovery is limited, it is exactly this "billing judgment" which enables the parties to achieve a settlement; any competent attorney, whether prosecuting or defending a contract action for $10,000, would realize that the case simply cannot justify a fee in excess of the potential recovery on the part of either the plaintiff's or the defendant's attorney. All of these examples illuminate the point made in *Hensley* that "the important factor" in determining a "reasonable" fee is the "results obtained." 461 U. S., at 434. The very "reasonableness" of the hours expended on a case by a plaintiff's attorney necessarily will depend, to a large extent, on the amount that may reasonably be expected to be recovered if the plaintiff prevails.

The amount of damages which a jury is likely to award in a tort case is of course more difficult to predict than the amount it is likely to award in a contract case. But even in a tort case some measure of the kind of "billing judgment" previously described must be brought to bear in computing a "reasonable" attorney's fee. Again, a hypothetical example will illustrate the point. If, at the time respondents filed their lawsuit in 1976, there had been in the Central District of California a widely publicized survey of jury verdicts in this type of civil rights action which showed that successful plaintiffs recovered between $10,000 and $75,000 in damages, could it possibly be said that it would have been "reasonable" for respondents' attorneys to put in on the case hours which, when multiplied by the attorneys' prevailing hourly rate, would result in an attorney's fee of over $245,000? In the absence of such a survey, it might be more difficult for a plaintiff's attorney to accurately estimate the amount of damages likely to be recovered, but this does not absolve the attorney of the responsibility for making such an estimate and using it as a guide in the exercise of "billing judgment."

In the context of § 1988, there would obviously be some exceptions to the general rules of "billing judgment" which I have been discussing, but none of these exceptions are applicable here. If the litigation is unnecessarily prolonged by the bad-faith conduct of the defendants, or if the litigation produces significant, identifiable benefits for persons other than the plaintiffs, then the purpose of Congress in authorizing attorney's fees under § 1988 should allow a larger award of attorney's fees than would be "reasonable" where the only relief is the recovery of monetary damages by individual plaintiffs. Nor do we deal here with a case such as *Carey* v. *Piphus*, 435 U. S. 247, 266 (1978), in which the deprivation of a constitutional right necessarily results in only nominal pecuniary damages. See S. Rep. No. 94–1011, *supra*, at 6 (fee awards under § 1988 should "not be reduced because the rights involved may be nonpecuniary in nature"). Here, re-

spondents successfully claimed both compensatory and punitive damages for false arrest and imprisonment, negligence, and violations of their constitutional rights under the Fourth and Fourteenth Amendments, and the jury assessed damages as juries do in such cases. In short, this case shares none of the special aspects of certain civil rights litigation which the plurality suggests, in Part III of its opinion, would justify an award of attorney's fees totally divorced from the amount of damages awarded by the jury.

The plurality, *ante*, Part III, at 573–574, explains the position advanced by petitioner and the United States concerning fee awards in a case such as this, and then goes on to "reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." *Ante*, at 574. I agree with the plurality that the importation of the contingent-fee model to govern fee awards under § 1988 is not warranted by the terms and legislative history of the statute. But I do not agree with the plurality if it means to reject the kind of "proportionality" that I have previously described. Nearly 2,000 attorney-hours spent on a case in which the total recovery was only $33,000, in which only $13,300 of that amount was recovered for the federal claims, and in which the District Court expressed the view that, in such cases, juries typically were reluctant to award substantial damages against police officers, is simply not a "reasonable" expenditure of time. The snippets of legislative history which the plurality relies upon to dismiss *any* relationship between the amount of time put in on a case and the amount of damages awarded are wholly unconvincing. One may agree with all of the glowing rhetoric contained in the plurality's opinion about Congress' noble purpose in authorizing attorney's fees under § 1988 without concluding that Congress intended to turn attorneys loose to spend as many hours as possible to prepare and try a case that could reasonably be expected to result only in a relatively minor award of monetary damages.

In *Hensley*, we noted that "complex civil rights litigation involving numerous challenges to institutional practices or conditions" might well require "many hours of lawyers' services," and thus justify a large award of attorney's fees. 461 U. S., at 436. This case is a far cry from the situation we referred to in *Hensley*. I would reverse the judgment of the Ninth Circuit affirming the District Court's award of attorney's fees, and remand the case to the District Court for recomputation of the fee award in light of both *Hensley* and the principles set forth in this opinion.

UNITED STATES DEPARTMENT OF TRANSPORTATION ET AL. v. PARALYZED VETERANS OF AMERICA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-289. Argued March 26, 1986—Decided June 27, 1986

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against handicapped persons in "any program or activity receiving Federal financial assistance." The United States provides financial assistance to airport operators through grants from a Trust Fund under the Airport and Airway Development Act of 1970 and its successor statute, the Airport and Airway Improvement Act of 1982 (Trust Fund Acts). The Government also operates a nationwide air traffic control system. Respondent organizations representing handicapped individuals brought an action in the Court of Appeals challenging, *inter alia*, the conclusion of the Civil Aeronautics Board (CAB) that its regulatory authority under § 504 was limited to those few airlines that receive subsidies under the Federal Aviation Act. The Court of Appeals held that § 504 gave CAB jurisdiction over all air carriers by virtue of the extensive program of federal financial assistance to airports under the Trust Fund Acts, and that the air traffic control system was an additional source of financial assistance to airlines. The court then vacated the regulations to the extent that their application was limited to carriers receiving funds under the Federal Aviation Act, and instructed the Department of Transportation, CAB's successor, to issue new regulations that would apply to all commercial airlines.

Held: Section 504 is not applicable to commercial airlines. Pp. 603-612.

(a) Section 504's scope is limited to those who actually "receive" federal financial assistance. Congress sought to impose § 504 coverage as a condition or obligation tied to the recipient's agreement to accept the federal funds. By so limiting coverage to recipients, Congress imposed § 504's obligations upon those who are in a position to accept or reject those obligations as part of the decision whether or not to "receive" federal funds. In this case, the only parties in that position are the airport operators who are the recipients of federal funds under the Trust Fund Acts. Pp. 603-606.

(b) To assert that the economic benefit to airlines from the aid to airports is a form of federal financial assistance ignores the distinction that

Congress made in § 504 that the statute covers only those who receive the aid and does not extend to those who benefit from it. Pp. 606–607.

(c) To tie § 504's scope to economic benefit derived from the Trust Fund expenditures in question here would give § 504 almost limitless coverage. Congress recognized a need to improve airports in order to benefit a wide variety of persons and entities, all of them classified together as beneficiaries, and did not set up a system whereby passengers are the primary or direct beneficiaries and all others, including airlines, benefited by the Trust Fund Acts are indirect recipients of the financial assistance to airports. Pp. 608–610.

(d) The Court of Appeals' attempt to fuse airports and airlines into a single program or activity for purposes of § 504 is unavailing. Regulatory coverage tied to the scope of the intended beneficiaries of the Trust Fund Acts is inconsistent with congressional intent in passing § 504. Pp. 610–611.

(e) Since the air traffic control system is "owned and operated" by the United States, it is not "Federal financial assistance" within the meaning of § 504. Rather, it is a federally conducted program that has many beneficiaries but no recipients. Pp. 611–612.

243 U. S. App. D. C. 237, 752 F. 2d 694, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 613.

Solicitor General Fried argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Reynolds*, *Deputy Solicitor General Kuhl*, *Deputy Assistant Attorney General Disler*, *Kathryn A. Oberly*, and *Miriam R. Eisenstein*.

Douglas L. Parker argued the cause for respondents. With him on the brief were *Arlene Battis* and *Karen Peltz Strauss*.*

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*Briefs of *amici curiae* urging reversal were filed for the Air Transport Association of America by *James E. Landry;* for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *William S. Franklin;* and for the International Air Transport Association by *Gordon Dean Booth, Jr.*, and *Robert Glasser*.

William C. Gleisner III filed a brief for the National Federation of the Blind as *amicus curiae* urging affirmance.

JUSTICE POWELL delivered the opinion of the Court.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against handicapped persons in any program or activity receiving federal financial assistance. The United States provides financial assistance to airport operators through grants from a Trust Fund created by the Airport and Airway Development Act of 1970. The Government also operates a nationwide air traffic control system. This case presents the question whether, by virtue of such federal assistance, § 504 is applicable to commercial airlines.[1]

I

Respondents successfully challenged regulations promulgated by the Civil Aeronautics Board (CAB) to implement § 504 of the Rehabilitation Act of 1973, 87 Stat. 390, as amended; 29 U. S. C. § 790 *et seq.* (1982 ed. and Supp. II). To understand respondents' arguments, it is necessary to review the process by which the regulations were promulgated.

A. *The Rulemaking Process*

Section 504 provides:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U. S. C. § 794.

The statute did not specifically provide for administrative implementation. In 1976, however, the President issued Executive Order No. 11914, 3 CFR 117 (1976–1980), calling on the

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[1] As used herein, the term "airport operator" refers to the various entities that own or manage airports and that have authority to apply for planning or development grants from the Trust Fund. "Commercial airlines" refers to all passenger carriers formerly certificated by the Civil Aeronautics Board.

Secretary of Health, Education, and Welfare[2] to coordinate rulemaking under § 504 by all federal agencies. At that time two federal agencies were principally concerned with aviation: the Federal Aviation Administration (FAA), which is primarily concerned with the Air Traffic Control System and the safety of airline operations, including airports, and CAB, which was primarily concerned with economic regulation of the airline industry.[3] Because § 504 had been modeled after Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*,[4] both FAA and CAB patterned their proposed rules after the regulations issued to implement Title VI.

1. The Notice of Proposed Rulemaking Under § 504

CAB issued a Notice of Proposed Rulemaking on June 6, 1979.[5] CAB concluded that its authority under § 504 was limited to those few airlines that receive a subsidy under § 406(b) or § 419 of the Federal Aviation Act.[6] CAB an-

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[2] This responsibility later was transferred to the Secretary of Health and Human Services when the Department of Health, Education and Welfare was divided into the Department of Education and the Department of Health and Human Services. See The Department of Education Organization Act, Pub. L. 96–88, 93 Stat. 669, codified at 20 U. S. C. § 3401 *et seq.*

[3] The FAA became part of the Department of Transportation (DOT) in 1966. CAB later was disbanded and its functions largely transferred to DOT under the Civil Aeronautics Board Sunset Act of 1984, Pub. L. 98–443, 98 Stat. 1703 *et seq.*

[4] Title VI is the congressional model for subsequently enacted statutes prohibiting discrimination in federally assisted programs or activities. We have relied on case law interpreting Title VI as generally applicable to later statutes. See *Grove City College* v. *Bell*, 465 U. S. 555, 566 (1984); see also S. Rep. No. 93–1297, p. 39 (1974).

[5] Notice of Proposed Rulemaking, Part 382, Nondiscrimination on the Basis of Handicap, 44 Fed. Reg. 32 401 (1979).

[6] 49 U. S. C. App. §§ 1376(b) and 1389 (1982 ed. and Supp. II). Section 406 created a program designed to guarantee the air service necessary to transport mail to small communities. That program was terminated in 1982. In 1978, CAB began operating the "section 419 program" in order to subsidize small community and other essential air service that would not

nounced its intention, however, to go beyond its § 504 jurisdiction in order to regulate the activities of all commercial airlines. CAB relied on its authority under § 404 of the Federal Aviation Act of 1958, 49 U. S. C. App. § 1374.

Section 404 contains two provisions relevant here: § 404(a)(1), requiring all air carriers to "provide safe and adequate service, equipment, and facilities," and § 404(b), prohibiting carriers from "subjecting any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." CAB explained that "the proposed rules would emphasize that the handicapped are protected by the adequacy of service and antidiscrimination provisions of Section 404 . . . which are applicable to all air carriers, whether or not receiving Federal financial assistance." 44 Fed. Reg. 32401–32402 (1979). Somewhat inexplicably, CAB relied on both provisions of § 404 taken together to support its regulatory authority over the on-board activities of air carriers, even though it was aware that, under the Airline Deregulation Act of 1978,[7] the antidiscrimination provision of § 404(b) would lapse as of Janu-

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otherwise be provided. See Airline Deregulation Act of 1978, Pub. L. 95–504, § 33, 92 Stat. 1732. This program will operate through 1988.

CAB's decision not to regulate the on-board activities of commercial airlines was consistent with administrative practice under Title VI, which prohibits racial discrimination in any program or activity receiving federal financial assistance. None of the agencies concerned with aviation attempted to regulate the on-board activities of commercial airlines under Title VI. Thus, the consistent administrative interpretation of the program-specific language of Title VI and § 504 has been that it does not cover commercial airlines, unless the airline itself received subsidies from CAB. See 14 CFR § 379.2 (1965), 29 Fed. Reg. 19287 (1964) (CAB); 14 CFR § 15.5(c) (1965), 29 Fed. Reg. 19283 (1964) (FAA). That interpretation of the statutes by the agencies charged with their enforcement in the area of aviation is entitled to deference. *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 566 (1980).

[7] Pub. L. 95–504, § 40(a), 92 Stat. 1705, 1744 (codified at 49 U. S. C. App. § 1551 (a)(2)(B)).

ary 1, 1983, and only § 404(a)(1), requiring "safe and adequate service," would remain in effect.

2. The Final Regulations

CAB received public comment on the proposed regulations. Several airlines and the Air Transport Association challenged CAB's regulatory jurisdiction over the airlines. In the interim, Executive Order No. 12250, 3 CFR 298 (1981), transferred responsibility for coordinating the administration of various civil rights statutes, including § 504, from the Secretary of Health and Human Services to the Attorney General. After public comment and consultation with the Attorney General, CAB issued final regulations. 14 CFR Pt. 382 (1986), 47b Fed. Reg. 25948 *et seq.* (1982).

The regulations have three subparts. Subpart A prohibits discrimination in air transportation against qualified handicapped persons. Subpart B contains specific, detailed requirements that must be followed by all air carriers in providing service to the handicapped. Subpart C sets forth compliance and enforcement mechanisms. As to all three subparts, CAB adhered to its original position that § 504 supported regulatory jurisdiction only over those carriers that receive funds under § 406 or § 419. CAB concluded, however, that the surviving portion of § 404—the "safe and adequate service" clause of § 404(a)(1)—did not support imposition of the specific provisions of subparts B and C on nonsubsidized carriers. Thus, those subparts would apply only to the extent authorized by § 504, that is, to carriers receiving subsidies under § 406 or § 419. CAB concluded, however, that it had authority to extend the reach of subpart A to all air carriers by virtue of § 404(a)(1)'s "safe and adequate service" clause. The Attorney General approved these regulations.

B. *The Court of Appeals Decision*

Respondents Paralyzed Veterans of America and two other organizations representing handicapped individuals

(collectively PVA)[8] brought this action in the Court of Appeals for the District of Columbia Circuit. PVA challenged the substance of some of the regulations, as well as CAB's conclusion regarding its rulemaking authority under § 504. Only the latter claim is before us. On that issue, PVA contended that CAB's interpretation of the scope of its rulemaking authority under § 504 was inconsistent with congressional intent and controlling legal precedent.

The Court of Appeals agreed with PVA's position. *Paralyzed Veterans of America* v. *CAB*, 243 U. S. App. D. C. 237, 752 F. 2d 694 (1985). In the court's view, § 504 gave CAB jurisdiction over all air carriers by virtue of the extensive program of federal financial assistance to airports under the Airport and Airway Development Act of 1970, 49 U. S. C. § 1714, as amended (1976 ed., Supp. V).[9] The Court of Appeals found an additional source of financial assistance to airlines in the form of the air traffic control system in place at all major airports. The court vacated the regulations to the extent that their application was limited to carriers receiving funds under § 406 or § 419. It instructed DOT—CAB's successor agency after CAB was disbanded[10]—to issue new regulations that would apply to all commercial airlines.

We granted certiorari to resolve the question of the scope of DOT's regulatory jurisdiction under § 504. 474 U. S. 918 (1985). We now reverse.

II

It may be helpful briefly to explain the limited nature of the question before us. This case does not present any challenge to CAB's interpretation of the scope of its regulatory jurisdiction under § 504. Nor is there any challenge to the appli-

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[8] The other respondents are the American Council of the Blind and the American Coalition of Citizens with Disabilities.

[9] The 1970 Act has been replaced with the Airport and Airway Improvement Act of 1982, 49 U. S. C. App. § 2201 *et seq.*

[10] See *supra*, n. 3.

cation of subpart A—the general antidiscrimination regulation—to all commercial airlines. The only issue before us is the Court of Appeals' conclusion that § 504 applies to commercial airlines as recipients of federal financial assistance.

Section 504 prohibits discrimination against any qualified handicapped individual under "any program or activity receiving Federal financial assistance." We examine first the grants of federal funds to airport operators, which clearly are federal financial assistance, to determine whether it fairly can be said that commercial airlines "receive" these grants.

A

The starting point of any inquiry into the application of a statute is the language of the statute itself. *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979). By its terms § 504 limits its coverage to the "program or activity" that "receiv[es]" federal financial assistance. At the outset, therefore, § 504 requires us to identify the recipient of the federal assistance. We look to the terms of the underlying grant statute.

The grant statutes relied on by the Court of Appeals are the Airport and Airway Improvement Act of 1982 (1982 Act), 49 U. S. C. App. § 2201 *et seq.*, and its predecessor statutes, particularly the Airport and Airway Development Act of 1970 (1970 Act), Pub. L. 91–258, 84 Stat. 219 *et seq.* (formerly codified at 49 U. S. C. § 1701 *et seq.* (1976 ed.)). The 1970 Act established the Airport and Airway Trust Fund, appropriations from which are used to fund airport development. The purpose of disbursements from the Trust Fund is to establish "a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics." 84 Stat. 224. Congress directed the Secretary of Transportation to prepare a national airport system plan, *id.*, at 221, and required airport project applications to be consistent with that plan. *Id.*, at 226. In the 1982 Act Congress authorized disbursements from the Trust Fund for the Airport Improvement Program (AIP). Under AIP airport operators

submit project grant applications for "airport development or airport planning." 49 U. S. C. App. § 2201(a). Funds are disbursed for a variety of airport construction projects: *e. g.*, land acquisition, 14 CFR § 151.73 (1986); runway paving, § 151.77; and buildings, sidewalks, and parking, § 151.93. The use of the Trust Fund is strictly limited to projects that concern airports. See, *e. g.*, § 151.89 (authorizing road construction) ("Only those airport entrance roads that are definitely needed and are intended only as a way in and out of the airport are eligible").

It is not difficult to identify the recipient of federal financial assistance under these Acts: Congress has made it explicitly clear that these funds are to go to airport operators. Not a single penny of the money is given to the airlines. Thus, the recipient for purposes of § 504 is the *operator* of the airport and not its users.

Congress limited the scope of § 504 to those who actually "receive" federal financial assistance because it sought to impose § 504 coverage as a form of contractual cost of the recipient's agreement to accept the federal funds. "Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds." *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624, 633, n. 13 (1984). We relied on this same rationale in *Grove City College* v. *Bell*, 465 U. S. 555 (1984), where we noted that the recipient of the federal assistance—the College—was free to terminate its participation in the federal grant program and thus avoid the requirements of Title IX. *Id.*, at 565, n. 13. Under the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision. See *Soberal-Perez* v. *Heckler*, 717 F. 2d 36, 41 (CA2 1983) ("This emphasis upon the contractual nature of the receipt of federal moneys in exchange

for a promise not to discriminate is still another reason to conclude that Title VI does not cover direct benefit programs since these programs do not entail any such contractual relationship"), cert. denied, 466 U. S. 929 (1984). By limiting coverage to recipients, Congress imposes the obligations of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to "receive" federal funds. In this case, the only parties in that position are the airport operators.

B

Respondents attempt to avoid the straightforward conclusion that airlines are not recipients within the meaning of § 504 by arguing that airlines are "indirect recipients" of the aid to airports. They contend that the money given to airports is simply converted by the airports into nonmoney grants to airlines. Under this reasoning, federal assistance is disbursed to airport operators in the form of cash. The airport operators convert the cash into runways and give the federal assistance—now in the form of a runway—to the airlines. In support of this position, respondents point to the fact that many of the structures constructed at airports with aid from the Trust Fund are particularly beneficial to airlines, *e. g.*, runways, taxiways, and ramps. They also find support for their position in *Grove City*'s recognition that federal financial assistance could be either direct or indirect. This argument confuses intended *beneficiaries* with intended *recipients*. While we observed in *Grove City* that there is no "distinction between direct and indirect aid" and that "[t]here is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the Federal Government are subject to regulation," we made these statements in the context of determining whom Congress intended to receive the federal money, and thereby be covered by Title IX. 465 U. S., at 564. It was clear in *Grove City* that Congress' intended recipient was

the College, not the individual students to whom the checks were sent from the Government. It was this unusual disbursement pattern of money from the Government through an intermediary (the students) to the intended recipient that caused us to recognize that federal financial assistance could be received indirectly. While *Grove City* stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid. In this case, it is clear that the airlines do not actually receive the aid; they only benefit from the airports' use of the aid.

Respondents do not contend that airlines actually receive or are intended to receive money from the Trust Fund. Nor can they argue that the airport operators are, like the students in *Grove City*, mere conduits of the aid to its intended recipient, since, unlike the students, the airports are the intended recipients of the funds. Rather, respondents assert that the economic benefit to airlines from the aid to airports is a form of federal financial assistance. This position ignores the very distinction made by Congress in § 504, and recognized in *Grove City:* The statute covers those who receive the aid, but does not extend as far as those who benefit from it. In *Grove City* we recognized that most federal assistance has "economic ripple effects." We rejected the argument that those indirect economic benefits can trigger statutory coverage. *Id.*, at 572. Congress tied the regulatory authority to those programs or activities that *receive* federal financial assistance; the key is to identify the recipient of that assistance. In this case, it is clear that the recipients of the financial assistance extended by Congress under the Trust Fund are the airport operators.[11]

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[11] This is not to say that Congress could not give federal financial assistance in the form of property improvements, such as a runway. Although the word "financial" usually indicates "money," federal financial assistance

C

By tying the scope of § 504 to economic benefit derived from Trust Fund expenditures, respondents would give § 504 almost limitless coverage. Congress' purpose in passing the Acts and establishing the Trust Fund was to confer economic benefits on a large number of persons and businesses. As the House Committee on Interstate and Foreign Commerce explained:

> "In addition to the actual users of the airport and airway system—such as airline passengers, general aviation, including private and business aviation operations, air freight forwarders, individual corporate and private shippers, etc.—there are others who benefit substantially from aviation; primarily, perhaps, the military should be considered. From a civilian standpoint those who benefit indirectly include the aircraft manufacturers and all of those whose employment is directly or indirectly related to aviation. To illustrate, an aircraft or aircraft component manufacturer may employ thousands of persons who never fly, yet those persons' economic lives depend entirely on aviation. More indirectly, but still to be considered, are those who make their livelihood by providing services for the manufacturers' employees. The employees of such corporations indirectly support such nonaviation interests such as real estate brokers and builders, doctors, dentists, school teachers, etc. This is brought forth here to establish the fact that air transportation in a true sense touches every American home, whether those in the home ever fly or not." H. R. Rep. No. 91-601, p. 6 (1969).

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may take nonmoney form. Cf. *Grove City*, 465 U. S., at 564–565. Again, the relevant starting point is the grant statute. If it extends money, then the recipient for the purposes of § 504 is the entity that receives the money. If the grant statute extends something other than money, then the recipient is the entity that receives whatever thing of value is extended by the grant statute.

Even if the reach of § 504 were limited to those whom Congress specifically intended to benefit, the scope of the statute would be broad indeed, covering whole classes of persons and businesses with only an indirect relation to aviation. The statutory "limitation" on § 504's coverage would virtually disappear, a result Congress surely did not intend.

Respondents contend that distinctions can be drawn among classes of beneficiaries under the 1982 and 1970 Acts. In particular, they assert that the ultimate beneficiaries under the Acts are the passengers, while the economic benefit derived by the airlines is intended to aid the airlines in benefiting the passengers. Section 504 provides no basis for this distinction. Nor can we find a basis in the Trust Fund Acts for preferring passengers over other beneficiaries. Nowhere has Congress expressed a special intent to benefit passengers. Nor has it indicated that the economic benefit to airlines, either because it was more direct or for any other reason, makes them a recipient of federal financial assistance. Rather, Congress recognized a need to improve airports in order to benefit a wide variety of persons and entities, all of them classified together as beneficiaries.[12] Congress did not set up a system where passengers were the primary or direct beneficiaries, and all others benefited by the Acts are indirect recipients of the financial assistance to airports.

In almost any major federal program, Congress may intend to benefit a large class of persons, yet it may do so by fund-

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[12] For example, Congress recognized that improved airports would not only satisfy the growing needs of commercial aviation, but also would help foster the significant growth that other areas of civil aviation were experiencing, including air carriers and passengers, air cargo carriers, air taxis, private business flying, and private recreational flying. H. R. Rep. No. 91-601, p. 5 (1969). In short, Congress intended to benefit interstate commerce in general through the means of aiding airports. In the 1970 Act, for example, Congress justified the expenditure because "substantial expansion and improvement of the airport and airway system is *[sic]* required to meet the demands of interstate commerce, the postal service, and the national defense." 84 Stat. 219. The 1982 Act contains a similar statement of purpose. 49 U. S. C. App. § 2201(a)(2).

ing—that is, extending federal financial assistance to—a limited class of recipients. Section 504, like Title IX in *Grove City*, draws the line of federal regulatory coverage between the recipient and the beneficiary.

III

The Court of Appeals found that airports and airlines are "inextricably intertwined" and that the "indissoluble nexus between them is the provision of commercial air transportation." 243 U. S. App. D. C., at 257, 752 F. 2d, at 714. For these reasons, the Court of Appeals concluded that commercial airlines are part of a federally assisted program of "commercial air transportation" because they make use of airports that accept federal funds, and because airports are "indispensable" to air travel.

We find this reasoning overbroad and unpersuasive. The Court of Appeals defined "program or activity" in part by reference to who is benefited by the financial assistance to airports. See *id.*, at 257–258, 752 F. 2d, at 714–715. As shown above, regulatory coverage tied to the scope of the intended benefits of the Trust Fund Acts is inconsistent with congressional intent in passing § 504. We recognized in *Alexander v. Choate*, 469 U. S. 287, 299 (1985) that "[a]ny interpretation of § 504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." The Court of Appeals' reasoning extends § 504 beyond its bounds. Under the Court of Appeals' view various industries and institutions would become part of a federally assisted program or activity, not because they had received federal financial assistance, but because they are "inextricably intertwined" with an institution that has. For example, Congress, with the assistance of the States, has engaged in a mammoth program of interstate highway construction and maintenance. See the Federal-Aid Highway Act of 1956, Pub. L. 627, 70 Stat. 374. Congress in this pro-

gram used a Trust Fund approach similar to the Airport and Airway Development Act of 1970. If we accepted the Court of Appeals' construction of "program or activity," we would also be compelled to conclude that industries that depend on the federally funded highways for their existence, such as trucking firms and delivery services, are part of a program or activity of national highway transportation. The same could be said of federally supported port facilities. This interpretation of § 504 would give it a scope broader than its language implies, and one never intended by Congress.

The Court of Appeals' reliance on *Grove City* in support of its definition of the relevant program or activity is misplaced. In *Grove City*, despite the arguably "indissoluble nexus" among the various departments of a small college, we concluded that only the financial aid program could be subjected to Title IX. In any analogy between *Grove City* and this case, airport operators would be placed in the position of the College. It is readily apparent that our conclusion in *Grove City* that only a portion of the College was covered by Title IX cannot support the conclusion that commercial air transportation—a concept much larger than the airports—is the program or activity covered by § 504. The Court of Appeals' attempt to fuse airports and airlines into a single program or activity is unavailing. It is by reference to the grant statute, and not to hypothetical collective concepts like commercial aviation or interstate highway transportation, that the relevant program or activity is determined.

IV

The Court of Appeals also held that the federally provided air traffic control system is a form of federal financial assistance to airlines.[13] The Federal Government spends some

[13] The Court of Appeals concluded that the air traffic control system constituted federal financial assistance, without specifically concluding that the on-board activities of commercial airlines are a program or activity receiving that assistance. Respondents have suggested that we do not need to reach the question whether the air traffic control system is federal

$2 billion annually to run this system 24 hours a day nationwide and in various spots around the world. The air traffic controllers are federal employees, and the Federal Government finances operation of the terminal control facilities. In short, the air traffic control system is "owned and operated" by the United States. For that reason, the air traffic control system is not "federal financial assistance" at all. Rather, it is a federally conducted program that has many beneficiaries but no recipients. The legislative history of Title VI makes clear that such programs do not constitute federal financial assistance to anyone. As then-Deputy Attorney General Katzenbach explained:

> "Activities wholly carried out by the United States with Federal funds, such as river and harbor improvements and other public works, defense installations, veterans' hospitals, mail service, etc., are not included in the list [of federally assisted programs]. Such activities, being wholly owned by, and operated by or for, the United States, cannot fairly be described as receiving Federal 'assistance.' While they may result in general economic benefit to neighboring communities, such benefit is not considered to be financial assistance to a program or activity within the meaning of title VI." 110 Cong. Rec. 13380 (1964).

That reasoning, of course, applies with equal force to § 504. The federal air traffic control system is a public program that does not involve "financial assistance" to anyone.[14]

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financial assistance. We disagree. If we did not reach the issue, then on remand DOT would be required to formulate its policies in accordance with the conclusion of the Court of Appeals.

[14] The Court of Appeals reasoned that the air traffic control system constitutes federal financial assistance because the Federal Government is providing the airlines the services of federal personnel. That reasoning is inconsistent with the longstanding and consistent interpretation of the relevant agencies. FAA, like other agencies, originally promulgated regulations implementing Title VI that defined federal financial assist-

V

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

The Court starts from the proposition that no federal funds under the Airport and Airway Improvement Act of 1982, 49 U. S. C. App. § 2201 *et seq.*, are disbursed directly to com-

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ance in a way that allowed for nonmoney assistance. In its definition section, FAA included among possible forms of federal assistance the "detail of Federal personnel." 14 CFR § 15.23(3) (1965), 29 Fed. Reg. 19286 (1964). DOT's current Title VI regulations use the same phrase. 49 CFR § 21.23(c)(3) (1985). The air traffic control system does not involve the "detail" of federal personnel; there is, in fact, no other air traffic control entity to which federal personnel can be "detailed"—the system is self-contained. In 1978, pursuant to its responsibility to coordinate the implementation of regulations under § 504 by federal agencies, the Department of Health, Education, and Welfare (HEW) published guidelines that substituted the word "services" for "detail." 43 Fed. Reg. 2137 (1978). But at the same time HEW explained that it did not intend any substantive change in the definitions:

"Despite some difference in the wording of the definitions of federal financial assistance in the regulations implementing section 504 and title VI, the substance of the two definitions does not differ." *Id.*, at 2132.

Later, the Department of Justice was given the task of coordinating the regulations under various civil rights laws, including § 504. Exec. Order No. 12250, 3 CFR 298 (1980). It retained the HEW definition of federal financial assistance that included "[s]ervices of Federal personnel." 28 CFR § 41.3(e)(2) (1985). Since the first regulations under Title VI, the interpretation of federal financial assistance has been that the detail, or loan, of federal personnel can constitute federal assistance. "Services" in this context means "detail." No such selection of federal personnel for a particular duty is involved here. The Court of Appeals erred in ignoring this longstanding administrative interpretation. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984). We note that any other interpretation would give almost limitless meaning to the term "federal financial assistance."

mercial airlines. It infers that commercial airlines therefore do not "receive" federal financial assistance. And it concludes that § 504 of the Rehabilitation Act of 1973 is therefore wholly inapplicable to those airlines. That reasoning misperceives the proper inquiry under § 504.

Section 504 provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . ." 29 U. S. C. § 794. The appropriate question is thus not whether commercial airlines "receive" federal financial assistance. Rather, it is whether commercial airlines are in a position to "exclud[e handicapped persons] from the participation in, . . . den[y them] the benefits of, or . . . subjec[t them] to discrimination under" a program or activity receiving federal financial assistance or conducted by an Executive agency. I believe that they are, and I therefore dissent.

I

The Court begins its analysis at the proper place: the underlying grant statute. See Note, 83 Colum. L. Rev. 1210, 1227–1232 (1983). The Airport and Airway Improvement Act of 1982 (Act), which replaced the Airport and Airway Development Act of 1970, Pub. L. 91–258, 84 Stat. 219 *et seq.*, is designed to ensure "the safe operation of the airport and airway system" and to ensure that system's more effective management and utilization. 49 U. S. C. App. §§ 2201(a)(1), (2). To that end, the Act authorizes the Secretary of Transportation to make grants to owners of public-use airports and to certain governmental units for airport development and airport planning. §§ 2204(a), 2208(a). It provides for certain other disbursements to airport owners and to States for the same purposes. §§ 2206, 2207. It authorizes the Secretary to expend other funds for the purposes of acquiring, estab-

lishing, and improving air navigation facilities, § 2205(a), and operating and maintaining those facilities, § 2205(c), for associated research and demonstration projects, § 2205(b), and for certain weather reporting services, § 2205(d). The Act finally directs the Secretary to fund the Explosive Detection K-9 Team Training Program for the purpose of detecting explosives at airports and aboard aircraft. § 2225.

The majority never explains the scope of the "program or activity receiving Federal financial assistance or . . . conducted by any Executive agency" that it believes the Act creates. In light of the Court's treatment of the "program or activity" issue in *Grove City College* v. *Bell*, 465 U. S. 555 (1984), I believe that the Act is most naturally viewed as creating "programs" or "activities" relating to the construction and maintenance of safe and efficient airports, and the creation of safe airways. That, however, is not the end of the inquiry.

The next question is whether the Department of Transportation (DOT) has jurisdiction under § 504 to regulate commercial airlines in order to ensure that handicapped individuals are not "excluded from the participation in, . . . denied the benefits of, or . . . subjected to discrimination under" those programs or activities.[1] In my view, the nature of airline transportation demands that DOT have such authority. If commercial airline companies barred the handicapped from traveling on their airlines at all, then that conduct would deny the handicapped the benefits of federally funded and conducted programs and activities relating to the airport and airway system. When commercial airlines allow the handicapped to travel on airlines, but, unreasonably and solely be-

[1] The original rulemaking proceedings in this case were undertaken by the Civil Aeronautics Board (CAB). As the Court explains, *ante*, at 600, n. 3, however, the relevant functions of the CAB were transferred to DOT under the Civil Aeronautics Board Sunset Act of 1984, Pub. L. 98–443, 98 Stat. 1703 *et seq.* See also *Paralyzed Veterans of America* v. *CAB*, 243 U. S. App. D. C. 237, 267, 752 F. 2d 694, 724 (1985).

cause of their handicap, force them to do so under conditions not substantially equal to those enjoyed by persons who are not handicapped, I believe that there too the airlines discriminatorily deny the handicapped the benefits of federally funded programs or activities supporting the airport and airway system.

This result derives from the fact that commercial airlines are in a unique position to deny public access to federally funded airport and airway services. It is true, as the Court points out, that the airport and airway system benefits a wide variety of persons and entities, including some who never fly. See *ante*, at 608–610. At the same time, however, a critical and obvious benefit of the airport and airway system, for members of the general public, is that it allows them to purchase tickets on airlines and to travel from city to city. The vast majority of members of the general public can enjoy that benefit only to the extent allowed, and under conditions set, by commercial airlines. Commercial airlines thus necessarily act as gatekeepers controlling who shall enjoy, and under what conditions, important benefits under federally funded and conducted programs. The airlines' position, as a result, is quite different from that of the trucking firms and delivery services referred to by the majority, *ante*, at 611.[2]

The Civil Aeronautics Board (CAB), in promulgating the rules at issue in this case, apparently relied on an understanding that § 504 gave it no authority whatsoever to regu-

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[2] The majority ignores this aspect of the question presented by the parties by relying unwaveringly on the fact that, as a general matter, no federal funds are disbursed directly to commercial airlines. The Court, however, has never held that fact dispositive. In *Grove City College* v. *Bell*, 465 U. S. 555 (1984), indeed, on which the majority heavily relies, the federal funds triggering Title IX coverage were not disbursed to Grove City College at all, but to some of its students. We nonetheless found part of the college subject to Title IX. Cf. *Frazier* v. *Board of Trustees of Northwest Mississippi Regional Medical Center*, 765 F. 2d 1278, 1290 (CA5 1985).

late the activities of commercial airlines not receiving direct subsidies under §§ 406 or 419 of the Federal Aviation Act, 49 U. S. C. App. §§ 1376, 1389 (1982 ed. and Supp. II). See App. 88a–89a. For the reasons stated above, I believe that that conclusion was in error. I therefore agree with the Court of Appeals that the regulations should be remanded to DOT to be reconsidered in the light of a proper understanding of the agency's authority under § 504.

II

Were this case to be remanded, it would be appropriate for DOT to proceed upon an additional premise not available to the CAB in its original rulemaking proceeding: that DOT has power, through regulation of *airport operators*, to ensure that commercial airlines do not discriminatorily deprive handicapped persons of the benefits of federal programs supporting the airport and airway system.[3] In order to serve an airport, an air carrier must enter into a lease with the airport operator for the use of airport facilities. DOT has power to direct each federally assisted airport, as part of that lease, to secure from all air carriers serving the airport an assurance of compliance with regulatory standards for service to handicapped persons.[4]

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[3] At the time of the original rulemaking proceeding, the involved federal agencies had apparently agreed that regulation of airlines would be in the hands of the CAB, but that regulation of airport operators would be left to DOT. See 44 Fed. Reg. 31451 (1979). DOT, in fact, postponed its inquiry into whether it should require airport operators, "through their leasing agreements with the airlines," to require the airlines to provide service to the handicapped on a nondiscriminatory basis, because the CAB was considering imposing such regulation on the airlines directly. *Ibid.* At present, DOT exercises jurisdiction over both airlines and airport operators.

[4] DOT officials, at least in the past, have shared this view. See Review of Airline Deregulation and Sunset of the Civil Aeronautics Board (Legislative Proposals Relating to Airline Deregulation and CAB Sunset): Hearings before the Subcommittee on Aviation of the House Committee on Public Works and Transportation, 98th Cong., 2d Sess., 16 (1984) (statement of James Burnley, Deputy Secretary of Transportation) ("I don't

Such a requirement would be a proper exercise of authority under § 504. For the reasons stated above, discrimination by commercial airlines against handicapped persons deprives those persons of equal access to the benefits provided by federally supported airport and airway programs. An airport can properly be considered in violation of § 504 when, through its contractual agreement with the airlines, it perpetuates discrimination against handicapped persons giving those persons unequal access to those programs. See 49 CFR § 27.7 (1985).

III

This case raises important and difficult issues regarding the extent of federal regulatory authority over entities, not themselves direct recipients of federal financial assistance, that nonetheless, in important respects, control the terms of public access to the benefits of such assistance. The majority ignores these issues because it believes that the single question whether commercial airlines are direct "recipients" of federal financial assistance disposes of this case. Because I find the matter more complicated than that, I dissent.

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think there is any question that we would have the authority to require a federally assisted airport in its contracts with carriers, who are given the right to use the facilities at those airports, that they provide that there will be no discrimination against the handicapped"); see also 44 Fed. Reg. 31451 (1979).

OHIO CIVIL RIGHTS COMMISSION ET AL. v. DAYTON CHRISTIAN SCHOOLS, INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85-488. Argued March 26, 1986—Decided June 27, 1986

Appellee Dayton Christian Schools, Inc. (Dayton), a private nonprofit corporation that provides elementary and secondary education, requires that its teachers subscribe to a particular set of religious beliefs, including belief in the internal resolution of disputes through the "Biblical chain of command." As a contractual condition of employment, teachers must agree to present any grievance to their immediate supervisor and to acquiesce in the final authority of Dayton's board of directors, rather than to pursue a remedy in civil court. After a pregnant teacher was told that her employment contract would not be renewed because of Dayton's religious doctrine that mothers should stay home with their preschool age children, she contacted an attorney, who threatened Dayton with litigation under state and federal sex discrimination laws if it did not agree to rehire the teacher for the coming school year. Dayton then rescinded its nonrenewal decision, but terminated the teacher because of her violation of the internal dispute resolution doctrine. The teacher then filed a charge with appellant Ohio Civil Rights Commission, alleging that under Ohio statutes Dayton's original nonrenewal decision constituted unlawful sex discrimination and its termination decision unlawfully penalized her for asserting her rights. Ultimately, the Commission initiated administrative proceedings against Dayton, which answered the complaint by asserting that the First Amendment prevented the Commission from exercising jurisdiction over it since its actions had been taken pursuant to sincerely held religious beliefs. While the administrative proceedings were pending, Dayton and others (also appellees here) filed this action in Federal District Court, seeking an injunction against the state administrative proceedings on the ground that any investigation of Dayton's hiring process or any imposition of sanctions for its nonrenewal or termination decisions would violate the Religion Clauses of the First Amendment. Without addressing the Commission's argument that the court should abstain from exercising its jurisdiction, the District Court refused to issue an injunction, holding, *inter alia*, that the Commission's proposed action would not violate the First and Fourteenth Amendments. The Court of Appeals reversed, holding that the Commission's exercise of jurisdiction would violate both

the Free Exercise Clause and the Establishment Clause of the First Amendment.

Held:

1. This Court has appellate jurisdiction over this case under 28 U. S. C. § 1254(2), which authorizes review of a court of appeals' decision holding a state statute unconstitutional as applied to the facts of the case. Here, the Court of Appeals expressly held that the Ohio statutory provisions relied on by the teacher, as applied to authorize the administrative proceedings, were repugnant to the Religion Clauses. P. 625.

2. The District Court should have abstained from adjudicating this case under *Younger* v. *Harris*, 401 U. S. 37, and its progeny. *Younger*, which held that a federal court should not enjoin a pending state criminal proceeding except when necessary to prevent great and immediate irreparable injury, was based on concerns for comity and federalism. Such concerns are equally applicable to other types of state proceedings, including state administrative proceedings, judicial in nature, in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff will have a full and fair opportunity to litigate his constitutional claim. The elimination of prohibited sex discrimination is a sufficiently important state interest to bring the present case within the ambit of the *Younger* doctrine, and there is no reason to doubt that Dayton will receive an adequate opportunity to raise its constitutional claims. Even assuming that Ohio law is such that the Commission may not consider the constitutionality of the statute under which it operates, it is sufficient that under Ohio law constitutional claims may be raised in state-court judicial review of the administrative proceedings. Pp. 625–629.

766 F. 2d 932, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 629.

Kathleen McManus argued the cause for appellants. With her on the briefs were *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, and *Helen M. Ninos*, Assistant Attorney General.

William Bentley Ball argued the cause for appellees. With him on the brief were *Philip J. Murren*, *Sandra E. Wise*, and *Bruce E. Pence*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Dayton Christian Schools, Inc. (Dayton), and various individuals brought an action in the United States District Court for the Southern District of Ohio under 42 U. S. C. § 1983, seeking to enjoin a pending state administrative proceeding brought against Dayton by appellant Ohio Civil Rights Commission (Commission). Dayton asserted that the Free Exercise and Establishment Clauses of the First Amendment prohibited the Commission from exercising jurisdiction over it or from punishing it for engaging in employment discrimination. The District Court refused to

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**Joan E. Bertin*, *George Kannar*, *Charles S. Sims*, *Isabelle Katz Pinzler*, and *Burt Neuborne* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Jewish Committee et al. by *Kimberlee Wood Colby*, *Samuel E. Ericsson*, *Michael J. Woodruff*, *Samuel Rabinove*, and *Richard T. Foltin*; for Americans United for Separation of Church and State by *Lee Boothby* and *Robert A. Yingst*; for the Associated Christian Conciliation Services by *John D. Robb*; for the Catholic Conference of Ohio by *David J. Young*; for Concerned Women of America by *Diane E. White*, *Joy R. Powell*, and *Jordan W. Lorence*; for the Council on Religious Freedom by *Lee Boothby* and *Rolland Truman*; for the General Conference of Seventh-Day Adventists by *Walter E. Carson* and *Warren L. Johns*; for the Gulf & Great Plains Legal Foundation by *Jerald L. Hill* and *Mark J. Bredemeier*; for the National Jewish Commission on Law and Public Affairs ("COLPA") by *Daniel D. Chazin*, *Nathan Lewin*, and *Dennis Rapps*; for the Rutherford Institute et al. by *W. Charles Bundren*, *Guy O. Farley, Jr.*, *John W. Whitehead*, *D. Kevin Ikenberry*, *Thomas O. Kotouc*, *Alfred Lindh*, *William B. Hollberg*, and *Wendell R. Bird*; and for the United States Catholic Conference by *Wilfred R. Caron* and *Mark E. Chopko*.

Briefs of *amici curiae* were filed for the American Jewish Congress by *Marc D. Stern* and *Ronald A. Krauss*; and for the Catholic League for Religious and Civil Rights et al. by *Steven Frederick McDowell*.

issue the injunction on grounds that any conflict between the First Amendment and the administrative proceedings was not yet ripe, and that in any case the proposed action of the Commission violated neither the Free Exercise Clause nor the Establishment Clause of the First Amendment, as made applicable to the States by the Fourteenth Amendment. The Court of Appeals for the Sixth Circuit reversed, holding that the exercise of jurisdiction and the enforcement of the statute would impermissibly burden appellees' rights under the Free Exercise Clause and would result in excessive entanglement under the Establishment Clause. We postponed the question of jurisdiction pending consideration of the merits. 474 U. S. 978 (1985). We now conclude that we have jurisdiction, and we reverse, holding that the District Court should have abstained under our cases beginning with *Younger* v. *Harris*, 401 U. S. 37 (1971).

Dayton is a private nonprofit corporation that provides education at both the elementary and secondary school levels. It was formed by two local churches, the Patterson Park Brethren Church and the Christian Tabernacle, and it is regarded as a "nondenominational" extension of the Christian education ministries of these two churches. Dayton's corporate charter establishes a board of directors (board) to lead the corporation in both spiritual and temporal matters. App. 11. The charter also includes a section entitled "Statement of Faith," which serves to restrict membership on the board and the educational staff to persons who subscribe to a particular set of religious beliefs. The Statement of Faith requires each board or staff member to be a born-again Christian and to reaffirm his or her belief annually in the Bible, the Trinity, the nature and mission of Jesus Christ, the doctrine of original sin, the role of the Holy Ghost, the resurrection and judgment of the dead, the need for Christian unity, and the divine creation of human beings. *Id.*, at 5–6.

The board has elaborated these requirements to include a belief in the internal resolution of disputes through the "bibli-

cal chain of command." The core of this doctrine, rooted in passages from the New Testament, is that one Christian should not take another Christian into courts of the State. Teachers are expected to present any grievance they may have to their immediate supervisor, and to acquiesce in the final authority of the board, rather than to pursue a remedy in civil court. The board has sought to ensure compliance with this internal dispute resolution doctrine by making it a contractual condition of employment.

Linda Hoskinson was employed as a teacher at Dayton during the 1978–1979 school year. She subscribed to the Statement of Faith and expressly agreed to resolve disputes internally through the biblical chain of command. In January 1979, she informed her principal, James Rakestraw, that she was pregnant. After consulting with his superiors, Rakestraw informed Hoskinson that her employment contract would not be renewed at the end of the school year because of Dayton's religious doctrine that mothers should stay home with their preschool age children. Instead of appealing this decision internally, Hoskinson contacted an attorney who sent a letter to Dayton's superintendent, Claude Schindler, threatening litigation based on state and federal sex discrimination laws if Dayton did not agree to rehire Hoskinson for the coming school year.

Upon receipt of this letter, Schindler informed Hoskinson that she was suspended immediately for challenging the nonrenewal decision in a manner inconsistent with the internal dispute resolution doctrine. The board reviewed this decision and decided to terminate Hoskinson. It stated that the sole reason for her termination was her violation of the internal dispute resolution doctrine, and it rescinded the earlier nonrenewal decision because it said that she had not received adequate prior notice of the doctrine concerning a mother's duty to stay home with her young children.

Hoskinson filed a complaint with appellant Ohio Civil Rights Commission (Commission), alleging that Dayton's

nonrenewal decision constituted sex discrimination, in violation of Ohio Rev. Code Ann. § 4112.02(A) (Supp. 1985), and that its termination decision penalized her for asserting her rights, in violation of Ohio Rev. Code Ann. § 4112.02(I) (Supp. 1985). The Commission notified Dayton that it was conducting a preliminary investigation into the matter, and repeatedly urged Dayton to consider private settlement, warning that failure to do so could result in a formal adjudication of the matter.

The Commission eventually determined that there was probable cause to believe that Dayton had discriminated against Hoskinson based on her sex and had retaliated against her for attempting to assert her rights in violation of §§ 4112(A) and (I). Pursuant to Ohio Rev. Code Ann. § 4112.05(B) (Supp. 1985), it sent Dayton a proposed Conciliation Agreement and Consent Order that would have required Dayton to reinstate Hoskinson with backpay, and would have prohibited Dayton from taking retaliatory action against any employee for participating in the preliminary investigation. The Commission warned Dayton that failure to accede to this proposal or an acceptable counteroffer would result in formal administrative proceedings being initiated against it. When Dayton failed to respond, the Commission initiated administrative proceedings against it by filing a complaint. Dayton answered the complaint by asserting that the First Amendment prevented the Commission from exercising jurisdiction over it since its actions had been taken pursuant to sincerely held religious beliefs. App. 103.

While these administrative proceedings were pending, Dayton filed this action against the Commission in the United States District Court for the Southern District of Ohio under 42 U. S. C. § 1983, seeking a permanent injunction against the state proceedings on the ground that any investigation of Dayton's hiring process or any imposition of sanctions for Dayton's nonrenewal or termination decisions would violate

the Religion Clauses of the First Amendment. App. 118–120. The Commission filed a motion to dismiss, arguing, *inter alia*, that the District Court should refrain from enjoining the administrative proceedings based on federal abstention doctrines. Record, Doc. No. 9, pp. 7–8. It also filed various documents defending its action on the merits.

Without addressing the abstention argument, the District Court refused to issue the injunction. 578 F. Supp. 1004 (1984). The Court of Appeals for the Sixth Circuit reversed, as previously noted, holding that the exercise of such jurisdiction would violate both the Free Exercise Clause and the Establishment Clause of the First Amendment. 766 F. 2d 932 (1985).

We hold that we have appellate jurisdiction under 28 U. S. C. § 1254(2) to review the decision of the Court of Appeals. That statute authorizes an appeal to this Court "by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution." This authority embraces cases holding a state statute unconstitutional as applied to the facts of the case. *Dutton* v. *Evans*, 400 U. S. 74, 76, n. 6 (1970). Here there is no doubt that the decision by the Court of Appeals satisfies this test. The court expressly held that Ohio Rev. Code Ann. § 4112.02 *et seq.* (Supp. 1985) is repugnant to the Free Exercise and Establishment Clauses as applied to authorize the administrative body to investigate the charges against Dayton and to decide whether to impose sanctions. See 766 F. 2d, at 935, n. 5, 944, 955, 961.

Having taken jurisdiction over the decision below, we now turn to whether the District Court should have exercised jurisdiction over the case itself. We conclude that the District Court should have abstained from adjudicating this case under *Younger* v. *Harris*, 401 U. S. 37 (1971), and later cases.[1] The Commission urged such abstention in the Dis-

[1] We think that any ripeness challenge to appellees' complaint is foreclosed by *Steffel* v. *Thompson*, 415 U. S. 452 (1974), and *Doran* v. *Salem*

trict Court, and on oral argument here. Tr. of Oral Arg. 7–8. Dayton has filed a postargument brief urging that the Commission has waived any claim to abstention because it had stipulated in the District Court that that court had jurisdiction of the action. We think, however, that this argument misconceives the nature of *Younger* abstention. It does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced. A State may of course voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention. See *Brown* v. *Hotel Employees*, 468 U. S. 491, 500, n. 9 (1984); *Ohio Bureau of Employment Services* v. *Hodory*, 431 U. S. 471, 479–480 (1977); *Sosna* v. *Iowa*, 419 U. S. 393, 396–397, n. 3 (1975). But in each of these cases the State expressly urged this Court or the District Court to proceed to an adjudication of the constitutional merits. We think there was no similar consent or waiver here, and we therefore address the issue of whether the District Court should have abstained from deciding the case.

In *Younger* v. *Harris*, *supra*, we held that a federal court should not enjoin a pending state criminal proceeding except in the very unusual situation that an injunction is necessary to prevent great and immediate irreparable injury. We justified our decision both on equitable principles, *id.*, at 43, and on the "more vital consideration" of the proper respect for the fundamental role of States in our federal system. *Id.*, at

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Inn, Inc., 422 U. S. 922 (1975). *Steffel* held that a reasonable threat of prosecution for conduct allegedly protected by the Constitution gives rise to a sufficiently ripe controversy. 415 U. S., at 458–460. If a reasonable threat of prosecution creates a ripe controversy, we fail to see how the actual filing of the administrative action threatening sanctions in this case does not. It is true that the administrative body may rule completely or partially in appellees' favor; but it was equally true that the plaintiffs in *Steffel* and *Doran* may have prevailed had they in fact been prosecuted.

44. Because of our concerns for comity and federalism, we thought that it was

> "perfectly natural for our cases to repeat time and time again that the *normal* thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Id.*, at 45 (emphasis added).

We have since recognized that our concern for comity and federalism is equally applicable to certain other pending state proceedings. We have applied the *Younger* principle to civil proceedings in which important state interests are involved. *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975); *Juidice* v. *Vail*, 430 U. S. 327 (1977); *Trainor* v. *Hernandez*, 431 U. S. 434 (1977); *Moore* v. *Sims*, 442 U. S. 415, 423 (1979). We have also applied it to state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim. We stated in *Gibson* v. *Berryhill*, 411 U. S. 564, 576–577 (1973), that "administrative proceedings looking toward the revocation of a license to practice medicine may in proper circumstances command the respect due court proceedings." Similarly, we have held that federal courts should refrain from enjoining lawyer disciplinary proceedings initiated by state ethics committees if the proceedings are within the appellate jurisdiction of the appropriate State Supreme Court. *Middlesex County Ethics Committee* v. *Garden State Bar Assn.*, 457 U. S. 423 (1982). Because we found that the administrative proceedings in *Middlesex* were "judicial in nature" from the outset, *id.*, at 432–434, it was not essential to the decision that they had progressed to state-court review by the time we heard the federal injunction case.[2]

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[2] The lower courts have been virtually uniform in holding that the *Younger* principle applies to pending state administrative proceedings in which an important state interest is involved. See, *e. g.*, *Williams* v. *Red*

We think the principles enunciated in these cases govern the present one. We have no doubt that the elimination of prohibited sex discrimination is a sufficiently important state interest to bring the present case within the ambit of the cited authorities. We also have no reason to doubt that Dayton will receive an adequate opportunity to raise its constitutional claims. Dayton contends that the mere exercise of jurisdiction over it by the state administrative body violates its First Amendment rights. But we have repeatedly rejected the argument that a constitutional attack on state procedures themselves "automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases." *Moore*, *supra*, at 427, n. 10. Even religious schools cannot claim to be wholly free from some state regulation. *Wisconsin* v. *Yoder*, 406 U. S. 205, 213 (1972). We therefore think that however Dayton's constitutional claim should be decided on the merits, the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.

Bank Board of Education, 662 F. 2d 1008 (CA3 1981); *Grandco Corp.* v. *Rochford*, 536 F. 2d 197, 206 (CA7 1976); *McCune* v. *Frank*, 521 F. 2d 1152, 1158 (CA2 1975); *McDonald* v. *Metro-North Commuter Railroad Division of Metropolitan Transit Authority*, 565 F. Supp. 37 (SDNY 1983) (Weinfeld, J.). Only the recent case of *Martori Bros. Distributors* v. *James-Massengale*, 781 F. 2d 1349, 1354 (CA9 1986), departs from this position, and it does so without analysis. Of course, if state law expressly indicates that the administrative proceedings are not even "judicial in nature," abstention may not be appropriate. See *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 237–239 (1984).

The application of the *Younger* principle to pending state administrative proceedings is fully consistent with *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982), which holds that litigants need not exhaust their administrative remedies prior to bringing a § 1983 suit in federal court. Cf. *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 607–611 (1975). Unlike *Patsy*, the administrative proceedings here are coercive rather than remedial, began before any substantial advancement in the federal action took place, and involve an important state interest.

Dayton also contends that the administrative proceedings do not afford the opportunity to level constitutional challenges against the potential sanctions for the alleged sex discrimination. In its reply brief in this Court, the Commission cites several rulings to demonstrate that religious justifications for otherwise illegal conduct are considered by it. See, *e. g.*, *In re St. Mary of the Falls*, No. 948 (1975). Dayton in turn relies on a decision of the Supreme Court of Ohio, *Mobil Oil Corp.* v. *Rocky River*, 38 Ohio St. 2d 23, 26, 309 N. E. 2d 900, 902 (1974), in which that court held that a local zoning commission could not consider constitutional claims. But even if Ohio law is such that the Commission may not consider the constitutionality of the statute under which it operates, it would seem an unusual doctrine, and one not supported by the cited case, to say that the Commission could not construe its own statutory mandate in the light of federal constitutional principles. Cf. *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490 (1979). In any event, it is sufficient under *Middlesex*, *supra*, at 436, that constitutional claims may be raised in state-court judicial review of the administrative proceeding. Section 4112.06 of Ohio Rev. Code Ann. (1980) provides that any "respondent claiming to be aggrieved by a final order of the commission . . . may obtain judicial review thereof." Dayton cites us to no Ohio authority indicating that this provision does not authorize judicial review of claims that agency action violates the United States Constitution.

The judgment of the Court of Appeals is therefore reversed, and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in the judgment.

Appellee Dayton Christian Schools, Inc. (School), employed Mrs. Linda Hoskinson as a teacher. Shortly after

learning that she was pregnant, the School refused to renew Mrs. Hoskinson's teaching contract for the next academic year. The two reasons for this decision, according to the School, were (1) the School's belief that Mrs. Hoskinson should remain at home to supervise and care for her forthcoming child; and (2) the School's belief that Mrs. Hoskinson had violated the "Biblical chain of command" by consulting an attorney regarding her disagreement with the School's conviction that she remain at home. App. 115 (complaint of Dayton Christian Schools, Inc., et al.).

After her termination, Mrs. Hoskinson filed a sex discrimination charge against the School with appellant Ohio Civil Rights Commission. The Commission investigated her charge and, upon finding probable cause to believe that the School had violated § 4112.02 of the Ohio Revised Code,[1] scheduled a hearing. The School thereupon filed this action in Federal District Court seeking declaratory and injunctive relief.

In the District Court, the School argued that the Ohio antidiscrimination statute violates the First Amendment Religion Clauses as applied to sectarian schools.[2] The District Court determined that "[t]he only conduct on the part of the Commission that is presently being threatened with suffi-

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[1] That section provides, in part:

"§ 4112.02 Unlawful discriminatory practices.

"It shall be an unlawful discriminatory practice:

"(A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Ohio Rev. Code Ann. § 4112.02 (Supp. 1985).

[2] The School also argued that § 4112.02 of the Ohio Revised Code is unconstitutional on its face. The District Court held the section to be neither overbroad nor void for vagueness. Because the Court of Appeals invalidated the section as applied to the School, it did not address appellees' facial attack. The School no longer presses the argument that the statute is unconstitutional on its face.

cient immediacy and reality to present a justiciable controversy is the investigation, which has already taken place, and the pending hearing on the complaint filed by the [Commission] concerning the discharge of Mrs. Hoskinson." 578 F. Supp. 1004, 1029 (SD Ohio 1984). Accord, *id.*, at 1039. On the merits, the District Court concluded that the Commission's investigation and adjudication of sex discrimination charges was constitutional. The court recognized that "the statute *could* be applied in any number of ways that could impermissibly interfere with" appellees' religious freedom, but it concluded that these concerns—which relate to the possible remedies that might or might not be ordered if a violation is found—were "hypothetical or speculative" and therefore not ripe on the current state of the record. *Id.*, at 1028.[3]

The Court of Appeals reversed. 766 F. 2d 932 (CA6 1985). It recognized that the School "challenge[d] only the [Commission's] exercise of jurisdiction and its issuance of the complaint in this case." *Id.*, at 950, n. 31. It further acknowledged that "an order of reinstatement or backpay is not at issue in this case." *Ibid.* It nevertheless determined that the "chilling knowledge" that the School's selection criteria for teachers "will be reevaluated, and, perhaps, adjusted by the state applying secular criteria" placed an impermissible burden on appellees' religious freedoms. *Ibid.* Looking into the future, the Court of Appeals also concluded that the

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[3] "In permitting the [Commission] to exercise jurisdiction over the instant controversy, the Court has in no way determined either that the full force of [the Commission's] jurisdiction under [Ohio Revised Code] Chapter 4112 can be brought to bear on [Dayton Christian Schools] without impermissibly burdening [appellees'] first amendment rights or, even with respect to the present controversy, that any remedy deemed appropriate by the [Commission] should they find [Dayton Christian Schools] liable, would necessarily present no further first amendment problems. However, because many of the concerns voiced by [appellees] about state encroachment on their religious freedoms remain as yet only possibilities, they cannot serve as the basis for the issuing of a permanent injunction against the [Commission]." 578 F. Supp., at 1041.

"highly intrusive nature" of backpay and reinstatement, as well as the "continuing surveillance implicated by the conciliation agreement proposed by the Commission" and rejected by the School, "reveal the 'significant risk that the First Amendment will be infringed.'" *Id.*, at 942–943 (quoting *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 502 (1979)). Accord, 766 F. 2d, at 951.

Like the majority, I agree with the District Court that neither the investigation of certain charges nor the conduct of a hearing on those charges is prohibited by the First Amendment: "the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Ante*, at 628.

I further agree with the District Court that any challenge to a possibly intrusive remedy is premature at this juncture. As the majority points out, *ante*, at 629, the Commission recognizes religious justifications for conduct that might otherwise be illegal. Thus, although § 4112.02 forbids discrimination on the basis of religion, the Commission has dismissed complaints alleging religious discrimination by religious educational institutions, see *Menz* v. *St. Pius School*, No. 3823 (1983), and in particular has dismissed complaints by teachers against sectarian schools for limiting employment to instructors who subscribe to the appropriate faith, see *In re St. Michael's School*, No. 2726 (1976); *In re St. Mary of the Falls*, No. 948 (1975). It bears emphasis that the Commission dismissed these complaints only *after* investigating charges of discrimination, finding probable cause that the statute had been violated, and holding a hearing on the complaint. It therefore follows that the Commission's finding of probable cause and decision to schedule a hearing in this case does not also mean that the Commission intends to impose *any* sanction, let alone a sanction in derogation of the First Amendment's Religion Clauses. In view of this fact, the District

Court was entirely correct in concluding that appellees' constitutional challenge to the remedial provisions of the Ohio statute is not ripe for review.[4] Accordingly, I concur in the judgment.[5]

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[4] I fully agree with the majority's general statement that "a reasonable threat of prosecution for conduct allegedly protected by the Constitution gives rise to a sufficiently ripe controversy." *Ante*, at 626, n. 1 (citation omitted). Thus, when the constitutional challenge is to the arrest and initiation of criminal proceedings—as was the case with the pamphleteer in *Steffel* v. *Thompson*, 415 U. S. 452, 458–460 (1974), and the operators of the bars in *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 930–931 (1975)—a "reasonable threat" of arrest and prosecution is sufficient to make the controversy ripe for judicial review. For purposes of this case, it follows from *Steffel* and *Doran* that appellees' First Amendment challenge to the Commission's decision to investigate and adjudicate a charge of sex discrimination against the School is ripe, because the investigation has been completed and the matter set for hearing.

However, it does not follow that a challenge to whatever *remedy* might ultimately be fashioned (should liability be established and relief ordered) is ripe merely upon a showing of a "reasonable threat" that proceedings will commence. *Doran* and *Steffel* do not suggest this result, for they did not address the constitutionality of possible remedies for the conduct prosecuted in those cases. In view of the absence of any finding of liability in this case, and the Commission's demonstrated willingness to tailor remedies to accommodate the exercise of religious freedoms, there is plainly no "reasonable threat" that an overly intrusive remedy will trench on appellees' First Amendment rights. To hold otherwise would require the District Court to detail the constitutionally permissible range of the Commission's sentencing discretion in advance of any facts regarding the School's discriminatory conduct or any explanation by the Commission justifying the relief it might fashion. Either or both of these items of information would inform the First Amendment analysis and might prove decisive in determining the constitutionality of the Commission's hypothesized remedy.

[5] I do not agree with the majority that the doctrine of abstention associated with *Younger* v. *Harris*, 401 U. S. 37 (1971), required the District Court to dismiss appellees' complaint. That disposition would presumably deny the School a federal forum to adjudicate the constitutionality of a provisional administrative remedy, such as reinstatement pending resolution of the complainant's charges, even though the constitutional issues have become ripe for review by the Commission's entry of a coercive order and

the Commission refuses to address the merits of the constitutional claims. *Younger* abstention has never been applied to subject a federal-court plaintiff to an allegedly unconstitutional state administrative order when the constitutional challenge to that order can be asserted, if at all, only in state-court judicial review of the administrative proceeding. See *Steffel* v. *Thompson*, 415 U. S., at 462 (holding that *Younger* abstention is inappropriate when no state-court proceeding "is pending at the time the federal complaint is filed," because in that circumstance "federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system"; it cannot "be interpreted as reflecting negatively upon [a] state court's ability to enforce constitutional principles"; and the absence of a pending state-court proceeding deprives "the federal plaintiff [of] a concrete opportunity to vindicate his constitutional rights"). See also *Middlesex Ethics Committee* v. *Garden State Bar Assn.*, 457 U. S. 423, 437 (1982) (requiring abstention where "an adequate state forum for all relevant issues has clearly been demonstrated to be available prior to any proceedings on the merits in federal court" (citation omitted)).

LYNG, SECRETARY OF AGRICULTURE v. CASTILLO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

No. 85-250. Argued April 29, 1986—Decided June 27, 1986

Eligibility and benefit levels in the federal food stamp program are determined on a "household" rather than an individual basis. The statutory definition of the term "household," as amended in 1981 and 1982, generally treats parents, children, and siblings who live together as a single household, but does not treat more distant relatives, or groups of unrelated persons who live together, as a single household unless they also customarily purchase food and prepare meals together. Appellees are families who generally buy their food and prepare their meals as separate economic units, and who will either lose benefits or have their food stamp allotment decreased as a result of the 1981 and 1982 amendments to the statute. They filed actions that were consolidated in Federal District Court, claiming that the statutory distinction between parents, children, and siblings and all other groups of individuals violates the guarantee of equal treatment in the Due Process Clause of the Fifth Amendment. On cross-motions for summary judgment, the District Court, applying "heightened scrutiny," invalidated the distinction.

Held: The statutory distinction is not unconstitutional. The District Court erred in judging its constitutionality under "heightened scrutiny" since close relatives are not a "suspect" or "quasi-suspect" class. The statutory distinction does not "directly and substantially" interfere with family living arrangements and thereby burden a fundamental right. Judged under the proper standard of review, Congress had a rational basis for making the distinction, since it could reasonably determine that close relatives sharing a home tend to purchase and prepare meals together while distant relatives and unrelated individuals might not be so inclined. Pp. 638-643.

Reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., *post*, p. 643, WHITE, J., *post*, p. 643, and MARSHALL, J., *post*, p. 643, filed dissenting opinions.

Jeffrey P. Minear argued the cause *pro hac vice* for appellant. With him on the brief were *Solicitor General Fried*,

Assistant Attorney General Willard, and *Deputy Solicitor General Geller*.

Maria Norma Martinez argued the cause for appellees. With her on the brief was *David Hall*.*

JUSTICE STEVENS delivered the opinion of the Court.

Eligibility and benefit levels in the federal food stamp program are determined on a "household" rather than an individual basis. The statutory definition of the term "household," as amended in 1981 and 1982, generally treats parents, children, and siblings who live together as a single household, but does not treat more distant relatives, or groups of unrelated persons who live together, as a single household unless they also customarily purchase food and prepare meals together.[1] Although there are variations in the facts of the four cases that were consolidated in the District Court, they all raise the question whether the statutory distinction between parents, children, and siblings, and all other groups of individuals violates the guarantee of equal treatment in the Due Process Clause of the Fifth Amendment.[2]

**Michael R. Lemov* filed a brief for the Food Research and Action Center et al. as *amici curiae* urging affirmance.

[1] Section 3(i) of the Food Stamp Act of 1964, 78 Stat. 703, as redesignated and amended, 7 U. S. C. § 2012(i), provides in part:

"'Household' means (1) an individual who lives alone or who, while living with others, customarily purchases foods and prepares meals for home consumption separate and apart from the others, or (2) a group of individuals who live together and customarily purchase food and prepare meals together for home consumption; *except that parents and children*, **or siblings**, *who live together shall be treated as a group of individuals who customarily purchase and prepare meals together for home consumption even if they do not do so, unless one of the parents*, **or siblings**, is an elderly or disabled member."

The italicized language was added to the definition by § 101(1) of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 358. The clause extending the proviso to siblings, which appears in bold face, was added by the Omnibus Budget Reconciliation Act of 1982, Pub. L. 97-253, 96 Stat. 772.

[2] "The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's

I

Appellees are families who generally buy their food and prepare their meals as separate economic units; each family will either lose its benefits or have its food stamp allotment decreased as a result of the 1981 and 1982 amendments. Moreover, as appellees' counsel eloquently explained, in each case the loss or reduction of benefits will impose a severe hardship on a needy family, and may be especially harmful to the affected young children for whom an adequate diet is essential.

Appellees accordingly filed these lawsuits to invalidate the 1981 and 1982 amendments and to be treated as separate households for the purpose of determining eligibility and allotment of food stamps. On cross-motions for summary judgment, the District Court considered the merits of appellees' challenge to the constitutionality of the "household" definition.

The District Court was persuaded that the statutory definition had a rational basis. It observed that the amendment made it more difficult for individuals who live together to "manipulate" the rules "so as to obtain separate household status and receive greater benefits"; that the administrative burden of "attempting to make individual household determinations as to 'household' status" was time-consuming; and that unrelated persons who live together for reasons of economy or health are more likely "'to actually be separate households'" than related families who live together. App. to Juris. Statement 5a-6a. It held, however, that "a stricter standard of review than the 'rational basis' test" was required. *Id.*, at 7a. Relying primarily on *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528, 534 (1973), a

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guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 100 (1976). Accord, *e. g.*, *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528, 533, n. 5 (1973); *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

case which it construed as holding that a "congressional desire to harm a politically unpopular group" could not justify the exclusion of household groups which contained unrelated persons, the District Court reasoned that "if the Supreme Court is willing to protect unpopular political groups it should even be more willing to protect the traditional family value of living together." App. to Juris. Statement 8a.

We noted probable jurisdiction, 474 U. S. 994 (1985), and now reverse.

II

The District Court erred in judging the constitutionality of the statutory distinction under "heightened scrutiny." The disadvantaged class is that comprised by parents, children, and siblings. Close relatives are not a "suspect" or "quasi-suspect" class. As a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless. See, *e. g.*, *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 313–314 (1976) *(per curiam)*. In fact, quite the contrary is true.

Nor does the statutory classification "directly and substantially" interfere with family living arrangements and thereby burden a fundamental right. *Zablocki* v. *Redhail*, 434 U. S. 374, 386–387, and n. 12 (1978). See *id.*, at 403–404 (STEVENS, J., concurring); *Califano* v. *Jobst*, 434 U. S. 47, 58 (1977). The "household" definition does not order or prevent any group of persons from dining together. Indeed, in the overwhelming majority of cases it probably has no effect at all. It is exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps, for the cost of separate housing would almost certainly exceed the incremental value of the additional stamps. See 50 Fed. Reg. 36641, 36642 (1985). Thus, just as in

United States Dept. of Agriculture v. *Moreno*—the decision which the District Court read to require "heightened scrutiny"—the "legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest." 413 U. S., at 533. See *id.*, at 533–538.[3]

Under the proper standard of review, we agree with the District Court that Congress had a rational basis both for treating parents, children, and siblings who live together as a single "household," and for applying a different standard in determining whether groups of more distant relatives and unrelated persons living together constitute a "household."

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[3] In *United States Dept. of Agriculture* v. *Moreno*, we held that the definition of the term "household" in the Food Stamp Act as amended in 1971, 84 Stat. 2048, was unconstitutional. That definition drew a distinction between households composed entirely of persons who are related to one another and households containing one or more members who are unrelated to the rest. Unlike the present statute, the 1971 definition completely disqualified all households in the latter category. Not only were all groups of unrelated persons ineligible for benefits, but even groups of related persons would lose their benefits if they admitted one nonrelative to their household. We concluded that this definition did not further the interest in preventing fraud, or any other legitimate purpose of the Food Stamp Program.

"Thus, in practical operation, the 1971 amendment excludes from participation in the food stamp program, *not* those persons who are 'likely to abuse the program' but, rather, *only* those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility." 413 U. S., at 538.

The House Committee Report on the Food Stamp Act of 1977 made this reference to the 1971 amendment invalidated in *Moreno:*

"This proviso was essentially an attempt to ban food stamp participation by communal households (so-called 'hippie communes'). In 1973 the Supreme Court in *Moreno* v. *U. S. Department of Agriculture*, 413 U. S. 528, upheld an earlier ruling by a lower court to the effect that this provision was unconstitutional. It had been implemented for only a brief period in a few states." H. R. Rep. No. 95–464, p. 140 (1977).

The 1971 definition was, therefore, "wholly without any rational basis" and "invalid under the Due Process Clause of the Fifth Amendment." 413 U. S., at 538.

As a general matter, the economies of scale that may be realized in group purchase and preparation of food surely justified Congress in providing additional food stamp benefits to households that could not achieve such efficiencies.[4] Moreover, the Legislature's recognition of the potential for mistake and fraud[5] and the cost-ineffectiveness of case-by-case verification of claims that individuals ate as separate house-

[4] See S. Rep. No. 97–504, p. 24 (1982) ("Because of economics of scale, small (one-, two-, and three-person) households are provided more food stamps per person than larger households. For example, current benefit levels are $70 for 1-, $128 for 2-, $183 for 3-person households"); S. Rep. No. 97–128, p. 31 (1981) ("It should be noted that because of economics of scale, small (one, two, or three persons) households are provided more food stamps per person than larger households—for example, $70 for one, $128 for two, $183 for three, and $233 for four").

[5] See, *e. g.*, S. Rep. No. 97–504, p. 25 (1982) ("Thus, for larger households that are able to fragment into separate, smaller households simply by purchasing and preparing food separately, or claiming to do so, benefits can be significantly increased. In 1981, Congress took a first step toward limiting this potential manipulation of food stamp rules by *requiring* that parents and children living together apply together, except for elderly or disabled parents. This year's Committee proposal would take the next logical step"); H. R. Rep. No. 97–106, pp. 118–119 (1981) ("Currently, the program definition of household states, in part, that a household may consist of an individual or group of individuals who, while living with others, customarily purchase food and prepare meals for home consumption separate and apart from others. This can result in some closely related individuals claiming separate household status for purposes of obtaining food stamp benefits to which they would not otherwise be entitled. For example, an individual over 18 years old, who is living with his parents and has no visible means of support, could be eligible to participate, even though his parents would not be eligible, if the individual were to claim separate household status and indicate that he has zero gross income. The individual could, under existing law, be certified as a separate household, although in fact he was being supported by his parents"); S. Rep. No. 97–128, p. 31 (1981) ("[C]urrent law . . . enables large households to fragment into separate households, result[ing] in increased food stamp benefits"); S. Rep. No. 97–139, pp. 52–53 (1981) ("Under present law, family units may apply as separate households and receive larger benefits if they claim to purchase food and prepare meals separately, even though the children are totally supported by the parents").

holds[6] unquestionably warrants the use of general definitions in this area.[7]

The question that remains is whether Congress could accommodate the wishes of distant relatives and unrelated individuals to dine separately without invidiously discriminating against close relatives.[8] The question, in other words, is whether Congress could "[l]imi[t] the availability of the 'purchase and prepare food separately' rule to those most likely to actually be separate households, although living together

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[6] "Limiting the availability of the 'purchase and prepare food separately' rule to those most likely to actually be separate households, although living together with others for reasons of economy or health (i. e., unrelated persons and the elderly or disabled), would place a reasonable control on a situation that State and local administrators have identified as one which r[e]quires congressional action. In fact, tightening of the household definition was the leading recommendation for change made in response to a recent survey by the Committee. Suggestions for revision were received from Alaska, Georgia, Louisiana, North Carolina, Oklahoma, South Carolina, Virginia, Washington, Wyoming, and numerous local administrators, including several who testified before the Committee.

"A further problem with the existing household definition occurs when members of a household 'claim' to purchase and prepare food separately, but, in fact, do not. Verification of a household's claim can be difficult and administratively burdensome as noted in the following examples from State administrators." S. Rep. No. 97-504, pp. 24-25 (1982).

[7] See, *e. g.*, *Califano* v. *Jobst*, 434 U. S. 47, 53 (1977) ("General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases"); *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970) ("'The problems of government are practical ones and may justify, if they do not require rough accommodations—illogical, it may be, and unscientific'" (quoting *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61, 69-70 (1913)). See also, *e. g.*, *Mathews* v. *De Castro*, 429 U. S. 181, 189 (1976); *Weinberger* v. *Salfi*, 422 U. S. 749, 785 (1975).

[8] Although the origin of the distinction is not entirely clear, the Report of the House Agriculture Committee suggests that its decision not to "expan[d] the single household concept to the entire case load, requiring all individuals living in the same home to be treated as one household," was based on its concern over "the impact of the amendment upon various types of living arrangements." H. R. Rep. No. 97-106, p. 256 (1981).

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with others for reasons of economy or health (i. e., [distant relatives and] unrelated persons)." S. Rep. No. 97–504, p. 25 (1982).

So stated, the justification for the statutory classification is obvious. Congress could reasonably determine that close relatives sharing a home—almost by definition—tend to purchase and prepare meals together while distant relatives and unrelated individuals might not be so inclined. In that event, even though close relatives are undoubtedly as honest as other food stamp recipients, the potential for mistaken or misstated claims of separate dining would be greater in the case of close relatives than would be true for those with weaker communal ties, simply because a greater percentage of the former category in fact prepare meals jointly than the comparable percentage in the latter category. The additional fact that close relatives represent by far the largest proportion of food stamp recipients,[9] might well have convinced Congress that limited funds would not permit the accommodation given distant relatives and unrelated persons to be stretched to embrace close relatives as well.[10] Finally,

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[9] Cf. U. S. Dept. of Commerce, Bureau of the Census, Economic Characteristics of Households in the United States: Fourth Quarter 1984, pp. 24, 34 (1986) (statistical table indicating that more than 87% of households receiving food stamps are families related by blood, marriage, or adoption who live and eat together); U. S. Dept. of Commerce, Bureau of the Census, Economic Characteristics of Households in the United States: Third Quarter 1984, pp. 26, 36 (1985) (same); U. S. Dept. of Commerce, Bureau of the Census, Economic Characteristics of Households in the United States: Second Quarter 1984, pp. 26, 36 (1985) (same); U. S. Dept. of Commerce, Bureau of the Census, Economic Characteristics of Households in the United States: First Quarter 1984, pp. 26, 36 (1985) (same).

[10] "[A]n open-ended rule that allows most or all households to fragment simply by changing food purchasing and eating habits is too subject to manipulation." S. Rep. No. 97–504, p. 25 (1982). Even a small percentage of error—given the millions of families involved and the fact that Congress believed that almost all of them could purchase food jointly—could result in the improper expenditure of many millions of dollars. See Budget of the United States Government FY 1985, p. 8–43 (in 1983, ap-

Congress might have reasoned that it would be somewhat easier for close relatives—again, almost by definition—to accommodate their living habits to a federal policy favoring common meal preparation than it would be for more distant relatives or unrelated persons to do so. Because of these differences, we are persuaded that Congress could rationally conclude that the two categories merited differential treatment. Neither the decision to take "one step" in 1981—when the rule was applied to parents and children—nor the decision to take a second step in 1982, when the rule was extended to siblings as well—was irrational because Congress did not simultaneously take a third step that would apply to the entire food stamp program.

The judgment of the District Court is therefore

Reversed.

JUSTICE BRENNAN, dissenting.

I would affirm on the ground that the challenged classifications violate the Equal Protection Clause because they fail the rational-basis test.

JUSTICE WHITE, dissenting.

For the reasons given in the last three paragraphs of JUSTICE MARSHALL's dissenting opinion, the classification at issue in this case is irrational. Accordingly, I dissent.

JUSTICE MARSHALL, dissenting.

This case demonstrates yet again the lack of vitality in this Court's recent equal protection jurisprudence. See, *e. g.*, *Cleburne* v. *Cleburne Living Center*, 473 U. S. 432, 455

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proximately 21 million participants received food stamp assistance valued at nearly $12 billion); U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 1985, pp. 122–123 (105th ed.) (same). Congress "expect[ed] that eligibility workers could effectively question claims" of "'separateness'" submitted by distant relatives and unrelated individuals. S. Rep. No. 97–504, p. 26 (1982).

(1985) (MARSHALL, J., concurring in judgment in part and dissenting in part); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 70 (1973) (MARSHALL, J., dissenting). In my view, when analyzing classifications affecting the receipt of governmental benefits, a court must consider "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Dandridge* v. *Williams*, 397 U. S. 471, 521 (1970) (MARSHALL, J., dissenting). By contrast, the Court's rigid, bipolar approach, which purports to apply rational-basis scrutiny unless a suspect classification is involved or the exercise of a fundamental right is impeded, see *ante*, at 638–639, puts legislative classifications impinging upon sensitive issues of family structure and survival on the same plane as a refusal to let a merchant hawk his wares on a particular street corner. I do not believe the equal protection component of the Due Process Clause could become such a blunt instrument.

The importance of the interests involved in this case can hardly be denied. The Court concludes that the challenged statute does not directly and substantially interfere with family living arrangements, cf. *Moore* v. *East Cleveland*, 431 U. S. 494 (1977) (plurality opinion), because it "does not order or prevent any group of persons from dining together," *ante*, at 638. The Court relies, apparently, on the fact that the statute does not use criminal sanctions, but merely the loss of benefits, to influence family living decisions. It is a bit late in the day, however, to cut off due process analysis—be it procedural or substantive—by simply invoking such a distinction. See *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970); *Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969).

The food stamp benefits at issue are necessary for the affected families' very survival, and the Federal Government denies that benefit to families who do not, by preparing their

meals together, structure themselves in a manner that the Government believes will minimize unnecessary expenditures. The importance of that benefit belies any suggestion that the Government is not directly and substantially influencing the living arrangements of families whose resources are so low that they must rely on their relatives for shelter. The Government has thus chosen to intrude into the family dining room—a place where I would have thought the right to privacy exists in its strongest form. What possible interest can the Government have in preventing members of a family from dining as they choose? It is simply none of the Government's business.

The challenged classifications amount to a conclusive presumption that related families living under the same roof do all of their cooking together. Thus the regulation does not merely affect the important privacy interest in family living arrangements recognized in *Moore*, but the even more vital interest in survival. As Congress itself recognized, some separate families live in the same house but cannot prepare meals together because of different work schedules. See S. Rep. No. 97–504, p. 25 (1982). Others may lack sufficient plates and utensils to accommodate more than a few persons at once, or may have only one burner on their stove. These extended families simply lack the option of cooking and eating together. For them, the legislative presumption in this case does far greater damage than merely prescribing with whom they must dine. By assuming that they realize economies of scale that they in fact cannot achieve, the regulation threatens their lives and health by denying them the minimal benefits provided to all other families of similar income and needs.

Balanced against these vital interests is Congress' undeniably legitimate desire to prevent fraud and waste in the food stamp program. The legislative presumption that Congress used, however, is related at best tenuously to the achievement of those goals. While I believe that our standard of

review must take into consideration the importance of the individual interests affected, I have some doubt that the classification used here could pass even a rational-basis test. In *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528 (1973), we held that a definition of "household" that excluded any living group containing an individual unrelated to any other member of the group did not rationally further the Government's interest in preventing fraud in the food stamp program. Despite the Court's attempts to distinguish this case from *Moreno*, the critical fact in both cases is that the statute drew a distinction that bears no necessary relation to the prevention of fraud. See *id.*, at 535–536 ("denial of essential federal food assistance to *all* otherwise eligible households containing unrelated members" not rationally related to fraud prevention). In the present case, the Government has provided no justification for the conclusion that related individuals living together are more likely to lie about their living arrangements than are unrelated individuals. Nor has it demonstrated that fraudulent conduct by related households is more difficult to detect than similar abuses by unrelated households.

Congress stressed its desire to prevent fraud in the food stamp program, see H. R. Rep. No. 97–687, p. 25 (1982); H. R. Rep. No. 97–106, p. 50 (1981), and it classified the "household consolidation" provision as an antifraud measure. Nevertheless, the Committee Reports cite no hard evidence that related persons living together were in fact significant sources of fraud; the Committees merely determined that the Government could save money by "tighten[ing] the definition of an eligible food stamp household." S. Rep. No. 97–504, at 24. The House did hypothesize, in the course of considering the 1981 amendments, that an 18-year-old child living with his parents could declare himself a separate household for food stamp purposes, H. R. Rep. No. 97–106, at 119. If indeed that abuse widely existed, the resulting legislation, which lumped together all nonelderly parents and their off-

spring living under one roof as a "household," provided a more than sufficient cure. Nevertheless, Congress proceeded to restrict eligibility even further the following year.

When it moved beyond the rule that merely grouped parents and children, and in the 1982 amendments grouped siblings together as well, Congress interfered substantially with the desires of demonstrably separate families to remain separate families. It did so, moreover, while recognizing that distinct families living together often are genuinely separate households, and that the food stamp program should permit separate families that are not related to live together but maintain separate households. S. Rep. No. 97-504, at 25. Congress nevertheless assumed that related families are less likely to be genuinely separate households than are unrelated families, and failed even to provide related families a chance to rebut the legislative presumption. In view of the importance to the affected families of their family life and their very survival, the Court's extreme deference to this untested assumption is simply inappropriate. I respectfully dissent.

NEW MEXICO *v.* EARNEST

CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

No. 85-162. Argued April 1, 1986—Decided June 27, 1986

103 N. M. 95, 703 P. 2d 872, vacated and remanded.

Paul Bardacke, Attorney General of New Mexico, argued the cause for petitioner. With him on the briefs was *William McEuen*, Assistant Attorney General.

J. Thomas Sullivan argued the cause for respondent. With him on the brief was *Gary C. Mitchell.**

PER CURIAM.

We vacate the judgment of the Supreme Court of New Mexico and remand for further proceedings not inconsistent with the opinion in *Lee* v. *Illinois*, 476 U. S. 530 (1986).

It is so ordered.

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*A brief of *amici curiae* urging reversal was filed for the State of Indiana et al. by *Linley E. Pearson*, Attorney General of Indiana, *William E. Daily and Lisa M. Paunicka*, Deputy Attorneys General, *Robert K. Corbin*, Attorney General of Arizona, *John J. Kelly*, Chief State's Attorney of Connecticut, *Charles M. Oberly*, Attorney General of Delaware, *Richard Opper*, Attorney General of Guam, *Corinne K. A. Watanabe*, Attorney General of Hawaii, *Jim Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *William J. Guste, Jr.*, Attorney General of Louisiana, *Mike Greely*, Attorney General of Montana, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Anthony Celebrezze*, Attorney General of Ohio, *Michael Turpen*, Attorney General of Oklahoma, *Travis Medlock*, Attorney General of South Carolina, *W. J. Michael Cody*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, *David L. Wilkinson*, Attorney General of Utah, *Jeffrey Amestoy*, Attorney General of Vermont, *William G. Broaddus*, Attorney General of Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, and *Archie G. McClintock*, Attorney General of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the New Mexico Public Defender Department by *David Stafford* and *Susan Gibbs;* and for the American Civil Liberties Union et al. by *Burt Neuborne* and *Charles S. Sims*.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE O'CONNOR join, concurring.

I agree that the decision of the Supreme Court of New Mexico should be vacated and the case remanded for further consideration in light of *Lee* v. *Illinois*, 476 U. S. 530 (1986). The Supreme Court of New Mexico held that the admission against respondent of an out-of-court statement of a codefendant violated respondent's rights under the Confrontation Clause of the Sixth Amendment. The court believed that *Douglas* v. *Alabama*, 380 U. S. 415 (1965), was "directly on point" and mandated the reversal of respondent's conviction because there had been no opportunity for respondent to cross-examine the codefendant, either at the time the statement was made or at trial. 103 N. M. 95, 98–99, 703 P. 2d 872, 875–876 (1985).

As *Lee* v. *Illinois* makes clear, to the extent that *Douglas* v. *Alabama* interpreted the Confrontation Clause as requiring an opportunity for cross-examination prior to the admission of a codefendant's out-of-court statement, the case is no longer good law. Although *Ohio* v. *Roberts*, 448 U. S. 56 (1980), did not attempt to set forth specific standards for constitutional admissibility applicable to all categories of hearsay, see *United States* v. *Inadi*, 475 U. S. 387, 392–393 (1986), that decision did establish that a lack of cross-examination is not necessarily fatal to the admissibility of evidence under the Confrontation Clause. See *Lee* v. *Illinois*, *supra*, at 543.* In the instant case, therefore, the State is entitled to an opportunity to overcome the weighty

*For example, in a case in which the State claims that a codefendant's confession is admissible because it "interlocks" with the defendant's confession, *Lee* v. *Illinois* sets out the following test:

"If those portions of the codefendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted." 476 U. S., at 545.

presumption of unreliability attaching to codefendant statements by demonstrating that the particular statement at issue bears sufficient "indicia of reliability" to satisfy Confrontation Clause concerns.

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